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A. I. R. PUBLICATION

THE
A. I. R. MANUAL
UNREPEALED CENTRAL ACTS
(CIVIL AND CRIMINAL)

3rd Edition

BY

D. V. CHITALEY, B.A., LL.B., *Advocate*

AND

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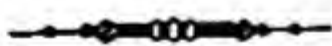
Chief Editor, "The All India Reporter"

VOLUME 6

CONSTITUTION OF INDIA, ARTICLES 310-311

TO

COURT-FEES ACT (1870), S. 7



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PREFACE

(Reprinted from Vol. 1)



When the A.I.R. entered the field with the first edition of its "Manual" in the year 1947, it at once leapt to the first rank and carved for itself an unrivalled position in the field of such publications, although it was a newcomer in that particular field. This was due to certain settled principles of the A.I.R. to which it has been adhering steadfastly since its foundation more than 50 years ago. These principles may be summed up in three rules, which the A.I.R. has been having as its watchwords since the beginning: (1) thoroughness, (2) exhaustiveness, and (3) meticulous study of all possible ways by which the usefulness of a publication to the legal profession can be enhanced. All these three principles were given full effect to in the A.I.R. Manual.

2. The publication proved to be the most exhaustive and reliable collection of central statute-law together with all the relevant case-law bearing on it, summarised, arranged and presented in a most conscientious manner with a view to affording the maximum facilities to the legal profession, both on the Bench and at the Bar. These qualities meant very hard work both for the editorial staff engaged by the A.I.R. as well as for the management. But they have built up the reputation of the A.I.R. Manual on a most solid and enduring foundation. This reputation brought correspondingly good results as regards the actual sales of the publication and in a little over 20 years after the A.I.R. entered the field, a third edition of the Manual has become necessary to meet the insistent demand of the legal profession.

3. It is needless to dilate, at length, on the special features of the publication. It gives, as in the previous editions, both civil and criminal Acts, and the inconvenient and illogical division into civil and criminal portions has been rejected as in the previous editions. The post-Independence period has been extraordinarily prolific in the matter of legislative output, both at the Centre and in the States. The A.I.R. Manual aims at placing within the reach of the profession, at a reasonable cost, the entire body of central statute-law together with the relevant case-law arranged in a convenient form which has been developed, after patient thought and experimentation, as being the most suitable from the point of view of quick and efficient service to the profession, whenever its members may have to look up a point of law in the statutes of India. Needless to say that our statutes, unlike under the English system, constitute the staple of our law and, therefore, provide the most important and the bulkiest part of our law.

4. In the interval of about 8 years since the completion of the second edition, more than 100 new Acts have been added to the statute book and there have been also a very vast number of amendments and additions to the old Acts. This edition includes all the new Acts and all the up-to-date amendments, besides giving the State amendments also wherever it was possible to trace them.

5. Among the new Acts, special mention may be made of some which are of outstanding importance. Perhaps, the first place in this category will have to be

given to the Limitation Act of 1963 which has taken the place of the Act of 1908 and not only overhauled the entire Law of Limitation but has revolutionised and simplified the law in many respects as, for instance, in regard to suits for possession of immovable property and applications for execution, which were two of the toughest and most confusing topics under the previous Limitation Act. The Advocates Act, 1961, has repealed the Bar Councils Act, 1926, and the Legal Practitioners Act, 1879 and has brought into existence a single unified Bar for the whole of India—which is itself a revolutionary change in the constitution of the Indian Bar and has been looked forward to, for a very long period by the whole Bar as an ideal to be realised.

6. The Arms Act, 1959, is another important Act which, by liberalising the provisions of the Arms Act of 1878 in a marked way, has shown itself to be a product of the post-Independence period. The Income-tax Act of 1961 has overhauled the whole structure of the Income-tax Act, 1922, and made a real attempt at simplification of the provisions of the law. Other Acts of the period also reflect the spirit of the times, each in its own way.

7. Above everything, however, this edition of A.I.R. Manual will be of special value to the Bench and the Bar as perhaps the most exhaustive and up-to-date reference book on the Constitution of India. The period, after the last edition, has witnessed an enormous growth and development of the Constitutional Law of India. Not only have there been a very large number of important amendments of the Constitution during this period but a phenomenally voluminous body of case-law which has accumulated on the Constitution.

8. This edition will not only contain the most authoritative version of the Constitution but also the most exhaustive collection of the case-law bearing on it. The subject is so voluminous that no ordinary text-book can be expected to cope with it and do full justice to it. This edition will be found to be practically unequalled as a book of reference on the Constitution of India.

9. All the special features of the previous editions, such as synopsis, "at-paging" of the Reports, etc., are continued in this edition and have also been considerably improved. These special features have been enumerated elsewhere at the beginning of this volume.

10. Before concluding, it is our pleasant duty to place on record our sense of gratitude to all our colleagues without whose unstinted labour and co-operation it would have been impossible to bring out such a vast publication. The editorial work, as can be seen, consists mainly of two branches: (i) that relating to preparing and editing the text of the various Acts, and (ii) the collection and editing of the notes of case-law bearing on the different Acts.

11. The responsibility for preparing and editing the text of the various Acts has been ably shouldered and executed by Sarvashri D. R. Rajandekar, B.A., LL.B., and A. G. Tambe, B.A., LL.B., assisted by Sarvashri P. A. Bakre, B.A., LL.B., H. G. Pathak, B.A., LL.B., and S. G. Kulkarni, B.A., LL.B.

12. The entire credit for organising and managing the editorial work in connection with the case-law must go to Shri V. B. Bakhale, M.A., LL.B., who has been assisted by a band of devoted workers, among whom may be chiefly mentioned

PREFACE

Sarvashri R. G. Dhobley, B.A., LL.B., D. H. Zadgaonkar, B.A., LL.B., K. S. Bakre, B.Sc., LL.B., M. Kuppaswami, B.A., B.L., G. M. Jatar, B.A., LL.B., S. S. Guru, B.A., LL.B., M. V. Joshi, B.A., LL.B., L. G. Chavhan, B.A., LL.B., B. N. Pradhan, B.Sc., LL.B., C. W. Moharir, B.Com., LL.B., D. V. Thakre, B.Sc., LL.B., G. D. Ruikar, B.A., LL.B., Y. P. Baxi, B.A., LL.B., M. N. Thomare, B.A., LL.B., B. D. Bhawe, B.Sc., LL.B., D. G. Bhagwat, B.Sc. LL.B., N. N. Harshe, M.A., LL.B. F.I.A., V. R. Buche, B.A., LL.B., G. G. Modak, B.Sc., LL.B., V. S. Sarma, B.A., LL.B. and S. V. Golwalkar, B.A., LL.B.

13. Shri Gopalrao Udar and his team including among others Sarvashri P. K. Thosar, H. W. Mendhi, Govindrao Udar, D. R. Landge, Ku. S. Naidu, Ku. K. G. Deshpande and Ku. S. Deshpande have done the very arduous and responsible work of correcting and passing the proofs and our thanks are due to them for this.

14. Scarcely less important than the work of the editors has been the work of Shri B. R. Abhyankar, who, with his devoted band of workers including Sarvashri M. S. Savarkar, B. R. Katankar, D. P. Alshi, W. J. Joshi, P. N. Deo, G. D. Deshpande, S. M. Lambe, L. S. Wavde and D. T. Joshi and others has manned the responsibility of preparing the manuscript for the press.

15. Thanks must also be given to Sarvashri M. W. Chitaley, C. R. Banerjee, and G. G. Padhye, M. M. Kanitkar and others of the A.I.R. Rotary Printing Press, who, under the leadership and guidance of Shri J. W. Chitaley, finished the printing of the work in record time.

16. Last, but by no means least, our thanks are due to Shri W. W. Chitaley, B.A., LL.B., who has been in overall charge of the whole undertaking and whose exceptional talents, in organising and managing the business side of the undertaking are of inestimable value for the success of the gigantic undertaking that this publication obviously is.

13th June, 1969.

D.V.C.
S.A.R.

SCHEME OF PUBLICATION

1. Only existing Central Acts of all-India importance are given.
 2. Acts are arranged in the alphabetical order of their short titles.
 3. The prefixes 'The' or 'The Indian' in the short title of an Act are not taken into consideration in the alphabetical arrangement.
 4. After all the Acts, the existing non-temporary Central Ordinances are given and arranged also alphabetically.
 5. Provincial or State Amendments to the provisions of the Central Acts or the State Acts which repeal or replace a Central Act are given in their appropriate places wherever it is possible. But it is not possible to guarantee completeness in this respect.
 6. Rules made by the Central Government under an enactment are, wherever possible, indicated in appropriate places along with their Gazette references.
 7. All the amendments, repeals and adaptations are carefully traced and incorporated in the text of the enactment.
 8. Date of the commencement of an enactment or that of the amendment is given where published in the Gazette.
 9. A verbatim reproduction of the Statement of Objects and Reasons is invariably given.
 10. Useful notes on the provisions of an enactment culled from the Statement of Objects and Reasons and the Select Committee Report are given under those provisions.
 11. A statement showing how an Act is affected by subsequent amendment, adaptation or repeal in part is given.
 12. Wherever possible, cognate provisions are indicated.
 13. A few Acts enacted by British Parliament but applicable to India or the information about which is useful in India are also included.
 14. Notes containing exhaustive points and all important cases are given and arranged under appropriate headings under the respective statutory provisions.
 15. Wherever necessary, comparative table showing the parallel provisions of the present and past Acts is given.
 16. After giving all the existing Central Acts made applicable to the whole of India and enacted up to the end of the year 1968, an attempt will be made to include such Central Acts as have been enacted during the period intervening between the publications of the first and the last volumes of the series.
 17. A complete list of all the Acts and Ordinances included in the series will be given in the last volume.
 18. A Subject Index for all the Acts in the series will form the last item of this series.
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CONTENTS OF VOLUME VI

	Pages
Constitution of India, Articles 310-311	1
Consular Relations Act, 1968	386
Contempt of Courts Act, 1952 (XXXII of 1952)	403
Contingency Fund of India Act, 1950 (XLIX of 1950)	447
Continuance of Legal Proceedings Act, 1948 (XXXVIII of 1948)	448
Contract Act, 1872 (IX of 1872)	450
Convert's Marriage Dissolution Act, 1866 (XXI of 1866)	988
Cooch Behar (Assimilation of Laws) Act, 1950 (LXVII of 1950)	997
Co-operative Societies Act, 1912 (II of 1912)	1000
Copyright Act, 1957 (XIV of 1957)	1037
Coroners Act, 1871 (IV of 1871)	1094
Cost and Works Accountants Act, 1959 (XXIII of 1959)	1114
Cotton Cloth Act, 1918 (XXIII of 1918)	1134
Cotton Ginning and Pressing Factories Act, 1925 (XII of 1925)	1137
Cotton Textiles Cess Act, 1948 (VII of 1948)	1174
Cotton Textile Companies (Management of Undertakings and Liquidation or Reconstruction) Act, 1967 (Act 29 of 1967)	1176
Cotton Transport Act, 1923 (III of 1923)	1184
Countess of Dufferin's Fund Act, 1957 (LXIII of 1957)	1189
Court-Fees Act, 1870 (VII of 1870)	1191



CHRONOLOGICAL LIST OF ACTS

GIVEN IN VOL. VI

				Pages
1866 (XXI of 1866)	...	...	Convert's Marriage Dissolution Act ...	988
1870 (VII of 1870)	...	...	Court-Fees Act ...	1191
1871 (IV of 1871)	...	...	Coroners Act ...	1094
1872 (IX of 1872)	...	...	Contract Act ...	450
1912 (II of 1912)	...	...	Co-operative Societies Act ...	1000
1918 (XXIII of 1918)	...	...	Cotton Cloth Act ...	1134
1923 (III of 1923)	...	...	Cotton Transport Act ...	1184
1925 (XII of 1925)	...	...	Cotton Ginning and Pressing Factories Act ...	1137
1948 (VII of 1948)	...	...	Cotton Textiles Cess Act ...	1174
1948 (XXXVIII of 1948)	...	...	Continuance of Legal Proceedings Act	448
1949			Constitution of India ...	1
1950 (XLIX of 1950)	...	...	Contingency Fund of India Act ...	447
1950 (LXVII of 1950)	...	...	Cooch Behar (Assimilation of Laws) Act ...	997
1952 (XXXII of 1952)	...	...	Contempt of Courts Act ...	403
1957 (XIV of 1957)	...	...	Copyright Act ...	1037
1957 (LXIII of 1957)	...	...	Countess of Dufferin's Fund Act ...	1189
1959 (XXIII of 1959)	...	...	Cost and Works Accountants Act ...	1114
1967 (Act 29 of 1967)	...	...	Cotton Textile Companies (Management of Undertakings and Liquidation or Reconstruction) Act ...	1176



A. I. R. MANUAL

UNREPEALED CENTRAL ACTS

(CIVIL & CRIMINAL)

VOLUME VI

CONSTITUTION OF INDIA (*contd.*)

PART XIV (*contd.*)

SERVICES UNDER THE UNION AND THE STATES (*contd.*)

CHAPTER I (*contd.*)

SERVICES (*contd.*)

310. Tenure of office of persons serving the Union or a State.—(1) Except as expressly provided by this Constitution, every person who is a member of a defence service or of a civil service of the Union or of an all-India service or holds any post connected with defence or any civil post under the Union, holds office during the pleasure of the President, and every person who is a member of a civil service of a State or holds any civil post under a State holds office during the pleasure of the Governor ^a[° ° °] of the State.

(2) Notwithstanding that a person holding a civil post under the Union or a State holds office during the pleasure of the President or, as the case may be, of the Governor ^b[° ° °] of the State, any contract under which a person, not being a member of a defence service or of an all-India service or of a civil service of the Union or a State, is appointed under this Constitution to hold such a post may, if the President or the Governor, ^b[° ° °] as the case may be, deems it necessary in order to secure the services of a person having special qualifications, provide for the payment to him of compensation, if before the expiration of an agreed period that post is abolished or he is, for reasons not connected with any misconduct on his part, required to vacate that post.

[Government of India Act (1935), S. 240 (1), (4).]

[a] The words "or, as the case may be, the Rajpramukh" were omitted by the Constitution (Seventh Amendment) Act, 1956, S. 29 and Schedule (1-11-1956).

[b] The words "or Rajpramukh" and "or, the Rajpramukh" were omitted *ibid*.

311. Dismissal, removal or reduction in rank of persons employed in civil capacities under the Union or a State.—(1) No person who is a member of a civil service of the Union or an all-India service or a civil service of a State or holds

ARTICLES 310 AND 311 — SYNOPSIS

1. Scope and applicability.

2. Retrospective effect.

3. Conditions of service and recruitment.
— See also *ibid*, Art. 309.

4. Appointment and dismissal of members of judicial service — See also Note 52.

5. Persons to whom Articles apply.

6. Persons in temporary service —
See also under Notes 24 and 104.

a civil post under the Union or a State shall be dismissed or removed by an authority subordinate to that by which he was appointed.

^a[(2) No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges and where it is proposed, after such inquiry, to impose on him any such penalty, until he has been given a reasonable opportunity of making representation on the penalty proposed, but only on the basis of the evidence adduced during such inquiry :

Provided that this clause shall not apply—

- (a) where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge; or
- (b) where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry; or
- (c) where the President or the Governor, as the case may be, is satisfied that in the interest of the security of the State it is not expedient to hold such inquiry.

(3) If, in respect of any such person as aforesaid, a question arises whether it is reasonably practicable to hold such inquiry as is referred to in clause (2), the decision thereon of the authority empowered to dismiss or remove such person or to reduce him in rank shall be final.]

[Government of India Act, 1935, S. 240 (2) and (3).]

[a] Substituted for original clauses (2) and (3), by the Constitution (Fifteenth Amendment) Act, 1963, S. 10 (5-10-1963).

Articles 310 and 311 — Synopsis (contd.)

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| <ul style="list-style-type: none"> 7. Probationers — See also Notes 39 and 112. 8. Persons in defence services. 9. Servants of co-operative societies. 10. Servants of educational bodies. 11. Servants of Statutory Corporations. 12. Members of Police Service. 13. Service under Municipalities, local boards and panchayats. 14. Contract service — See also Note 5. 15. Civil Posts and Civil Services — See also Note 5. 16. Members of Indian Civil Service — See also Article 314. 17. "Except as expressly provided by this Constitution" — See also Note 18. 18. "Holds office during the pleasure of" — Rule of pleasure in Art. 310 (1) — Its scope and limitation. 19. English Law. 20. Age of superannuation — Alteration of rule as to. 21. Scales of pay, alteration of. 22. Pleasure, whether can be delegated. 23. Right to hold office, whether Fundamental Right — See also Article 309. 24. "Dismissed" or "removed" — General. 25. Article 311 (2) applies only when there is punishment. | <ul style="list-style-type: none"> 26. Termination of service, when amounts to punishment — Tests and illustrations. 27. Termination of service of temporary servants. 28. Termination on basis of misconduct, negligence, etc. 29. Termination in terms of Service Rule or contract of service. 30. Phraseology of order does not determine its nature. 31. Automatic termination of service under Service Rules. 32. Distinction between 'removal' and 'dismissal' — See also Note 24. 33. Removal of honorary servant. 34. Discharge. 35. Retrenchment. 36. Discharge on account of abolition of post. 37. Termination upon integration of States. 38. Discharge from temporary posts — Right to lien on substantive post — See also Note 135. 39. Discharge of probationer. 40. Termination on ground of lack of competency or on ground of medical unfitness. 41. Removal on ground of being member of political party — See also Note 125. 42. Withholding of salary. |
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Articles 310 and 311 — Synopsis (contd.)

43. Termination after extension of superannuation — See also Note 103.
44. Authority by whom Government servant can be dismissed or removed — Article 311 (1) — General.
45. Delegation of power of dismissal.
46. Appeal from dismissal.
47. "Subordinate", meaning of.
48. Appointing authority.
49. Who can dismiss or remove or order compulsory retirement or suspension — Illustrative cases.
50. Who can order reduction in rank.
51. Prevention of Corruption Act — Who can sanction prosecution.
52. Officers and servants of High Court — Power to appoint and remove — See also Note 4.
53. Enquiry and report by authority different from that empowered to dismiss.
54. Authority who can issue notice — See also Note 80.
55. Order of suspension pending final order of dismissal by another authority.
56. Service Rules — General — See also Article 309.
57. Rules contravening Article 311 (2).
58. Two types of Rules.
59. Rules, whether "laws in force" — See also Article 313.
60. Alterability of Rules — See also Note 20.
61. Rules not legally enforceable.
62. Rules legally enforceable.
63. Termination of service according to terms of contract or conditions of service — See also Note 29.
64. Reasonable opportunity to show cause against proposed action — General.
65. Scope and ambit of right conferred by Article 311 (2).
66. Temporary civil servants.
67. Charge-sheet, right of civil servant to.
68. Charges not to be vague.
69. Notice to specify particular punishment to be awarded and grounds thereof.
70. Enhancement of punishment by higher authority.
71. Additional charges and amendment of charges.
72. Powers of revising authority.
73. Bias and want of bona fide — See also Note 75 (d).
74. Reasonable opportunity, what amounts to — General.
 - (a) Two opportunities.
 - (b) Right to copy of findings of enquiry and other documents.
 - (c) Right to personal hearing.
 - (d) Right to be represented.
 - (e) Right to call witnesses.
 - (f) Right to cross-examine.
 - (g) Reasonable opportunity given — Illustrative cases.
 - (h) Reasonable opportunity not given — Illustrative cases.
75. Departmental enquiry — General.
 - (a) Findings of.
 - (b) Evidence.
 - (c) Natural justice, rules of.
 - (d) Bias and bona fides — See also Note 73.
 - (e) Procedure.
 - (f) Departmental inquiry after acquittal in criminal prosecution — See also Note 126.
 - (g) Powers of appellate authority.
76. Waiver of enquiry and objections to defects in it.
77. Opportunity given but not availed of.
78. Apology by civil servant — Effect.
79. Public Service Commission — Reference to — See also Note 136 and Article 320.
80. Show cause notice, by whom to be given.
81. Authority who can frame charges.
82. Order must show that authority applied its mind.
83. Reinstatement — Effect of.
84. Domestic enquiry.
85. Fresh proceedings in respect of same matter.
86. Article 311 (2), Provisos.
87. Article 311 (3).
88. Voluntary resignation or voluntary retirement.
89. Suspension — See also Note 105.
90. Retirement on superannuation.
91. Withholding increments.
92. Compulsory retirement.
 93. Compulsory retirement on proportionate pension in terms of specific Service Rule, is not dismissal or removal.
 94. Compulsory retirement, when dismissal or removal.
 95. Except where authorised by specific Rules, compulsory retirement before age of superannuation is dismissal or removal.
 96. Compulsory retirement based on charges of misconduct, negligence, etc., is dismissal or removal.
 97. Compulsory retirement coupled with loss of benefits already earned is dismissal or removal.

Articles 310 and 311 — Synopsis (contd.)

98. Compulsory retirement amounting to removal — No right to pension.
99. Alteration of superannuation rule — See Note 20.
100. Right of ministerial servant to continue in service till age of sixty.
101. Compulsory retirement with retrospective effect.
102. Reduction of pension as punishment.
103. Extension of superannuation.
104. "Reduction in rank".
105. Suspension is not reduction.
106. Reduction must be by way of penalty.
107. Tests for determining whether reversion amounts to reduction in rank and illustrative cases.
108. Instances where reversion does not amount to reduction in rank.
109. Mala fide order of reduction.
110. Reversion from officiating post on ground of incompetency or unfitness.
111. Demotion on ground of financial stringency.
112. Extension of probationary period — See also Note 7.
113. Officiating appointments and temporary posts.
114. Reversion from officiating post to permanent post not reduction where incapacity is only background or motive and not basis of reversion.
115. Retrospective reversion.
116. Abolition of post and reversion to lower rank.
117. Integration of services upon abolition of former Indian States and on reorganisation of States.
118. Cancellation of promotion.
119. Refusal to promote.
120. Reversion and departmental enquiry for same cause.
121. Retrospective orders under the Articles.
122. Censure.
123. Determining order of seniority.
124. Grounds of dismissal or removal.
125. Grounds of dismissal — Subversive activities — See also Note 41.
126. Criminal proceedings against officer.
127. Suit for declaration.
128. Suit for salary.
129. Suit for pension.
130. Suit for damages.
131. Suit for mandatory injunction.
132. Claim for dearness allowance.
133. Writ proceedings — See also Arts. 226 and 32.
134. Equality clauses in the Constitution.
135. Lien.
136. Public Service Commission, consultation with — See also Article 320.
137. Public Servants (Inquiries) Act, 37 of 1850.
138. High Court's power of superintendence under Article 227.
139. Practice.
 1. Scope and applicability.— (1) Article 310 fetters Article 309 while Art. 309 does not control Articles 310 and 311. (1966) 70 Cal WN 925 (929) = (1967) 2 Lab LJ 782 (DB).
 - (2) Articles 309, 310 and 311 should be read together. AIR 1959 Andh Pra 497 (500) (DB).
 - (3) Article 309 has to be read subject to Arts. 310 and 311. Article 310 has to be read subject to Art. 313. Article 311 is not subject to any other provision of the Constitution. "Doctrine of pleasure" has lost some of its majesty and power because it is controlled by provisions of Article 311. AIR 1967 All 197 (200) = (1968) 2 Lab LJ 6.
 - (4) Clauses (1) and (2) of Article 311 have to be read as qualifications or provisos to Article 310 (1). AIR 1958 SC 300 (304).
 - (5) Provisions of Articles 309 and 310 are subject to provisions of Article 229. AIR 1964 Punj 285 (287) = ILR (1964) 1 Punj 377 (DB).
 - (6) Article 311 is a mandatory provision which has to be complied with, before the pleasure as envisaged in Article 310 can be exercised. AIR 1966 Cal 252 (257) = (1967) 1 Lab LJ 318 (DB).
 - (7) Article 311 is mandatory and no attempt should be made to circumvent or bypass it by colourable acts; nor is it advisable to do anything which may even reasonably give such an impression, for, justice must not only be done but it must also be seen to be done. 1963 Cur LJ 260 (266) (Punj).
 - (8) A violation of Article 311 (1) or 311 (2) is a justiciable issue in a Court of law, as the terms thereof are mandatory and not permissive, qualifying the provisions of Article 310 and providing a condition precedent to the exercise of the power under Article 310. AIR 1961 Mad 486 (489, 490) = (1961) 1 Mad LJ 273 (DB).
 - (9) Article 311 only covers certain forms of punishment against a Government servant. AIR 1954 Madh B 49 (51) = ILR (1954) Madh B 314.
 - (10) Article 311 gives a two-fold protection to persons who come within the Article, namely (1) against removal or dismissal by an authority subordinate to that by which they were appointed and (2) against dismissal or removal or reduction in rank without giving them a reasonable opportunity of showing cause against the action proposed to be taken in regard to them. AIR 1958 SC 36 (41) = 1958 SCR 828 ** AIR 1956 Madh B 259 (261) = 1956 Madh BLJ 292 (DB).

Articles 310 & 311 — Note 1 (contd.)

(11) Termination of service except as punishment is not covered by Art. 311. (1957) 70 Mad LW 965 (969) = (1957) 2 Lab LJ 668 ** AIR 1967 Madh Pra 79 (80) = 1965 MPLJ 990 (DB) ** (1963) 76 Mad LW 164 (165) ** AIR 1961 All 316 (318) ** AIR 1961 Ker 203 (207) = 1960 Ker LT 1179 (DB) ** AIR 1959 Mad 1 (5) = (1958) 2 Mad LJ 379 (DB) ** 1957 Ker LT 772 (773) = (1958) 2 Lab LJ 82.

(12) If the duties of an employee relate to activities which fall directly within sphere of the Union or the State and his services are under the direction and control as also his appointment was by either Union or State, then Article 311 will apply. AIR 1966 All 552 (554).

(13) A person who is not a member of a civil service of the Union or an All India service or a civil service of a State or holds a Civil post under the Union or a State cannot claim protection of Article 311. AIR 1968 Punj 312 (313) = 1968 Lab IC 967 = ILR (1967) 1 Punj 649 (FB) ** AIR 1967 Pat 160 (165) = 1966 BLJR 770 (DB).

(14) In order to see whether a person was entitled to benefits of Article 311, one had to look to the post he is holding at the time the disciplinary action is taken against him. AIR 1969 Delhi 170 (177, 178) = (1969) Lab IC 649 (DB). (AIR 1965 SC 360, Dist. (1964) 66 Punj LR 1040, Rel. o^d.) (School run by Government transferred to society registered under Societies Registration Act — Some members of Board of Society, Government nominated — Services of petitioner who was employee of school continued by Board after termination by Government does not remain a Government servant.)

(15) Protection under Article 311 is not available to a workman of private employer. AIR 1960 Tripura 35 (39, 40).

(16) Protection under Article 311 is not available to a machinist in Ordnance Factory. AIR 1966 Madh Pra 82 (84, 85) = 1965 MPLJ 881.

(17) Mysore Village Offices Abolition Act (XIV of 1961) is valid — Article 311 is not relevant in this respect. AIR 1964 Mys 84 (94) = (1964) 1 Mys LJ 50 (DB).

(18) Analogy of the Article not to be made in view of difference in language of the Article and Section 298 of Assam Act 15 of 1957. AIR 1967 SC 1398 (1400) = (1967) 2 SCR 732. (AIR 1966 Assam & Nagaland 120, Reversed.)

(19) The word State in Article 311 is not the State as defined in Article 12, but State as defined in Article 308. AIR 1962 Madh Pra 50 (54) = 1961 MPLJ 1465 (DB) ** AIR 1960 Punj 554 (556) (DB) ** AIR 1960 Cal 549 (550, 551).

(20) Service Chapter of the Constitution relates only to recruitment, conditions and tenure of service of persons, citizens

or otherwise, appointed to a civil service or to posts in connection with affairs of the Union or any State. AIR 1961 SC 564 (569 to 573) = (1961) 1 Andh WR (SC) 63 = (1961) 1 SCJ 310.

(21) Unless there is valid appointment the person is not entitled to the benefit of Article 311 (2). AIR 1957 Him Pra 49 (51) ** AIR 1955 Nag 163 (164) = ILR (1955) Nag 187 (DB) ** AIR 1965 Madh Pra 48 (52) = 1964 MPLJ 447.

(22) Government's order appointing a person as police patel with effect from future date — He has no right to the post till the future date arrives — Revocation of the order before that date does not attract Article 311. (1967) 2 Lab LJ 813 (815) (Guj) = 9 Guj LR 749 (DB).

(23) Article 310 (2) contemplates premature termination of contractual service. (1967) 10 Law Rep 555 (594) (DB).

2. Retrospective effect.— (1) Article 311 does not apply to an order of dismissal, removal or reduction in rank passed before the Constitution. AIR 1956 Pat 23 (28) (DB) ** AIR 1956 Punj 106 (108) = ILR (1956) Punj 77 (DB) ** AIR 1955 Hyd 168 (169) = ILR (1955) Hyd 370 (DB) ** AIR 1955 Punj 157 (158) (DB) ** AIR 1959 Pat 326 (327) = 1959 BLJR 279 (DB).

(2) Enquiry into charges — Order of compulsory retirement passed after commencement of Constitution — Order is governed by Article 311. AIR 1964 Andh Pra 206 (212) = (1965) 1 Lab LJ 34 (DB).

(3) As regards pre-Constitution misconduct, the provisions of the Constitution only should govern matters in relation to public office after the coming into force of the Constitution. AIR 1960 Andh Pra 479 (481, 482, 485) = ILR (1960) 2 Andh Pra 148 (DB).

(4) Where a suit by a retired Government servant against Government for certain declarations about conditions of service and recovery of arrears of pay was brought long before the Constitution of India came into force Article 310 has no application. AIR 1959 All 393 (396) (DB).

(5) The Constitution is prospective in effect, but not retrospective, unless otherwise provided by the Constitution itself. Article 311 has improved the position of civil servants inasmuch as the guarantee under it extends even to a case of removal. AIR 1964 Andh Pra 206 (210) = (1965) 1 Lab LJ 34 (DB).

(6) Amendment made by Constitution (15th Amendment) Act, 1963 is not retrospective. AIR 1970 Delhi 52 (56) (DB).

3. Conditions of service and recruitment. — See also *ibid*, Art. 309. — (1) The conditions of service of a Government servant appointed to a post, permanent or temporary, are regulated by

Articles 310 & 311 — Note 3 (contd.)

the terms of the contract of employment expressed or implied and, subject thereto, by the rules applicable to the members of the particular service. AIR 1958 SC 36 (42).

(2) A person, who has been appointed temporarily to a post but has been in continuous service for more than three years or has been certified by the appointing authority as fit for employment in a quasi-permanent capacity, acquires what is known as a quasi-permanent status under the Rules. AIR 1958 SC 36 (48).

[See AIR 1958 SC 419 (431).]

(3) Where a person is appointed substantively to a permanent post in Government service, he acquires a right to hold the post until, under the rules, he attains the age of superannuation or is compulsorily retired on proportionate pension on attaining the prescribed age or completing the prescribed number of years' service for such retirement. AIR 1958 SC 36 (42).

(4) Where a Government servant has been appointed to a specific post and that post is in its very nature such that it can be performed at the particular place only, he cannot under rule 15 of the Fundamental Rules be transferred to another post. AIR 1959 All 629 (630, 631).

(5) On the merger of the former Indian State of Mandi in Himachal Pradesh (later a Part C State of the Union of India) the old contracts of service came to an end. The right to enforce an assurance with respect to the services remains only with the high contracting parties. AIR 1959 Him Pra 32 (33).

(6) Passing of recruitment examination — Confers no right to service — Cancellation of examination — High Court does not interfere by way of writ unless right of a party is affected in any matter. AIR 1960 All 123 (123) (DB).

(7) Temporary appointments can be only under Rule 7-A, Madras Subordinate Civil Judicial Service Rules — Conditions for such appointment — Satisfaction of Governor regarding existence of the conditions — Function is administrative and not justiciable. AIR 1961 Andh Pra 229 (234 to 237) = ILR (1960) 2 An Pra 61 (DB).

(8) Order of appointment of Mauzadar who is in effect agent for collection of revenue on behalf of State Government, on basis of commission — Cancellation of appointment for failure to give security — Government has absolute right to pass order of appointment and cancelling the same. AIR 1959 Assam 118 (119) (DB).

(9) Complaints as to service conditions — Not amenable to Judicial review under Article 226. AIR 1960 Ker 82 (83) = 1959 KLT 492.

(10) Held, on facts that the fact that the conditions of service were not mentioned in the second order of appointment could not give rise to an implied contract that the petitioner would continue to be employed till the Department continued to exist or till he attains the age of 55. The very use of the words 'has been pleased to re-appoint' in the second order implied that the appointment was subject to the same conditions. AIR 1958 Tripura 38 (39, 40).

(11) Where the grievance is that a civil right of Government servant is taken away on basis of an executive instruction which is not applicable to him in the matter of his seniority in service and the grievance is found to be justified, High Court has jurisdiction to grant relief. AIR 1969 Punj 257. (AIR 1966 Punj 443 (445), **Reversed.**)

(12) Terms of service — Can be altered unilaterally by Government — No vested contractual right for servant. AIR 1967 SC 1889 (1894, 1895).

(13) Government servant — Ordinance issued under Article 123 relating to conditions of service and Service Rules framed under Proviso to Article 309, affecting fundamental rights — Validity is justiciable under Article 226 — Article 310 no bar. AIR 1962 Bom 53 (60, 61) = 1961 Nag LJ 695 (DB). (**Reversed** on another point in AIR 1963 SC 812.)

(14) Appointment on temporary basis — Rules not providing for such appointment — Appointment is under Governor's powers under Article 310. ILR (1965) 15 Raj 664 = 1966 RLW 262 (266) (DB).

(15) Government servant — Resignation — Acceptance by Government — Withdrawal of resignation not permissible even before communication of order of acceptance. AIR 1969 SC 180 (182) = (1969) 1 SCA 48 = 1969 Lab IC 310.

4. Appointment and dismissal of members of judicial service — See also Note 52. — (1) Judges are entitled to protection under Article 311 (2). 1966 All WR (HC) 705 (713) = 1968 All LJ 879.

(2) The power of control of the High Court over judicial officers under Article 235 has to be exercised in accordance with the conditions of service prescribed by law under Article 309. But this only refers to matters of procedure. AIR 1955 Andhra 65 (68) = ILR (1955) Andhra 132 (DB).

(3) Disciplinary jurisdiction of High Court over District Judge and Judges subordinate to them, vests exclusively in High Court except making order of dismissal or removal — Exercise of Governor's powers has to be in consultation with High Court. AIR 1965 Bom 156 (163) = 67 Bom LR 170 (DB). ** AIR 1961 Cal 1 (9, 11, 12) = 65 Cal WN 361 (SB).

(4) Order by Government on recommendations of High Court — Ancillary recommendation of High Court to com-

Articles 310 & 311 — Note 4 (contd.)

firm member as Subordinate Judge before retiring him compulsorily not accepted — Mere non-acceptance did not affect validity of main order of punishment. AIR 1965 Orissa 183 (186) = (1965) 7 OJD 74 (DB).

(5) Where the appointing authority is the High Court, it can remove a person from service. But the power of Governor to remove him under Article 310 is not affected. AIR 1954 Mad 1043 (1045).

(6) Where an appointment is not in accordance with the provisions of Article 233 or Article 234, it will be invalid. But this will not affect the jurisdiction exercised by the person appointed as a member of the judicial service. AIR 1956 Raj 104 (107) = ILR (1956) 6 Raj 74 (DB).

(7) The Chief Justice of a High Court has the power of appointment, dismissal and discipline in regard to the staff of the High Court. AIR 1953 SC 285 (291) = (1955) 2 SCR 1331.

(8) Under the Patna High Court Rules, the position of a copyist is not that of a licensee and a copyist once employed in the copying department is entitled to work as copyist so long as his work is not inaccurate or in other respects unsatisfactory. AIR 1956 Pat 257 (267) = ILR 35 Pat 312 (DB).

(9) Rules 4 and 5, Andhra C. S. (D. P. T.) Rules — Enquiry — Cases of judicial officers are taken away from purview of Tribunal. AIR 1959 Andh Pra 497 (500) (DB).

5. Persons to whom Article 311 apply.—

(1) The true test of determining whether a person comes within Article 311 is whether he is a member of a Civil Service of a State or whether he holds a civil post under a State. AIR 1956 Pat 398 (402, 403) (DB).

(2) A person who is not a member of a civil service of the Union or the All India service or a civil service of a State or holds a civil post under the Union or a State cannot claim protection of Article 311. AIR 1968 Punj 312 (313) = 1968 Lah IC 967 = ILR (1967) 1 Punj 649 (FB).

(3) The expression 'civil post under a State' does not include the post held by persons in the service of any local authority within the territory of the States. AIR 1952 Punj 58 (59, 60) = 53 Pun LR 268 (DB).

(4) Article 311 itself does not exempt the case of civil servants who enter into service under Government on a contractual basis. It applies to all civil servants of the State and also applies to a case where a person had become a servant of State by virtue of a contract entered into between him and Government. AIR 1958 Mys 23 (24, 25) = 35 Mys LJ 347 (DB).

(5) The person whose service agreement is not in conformity with requirements of Section 175 (3) Government of India Act, 1935 or Art. 299 of the Constitution, is not a servant of Union of India and as such he cannot take advantage of Article 311 (2). AIR 1953 Cal 319 (320).

(6-7) In Article 311, the words "civil service" and "civil post" are used in contradistinction to "service, in or post under the defence forces" of Government of India. AIR 1955 Cal 556 (557, 558) = 59 Cal WN 628.

(8) Contingent servants can by no stretch of imagination be treated as holding a civil post within meaning of Article 311. AIR 1959 Tripura 21 (24)

(9) The expression 'civil post' means an appointment or office on civil side and it includes all personnel, whether permanent or temporary. AIR 1959 Tripura 2 (6).

(10) Protection of Article 311 extends to all Government servants holding permanent or temporary posts or officiating in them. AIR 1966 SC 1529 (1531, 1532, 1534) = (1966) 3 SCR 106. (W. P. No. 531 of 1961, D/- 12-12-1962 (Mys), Reversed.)

(11) It is for the petitioner to satisfy the Court that he was holding a civil post under the State. AIR 1959 J and K 26 (27) (DB).

(12) Article 311 applies to the case of a railway servant. AIR 1959 Punj 401 (402) = 60 Punj LR 597.

(13) Where a temporary Government servant is arbitrarily picked out and discharged, there would be a violation of the provisions of Article 16, Cl. (1). AIR 1959 Bom 134 (137, 138) = ILR (1958) Bom 1266 (DB).

6. Persons in temporary service —

See also under Notes 24 and 104. — (1) Both for purposes of Articles 310 and 311, Clauses (1) and (2) there is no difference between temporary and permanent members of the services or between persons holding permanent or temporary posts. AIR 1958 SC 36 (44). (AIR 1956 Nag 113 = ILR (1955) Nag 893 and AIR 1957 Punj 42 = (ILR (1957) Punjab 198 and AIR 1957 Punj 191 and AIR 1957 Raj 81 Overruled.) — (The decision in AIR 1956 Punj 207 on this point was Reversed. But the decision was confirmed on the ground that the reduction in rank did not operate as a punishment.) **AIR 1964 SC 1854 (1860 to 1863) = 66 Bom LR 319 = (1964) 5 SCR 190 ** AIR 1964 SC 449 (452) ** AIR 1963 SC 601 (604) ** AIR 1963 SC 531 (532) = (1963) 3 SCR 716 ** AIR 1962 SC 1711 (1715, 1716) = 1962 All LJ 883 = 64 Pun LR 1008 ** AIR 1969 Cal 164 (165) = 1969 Lab IC 406 ** AIR 1967 All 197 (201) = (1968) 2 Lab LJ 6 ** (1967) 1 Lab LJ 718 (720) = 15 Fac LR 347 (SC)

Articles 310 & 311 — Note 6 (contd.)

** AIR 1964 All 528 (530) (DB) ** AIR 1961 All 45 (49, 50) = ILR (1960) 2 All 249. (Reversed on another point in AIR 1963 All 94.) ** 1958 All LJ 372 (380) (SC).

[But see 59 Pun LR 185 (187) = ILR (1957) Punj 731.]

(2) Civil employee covers whether permanent or temporary. AIR 1958 Tripura 28 (33) ** AIR 1958 SC 36 (43) ** AIR 1959 Bom 134 (136) = ILR (1958) Bom 1266 (DB) ** AIR 1957 Bom 175 (176, 177, 178) = ILR (1957) Bom 616 (DB) ** 1967 All WR (HC) 607 (608) = 1967 All LJ 806 ** (1968) 69 Punj LR 482 (483) = 1967 Cur LJ 342 ** ILR (1966) Cut 503 (523) = 8 Ori JD 290 (DB) ** AIR 1966 Ori 173 (178) = (1966) 8 OJD 211 (DB) ** AIR 1965 Raj 108 (109) = 1964 Raj LW 635 (DB).

(3) Temporary clerk — Not confirmed — Presumption to be temporary till discharged. AIR 1956 Bom 455 (457) = ILR (1953) Bom 767 (DB).

(4) The mere fact that a person who is given temporary employment is asked to serve in a post which is normally held by a permanent employee is not proof of his engagement as a permanent servant. AIR 1959 Bom 134 (135, 136) = ILR (1958) Bom 1266 (DB).

(4-A) Only later, not earlier, appointment to be taken into consideration for purpose of Art. 311 (1). AIR 1970 Delhi 52 (55) (DB).

(5) Merely because there is no other person having a lien on an appointment to a temporary post, it cannot be said that a person is appointed to a post in a substantive and not officiating capacity. AIR 1954 Ajmer 22 (23).

(6) Temporary Posts of Village Level Workers — Distinct class created in Andhra Pradesh General Subordinate service consisting of temporary posts — Persons appointed to posts have no right to the posts nor does the completion of probation confer any right on them to the posts. AIR 1968 Andh Pra 307 (308) = 1968 Lab IC 1293.

(7) The question whether a particular employee of the State is in temporary service or in permanent service is a mixed question of fact and law. 1964 Raj LW 353 (355) = (1965) 1 Lab LJ 242 ** AIR 1959 Bom 134 (135, 136) = 60 Bom LR 342 (DB). (Reversed on another point in AIR 1962 SC 630.)

(8) Just as a post may be permanent or temporary so the appointment to such post may be substantive or on probation or on an officiating basis. But in all cases the person appointed will be one who "holds" a civil post and will be entitled to the protection of Article 311 just as he will be governed by the provi-

sions of Article 310. AIR 1958 SC 36 (42).

(9) Two ingredients are necessary to make an employee quasi-permanent. (1) three years' continuous Government service, and (2) a declaration made in regard to him as indicated in Rule 3 (ii). If both these factors exist, then his service cannot be terminated except in manner provided in relevant rules. AIR 1967 Cal 326 (331) = 70 Cal WN 1141 (DB).

(10) Employee on contingency staff are not even temporary employees and are not entitled to the protection of Article 311. AIR 1955 Pepsu 25 (27) = ILR (1954) Patiala 687.

(11) Promotion of an employee on a 'temporary' basis and 'until further orders' — Reversion to his substantive post — His promotion was an officiating or provisional arrangement and he did not acquire any legal right to hold higher post. (1967) 14 FLR 449 (451) (Cal).

(12) If a temporary servant is working on a contract then his conditions of service are regulated by terms of contract of employment. The contract may be express or implied and the terms would be regulated by rules applicable to members of that service. AIR 1967 All 197 (201) = (1968) 2 Lab LJ 6.

(13) Temporary service can be terminated at any time except in one case, namely, when the appointment to a temporary post is for a definite period. AIR 1967 All 197 (201) = (1968) 2 Lab LJ 6.

(14) Appointment of petitioner after retirement on attaining age of 55 years on temporary post, till his attaining age of 58 years — Such appointment is a substantive appointment to the post — His removal is governed by Article 311 — Non-observance of Article 311 — Termination quashed. AIR 1967 All 197 (203, 204) = (1968) 2 Lab LJ 6.

(15) Temporary service based on contract — Service terminated against principles of natural justice — Writ of certiorari applied for — Contract expiring afterwards — Writ can still be issued. AIR 1969 Cal 164 (167) = 1969 Lab IC 406.

7. Probationers — See also Notes 39 and 112. — (1) Article 311 applies to a probationer. AIR 1958 All 141 (145) ** AIR 1958 Andh Pra 269 (272) = ILR (1957) Andh Pra 780 (DB) ** AIR 1957 All 241 (243) = ILR (1957) 1 All 261 ** 1957 MPLJ 469 (473) (DB) (Nag) ** AIR 1957 Pat 357 (362) (DB) ** AIR 1956 Sau 41 (42, 43) (DB) ** AIR 1955 Nag 107 (108) = ILR (1954) Nag 670 (DB) ** AIR 1955 Pat 372 (375) = ILR 34 Pat 179 (DB) ** AIR 1953 Nag 138 (141)

Articles 310 & 311 — Note 7 (contd.)

= ILR (1953) Nag 522 ** AIR 1964 SC 449 (452) ** AIR 1960 SC 689 (692) = (1959-60) 17 FJR 390 = 1960 BLJR 220 = (1960) 1 Lab LJ 577 ** 1968 Serv LR 232 (234) (Punj).

(2) If an enquiry is held with a view to ascertain whether a probationer is fit to be confirmed and if as a result of enquiry, his services are terminated, provisions of Article 311 would not be attracted. AIR 1969 Cal 180 (197) = 1969 Lab IC 409 (DB).

(3) Probationer cannot after expiry of probationary period automatically acquire status of permanent member of a service, unless of course the rules under which he is appointed expressly provide for such a result. AIR 1966 SC 175 (179) = (1964) 6 SCR 279 ** AIR 1969 Orissa 215 (218) = 1969 Lab IC 1118 = 35 Cut LT 267 (DB) ** 1967 Cur LJ 187 (190) (Punj) ** AIR 1966 Madh Pra 333 (334) = 1966 MPLJ 41 (DB) ** (1965) 11 FLR 127 (130) (Cal) ** ILR (1963) Andh Pra 1130 (1138) ** AIR 1963 Manipur 25 (27) ** AIR 1961 All 450 (454, 455, 456) = 1961 All LJ 458 = (1961) 2 Lab LJ 251 (FB). (AIR 1959 All 536 and ILR (1959) 1 All 226, **Overruled.**) ** AIR 1959 Cal 100 (101, 102) = 1959 Cal LJ 125 (DB). (If the service of a probationer is terminated merely on the ground of his work being unsatisfactory and terminated in accordance with the terms of the employment, no question of any penalty being imposed, arises. But even a probationer can be proceeded against for misconduct and proceedings with a view to imposing a penalty can be taken against a probationer as well. If before the probationary period is over or if the Government servant concerned is still holding the status of a probationer, some misconduct is alleged against him and proceedings are started with a view to punishing him for such misconduct, the provisions of Article 311 (2) will apply.) ** AIR 1958 Mad 216 (217) (DB).

(4) A Government servant on probation is not to be deemed to be confirmed on expiry of period of his probation, if no orders confirming him in his substantive post or extending his period of probation are passed by competent authority. AIR 1961 All 450 (456) (FB). (1959 All LJ 79 = AIR 1959 All 536 and ILR (1959) 1 All 226, **Overruled.**)

(5) A condition of appointment of a civil servant in the temporary post to the effect that he shall be on probation for a fixed period and that his probationership shall not be extended, is not such as cannot be varied by agreement mutually arrived at. When the civil servant is not made permanent in the temporary post even after the expiry of his initial probationary period, he may refuse to serve another period on probation. But where the probationership of the civil servant is sought to be extended and the

civil servant accepts the extensions and works under those terms, it is not open to him to contend later on that such extensions were illegal and could not be made by his appointing authority. AIR 1963 Cal 359 (362) = (1962) 2 Lab LJ 541.

(6) Civil servant — Appointment to permanent post on probation — Service terminable during probation without giving reasons — Continuance in service after probation period without any confirmation — In such a case, no automatic extension of period of probation but automatic confirmation in permanent office instead — Article 311 (2) attracted. AIR 1962 Cal 349 (354, 357, 359) ** AIR 1956 All 330 (332). (AIR 1956 Mad 216 Not foll.)

(7) When a person is appointed on probation to a substantive post, it cannot be said that he was appointed temporarily either for an indefinite period or for a specific period. During the period of his probation in such a substantive post, the Government can, no doubt, discharge him from service and Art. 311 will not apply to such a discharge. But when once the probation period is over and the Government servant is not discharged at the end of the probation period and is allowed to continue in the substantive post without his probation being extended and without order of confirmation he gets substantively appointed to the post and he acquires a right to hold the post. Article 311 will apply to such service. AIR 1960 Manipur 45 (47, 48, 49).

(8) Plea of automatic confirmation after 3 years under Rule 7 of Punjab Civil Medical Service Class II (Recruitment and Conditions of Service) Rules 1949 — Rule of automatic confirmation not applicable to probationer appointed against temporary vacancy — Article 311 could not therefore be relied upon by him. AIR 1967 Punj 213 (214) = (1968) 1 Lab LJ 760 (DB).

(9) Person appointed on probation — Probation to be extended or reduced at discretion of appointing authority — According to terms of appointment employee to be given fresh offer of appointment for three years — Period of probation expiring — Fresh offer not given — He must be regarded as continuing his probation as in temporary appointment. AIR 1963 Cal 421 (428) = (1963) 2 Lab LJ 569.

(10) Section 126 of Constitution of Jammu and Kashmir, does not make any distinction between temporary servant on probation or permanent servant and is applicable to a servant who is appointed to a temporary post on probation, provided that appointing authority chooses to proceed against him by way of punishment. AIR 1961 J and K 7 (8).

(11) It is within the province of the State Government to extend the period of probation of a Government servant

Articles 310 & 311 — Note 7 (contd.)
from time to time according to circumstances. AIR 1953 Nag 138 (140) = ILR (1953) Nag 522 (DB).

(12) Probationer may terminate his service by one month's notice. AIR 1963 Cal 359 (364) = (1962) 2 Lab LJ 541.

(13) Resignation from service — Before probationer resigns he must give reasonable notice of termination of his service. AIR 1963 Cal 359 (364) = (1962) 2 Lab LJ 541.

(14) Probationary service — Appointment of petitioner in — Government as employer has right to review work done by probationer. AIR 1964 Guj 145 (151) = (1964) 5 Guj LR 386 (DB).

(15) Normally a probationer will not be allowed to draw an increment unless he has completed his probation satisfactorily — Servant allowed to draw increments — Intention is not to treat him as probationer. AIR 1960 Manipur 45 (48).

(16) Confirmation of a probationer under Punjab Police Rules can only be if departmental examination has been cleared — Held, petitioner could not be automatically confirmed after expiry of period of probation and Article 311 (2) did not apply. 1967 Cur LJ 187 (190) (Punj).

(17) Services of permanent servant or probationer cannot be terminated by way of punishment without following provisions of Article 311 (2) — He has right to be personally present before enquiry officer and cross-examine Government witnesses. AIR 1967 Cal 461 (468) = (1969) 1 Lab LJ 290 (DB).

(18) Probationer — Services can be terminated during period fixed — Probationary status may also extend to reasonable period beyond expiry of fixed probationary period — Probationary status is to be determined according to facts and circumstances of each case. AIR 1967 Cal 461 (464) = (1969) 1 Lab LJ 290 (DB).

(19) It is of the very essence of concept of probation that the person is on trial regarding his suitability for regular appointment and is liable to be discharged on being found to be unsuitable for permanent absorption. AIR 1969 Ker 313 (315, 316) = 1969 Lab IC 1473 = 1969 Ker LR 465.

(20) A person appointed on probation does not ordinarily get automatic confirmation in service on expiry of stipulated probation period and if he is allowed to continue in service without any action being taken by employer either by way of confirmation or by way of termination he continues only as a probationer even after the expiration of period of probation. AIR 1969 Ker 313 (315) = 1969 Lab IC 1473 = 1969 Ker LR 465.

(21) Person appointed as special grade clerk on probation for one year — Proba-

tion neither extended nor person confirmed — Person continuing to work as such for five years and also in a higher post for some years — Sudden order reverting him to post of ordinary clerk — Order held amounted to punishment — Article 311, applied. 1961 MPLJ 986 (992) = 1963 Jab LJ 851 (DB).

(22) Probationer — Order of termination merely stated that his service was no longer required—Termination was not by way of penalty — Article 311 not attracted. (1965) 11 FLR 127 (130) (Cal).

(23) Where it is sought to terminate the probation of a Tahsildar and revert him to his substantive post of a Naib Tahsildar, as a measure of punishment on the basis of his alleged misconduct in drawing double travelling allowance he must be given an opportunity to show cause against the proposed punishment. AIR 1963 All 377 (380, 381, 382, 383) = 1962 All LJ 1015 (DB).

(24) Employer not satisfied with employee at the end of probation—Termination of service is not penal in nature. (1964) 1 Mad LJ 70 (79) = (1964) 2 Lab LJ 311 (Mad).

(25) Civil servant — Appointment to permanent post on probation — Service terminable during probation without giving reason — Continuance in service after probationary period without any confirmation — Termination of service on certain charges — Non-compliance of Article 311 (2) — The probation not having been terminated within the prescribed period, the plaintiff became a permanent incumbent to the office after the expiry of the probationary period of two years. AIR 1962 Cal 349 (354, 357, 359).

8. Persons in defence services. — (1) 'Person holding a post connected with defence' cannot be stated to be included in the class of persons 'holding civil post under the Union.' He is not entitled to any protection under Article 311. AIR 1960 Bom 101 (103, 104) = 61 Bom LR 1185.

(2) While Article 310 applies both to persons in the civil employ of the Government and in the defence services, Article 311 applies only to the former, and does not apply to the defence services or persons holding civil posts in them. ILR (1957) Punj 1695 (1698) ** AIR 1956 Bom 601 (602, 605) ** AIR 1956 Cal 532 (536, 537) ** AIR 1956 Punj 42 (44) = ILR (1955) Punj 1279 ** 1963 All LJ 464 (468) ** ILR (1961) 2 All 90 (94) ** 59 Punj LR 472 (474) = ILR (1957) Punj 1695.

(3) The employment of a member of the Defence Services can be terminated without assigning any reason. Even in the case of wrongful dismissal, no action for damages or compensation can be entertained in Courts. Article 310 (2) of the Constitution excludes from its purview all

Articles 310 & 311 — Note 8 (contd.)

personnel of the Defence Services. AIR 1961 Ker 155 (157, 158) = 1960 Ker LT 1148 = (1961) 1 Lab LJ 68.

(4) Article 311 does not apply to member of defence service or one holding any post connected with defence — Article 310 governs defence department employees only in respect of tenure of office — It follows that there is no constitutional provision affecting as to a member of defence service or to one holding any post with defence — As such, department rules not founded on constitutional provisions are merely directory — Such rules therefore cannot affect right of the President under Art. 310. 70 Cal WN 925 (929, 937) = (1967) 2 Lab LJ 782 (DB) ** AIR 1969 Delhi 220 (224) = 1969 Lab IC 802 ** AIR 1966 Cal 252 (256) = (1967) 1 Lab LJ 318 ** ILR (1967) 1 Punj 704 (710).

(5) Article 311 does not apply to civilian personnel of defence department — Civilian personnel in defence department will get protection of Article 311 by virtue of rules framed under Articles 309 and 310. AIR 1960 Madh Pra 119 (121, 123) = 1959 MPLJ 1053.

(6) Army instructions are made for the purpose of guidance of military authorities in connection with civilians employed in defence service and have no binding force in themselves. These rules have no force of affecting the provisions of Article 310 regarding the tenure of office of persons employed in the service of Government of India or State. The tenure of office of persons employed in such service continues to be at pleasure of the President or the Governor as the case may be. AIR 1960 Bom 101 (105) = 61 Bom LR 1185.

(7) Machinist in Ordnance Factory removed from service by General Manager — Protection under Article 311 is not available to such person — Civilians in Defence Services (Classification, Control and Appeal) Rules (1952), Rule 15—Non-compliance with — Person not holding civil post and thus excluded from Article 311 cannot claim benefit of any rule made under Article 309. AIR 1966 Madh Pra 82 (84, 85) = 1965 MPLJ 881 (DB).

9. Servants of co-operative societies. —

(1) A servant of the State Co-operative Bank does not hold a "civil post" under the State within the meaning of Art. 311. AIR 1955 Pat 223 (225) (DB).

(2) An employee of a Co-operative Society is not a Government servant. AIR 1952 Trav-Co 264 (266) = ILR (1951) Trav-Co 609.

(3) Writ of certiorari — Co-operative society registered under Co-operative Societies Act — Included within definition of State in Article 12 — Bye-law authorised suspension by way of punishment — Not competent to order suspen-

sion of employee pending inquiry — Such order is liable to be quashed. AIR 1961 Madh Pra 289 (293) = 1961 MPLJ 1059 (DB).

(4) The manager or other employee of a co-operative society is not a member of the civil service of the State or of the Union. AIR 1959 Madh Pra 218 (220) = 1960 MPLJ 715 = (1959) 1 Lab LJ 618 (DB).

10. Servants of educational bodies. —

(1) A teacher in private college affiliated to a statutory university is not a Government servant and is not entitled to the benefit of Art. 311. See AIR 1954 Trav-Co 199 (200, 201) = ILR (1953) Trav-Co 1224 (DB).

(2) Service of an Institution such as Murshidabad Institute of Technology which is sponsored and aided Engineering Institute for diploma courses is not "a civil service of a State" or "a civil post under a State" within the meaning of Article 311 (1). AIR 1963 Cal 161 (162) = (1963) 1 Lab LJ 149 ** 1954 Ker LT 557 (560) = ILR 1954 Trav-Co 836 (DB).

(3) Council of Scientific and Industrial Research — Neither a public body nor part of Government — Article 311, not applicable. AIR 1969 Cal 525 (528) = 1969 Lab IC 1334 = 73 Cal WN 249 (DB).

(4) Institute of Technology Act (1961), Section 26 — Statutes under, made by Indian Institute of Technology, Madras — Statute 13 — Assistant Professor of Metallurgy in service of Indian Institute of Technology at Madras — Article 311 of Constitution held inapplicable — But Statute 13 embodied similar provision — Services of employee petitioner held were terminated under Statute 13 (5) and non-observance of procedure under Statute 13 (9) did not vitiate the order. ILR (1965) 2 Mad 24 (29, 38) (DB).

(5) As a result of Section 28 (b) of the Travancore University Act, the servants of the University of Travancore must be deemed to be employees holding appointments under the Government. ILR (1954) Trav-Co 836 (838).

(6) Punjab University created by East Punjab University Act 7 of 1947, an autonomous body — Not a State within the meaning of that expression in Part XIV of the Constitution — Its employees cannot claim the benefits under Article 311. AIR 1969 Punj 391 (393) = 1969 Lab IC 1406 = 71 Punj LR 1047.

(7) Sarojini Naidu College for Women Dum Dum not a State — Its Vice-Principal, not a person holding civil post under the State and as such was not entitled to the constitutional safeguards provided in Article 311. AIR 1962 Cal 420 (427, 428) = 66 Cal WN 931.

(8) State Board constituted under Assam Primary Education Act whether department of Government and whether its employees are civil servants within the

Articles 310 & 311 — Note 10 (contd.)
 meaning of Article 311. — (Quaere.) AIR 1965 Assam 101 (105) (DB).

(9) A Government aided school is not a Government institution, nor are the Administrator and the teachers thereof Government employees under the Bengal Primary Education Act, 1919. (1963) 1 Lab LJ 719 = (1963) 6 Fac LR 42 (45) (Cal).

11. Servants of Statutory Corporations.—

(1) India is evolving three basic legal patterns for State enterprises namely (1) Statutory corporations formed by and under special Statutes, both Parliamentary and State, (2) Government departmental undertakings and (3) Government companies under the Companies Act with special Articles and Memoranda — Statutory Corporations are governed entirely by the terms and conditions of the particular statutes creating such corporations. Its service is generally regarded not as a civil service or civil post under the State within the meaning of Article 311. The second type or pattern of State enterprises is provided by the usual departmental undertakings. Many Government departments like the Railway and the Post Office and Public Works provide numerous examples of such departmental undertakings — The third basic pattern is the Government Companies under the Companies Act. There is perhaps another kind of State enterprise which may be described to be 'non-Government Companies but with Government control'. Its example is Chemicals and Allied Products Export Promotion Council. AIR 1963 Cal 421 (424 to 427) = (1963) 2 Lab LJ 569. (The question whether the employees under Durgapur Project under the Hindustan Steel, Limited are Government servants or hold civil posts under the State within meaning of Article 311 was not decided.)

(2) The mere fact that Government exercises control over statutory bodies or local authorities or statutory corporations does not make the employees Government servants for the purpose of Article 311. AIR 1958 J & K 6 (8) (DB) ** AIR 1957 Punj 219 (220) (DB) ** AIR 1955 Pat 223 (225) (DB).

(3) Employees of statutory corporation — Not entitled to invoke Article 311 but can invoke statutory regulations governing their conditions of service. AIR 1969 Madh Pra 216 (216) = 1969 MPLJ 339 = 1969 Lab IC 1211 (DB).

(4) A statutory corporation, which is an independent body, is not part of the Government and an employee of the corporation is not a Government servant for the purposes of Article 311. AIR 1957 Pat 10 (14, 15) (DB) ** AIR 1955 Cal 56 (58) ** ILR (1954) Patiala 300 (303) ** AIR 1953 Cal 581 (582) ** AIR 1953 Him Pra 103 (104) ** AIR 1953 Pepsu 99 (99) = ILR (1952) Patiala 419 ** ILR

(1967) Guj 102 = (1966) 1 Lab LJ 659 (666).

(5) A person serving under the Commissioners for the Port of Calcutta is not a civil servant in the employ of Government and cannot claim the protection of Article 311 (2). AIR 1957 Cal 720 (726) (DB).

(6) An employee of State Bank of India is not a civil servant under the State or Union but is an employee of a limited company incorporated under special statute namely State Bank Act 1955. AIR 1962 Cal 72 (74) = 65 Cal WN 1101 ** AIR 1958 Pat 418 (419) = ILR 37 Pat 431 (DB).

(7) Though under the Damodar Valley Corporation Act, Government exercises a considerable amount of control over the Corporation, that does not mean that Article 311 applies to the Corporation employees. The employees of the Damodar Valley Corporation are not civil servants within the meaning of Article 311. AIR 1960 Cal 549 (550, 551) ** (1956) 60 Cal WN 1023 (1025) = (1957) 1 Lab LJ 223.

(8) Company incorporated under Companies Act — Chemicals and Allied Products Export Promotion Council — Employee of — Not a civil servant not entitled to privileges of Article 311. AIR 1962 Cal 10 (12) = 65 Cal WN 1172.

(9) Employees of a Government Company within Section 617 of the Companies Act 1956 not entitled to protection of the Art. 311. AIR 1968 Cal 322 (325, 327) = 72 Cal WN 144 (DB).

(10) Employees of Calcutta State Transport Corporation are not persons holding civil posts. The fact that the State Government exercises administrative control under Sections 34, 44 and 45 of the Road Transport Corporation Act over the Corporation will not affect its separate legal entity. AIR 1963 Cal 116 (119, 120) = 67 Cal WN 361 ** AIR 1968 Mys 69 (71) = 10 Law Rep 646 = 1968 Lab IC 337 (DB).

(11) Employee of a State-owned undertaking transferred to Corporation constituted under statute — Employee ceases to hold a civil post after the transfer — Protection under Article 311 does not apply to him. 1964 MPLJ 432 (434) (DB).

(12) A. P. State Electricity Board constituted under Section 5 of Electricity (Supply) Act (1948) is not part and parcel of State Government — It is an autonomous body constituted and functioning under provisions of said Act — Art. 311 does not apply to Board. AIR 1969 Andh Pra 328 (334) = 1969 Lab IC 1080 = (1969) 1 Andh WR 551 (DB).

(13) Life Insurance Corporation of India not being a 'State', Article 311 does not apply to its employees — (Point conceded). AIR 1969 Bom 337 (341) = 1969 Lab IC 1198 = 71 Bom LR 286.

Articles 310 & 311 — Note 11 (contd.)

(14) Articles 311, 39, 41 and 47 — Applicability — Insurance Medical Officer under Employees' State Insurance Scheme — He is not an employee of State Government. AIR 1970 Cal 1 (5, 6) = 1970 Lab IC 24 (DB).

(15) Government taking over management of private trust fund and treating its employees as Government Servants — Services rendered by them in Trust fund are to be treated as part of services rendered under Government. AIR 1969 Mys 346 (350) = (1969) 1 Mys LJ 415.

(16) Clause (12) of Section 21 of Penal Code has got nothing to do with the determination of the question whether one is Government servant within the meaning of Article 311. Employees of Hindustan Cables Ltd. are not entitled to privileges conferred on civil servants by Article 311. 72 Cal WN 398 (401) = 38 Com Cas 500.

(17) Employees of — J. & K. Minerals, Ltd — Cannot be held to be servants of State or Union Government — Any action taken against such employees is not amenable to writ jurisdiction of High Court — Section 311 does not apply. 1968 Lab IC 1323 (1324, 1325) = 1967 Kash LJ 434 (J & K).

12. Members of Police Service.— (1) The Police Regulations in so far as they are inconsistent with the provisions of Article 311 Clauses (1) and (2) will now be invalid. But otherwise, such Regulations will continue in force under Article 313. AIR 1953 Cal 316 (318) = ILR (1952) 2 Cal 254 ** AIR 1951 Cal 179 (181).

(2) Though the rules of discipline should be enforced against a member of the Police rather rigorously, this does not necessarily lead to the conclusion that in a serious matter like his dismissal from service he should be deprived of the constitutional rights. AIR 1958 Punj 327 (330) = 59 Punj LR 532 (DB).

(3) The power of the Governor of a State to dismiss at pleasure a police officer of subordinate rank is not affected by the rules under the Police Act under which the Inspector-General of Police and some other officers have such power of dismissal. AIR 1954 All 629 (632) (DB).

(4) By the Constitution of India, the distinction between police officers and other civil servants in the matter of protection by constitutional guarantees is abolished and as from January 26, 1950, the recruitment and conditions of service of all persons serving the Union or the State are now governed by Article 309 and their tenure by Article 310 of the Constitution. AIR 1961 SC 1245 (1249, 1250) = ILR (1961) 2 All 167 = (1962) 1 SCR 151 = (1963) 1 SCJ 115 = (1961) 2 Lab LJ 166.

(5) Government of India Act (1935), Sections 243, 240 (3) — Dismissal of Head Constable of Police — Section 240 (3)

not applicable — Section 243 will apply — Second notice under Section 240 (3) is not necessary. AIR 1960 SC 1210 (1213).

(6) The removal or dismissal of a special constable is covered by Article 311 (2) even though he does not get any remuneration, because such removal or dismissal may have the effect of casting a slur on his character or may affect in respect of some other office which he may be holding. AIR 1955 Cal 556 (558).

(7) A police officer of the Madhya Pradesh Police Service, who was deputed to Hyderabad Police Service, continued to belong to the Madhya Pradesh Police Service and charges against him must be enquired into according to the rules in force in the Madhya Pradesh. AIR 1955 Nag 160 (162, 163) = ILR (1955) Nag 93 = 1955 Cri LJ 974 (DB).

(8) Where a police officer in Assam is charged with a cognizable offence and the charges are proved against him, he is unfit for the post of a Police officer and as such, he can be dismissed under Section 7, Police Act, on a departmental enquiry. There is no question of any trial by a competent Court before a departmental action is taken. AIR 1962 Assam 34 (36) = ILR (1962) 14 Assam 155 = 1962 (1) Cri LJ 265 (DB).

(9) Dismissal of Sub-Inspector and some constables after conviction for certain offences — Formation of Andhra State during pendency of appeal — Released under general Amnesty — Appeals withdrawn as not pressed — Being dismissed, their names not included in postings — **Held**, that order of Amnesty was not one under Article 161 but was one under Section 401 of Criminal P. C. — **Held** also that Article 311 (2) did not apply — Under Rule 3 (b) of Madras Police S. S. D. and A Rules Authority could dismiss police officer pending his appeal against conviction and sentence. AIR 1960 Andh Pra 259 (262, 263) = (1959) 2 Andh WR 526 = 1960 Cri LJ 565 (SB).

13. Service under municipalities, local boards and panchayats.— (1) Expression 'Civil Post under a State' in Article 311 does not include post held by person in the service of any local authority within the State. AIR 1960 Punj 554 (556) = 62 Punj LR 745 (DB) ** 1969 Lab IC 475 (476) (All). (Article 311, not applicable) ** 1967 All LJ 767 (771) = (1968) 2 Lab LJ 1.

(2) The servant of a Municipality or other local authority is not the holder of a civil post under the Government. AIR 1958 J & K 6 (8) (DB) ** AIR 1958 Mad 211 (212, 213) = ILR (1958) Mad 204 ** AIR 1957 Pat 333 (337) (DB) ** AIR 1956 All 460 (461) ** AIR 1956 All 181 (183) ** AIR 1956 Punj 220 (221) ** 1956 MBLJ (HCR) 1307 (1313) (DB) ** ILR (1955) Hyd 711 (712) (DB).

(3) The principle that office is held during the pleasure of the Government is

Articles 310 & 311 — Note 13 (contd.)

not applicable to a statutory body like a municipal board and the right to dispense with the services of an employee at pleasure cannot be claimed by such body. AIR 1956 All 460 ** AIR 1956 All 181 (183).

(4) Person appointed Secretary under Bombay Village Panchayats Act, 1933, though deemed appointed by the State Government retains same status as before — Person continues to be subject to the conditions of service and disciplinary rules of Panchayat — The post though a civil one is not under the State — Protection under Article 311 not available. AIR 1967 Guj 92 (96, 97, 98, 100) = (1966) 7 Guj LR 1024 (DB).

(5) Termination of services of Municipal employees without show cause notice would not invalidate it—Paras on pages 454 and 654 of U. P. Municipal Manuals providing for a hearing by municipal boards, have no statutory force and their breach does not confer a right of action. AIR 1958 All 841 (842, 843) = (1958) All LJ 363.

(6) Application of civil service rule to servants of municipality — Does not confer status of civil servant on municipal employees. ILR (1955) Hyd 711 (713) (DB).

(7) Service under Municipalities and Local boards — Article 311 does not apply at the time of suspension. AIR 1966 All 552 (554).

(8) An employee in the service of the kendra panchayat which owes its existence to the Madhya Bharat Panchayat Vidhan is not a member of the civil service of the Union or a civil service of the State or a person who holds a post under the Union or the State. AIR 1962 Madh Pra 50 (54) = 1961 MPLJ 1465 (DB).

(9) It is not the factum of appointment by an agency that determines the character of the post that one holds. Though the appointment is made by the Government the Executive Officer of a Panchayat is a servant of the Panchayat Board. AIR 1959 Andh Pra 506 (506, 507) = (1959) 1 Andh WR 390 (DB) ** (1966) 68 Punj LR 213 (215, 216).

(10) U. P. Town Improvement Act (8 of 1919), Sections 18, 19 — Trust has power to dismiss employees — Neither Section 240 Government of India Act 1935, nor Article 311 of Constitution applies to employees of local bodies. ILR (1962) 1 All 163 (166, 167) (DB).

(11) The post of a teacher in a school under the management of a District Board cannot be said to be a civil post within the meaning of Article 311. Order of Local Board removing such a teacher from service cannot be quashed under Article 226. AIR 1960 Andh Pra 342 (343) = (1959) 2 Lab LJ 561 (DB).

(12) A person holding a substantive appointment in a permanent post in the

Hyderabad Municipal Corporation before his services were transferred to the Government must be deemed to be in the civil service of the State under S. 3 of the Hyderabad Local Government service (Declaration as State Civil Services) Act (20 of 1956). (1960) 2 Lab LJ 391 (393) (DB) (Andh Pra).

(13) Employees of Devaswom Board — Petitioners held had ceased to be Government servants and the question whether Article 311 of the Constitution or Article 346 of the Travancore Service Reg. were violated did not arise. ILR (1958) Ker 949 (958) (DB).

(14) Sanction for prosecution of Chairman of Municipal Board was necessary as 'removable' in Section 197 C. P. C. must be construed in sense of office coming to end on some superior authority forcing public servant to vacate it and not in sense of its coming to end by operation of law. AIR 1968 Raj 136 (137) = 1968 Raj LW 59.

14. Contract service—See also Note 5.—

(1) The person whose service agreement is not in conformity with the requirements of Section 175 (3). Government of India Act, 1935, or Article 299 of the Constitution is not a servant of the Union of India and as such he cannot take advantage of Article 311 (2). AIR 1953 Cal 319 (320).

(2) Acquisition of territory by conquest — Automatic termination of service of servants under prior Government — Servants when become servants of new Government — Principle underlying law of Master and Servant applies — Servants of T. A. I. P. (Air Transport Service of Portuguese India) of former Portuguese concern in Goa could not claim status of servants of Government of India. AIR 1969 Goa 76 (84) = 1969 Lab IC 942.

(3) Rules under S. 31 of Calcutta Port Act, not approved by Central Government — Besides statutory powers under the Act, Commissioners for Port have powers of a master to employ servant and to impose terms with regard to service. (1968) Lab IC 826 (828) (Cal).

(4) Temporary servant — Contract to terminate services without notice and without assigning reasons — Contract is not hit by Article 311 — What is hit is removal or dismissal. 1962 Mys LJ (Supp) 487.

15. Civil Posts and Civil Services.—

See also Note 5.— (1) In the context of Arts. 309, 310 and 311 a post denotes an office. A post is an employment, but every employment is not a post. A casual labourer is not the holder of a post. A post may exist apart from the holder of office. A post under the State means a post under the administrative control of the State. AIR 1967 SC 884 (886) = (1967) 1 SCR 679.

Articles 310 & 311 — Note 15 (contd.)

(2) The expression 'civil post' used in Art. 311 means an appointment or office on the civil side of the administration as distinguished from the military side and the said expression does not include civilian personnel of the defence Department. (1962) 1 Lab LJ 674 (677, 678) = (1962) 4 Fac LR 278 = 1963 All LJ 464 ** AIR 1967 SC 884 (886). (AIR 1958 All 353, Dist.) (AIR 1957 Orissa 112, Overruled.) ** AIR 1969 Tripura 2 (6).

(3) Expression 'Member of a civil service' refers to several services existing at the time the Constitution came into force, viz., Indian Civil Service, Indian Engineering Service, the Central Services, Indian Medical Service etc. (Obiter). AIR 1967 Guj 92 (98) = (1966) 7 Guj LR 1024 (DB).

(4) The term "civil post" has not been defined in the Constitution, but, having regard to Arts. 310 and 311, seems to have been used as distinguished from defence service. AIR 1955 Cal 556 (558) ** AIR 1955 Nag 175 (176) = ILR (1955) Nag 221 (DB) ** AIR 1954 Pepsu 136 (139, 142) = ILR (1954) Patiala 183 (DB).

(5) Civil post means post other than post connected with defence — Person on daily wages serving State in civil capacity in the sphere of its non-sovereign functions is also person who holds civil post. AIR 1966 All 97 (99, 100) = (1966) 1 Lab LJ 799.

(6) A person holds a civil post under the State provided (i) that his duties fall under any sphere of activities connected with the State. (ii) that the post which he holds is created by the State and could be abolished by it; (iii) that the conditions of service of that person are regulated and controlled by the State; and (iv) that he is paid a monthly salary out of State funds. AIR 1959 J and K 26 (27) (DB). ** 1966 All LJ 978 (979) = 1968 Lab IC 49 (DB) ** AIR 1963 Cal 116 (119) = 67 Cal WN 361.

(7) The true test to determine whether a person holds a civil post under the Union or the State has primarily to be applied in relation to the functions which he performs. If his duties relate to activities which fall directly within the sphere of the Union or the State and his services are under the direction and control as also his appointment is by either the Union or the State, then his case comes under Article 311; but if the sphere of activity of the person falls within the sphere of activity of a local authority constituted by a statute having a separate legal existence then his case falls outside Article 311. AIR 1958 All 353 (359, 360) = ILR (1967) 2 All 280 (FB) ** AIR 1957 Punj 219 (220) (DB). (AIR 1954 Punj 255, Reversed.)

(8) The term "civil post" does not refer only to posts which are borne on the cadre of any regularly constituted service.

All posts held by any public servant, not being military or defence posts, must be held to be civil posts. AIR 1937 PC 31 (31) = 64 Ind App 55 = ILR (1937) Mad 532 ** AIR 1955 Cal 556 (557) ** AIR 1954 Assam 18 (22) = ILR (1954) 6 Assam 107 = 1954 Cri L Jour 31 ** AIR 1954 Pepsu 136 (139, 142) = ILR (1954) Patiala 183 (DB).

(9) A person holding a post under a State is a person serving or employed under the State — There is a relationship of master and servant between the State and a person said to be holding a post under it. AIR 1967 SC 884 (886, 887) = (1967) 1 SCR 679.

(10) The notion of a public servant is far wider than that of a servant of the State or Union or a member of a service under State or Union or an all-India service and should not be confused with those expressions. AIR 1962 Madh Pra 50 (54) = 1961 MPLJ 1465 (DB).

(11) A public servant holds a civil office during pleasure of the President or the Governor according as he holds office under Union or State. AIR 1963 SC 601 (604).

(12) Every public servant within the meaning of S. 21 of the Penal Code is not necessarily a person who holds civil post. ILR (1954) Patiala 300 (305).

(13) Fact that a person was not whole-time employee nor drew a salary but commission did not alter status of his post. AIR 1967 SC 884 (887) = (1967) 1 SCR 679.

(14) The mere fact that the holder of an office under Government does not get any remuneration does not make him any the less the holder of a civil post. AIR 1955 Cal 556 (558).

(15) Additional Government Advocate is a State servant holding a civil post. AIR 1959 All 169 (171, 177) (DB).

(16) An employee of a statutory corporation is not a Government servant for the purpose of Art. 311 though he is appointed and removable by Government and draws his pay from Government and though he may be a 'public servant' within the meaning of S. 21 of the Penal Code. ILR (1954) Patiala 300 (304) ** AIR 1961 All 502 (504 to 507).

(16-A) The question whether a particular person is a municipal servant or a Government servant is determined by the functions which he performs. AIR 1958 Punj 402 (404) = ILR (1958) Punj 1804 (DB).

(17) There is no decisive test for determining whether a person holds a civil post under the State or not. For a civil post under the State within the meaning of Article 311 though it is always relevant and almost sometimes crucial to see the nature of the control which the State exercises in the particular case, still even where it exists, such "control" may not be decisive of the question. Courts

Articles 310 & 311 — Note 15 (contd.)

should have to find in each case in its own merits whether a particular service in a particular case is a civil service or civil post under the State within the meaning of Art. 311 (1). AIR 1963 Cal 161 (162, 163) = (1963) 1 Lab LJ 149.

(18) Government of India Act (1935), Section 241 (3) Cls. (a) and (b) apply to persons who were serving in civil capacity in India before commencement of Part III of Government of India Act — Onus is on person claiming that he is governed by Civil Service Rules of 1930 to show that he was in this category — Otherwise his case is governed by Cl. (c) of Section 241 (3). ILR (1956) Punj 1213 (1226, 1227).

(19) A person is entitled to the benefit of Art. 311 if he holds a civil post at the time when disciplinary action is taken against him. (1964) 66 Pun LR 1040 (1041).

(20) An Assistant Sub-Inspector or Sub-Inspector of Police holds a civil post and is not member of a service like the Indian Police or Indian Police Service or the Punjab Police and therefore dismissal by a District Superintendent is not a contravention of Art. 311 (1). AIR 1959 Punj 402 (404, 408) = 61 Punj LR 167 (DB).

(21) A member of the Madhya Pradesh Home Guards holds a civil post, as under the C. P. and Berar Home Guards Act 1947, he has the powers, privileges and protection of a police officer. AIR 1955 Nag 175 (176) = ILR (1955) Nag 221 (DB).

(22) A quasi-permanent servant is entitled to protection under Art. 311. ILR (1961) Mys 1129 (1132) (DB).

(23) The General Manager of Court of Wards in Bihar holds a civil post under the State of Bihar within the meaning of Art. 311 and he is entitled to receive notice in terms of the Article before the order of dismissal is passed by the Board of Revenue. AIR 1960 Pat 366 (368, 369) = 1960 BLJR 312 (DB).

(24) A person appointed as a Special First Class Honorary Magistrate under Section 14 (1) of the Cr. P. Code for a certain period holds a civil post within the meaning of Art. 311 even though he is not a salaried employee. 1960 Ker LT 708 = (1960) 2 Lab LJ 407 = 1961 (1) Cr IJ 657 (658).

(25) A village officer under the Madras Hereditary Village Offices Act (3 of 1895) is a holder of a civil post under Art. 311 (1), under the Madras State. AIR 1956 Mad 460 (462) = 1956 Cri LJ 1081 ** AIR 1961 SC 564 (569) = 1961 SCA 410.

(26) The Bank of Patiala is not an independent corporation but only a commercial concern owned and controlled by the State and an employee of the Bank

is the holder of a civil post under the State. AIR 1954 Pepsu 136 (142) = ILR (1954) Patiala 183 (DB).

(27) Mouzadar appointed under the Assam Land and Revenue Regulation, 1886 — He holds a civil post under the State as he performs onerous functions on behalf of the Government and the Deputy Commissioner which are of a civil nature — His dismissal from service without giving an opportunity of showing cause against the action, as required under Art. 311, is unconstitutional and void. AIR 1964 Assam 54 (56) (DB).

(28) As the Treasurer of the Government Treasury is an employee of the State and not an independent contractor the principle laid down in AIR 1955 SC 404 becomes directly applicable and though the Tahvildar under him was not appointed directly by the State he could in the circumstances, claim to hold a civil post under the State and to have the benefit of Art. 311. AIR 1961 All 515 (516, 517, 518) = 1961 All WR (HC) 269 ** AIR 1965 SC 360 (361, 362, 363, 364) = (1964) 7 SCR 89 ** AIR 1957 All 779 (781).

(28-A) Tahvildars in sub-treasury are not entitled to protection under Art. 311. AIR 1959 All 739 (741, 742).

(28-B) An employee under the Hindustan Cables Ltd. does not hold a civil post 'under Union or State' — He cannot claim protection of Article 311. AIR 1968 Cal 124 (126) = 72 Cal WN 410.

(28-C) The person holding the post of General Manager and the person holding under contract the post of Superintendent Coke and Oven Department, of the Durgapur Steel Plant appertaining to Hindustan Steel Ltd., do not hold civil post under the Government of the Union within the meaning of Art. 311, so as to attract Clause (2) thereof. AIR 1969 Cal 95 (99, 103) = 1969 Lab IC 142 = 17 Fac LR 50.

(28-D) Employee of State Electricity Board is not covered by protection afforded under Art. 311 — Fact that the State Govt. has certain power in respect of Electricity Board does not affect or alter legal entity of Board set up by statute. AIR 1965 Punj 316 (317) = 67 Punj LR 316 (DB).

(28-E) Inspector of Station Accounts is not a 'ministerial servant'. AIR 1970 Delhi 71 (75) (DB).

(29) Mysore Village Officers Abolition Act abolishing all hereditary village offices — Act challenged on ground that village post 'Karnam' in South Kanara District was 'Civil Post' and that abolition thereof under Act amounted to 'removal' within Art. 311 — Held, that 'Karnam' was not 'Civil Post' to attract provisions of Art. 311. AIR 1966 SC 1571 (1576, 1577) = (1966) 2 SCJ 329.

Articles 310 & 311 — Note 15 (contd.)

(30) Advocate appointed by agreement as Government Advocate to conduct criminal cases in High Court but allowed private civil practice — Payment of monthly remuneration — Not a holder of civil post at any relevant time and Art. 311 cannot possibly be attracted in such cases. AIR 1960 Raj 138 (139, 141) = ILR (1959) 9 Raj 1217 (DB).

(31) Person appointed as Additional Government Advocate holds a civil post. AIR 1959 All 169 (174, 177) (DB).

(32) Claim to hold 'civil post' — Relationship of master and servant must exist before person can put such claim — Advocate appointed as Public Prosecutor — He does not hold 'Civil Post' within meaning of Art. 311. 1969 Lab IC 1257 (1258) = (1969) 2 Andh WR 465.

(33) Registrar of Board created under Pepsu Ayurvedic and Unani Practitioners Act, 2008 B.K. is not Civil Servant under Government and can be removed by Government at its pleasure — Art. 311, has no application. AIR 1955 NUC (Pepsu) 1601 = ILR (1954) Patiala 300 (305).

(34) An Executive Officer appointed under the Punjab Municipal (Executive Officers) Act 1931 does not hold a civil post within the meaning of Art. 311 although the Government might have a hand in his appointment or dismissal under the provisions of the Act. (1966) 68 Punj LR 213 (215).

(35) Notary cannot be deemed to hold civil post to whom Art. 311 applies. AIR 1965 Punj 220 (222) = 67 Punj LR 37 ** AIR 1967 All 173 (176, 177) = 1967 All LJ 290 (DB).

(36) Council of Scientific and Industrial Research is not a public body nor is it a Government department — Its employees are not civil servants holding Civil Posts under Government and not entitled to benefit of Art. 311 (2) — Writ of mandamus cannot be issued against it. 1968 Lab IC 320 (325, 326) (Cal). (Reversed on another point in AIR 1969 Cal 525.)

(37) Contingent servants can by no stretch of imagination be treated as holding a civil post within the meaning of Art. 311. AIR 1959 Tripura 21 (24).

(38) A Choudhary appointed under the Land Revenue Code of Bikaner for collection of land revenue is not a person in the civil employ of the Government. AIR 1956 Raj 110 (111) = ILR (1956) 6 Raj 335 (DB).

(39) Appointment of Branch Postmaster under Posts and Telegraph Extra Departmental Agents (Conduct and Service) Rules, 1959 — Not a public servant entitled to protection under Article 311. (1967) 1 Andh WR 228 (231) ** AIR 1957 Orissa 112 (116) (DB).

(40) An Extra Departmental Delivery Agent in Postal Department is a person holding a "civil post" within the meaning

of the expression in Art. 311 (2). ILR (1967) 2 Ker 649 (656, 657) = 1968 Serv. LR 337.

(41) Malis employed in Raj Bhawan are not Government servants. AIR 1956 Pat 398 (401) = ILR 34 Pat 412 (DB).

(42) Petitioner was in the Sert-e-khas army — Sert-e-khas merged in divani as a result of the Sert-e-khas Merger Regulation of 1358F — Sert-e-khas army disbanded — Petitioner continued in private service of Nizam of Hyderabad.

Held, petitioner not being in any State service, Art. 311 not attracted. ILR (1962) Andh Pra 278 (284) (DB).

(43) An extra typist working in the office of Collector from time to time according to exigencies and paid out of contingency funds, not even an approved apprentice is not a person holding of 'civil post under a State' within the meaning of Art. 311 (1) — Termination of service does not require compliance with Art. 311. 1966 All LJ 978 (979, 980) = 1968 Lab IC 49 = (1968) 1 Lab LJ 43 (DB).

(44) A person appointed as a Mandal (Village surveyor) under the Garo Hills District Council is not a member of the Civil Service of the State of Assam inasmuch as the State Government had nothing to do either with his appointment or dismissal or had any control over his duties and activities. Therefore, Art. 311 has no application and he cannot invoke the aid of Art. 311. AIR 1961 Assam 69 (70) = (1960) 1 Assam LR 136 (DB).

(45) Permanent Asst. Clerk in office of Secretary Board of High School and Intermediate Education — He holds a civil post in the State. AIR 1962 All 413 (419) = 1962 All LJ 446 (DB).

(46) Mauzadar in Assam valley is a holder of civil post under the State and is entitled to protection under Art. 311 (2). AIR 1967 SC 884 (887) = (1967) 1 SCR 679. (AIR 1964 Assam 54, Affirmed; AIR 1957 Orissa 112, Overruled.)

(47) Petitioner not a Government employee when in service or when departmental proceedings were started against him — Petitioner also prosecuted under S. 409 Penal Code — The fact of such prosecution will not make him a Government servant. AIR 1968 Manipur 68 (70) = 1968 Lab IC 1275.

(48) Non-compliance with S. 4 (1) of Employment Exchange (Compulsory Notification of Vacancies) Act (1959) does not invalidate the appointments made — Employees on temporary basis whose services are liable to be terminated without any notice cannot challenge their termination. (1967) 2 Lab LJ 606 (609) (Mys) (DB).

16. Members of Indian Civil Service — See also Article 314. — (1) Indian Independence Act (1947) Ss. 9 (1) (a) and 10

Articles 310 & 311 — Note 16 (contd.)

(2) — India (Provisional Constitution) Order (1947) Art. 7 (1) — Effect of Political change in India in 1947 on services of Indian Civil Servants — Announcement of Viceroy dated 30-4-1947 — Admissible in evidence — While initial option to continue or not in service was with servant concerned, final option to continue in service or not was with appropriate Government and special orders or arrangements contemplated were action taken in pursuance of that final option. AIR 1955 SC 817 (829) = (1955) 2 SCR 541. (AIR 1954 Mad 1155, Reversed.)

17. "Except as expressly provided by this Constitution". — See also Note 18 — (1) The opening words of the article "except as expressly provided by this Constitution" indicate that the provision in Art. 310 (1) is only subject to the exceptions provided by the Constitution itself and that it is not subject to any exceptions that may be sought to be made by statute law. AIR 1956 Bom 601 (603).

[But see AIR 1957 Pat 515 (527) = ILR 36 Pat 557 (DB).]

(2) The phrase "except as expressly provided by this Constitution" in Art. 310 cannot include Rules and Regulations which are continued in force under Art. 313 nor can they remain operative if they are inconsistent with the provisions of the Constitution. AIR 1958 Bom 283 (287) = 1958 Nag LJ 50 ** AIR 1960 Bom 431 (433) = 62 Bom LR 1.

(3) The English Common Law rule regarding the holding of office by an officer only during the pleasure of the Crown has not been adopted by the Constitution in all its entirety and with all its rigorous implications. AIR 1958 SC 36 (41). (AIR 1954 SC 245, Ref. to.)

(4) Except in the cases mentioned in Art. 311 there is no constitutional protection against any punishment imposed on a Government servant. ILR (1956) Punj 1213 (1223).

(5) Scope — Police Act and Police Regulations made under that Act, which were preserved under S. 243 of the Govt. of India Act, 1935, continue to be in force after the Constitution, so far as they are consistent with the provisions of the Constitution. AIR 1961 SC 751 (755, 756) = 1961 (1) Cri LJ 773 = (1961) 2 SCR 679.

18. "Holds office during the pleasure of . . ." — **Rule of pleasure in Art. 310 (1) — Its scope and limitations.** — (1) Pleasure of Governor cannot be exercised so as to abridge fundamental right of employee. AIR 1970 Assam 1 (7) = 1970 Lab IC 11 = 1969 Assam LR 99 (FB).

(2) The expression 'during the pleasure' indicates that it is the tenure of office which is held at the pleasure of the President or the Governor. The effect of the article is that the tenure of office can

be terminated by the President or the Governor as the case may be at his pleasure. AIR 1961 Mys 88 (91, 96) = 39 Mys LJ 1 (FB).

(3) Rules framed under Art. 309 cannot modify or abrogate the "tenure at pleasure" under Art. 310. AIR 1966 Madh Pra 82 (84, 85) = 1965 MPLJ 881 (DB) ** AIR 1969 All 422 (422, 423) ** 1967 All LJ 645 (646).

(4) Obiter — The pleasure of the President or the Governor or Rajpramukh under Art. 310 is only subject to the express limitations provided for under Art. 311. AIR 1958 All 532 (537) = ILR (1958) 1 All 577 ** AIR 1960 All 164 (170).

(5) The Parliament or State Legislature cannot make a law so as to impinge upon the overriding powers conferred upon the President or the Governor under Art. 310 as qualified by Art. 311. AIR 1961 SC 751 (761) = 1961 (1) Cri LJ 773 = (1961) 2 SCR 679. ** ILR (1968) 2 Ker 664 (672) ** 1968 Lab IC 1377 (1381, 1382) = (1968) 1 Mad LJ 348 ** 1962 Mys LJ (Supp) 437 (439).

(6) The power of the head of the State himself to dismiss or remove is not affected by Art. 311, Cl. (1) or its counter-part, S. 240, Sub-section (2) of the Government of India Act, 1935. AIR 1949 PC 112 (114) = 75 Ind App 343 = 1948 FCR 103 = 50 Cri L Jour 383

(7) Article 311 is one of the express provisions in Constitution which curtails the pleasure of President or Governor that is vested in him under Article 310. Article 311 is to be regarded as proviso to Article 310. It controls Article 310. AIR 1966 Cal 252 (257) = (1967) 1 Lab LJ 318 (DB) ** AIR 1967 Patna 318 (319) = 1967 BLJR 552 (DB).

(8) Doctrine of pleasure — Appointments to Government service — Doctrine is subordinated to restrictions provided under Art. 311. AIR 1966 Pat 364 (366) = 1966 BLJR 480 (DB) ** AIR 1966 Pat 97 (105) = ILR 45 Pat 1019 (DB) ** AIR 1961 Assam 74 (76) (DB) ** (1960) 2 Lab LJ 391 = (1960) 1 Andh WR 256 (258) (DB).

(9) The pleasure referred to in Art. 310 cannot afford to be unconstitutional and can only be exercised in strict accord with the express provisions of the Constitution. Article 311, being an express provision, acts as a rider of limitation on the pleasure under Art. 310. AIR 1961 Cal 1 (5, 6) = 65 Cal WN 361 (SB) ** AIR 1959 Bom 363 (365) = 1959 Nag LJ 93 (DB).

(10) As provided by Article 310 all Civil servants (including Railway servants) hold office during the pleasure of the President or the Governor as the case may be. This pleasure is subject only to the restrictions imposed by Art. 311 (2).

Articles 310 & 311 — Note 18 (contd.)

Subject only to the protection afforded by Art. 311 (2), a Civil servant who has been removed from service can have no justifiable cause in a Court of law. Once the procedure under Art. 311 (2) has been complied with the Courts are not entitled to determine whether the ground or charge upon which the authorities have proceeded against a civil servant is factually correct or sufficient to warrant the action taken against him. AIR 1962 Madh Pra 372 (373, 374) = (1963) 1 Lab LJ 792 = 1962 MPLJ 717 ** AIR 1961 SC 751 (761) = 1961 (1) Cri LJ 773 = (1961) 2 SCR 679.

(11) Article 311 does not affect the principle that a Government servant holds office during the pleasure of the head of the State. It only imposes certain constitutional obligations before he can be dismissed, removed or reduced in rank. AIR 1955 Hyd 54 (55) = ILR (1954) Hyd 728 (DB) ** AIR 1954 Madh B 54 (55) = ILR (1954) Madh B 301 ** AIR 1954 Madh B 49 (50) = ILR (1954) Madh B 314 (DB) ** AIR 1952 Madh B 105 (108) = ILR (1952) Madh B 253.

(12) In view of the "rule of pleasure" enunciated in Art. 311 (1) Government has always power to terminate services of Government servant by compulsory retirement on proportionate pension even before age of superannuation, irrespective of any specific service rule permitting such a course. AIR 1957 Assam 77 (81) (DB) ** AIR 1956 Madh B 40 (43) (DB) ** AIR 1954 Madh B 54 (56) = ILR (1954) Madh B 301 (DB) ** AIR 1943 Bom 268 (271) = ILR (1953) Bom 411 (DB).

(13) Unless, the Court finds a specific provision in some part of the Constitution giving to a Government servant a tenure different from the tenure provided for in Article 310, every member of the civil service holds his office during the pleasure of the President. AIR 1960 Bom 14 (15) = 60 Bom LR 1302 (DB).

(14) Pleasure of President in the matter of tenure of office of Public Servant — Rules and laws affecting or impairing such pleasure — Permissible limits stated. 1970 Lab IC 76 (79) (Delhi) (DB).

(15) Where a person holds an office under the provisions of a statute which fixes certain modes and methods for appointment, dismissal and removal, they must be complied with in all these matters. AIR 1952 Mad 865 (870, 871) = ILR (1953) Mad 262 (DB).

[But see AIR 1956 Bom 601 (605).]

(16) The general rule that service is during pleasure of Crown or State is protected only to the extent and within the limits prescribed by relevant statute and while Courts will take care to see that cardinal requirements prescribed by statute are fulfilled and principles of natural justice

have not been violated and public servant has had a fair deal, equally the Court will have discretion to refuse in suitable cases declaration on well settled principles applicable to specific relief. (1957) 70 Mad LW 965 (971) = (1957) 2 Lab LJ 668.

(16-A) Right of Government in matter of appointment and promotion of officers, extent of, indicated. AIR 1970 Punj 112 (Prs. 59, 64) = ILR (1969) 2 Punj 304.

(17) State has power under Article 310 to dismiss or punish Government servant even for misconduct unconnected with his official duties — Article 311 does not restrict this power of State. AIR 1960 All 55 (59, 60, 61) = 1960 Cri LJ 26.

(18) Except in the cases of substantive appointments to permanent posts and of appointments to temporary posts for specified period, appointment gives no right to the post and his service may be terminated unless his service had ripened into quasi-permanent service. AIR 1958 SC 36 (42, 43) = 1958 All LJ 372. (AIR 1956 Nag 113 and AIR 1957 Punj 42 and AIR 1957 Punj 191 and AIR 1957 Raj 81, Overruled.)

(19) It is only when there is a breach of the provisions of Article 311 or other constitutional provision that the termination of services of a Government servant can be questioned in a Court of law. AIR 1955 Hyd 54 (56) = ILR (1954) Hyd 728 (DB) ** AIR 1954 Madh B 49 (50) = ILR (1954) Madh B 314 (DB) ** AIR 1954 Mad 587 (591).

(20) 'Rule of Pleasure' laid down in Article 310 is embodied in Section 18, Army Act. 1968 Lab IC 60 (63) (Delhi) (DB).

(21) The paramount law as between Government and their servants is, as enunciated by Art. 310 (1) that the latter hold their office during pleasure of former subject only to two conditions, relating to disciplinary action embodied in Article 311 thereof. AIR 1959 Ker 338 (339) = 1958 KLT 1122.

(22) Under J and K Constitution, if termination of service of a civil servant in substance amounts to dismissal or removal, no matter what phraseology is used for such termination it will attract the provisions of Sec. 126 (2). AIR 1964 J and K 92 (95) = 1964 Kash LJ 271 (FB).

(23) Article 311 has to be read as a proviso or an exception to Article 310. It is only the Judges of the Supreme Court and of the High Courts, the Comptroller and Auditor-General of India, etc., for whom special provisions have been made in the Constitution that can be said to hold office during good behaviour. The tenure of office of others is at the pleasure of the President subject, of course, to Arti-

Articles 310 & 311 — Note 18 (contd.)
 cle 311 when it is applicable. AIR 1960 J and K 97 (101).

(24) The fact that a post is "held" under the Governor means that the Governor has full power to remove the employee from that post or to demote him from the same. This pleasure of the Governor is fettered only by express provisions of the Constitution. Article 310 of the Constitution does not, however, empower the Governor to refuse at its pleasure to pay him even for the period of his service. AIR 1965 Assam 109 (110) = ILR (1965) 17 Assam 253 (DB).

(25) Dismissal from service — Pleasure doctrine embodied in Articles 309, 310 — Limitations of — Rules under Article 309 designed purely for administrative guidance — Madras Police Standing Order No. 90 (3) (b) though considered as one under Article 309 is directory — Non-compliance does not involve error of jurisdiction. AIR 1966 Mad 203 = (1965) 2 MLJ 421 (FB).

(26) Natural justice requires that no person should be 'condemned unheard'. In a matter where the servant has to cease to hold office on account of the exercise of pleasure or policy pursued by an authority, the servant's mouth is shut as he has no right to be heard in opposition thereto. To punish a person at pleasure or on account of a policy regardless of any guilt of his, would be to condemn him unheard which is obnoxious to natural justice. Neither the pleasure nor the policy can, therefore, justify a punishment of a public servant by an order of dismissal. AIR 1956 Trav-Co 35 (40).

(27) The Parliament or the State Legislature can make a law regulating the conditions of service of a member of a public service, which includes proceedings by way of disciplinary action, without affecting the powers of the President or Governor under Article 310 read with Article 311. AIR 1961 SC 751 (761) = 1961 (1) CrL LJ 773 = (1961) 2 SCR 679.

(28) The pleasure of the President or Governor to dismiss a public servant cannot be fettered by any provisions in the contract of service. ILR (1968) 2 Ker 664 (672, 673).

(29) Art. 309 gives power to the President or the Governor to make rules regulating the conditions of service of civil servants. The rules so framed put a fetter upon the powers of the President or the Governor to dispense with the services of an officer at pleasure. ILR (1961) 11 Raj 371 = 1961 Raj LW 298 (307) (DB).

(30) Our Constitution has ensured security of tenure against mala fide punishment and it is well known that Government servants cannot be hired and fired arbitrarily or at the whim and caprice of anybody, however great the power entrusted to him. AIR 1966 Punj 66 (81) = 1965 Pun LR (Supp) 674 (DB).

(31) Where a resignation of a Government servant has been accepted by Government and intimation about its acceptance is sent to him, the Government servant cannot withdraw his resignation without the permission of the Government as the servant holds office only during the pleasure of the Government. AIR 1966 Punj 221 (224) = (1968) 1 Lab LJ 755.

(32) The principle embodied in Art. 310 (1) that Government servants hold office during the pleasure of the President or the Governor, as the case may be, is qualified by the 'provisions of Article 311 which give protection to Government servants. (1960) 1 Andh WR 256 = (1960) 2 Lab LJ 391 (393) (DB).

(33) The tenure of office of an employee of the Union or the State is only during the pleasure of the President and/or Governor; and accordingly, except as provided in the Constitution, there can be no justiciable cause available to a dismissed Government employee for getting relief in a Court of law. AIR 1960 Bom 431 (433 to 436) = 62 Bom LR 1.

(34) Substantive appointments to permanent post — No special contract governing the matter. Employee's service cannot be terminated except by way of punishment — Employee has a right to hold the post until he attains superannuation, or is compulsorily retired or the post is abolished. 1958 All LJ 372 (386, 387, 388) (SC).

(35) The provision in Article 310 (1) cannot confer a power on the State Government to compel an officer to continue in service of the State against his will apart from service rules. AIR 1964 SC 72 (81) = (1965) 1 SCA 259.

(36) Appointment to temporary post for a specified period—Tenure of person—Appointment cannot be put an end to before the end of the period except by way of punishment. 1958 All LJ 372 (386) (SC).

(37) In respect of Government servants other than, Supreme Court Judges, High Court Judges, Comptroller and Auditor-General etc., the tenure of service is at the pleasure of the President or the Governor as the case may be subject to what is contained in Article 311. Article 311 is nothing but a Proviso to Article 310. AIR 1959 All 643 (654).

(38) The right of the President of India to terminate the services of public servants is subject to the restrictions imposed by Article 310 (2) and Article 311. (1967) 10 Law Rep 555 (573) (DB).

(39) The rule of an office being held during pleasure cannot be extended to offices under a University or such other authority. AIR 1951 Mad 870 (871, 872) = (1951) 1 Mad LJ 518.

(40) Termination of service of Government servant serving in State — No complaint that there has been infringement of Articles 310 and 311 — Governor's plea-

Articles 310 & 311 — Note 18 (contd.)
 sure in the matter is final. 1958 All LJ 218 (221).

19. English law.— (1) The English Common Law rule regarding the holding of office by public servants only during the pleasure of the Crown has not been adopted by Article 310 (1) of the Constitution in its entirety and with all its rigorous implication. Article 311 gives a two-fold protection to persons who come within that Article viz., (1) against dismissal or removal by an authority subordinate to that by which they were appointed; and (2) against the dismissal, removal or reduction in rank without giving them a reasonable opportunity to show cause against the action proposed to be taken in regard to them. AIR 1964 Andh Pra 206 (210) = (1965) 1 Lab LJ 34 (DB).

(2) English Law—Civil servant holds office at pleasure of crown — Crown is not bound by any special control, let there be any—Servants are liable to be dismissed without notice and there is no right of action for wrongful dismissal. (1956) 2 Lab LJ 347 (351, 352) (Mad) (DB).

(3) When the Constitution of India accepts and adopts a doctrine well known to the common law of England, the doctrine that a civil servant holds his office at the pleasure of the Crown, it is futile to suggest that the Constitution makers did not wish that doctrine to have full sway. AIR 1960 Bom 14 (17) = 60 Bom LR 1302 (DB).

(4) The rule of English law pithily expressed in the Latin phrase 'durante bene placito' ("during pleasure") has not been fully adopted by Article 310 (1). The pleasure of the President is clearly controlled by the provisions of Article 311, and so, the field that is covered by Article 311 would be excluded from the operation of the absolute doctrine of pleasure. AIR 1964 SC 600 (609, 610, 621) = (1964) 5 SCR 683.

20. Age of superannuation — Alteration of rule as to.— (1) Once an employee attaining 55 years of age is found fit in efficiency and physical fitness tests memorandum dated 21st March 1963 issued by the Government of Assam under F. R. 56 gives right to such employee to continue in service upto 58 years. Therefore he cannot be compulsorily retired before 58 years on the ground that the pleasure of the Government, the Government may pick and choose any man for hostile treatment. The exercise of the pleasure of the Government under Article 310 is made subject to other express provisions in the Constitution. Therefore in exercise of its pleasure, the Government cannot deprive a person of his fundamental rights. AIR 1969 Assam 46 (50) = 1969 Lab IC 534 (DB).

(2) So long as age of compulsory retirement and period of qualifying service for such retirement fixed by rule are reason-

able, Article 311 is not attracted. AIR 1969 Orissa 37 (43) = 34 Cut LT 1026 (DB).

(3) There is no legal or constitutional bar to the alteration of the Service Rules as to the age of superannuation for retirement purposes to the disadvantage of persons already in service. AIR 1953 Trav-Co 140 (142) = ILR (1952) Trav-Co 756 (DB) * AIR 1962 All 328 (332) (FB).

(4) Termination of service resulting from change in age of superannuation — Article 311 is not attracted. AIR 1965 SC 1567 (1569, 1570) = (1965) 2 SCA 95 = (1965) 2 SCJ 718 = (1966) 1 Lab LJ 45.

(5) No ministerial servant can claim as a matter of right to be in service till the age of 60 and if the employee concerned is made to retire at the age of 55, he cannot complain of any breach of statutory obligation. AIR 1958 Andh Pra 697 (702) = (1958) 2 Andh WR 598.

(6) Correction in date of birth of Government servant — Application has to be made within three years of the actual age of superannuation of the Government servant and not the age of superannuation as given in the record. AIR 1967 Assam 13 (14) = ILR (1966) 13 Assam 34 (DB).

(7) The age of compulsory retirement having been extended unequivocally by the Government from 55 to 58 years, an employee holding permanent post has a right to continue in service till that age, unless he has completed 30 years of service earlier and he cannot be asked to leave service without giving any reason therefor at any time before attaining that age. Hence in absence of compliance with the procedure prescribed in Article 311 (2), such action, if taken, would be illegal. AIR 1969 Orissa 45 (49) = 1969 Lab IC 288 = 34 Cut LT 1392 (DB). (AIR 1968 Ori 44, Disting.)

(8) U. P. State Law Officers Rules (1942). Rules 7, 14 — Petitioner appointed Additional Government Advocate for three years — No superannuation age fixed at time of original appointment — Post described as tenure post and classed as "special post" — New rule fixing 60 years as superannuation age — Services of petitioner terminated before completing three years, under new Rule — Order is "removed" — Petitioner is entitled to protection of Article 311 (2). AIR 1959 All 169 (171, 174, 176, 179) = 1959 All LJ 323 = ILR (1959) 1 All 591 (DB).

21. Scales of pay, alteration of.— (1) The President cannot, in the exercise of the pleasure, fix the scales of pay of Government servants. AIR 1958 All 345 (347).

(2) Civil servant re-instated after termination of disciplinary proceedings — Government transferring him to some other department on administrative grounds — Old scale of pay continued though under the new post a higher scale of pay existed — Held, Government could effect such changes so long as provisions under Arti-

Articles 310 & 311 — Note 21 (contd.)
 cle 311 are not violated. AIR 1968 Manipur 16 (18, 19) = 1968 Lab IC 150.

(3) Conditions of service of public servants may be statutory or contractual. (1967) 10 Law Rep 555 (573) (DB).

22. Pleasure, whether can be delegated.—

(1) The power of dismissing "at pleasure" a Government servant cannot be delegated. AIR 1956 Trav-Co 35 (40).

(2) Court is debarred from examining pleasure of President — However, it can examine whether in fact the pleasure has been exercised by the President or by one duly authorised by Constitution to act in his behalf — Pleasure cannot be delegated and expressed by an officer — Pleasure of executive officer of Government does not enjoy the immunity granted to President — What is required under Article 310 is pleasure of President and not of Union of India — Both are not identical — Hence dismissal by officer is wrongful. (1966) 70 Cal WN 925 (931, 939) = (1967) 2 Lab LJ 782 (DB).

(3) The pleasure of the President or the Governor mentioned in Article 310 must be exercised in accordance with the rules or the statute made in that behalf. ILR (1966) 2 Punj 305 (310) (FB).

(4) Dismissal of Government servant — Power of the President — Nature of — It is executive power — Article 77 applies — Delegation permissible. 1970 Lab IC 76 (81) (Delhi) (DB). (AIR 1964 SC 648, Dist.)

(5) Power conferred by Article 310 can be delegated — Pleasure referred to in Article 310 is not strictly executive action to which Article 77 applies. AIR 1966 Cal 252 (258) = (1967) 1 Lab LJ 318 (DB).

(6) The President can delegate the powers under Article 310, but Article 309 cannot impair or affect the pleasure of the President therein specified. ILR (1966) 2 Punj 305 (310) (FB).

(7) The tenure of office of a person serving under the Union is at the pleasure of the President. The pleasure should be exercised by the President himself, and cannot be delegated to any subordinate authority. AIR 1963 Assam 94 (103) (FB).

[The view that the pleasure cannot be delegated by the President to any subordinate authority reversed in AIR 1964 SC 600.]

(8) The pleasure of the President is not a justiciable matter. (1965) 67 Pun LR 580 (583).

(9) Under Rule 146 of Railway Establishment Code issued by the President, the power of the President in respect of transfer of non-gazetted railway servants, may be exercised by an agent or by a lower authority to whom the Agent may re-delegate his power. AIR 1967 Punj 76 (78) = (1969) 2 Lab LJ 247.

23. Right to hold office whether Fundamental Right. See also Article 309.—

(1) Government servants have fundamen-

tal right to form associations under Article 19 (1) (c), but they have no fundamental right to be continued in employment and when their services are terminated by the State they cannot complain of infringement of any of their constitutional rights when no question of violation of Article 311 arises. AIR 1958 SC 232 (238) ** AIR 1965 Ker 19 (23) = (1966) 2 Lab LJ 93.

(2) Every Government servant has a right of appeal in accordance with rules governing his service, against an appointment made by promotion which is likely to infringe his rights. When such an appeal is filed person affected is entitled to notice and to a reasonable opportunity of being heard. 1969 Lab IC 712 (715) = (1968) 1 Andh WR 86 (DB).

(3) Where a post is being held by the Government employee only temporarily and not substantively, then on the facts of the case there can be no question of his having any right to hold that post or rank. AIR 1966 Orissa 173 (178, 179) = ILR (1965) Cut 893 (DB).

(4) A civil servant can hold office only during the pleasure of the Rajpramukh and there is no such thing as a vested right in him which is inviolable and inherent in him notwithstanding the Constitution, and his removal would be governed by Article 311. AIR 1960 Andh Pra 479 (483) = ILR (1960) 2 Andh Pra 148 (DB).

(5) A dismissal for established delinquency entails a bar to reinstatement of the dismissed servant. It is a taint on his reputation and would affect his position in society. AIR 1956 Trav-Co 35 (40).

(6) Compulsory retirement — Fundamental Rules, Chapter IV, Rule 56 (b) (i) — Right of servant to be retained in service after age of 55 years — Rule does not confer any such right — Authority can retire servant even if he continues to be efficient — Enquiry into reasons for exercise of discretion by authority is not the concern of High Court. AIR 1966 Cal 483 (485) = (1968) 1 Lab LJ 230 (DB).

24. "Dismissed" or "removed" —

General.— (1) The words "dismissed", "removed" and "reduced in rank" are all used in a special, technical sense. They must be understood in the sense in which they are used in the Civil Service (Classification, Control and Appeal) Rules, where they denote the three major categories of punishments which can be imposed on civil servants. AIR 1953 SC 250 (251, 252) = 1953 SCR 655. (Expressions are taken from R. 49 of C. S. (C. C. & A) Rules.) ** AIR 1958 SC 300 (304) ** AIR 1958 SC 36 (47) ** AIR 1954 Madh B 177 (180) (DB) ** AIR 1954 Madh B 49 (51) = ILR (1954) Madh B 314 (DB).

(2) Dismissed or removed — Includes every kind of termination of service. AIR 1964 SC 600 (621, 632) = (1964) 5 SCR 683.

Articles 310 & 311 — Note 24 (contd.)

(3-4) Dismissal includes removal. The only difference between dismissal proper and dismissal in shape of removal from service is that the former ordinarily disqualifies the servant from future employment but the latter does not do so. AIR 1961 Madh Pra 261 (266) = 1961 MPLJ 558 (DB) **AIR 1954 Mad 1155 (1160) = (1954) 2 MLJ 254 (DB). (Reversed on another point in AIR 1955 SC 817.) ** ILR (1966) 1 Mad 206.

(5) The word 'removal' in Article 311 has a narrow and technical meaning involving the concepts of arraignment, guilt, stigma and punishment and future debarring of employment under Government service whereas termination does not. (1957) 70 Mad LW 965 (972) = (1957) 2 Lab LJ 668.

(6) In deciding whether a dismissal is justified, the test to be applied must vary with the nature of the business and the position held by the employee. (1964) 1 Lab LJ 500 (510) (Mad).

(7) Dismissal or removal — Does not include termination of service on expiry of fixed period of employment of temporary employee. ILR (1955) Hyd 711 (713) (DB).

(8) Dismissal involves some serious consequences to the person affected and is also a slur on his character. Therefore he should be afforded an opportunity. The same thing cannot be said of "dispensing with services" of a servant by his master, unless he was bound by some agreement not to do it. (1959) 1 Lab LJ 554 (555) (Andh Pra) (DB).

(9) Dismissal from Government service for disqualifying a person for being elected as a Pancha must be for misconduct and a declaration by competent authority that the person is ineligible for further employment in public service — Removal of Gumastha-Patwari from service for misconduct by competent authority debarring him from holding any public post — Though term 'removal' is used, removal amounted to dismissal. ILR (1964) Andh Pra 1237 (1240, 1241) (DB).

(10) It is not the motive for either terminating the services of a Government servant or reducing him that is material in determining whether or not it amounts to an order of dismissal or removal or reduction in rank, but it is the ground on which a person has either been dismissed or removed or reduced in rank. ILR (1967) 2 All 240 (DB). (AIR 1958 SC 36. Foll.)

(11) The mere passing of an order of dismissal is not effective unless it is published and communicated to officer concerned. AIR 1966 SC 1313 (1316) = (1966) 2 SCJ 777.

(12) Mere transfer is not punishment unless the step taken amounts to punishment of the servant concerned. ILR (1964) 2 Mad 813 (814) ** AIR 1968 Andh Pra 129 (132, 133) = (1967) 2 Andh WR

269. (Transfer from one department to another.) ** 1967 Ker LT 354 (358) = 1967 Ker LJ 454.

(13) Government servant convicted for offence under Section 380, Penal Code, 1860, given benefit of Section 4 and released — Conviction cannot form basis for removal from service in view of Section 12 of Probation of Offenders Act (1958). (1967) 69 Punj LR 331 (333) = 1968 All Cri R 6.

(14-15) The words 'your work and conduct has not been found satisfactory' contained in the order of termination of service attach a stigma to the servant and cast an aspersion against his capacity as also against his conduct. Provisions of Art. 311 (2) must be complied with. 1968 Serv LR 734 (737) (DB) (Punj).

25. Article 311 (2) applies only when there is punishment.— (1) An order which would not otherwise be an order of removal does not become such merely because it follows an enquiry against the Government servant. AIR 1964 All 278 (280) (DB). (AIR 1963 All 390, Overruled.)

(2) The opportunity to show cause provided for in Clause (2) of Article 311 is required to be given only when the termination of service is resorted to as a punishment and not otherwise. AIR 1958 SC 36 (47) ** AIR 1956 Bom 455 (458) = ILR (1956) Bom 767 (DB) ** AIR 1962 SC 1711 (1715, 1716) = (1963) 1 SCR 416. (AIR 1957 Punj 191, Reversed on another point.)

(3) Article 311 is concerned only with dismissal or removal or reduction in rank 'as and by way of punishment' and has nothing to do if they are brought about on other considerations or conditions. AIR 1960 Mys 255 (257) = 38 Mys LW 522.

(4) Mere termination of service will not necessarily amount to "dismissal" or "removal" unless it is by way of penalty. AIR 1954 SC 369 (374) = 1955 SCR 26 ** AIR 1958 SC 232 (238) ** AIR 1958 SC 36 (47) ** AIR 1957 SC 892 (895) ** AIR 1953 SC 250 (251, 252) = 1953 SCR 655 ** AIR 1966 SC 1529 (1531) ** AIR 1969 Tripura 10 (11) = 1969 Lab IC 110 ** AIR 1958 Tripura 28 (33) ** (1956) 2 Lab LJ 347 (352) (DB) (Mad) ** AIR 1956 Orissa 113 (114) (DB). (Action is taken by Government only on the grounds of irregularities of promotion. Article 311 does not apply.) ** 1965 Mad WN 271 (275).

(5) When order is punitive in nature it is not necessary to find if it resulted in penal consequences. AIR 1966 Pat 364 (368) = 1966 BLJR 480 (DB).

(6-7) Constable officiating temporarily as Assistant Sub-Inspector — Examination for Assistant Sub-Inspectors not passed by him — Reversion to Constable's post not as punishment — Protection under Article 311 not available to such Constable. 1969 Lab IC 496 (498) (Pat).

(8) When, according to the Service Rules or according to the contract of service, a

Articles 310 & 311 — Note 25 (contd.)
Government servant is entitled to continue in service up to a particular time, the premature determination of his service before that time would, by itself, amount to a punishment (even though it may not purport to be such) and would, therefore, constitute 'dismissal' or 'removal' from service within the meaning of Article 311, Clause (2). AIR 1958 SC 36 (48, 49).

(9) An order passed under Rule 244 (2) of Rajasthan Service Rules (1950) does not attract the provisions of Article 311 (2) nor is the rule repugnant to the Article 311 (2). 1961 Raj LW 298 (305) (DB).

(10) Order reverting A only to make room for B who belonged to scheduled caste — Order not being punitive — Article 311 not attracted. AIR 1965 Raj 109 (111) = 1964 Raj LW 630 (DB).

(11) Retirement of civil servant after age of superannuation — Not a dismissal or removal. AIR 1958 Andh Pra 697 (704) = (1958) 2 Andh WR 598 (DB).

(12) Lambardar stopped from collecting land revenue by Revenue Minister — Order is not by way of punishment but only an administrative order. AIR 1965 J and K 102 (105) = 1965 Kash LJ 207.

(13) Appointment of Branch Postmaster under Posts and Telegraphs Extra Departmental Agents (Conduct and Service) Rules, 1959 — Not a public servant entitled to protection under Article 311. The fact that the Superintendent of Post Offices assigned a reason which is invalid does not render the order of removal in any way illegal or invalid. It is well settled that where services of a Government servant is liable to be terminated by a specified notice without assigning any reasons the existence of a reason for termination of the service does not convert the termination into an order of dismissal or removal. It follows that the order terminating the services of the petitioner is warranted by Rule 6, and cannot be questioned (1967) 1 An WR 228 (231).

(14) Temporary employment of applicant — Transfer order — Applicant refusing to abide by it and preferring to be discharged — One month's discharge notice — **Held** not by way of punishment. AIR 1963 Pat 125 (126, 127) = 1963 BLJR 69 (DB).

(15) For termination of service of temporary railway servant under Rule 148 of Railway Establishment Code, not being by way of punishment does not amount to removal. AIR 1962 Raj 244 (246) = 1962 Raj LW 296.

(16) Termination purporting to be under Rule 148 of Railway Establishment Code, in substance by way of punishment — Procedure prescribed by Article 311 (2) not followed — Order is void and of no legal effect. 1965 Mad WN 271.

26. Termination of service, when amounts to punishment: Tests and Il-

ustrations.— (1) If the order is based on the authority of a service rule, it must ordinarily be taken that the termination of service was in exercise of the powers conferred by that service rule. If, on the other hand, the order states that the temporary servant was guilty of misconduct or insubordination or was incompetent, etc., and if his service was terminated on the strength of any such ground, it would be a matter of punishment which would bring the case within the ambit of Article 311 (2). AIR 1960 J and K 97 (100).

(2) Services of temporary employee terminated without giving him chance of showing cause — Real motive behind termination that employee was not qualified — Employee is not entitled to any relief. AIR 1961 All 292 (293, 294). (AIR 1960 SC 689, Foll.)

(3) The question whether the particular order terminating his services was by way of punishment or only in the exercise of right under the contract will have to be determined on the facts and the circumstances of each case. Where the petitioner who held an officiating post was discharged from service on the ground that his past services were reported to be not good and honest:

Held, that the termination was by way of punishment and not in terms of contract of service and therefore the servant was entitled to the protection of Article 311 (2). AIR 1958 Assam 181 (182) (DB) ** 1965 Mad WN 271 (273) ** ILR (1965) 2 Mad 24 (35) (DB) ** 1968 BLJR 815 (821) (DB).

(4) One test for determining whether the termination of service of a Government servant is by way of punishment is to ascertain whether the servant but for such termination has the right to hold the post. The other test may be whether he has been visited with the evil consequence such as the forfeiture of his pay or allowances and the loss of his seniority in his substantive rank or the stoppage or postponement of his future chances of promotion. If a person is compulsorily retired or his services are terminated under some rules, the termination does not bring about any evil consequence. If, however, a person has right to remain in the post and that right is curtailed by the exercise of the power under the contract, or under the conditions of service rules in one sense it does affect his right to remain in the post. But as such an action is taken in the exercise of the contractual right or in the exercise of the powers given under the conditions of service rules, it is not taken by way of punishment and thus it is not covered by Article 311 of the Constitution. In such a case even though no enquiry is made, there is no violation of Article 311 of

Articles 310 & 311 — Note 26 (contd.) the Constitution as the termination does not come within Article 311 at all. AIR 1963 Assam 94 (98, 100) (FB). (Reversed on another point in AIR 1964 SC 600.) ** AIR 1962 SC 1711 (1715) ** AIR 1958 SC 36 (50) ** AIR 1958 SC 905 (908) ** AIR 1958 SC 232 (238) ** 1962 Ker LT 362 (365) = (1963) 1 Lab LJ 385 (DB) ** (1967) 1 Lab LJ 718 (721) = 17 Fac LR 347 (SC) ** AIR 1958 Madh Pra 135 (144) (DB).

(5) Two tests for determining whether termination of service was by way of penalty or not are: (1) Whether there was a charge or imputation against the officer and (2) Whether there is loss of benefit already accrued. AIR 1962 All 328 (332) (FB) ** 1970 Lab IC 139 (147) (Bom). (Factors to be considered stated.) ** ILR (1957) 2 All 486 (494, 495).

(6) Under the rules in the Railway Code a permanent servant has a right to hold the post until he reaches the age of superannuation, or until he is compulsorily retired under the relevant rule. If for any other reason that right is invaded and he is asked to leave his service, the termination of his service is in the nature of a penalty and amounts to removal. AIR 1964 SC 600 (610, 611) = (1964) 5 SCR 683. (AIR 1954 Cal 399 and AIR 1954 Cal 566, **Approved**; AIR 1956 Pat 221 and AIR 1958 Raj 250 and AIR 1959 All 439 and AIR 1960 Cal 264 and AIR 1962 Mad 379, **Overruled**; (Special Appeal No. 502 of 1958, dated 15-12-1959 (All) and LPA No. 81 of 1961, dated 6-4-1961 (Punj) and ILR (1960) 12 Assam 441 and AIR 1963 Assam 94 (FB), **Reversed**.)

(7) The consideration of the motive which impels the Government is of no consequence. The true test in each case is to find out what the basis of the order of the Government is. AIR 1964 Guj 145 (149, 150) = (1964) 5 Guj LR 386 (DB).

(8) Where a servant has a right to a post or to a rank either under terms of contract of employment, express or implied, or under rules governing conditions of service, termination of service of such a servant or his reduction to a lower post is by itself and prima facie a punishment, for it operates as a forfeiture of his right to hold that post or that rank and to get emoluments and other benefits attached thereto. AIR 1967 All 197 (202) = 1968 Lab LJ 6. (AIR 1958 SC 36, Rel. on.)

(9) Termination of service not amounting to removal — Motive is immaterial. AIR 1959 All 643 (648) ** 1968 All WR (HC) 834 = (1969) 1 Lab LJ 223. (Termination of temporary service — Reason not assigned — Motive irrelevant.)

(10) Where by an order the services of a temporary Government servant were terminated, without assigning any cause, it is not dismissal by way of punishment but simple termination under the terms of the

contract. Merely because at one time it was thought desirable to hold departmental enquiry against him, it cannot be said that the services were terminated by way of punishment. (1961) 2 Guj LR 268 (269) ** AIR 1961 All 284 (286) = (1961) 2 Fac LR 553. (Motive immaterial.)

(11) Holding departmental enquiry by itself does not favour that termination of service was accompanied by penal consequences. AIR 1960 Punj 126 (130) = ILR (1959) Punj 2189 (DB) ** AIR 1964 All 278. (AIR 1963 All 390, **Overruled**.) ** (1960) 2 Lab LJ 384 (386) (Andh Pra) (DB).

(12-13) Even though a Government servant may have no right to continue in service, the termination of his service may amount to punishment so as to attract the application of Article 311 if it involves the loss of benefit already accrued. AIR 1958 SC 36 (49).

(14) The termination of service will amount to punishment where it entails the loss of benefits already accrued. AIR 1958 SC 905 (908) ** AIR 1958 SC 232 (238) ** AIR 1958 SC 36 (49) ** 1963 All LJ 934 (942) (DB).

(14-A) Removal from service for overstaying leave — Prior opportunity of being heard must be given — Rule 14 (c) of Revised Service Rules (1933) cannot prevail over Article 311. 1970 Lab IC 248 (250) (Manipur).

(15) Where the intention of an order of termination of service was to deprive the petitioner of his full salary during period of suspension and the benefits that accrued to him, termination was in effect by way of punishment — Procedure prescribed by Article 311 (2) not followed — Order is illegal. AIR 1963 Mad 35 (36, 37).

(16) Temporary servant — Suspension on 26-1-1948 — Services automatically terminating on 31-3-1948 — Prosecution for bribery on 30-4-1948 — Conviction on 30-6-1949 — Order of dismissal passed on 23-7-1949 dismissing him with effect from date of suspension i.e., 26-1-48 — Effect of order held was that servant was deprived of his pay from 26-1-1948 to 31-3-1948. AIR 1953 All 470 (470) = 1953 Cri LJ 1052 = 1953 All WR (HC) 127 (DB).

(17) Assistant teacher appointed by Chief Secretary to State — Termination of Service after 5 years by Deputy Director of Education, an authority subordinate to Chief Secretary — Termination, held, amounted to removal since the incumbent was no longer in a position to serve. AIR 1969 Assam 3 (5) = 1969 Lab IC 6 (DB).

(18) Respondent, a railway servant put under suspension for 8 years — Thereafter respondent was informed that he could join duty — Immediately thereafter respondent served with order of termination of service — Emoluments during period of suspension not restored — Order held

Articles 310 & 311 — Note 26 (contd.)
was of penal character and attracted Article 311 (2). AIR 1964 Mad 243 (244, 245, 246) = (1964) 2 Mad LJ 78 (DB).

(19) Servant having right to post — Termination of service is prima facie punishment — If it is under terms of contract or under rules of service, unless it is by way of penalty, Art. 126(2) of J. & K. Constitution will not be attracted. AIR 1959 J and K 136 (137, 138) (DB).

(20) Termination of service resulting from change in age of superannuation — It is not removal within meaning of Article 311. AIR 1965 SC 1567 (1569, 1570) = (1965) 2 SCA 95 = (1965) 2 SCJ 718 = (1966) 1 Lab LJ 45 = (1965) 1 SCR 693.

(21) Termination of temporary servant will not prima facie and per se amount to a punishment so as to attract provisions of Article 311 (2). AIR 1960 J and K 97 (99) ** AIR 1960 Madh Pra 294 (296, 299) = 1960 MPLJ 762 (DB).

(22-23) Service for fixed period — Servant allowed to continue in service after such period — During such continuance servant accepting service in another State without permission — Services of servant terminated by order — Order held did not amount to removal and Article 311 (2) did not apply. 1963 Raj LW 329 (332, 333) = ILR (1963) 13 Raj 813.

(24) Punjab Educational Service (Provincialized Cadre) Class III Rules (1961). Rule 6 — Services of a teacher, taken over by State and he continued to hold post beyond maximum period of probation prescribed under Rules — He must be taken to have continued in substantive capacity — Services terminated after giving one month's notice and stating that it was in accordance with terms of his employment — **Held**, order was illegal as it amounted to punishment and removal from service which was not permissible without proper enquiry — After period of probation he must be taken to have been confirmed. AIR 1966 Punj 468 (471) = 67 Pun LR 312 (DB).

(25) Although the mere dropping of the charges immediately followed with the termination of services of an employee would leave a stigma on the employee for which he was given no opportunity to show that it was not justified, the proceedings cannot on that account be regarded as punitive. 1965 Mad WN 271 (274).

(26) Where the authority choosing to exercise its power of dismissal holds a formal departmental enquiry and terminates the services of temporary servant as a result of the finding in that enquiry, prima facie the termination would amount to a dismissal of the temporary servant. AIR 1964 SC 449 (453).

(27) Servant of former Gwalior Government—Dismissal—Reinstatement by Madhya Bharat Government treating his

past services as tacked on with all benefits and privileges accrued to him — Subsequent departmental enquiry against him for certain irregularities — Pending enquiry order rescinding his reinstatement passed and his services were treated as temporary — **Held**, that the order rescinding his reinstatement had the effect of removal from permanent service without any opportunity contemplated by Art. 311 (2) and therefore was invalid. AIR 1958 Madh Pra 135 (139) (DB).

(28) If the order of enquiring officer entailed penal consequences in addition to termination of service, it was obviously a case of dismissal. The same conclusion must be arrived at where order of discharge added a stigma e. g. that the employee had been found to be undesirable to be retained in Government service. AIR 1969 Cal 164 (166) = 1969 Lab IC 406.

(29) Refusal to pay subsistence allowance during period of suspension held did not indicate that termination of service was by way of punishment. AIR 1962 SC 630 (632) = (1961) 3 FLR 323 = (1961-62) 21 FJR 5 = (1961) 2 Lab LJ 427.

(30) Petitioner appointed Honorary Magistrate under Section 14 (1), Cr. P. Code for two years — Magisterial powers withdrawn before time on grounds of petitioner's political activity — Petitioner is entitled to reasonable opportunity to show cause — Since withdrawal of Magisterial powers caused slur or imputation on petitioner's character — Order quashed though the period of two years tenure had expired during pendency of writ petition. 1961 (1) Cr LJ 657 (658) = 1960 Ker LT 708. (AIR 1955 Cal 556 Rel. on.)

(31) Suspension of Government servant — Subsequent termination of his services after framing certain charges — No enquiry into charges made nor servant was given opportunity to show cause against termination — **Held**, order of termination was bad. 1966 All WR (HC) 624 (625).

(32-33) Motive for termination of service under Rule 148 (3) and (4) of the Railway Establishment Code not amounting to removal under the garb of termination, is immaterial. AIR 1959 All 643 (648).

(34) The burden is on petitioner to prove that his services had been terminated by way of penalty. AIR 1959 All 643 (648) **AIR 1964 SC 449 (452).

(35) The line demarketing the "removal" and "dismissal" on the one side and termination on the other is somewhat a thin line. 1962 Mys LJ (Supp) 487 (490).

(36) Termination of services of a permanent servant otherwise than on the ground of superannuation or compulsory retirement must per se amount to his

Articles 310 & 311 — Note 26 (contd.) removal within meaning of Art. 311. On a fair construction, Rules 148 (3) and 149 (3) of Railway Establishment Code (Vol. I) authorise Railway Administration to terminate services of all permanent servants to whom rules apply merely on giving notice for specified period or on payment of salary in lieu thereof and that clearly amounts to removal of servant within Article 311 and so Article 311 (2) must come into play. The Rules which do not require compliance with procedure prescribed by Art. 311 (2) must be struck down as invalid. **AIR 1964 SC 600 (610, 612, 617, 620, 626) = (1964) 5 SCR 683.** (AIR 1954 Cal 399 and AIR 1954 Cal 566, Approved; AIR 1956 Pat 221 & AIR 1950 Raj 250 and AIR 1959 All 439 and AIR 1960 Cal 264 and AIR 1962 Mad 349, **Overruled**; (Special Appeal No. 502 of 1958, D/- 15-12-1959 (All) and LPA No. 81 of 1961, D/- 6-4-1961 (Punj) and ILR (1960) 12 Assam 441 and AIR 1963 Assam 94 (FB) **Reversed**.)

(37) Railway servant declared ceasing to be in Government employ because of absence from service — Article applies. **AIR 1967 Orissa 171 (172) = ILR (1966) Cut 861 (DB).**

(38) Civil Service Regulations, Chapter XVII, Art. 422 — Break in service — Condonation of under Art. 422 — Condonation is only for purposes of pension and not for all purposes. **AIR 1968 Manipur 58 (60) = 1968 Lab IC 1065.**

(39) Petitioner, a clerk in Sales Tax Department of the State of Mysore transferred to the Income Tax department of the Central Government without his concurrence and contrary to the conclusions reached by the conference of Chief Secretaries of various States consequent on the reorganisation of States — Petitioner made an application to the State Government for repatriation—His services terminated on the ground of indiscipline — **Held** that as his transfer of service was without his concurrence it was not effective and he had not become the servant of Central Government and hence his termination of service was ineffective. (1967) 10 Law Rep 169 (175).

27. Termination of service of temporary servants. — (1) Both permanent and temporary members are within the protection of Cl. (2) of Art. 311. In the case of a temporary servant a mere termination of service per se does not amount to punishment. When a temporary service is terminated in pursuance of the terms of the contract or the rules governing it the termination is not a punishment. On the other hand, if the termination is founded upon misconduct, negligence, inefficiency or other disqualification attributed to the servant, it is a punishment attracting the protection afforded by Arti-

cle 311. **AIR 1960 Madh Pra 294 (296 to 299) = 1960 MPLJ 762 (DB).**

(2) A temporary servant has no lien over the post so long as it exists. It is also immaterial that certain civil servants junior to him are still in service; their retention in service will not by itself make termination of his services 'removal' within the meaning of Art. 311. **AIR 1964 All 278 (280, 281) = ILR (1965) 1 All 1 (DB).** (AIR 1963 All 390, **Overruled**; **AIR 1960 SC 689** and 1963 All LJ 934, **Disting.**)

(3) Though temporary Government servants appointed on contractual basis may be discharged from service in accordance with the terms of the contract, nevertheless, if such an order of discharge is passed by way of punishment the provisions of Art. 311 should be complied with.

An order discharging a temporary government servant for "unreliability, wilful absence from duty and disobedience of orders" after framing charges alleging specific instances of misconduct and asking him to show cause is without doubt a punishment and not merely an exercise of contractual right by the Government. **ILR (1959) Cut 158 (160, 161) = (1959) 1 Orissa JD 87 (DB) ** (1959) 1 Lab LJ 245 (248) (Andh Pra).** (Termination for misconduct, negligence and inefficiency — It is punishment.)

(4) Appropriate authority possesses two powers to terminate the services of a temporary public servant. It can either discharge him purporting to exercise its power under the terms of contract or the relevant rule, and in that case the provisions of Art. 311 will not be applicable. The authority can also act under its power to dismiss a temporary servant and make an order of dismissal in which case the provisions of Art. 311 will apply. (1967) 1 Lab LJ 718 (721) = 15 Fac LR 347 (SC) ****AIR 1962 SC 630 (632) **AIR 1962 Manipur 52 (54, 55) **AIR 1958 Tripura 38 (40).**

(5) Where a temporary appointment is made for a definite period the termination of service before that period will prima facie amount to punishment so as to attract the application of Art. 311 Cl. (2). **AIR 1958 SC 36 (48).**

(6) In the case of temporary Government servants, their services can generally be terminated at any time by notice by the Government and it will not be necessary for the Government to bring any charges against the Government servant or have an enquiry held into them. **AIR 1958 SC 36 (48) **AIR 1956 Bom 455 (458) = ILR (1956) Bom 767 (DB) **AIR 1958 Tripura 38 (39).**

(7) Termination of provisional appointment or reverting him to his substantive office in lower rank from an office of higher rank in which he was officiating, does not per se amount to punishment

Articles 310 & 311 — Note 27 (contd.)
or penalty. In the case of provisional or officiating appointments, something more than mere termination of service is necessary to bring the case within Art. 311. The office of the plaintiff being provisional, the termination of service on the ground of unsuitability cannot be considered to be a punishment. AIR 1958 Cal 551 (558, 559) = 62 Cal WN 622. (AIR 1958 SC 36, Foll.)

(7-A) U. P. Government Notification No. 230/IIB-1953 — Rule regulating the termination of services of temporary Government servants — Rule, held, not ultra vires Article 311 (2). 1970 Lab IC 131 (136) (All) (DB).

(8) Service whether permanent or temporary — Question of fact. AIR 1961 All 284 (285).

(9) Intention of Government in terminating service will decide character of order. AIR 1965 Raj 147 (148) = 1965 Raj LW 7 (DB).

(10) An order which is ex facie one of termination of employment of a temporary employee cannot be assumed to have been intended as one of dismissal. The onus to prove that such was the intention lies on the employee concerned. AIR 1963 SC 601 (604).

(11) Even in the case of a temporary Government servant, if the order terminating his service puts an indelible stigma affecting his future career, or casts slur on his capacity or character, he will be entitled to the protection of Art. 311 (2). If, however, his services are simply terminated and no penal consequences are involved, he cannot claim such protection. ILR (1959) Andh Pra 185.

(11-A) Where the employment of a temporary Government servant, even though liable to be terminated by notice of one month without assigning any reason, is not so terminated, but instead the superior officer chooses to hold an enquiry into his alleged misconduct, the termination of service consequent upon the report of the enquiring officer is by way of punishment, because it puts a stigma on his competence and thus affects his future career. The enquiry does not fall within the principle of AIR 1961 SC 177. AIR 1963 SC 531 (532, 533) = (1963) 3 SCR 716 **AIR 1959 Bom 134 (136) = 60 Bom LR 342 (DB). (Reversed in AIR 1962 SC 630 on another point.)

(12) Whatever may be the motive behind the termination of services of a temporary Government servant, if the Government proceeds to terminate the services without casting any aspersions on his honesty and competence, then Art. 311 is not attracted. Conversely, if, while terminating the services, the Government casts aspersions on the honesty or competence or integrity of the servant concerned, then that does cast a stigma

on his competence, affecting his future career and, therefore, would amount to punishment and would make Art. 311 applicable. AIR 1964 Punj 354 (355) = 1964 Cur LJ 168.

(13) Temporary appointment — Termination of service on one month's notice was valid. There is no stigma attached to the petitioner nor does it visit him with any civil consequences. Order does not amount to a punishment. So as to attract Art. 311. (1959) 25 Cut LT 167 (169) (DB).

(14) Termination of temporary service by one month's notice — No provision of such termination in the terms of contract or the relevant rule of service — Employee suffering loss of pay and allowances and indelible stigma affecting his future career as a result of termination — Termination is penal order of termination without compliance of Art. 311 is liable to be quashed. 1968 Lab IC 687 (690) = 1967 All LJ 564.

(15-16) Termination of service of temporary employee on expiry of period of engagement — Opportunity to show cause or giving of reasons not necessary — There is no violation of principles of natural justice in the case. ILR (1955) Hyd 711 (714) (DB) **1966 MPLJ 351 (353) = 1966 Jab LJ 377 (DB).

(17) Temporary or officiating appointment — Such appointment is liable to be terminated without notice — Order of termination or reversion is not punishment — Order is not assailable as offending Art. 311 (2). AIR 1969 Madh Pra 60 (61) = 1968 MPLJ 757 (DB).

(18) Incumbent petitioner holding temporary post continuously for five years. Termination without any cause being shown against petitioner — On facts, held, that as the petitioner ought to be treated as quasi-permanent employee termination amounted to removal of service attracting Article 311. AIR 1969 Assam 3 (6, 7) = 1969 Lab IC 6 (DB).

(19) A clause in the termination order of a temporary employee barring his future employment is a penal and as such the termination amounts to dismissal within the meaning of Art. 311. AIR 1967 Punj 415 (415) = 1966 Cur LJ 230 (DB).

(20) Termination of service of temporary employee in terms of Rule 5 of Central Civil Services (Temporary Service) Rules (1949) — Petitioner challenging the order merely on the ground that he was entitled to be deemed as 'quasi-permanent' and hence the Rule did not apply — No allegation in the petition that the order though purporting to be one for termination of service under the Rules was in effect, founded upon inefficiency. — Though motive for the action was petitioner's inefficiency, the order not showing that the action was founded on the ground of inefficiency or misconduct —

Articles 310 & 311 — Note 27 (contd.)
Held, that the petitioner had failed to discharge the burden of proving that the order though in the language was one terminating the service was in effect, an order founded on inefficiency and hence he was not entitled to succeed on the ground of non-compliance with Art. 311. AIR 1964 Assam 68 (69, 70) = ILR (1963) 15 Assam 525 (SB).

(21) Valid order of termination of services of a temporary servant with one month's notice — Subsequent order of dismissal not giving one month's notice — Subsequent order held surplusage — Termination is valid. AIR 1967 Cal 326 (331) = 70 Cal WN 1141 (DB).

(22) If the servant is appointed to officiate in a permanent post, or to hold a temporary post other than one for a fixed term, whether substantively or on probation or on officiating basis under the general law the implied term of his employment is, that his service may be terminated on reasonable notice and the termination of services of such a servant will not per se amount to dismissal or removal from service. AIR 1958 SC 36 (48) **AIR 1956 Bom 455 (458) = ILR (1956) Bom 767 (DB).

(23) Under R. 3 of the Central Civil Services (Temporary Service) Rules, 1949, two conditions are required to achieve quasi-permanency by a Government servant. The first condition is that he must have been in continuous Government service for more than 3 years. The further essential condition is that the appointing authority being satisfied as to the Government servant's suitability in respect of age, qualifications, work and character for employment in a quasi-permanent capacity has issued a declaration to that effect. AIR 1963 Tripura 38 (40, 41).

(24) Where service was neither permanent nor quasi-permanent, and not even for any term fixed, though temporary, and termination of service could not per se be deemed as a case of punishment. The order of termination of service could not be struck out or held illegal on the ground that it lacked the compliance of what is provided in Art. 311 (2). AIR 1963 Pat 190 (192, 193) = 1963 BLJR 693.

(25) Where the petitioner was employed in place of a discharged constable in the Police force, who was entertained and discharged as a temporary constable, the petitioner's appointment made him a temporary servant and he can be dealt with as a temporary servant. AIR 1960 Tripura 31 (32). (Reversed on another point in AIR 1963 SC 601.)

(26) Training course for teachers — Government cannot compel even temporary teachers to undergo training course if they are not inclined to do so for whatever reasons — This does not mean that no step can be taken against those refusing to undergo training, because they are

temporary. 1969 Lab IC 1165 (1166) (Pat) (DB).

(27) In case of temporary post Section 126 of J. and K. Constitution is not attracted unless termination is by way of punishment or penalty — In case of permanent servant, the very removal per se would be punishment provided termination is not by way of retirement or by operation of rule of superannuation. AIR 1965 J and K. 15 (21) = 1964 Kash LJ 366 (FB).

(28) Even in a case where a formal departmental enquiry is instituted against temporary Government servant, it is open to the authority to drop further proceedings in departmental enquiry and to make no order of discharge simpliciter against the temporary Government servant. (1967) 1 Lab LJ 718 (721) = 15 Fac LR 347 (SC).

(29) Where the employment of temporary servant, even though liable to be terminated by notice of one month without assigning any reason, is not so terminated but instead the superior officer chooses to hold an enquiry into his alleged misconduct, termination of service is by way of punishment, because it puts a stigma on his competence and thus affects his future career. In such a case, he is entitled to the protection of Art. 311 (2). AIR 1963 SC 531 (532, 533) = (1963) 3 SCR 716 = (1963) 2 SCJ 185 ** 1963 All LJ 934 (943) (DB). (ILR (1962) 1 Punj 239, Reversed.)

(30) Termination of service of temporary Government Servant on the ground that his continuance in service is considered highly detrimental to public interest — Neither any charge-sheet nor any show cause notice given nor any enquiry held against him — Termination order amounted to dismissal and was hit by inhibition contained in Art. 311. 1966 Cur LJ 103 (105) (Punj).

(31) Where a person is governed by temporary service rules, the same become conditions of service, so far as he is concerned and provided requisite notice has been given or compensation has been provided for, provisions of Art. 311 do not operate. Termination of service of such a person is not a case of punishment at all but dismissal or discharge as the case may be in accordance with terms of service. AIR 1966 Cal 353 (355) = (1967) 1 Lab LJ 307 (DB).

(32) Termination of service whether it amounts to removal, suspension or dismissal — Court must come to a conclusion on the wording of the text of the document terminating service, facts and circumstances in connection therewith and see whether it was by way of punishment — Inference cannot be drawn that it is a final step merely because the authority contemplated taking punitive action — Motive of terminating authority cannot also be taken into account — Ter-

Articles 310 & 311 — Note 27 (contd.)
 mination of service of temporary employee which is in form and substance no more than his discharge effected under terms of contract, of relevant rule, cannot in law be regarded as his dismissal because the authority was actuated by motive that the said servant did not deserve to be continued for same alleged misconduct. AIR 1966 Cal 545 (549, 551, 552) = (1969) 1 Lab LJ 27 (DB).

(33) Administrative instructions to officers requiring ad hoc appointments not to exceed three months' term — Yet ad hoc employees allowed to continue beyond such term — Under newly framed Rules, employees reverted or discharged — Those employees have no right to posts officiated. It will not amount to dismissal, removal or reduction in rank. Assessment of their fitness cannot be said to be a stigma on the career and character — It is not made by way of punishment — Art. 311 (2) not applicable. AIR 1969 Delhi 246 (250, 255) = 1969 Lab IC 974 (DB).

(33-A) Temporary Civil Judge — State Government, having regard to resolution passed by High Court, terminating his services — Order not casting stigma on his character or integrity nor visiting him with any evil consequences — Order not passed by way of punishment — Provisions of Article 311, held not attracted. AIR 1970 SC 158 (160) = (1969) 1 SCWR 1115.

(34) Extra departmental Branch Post Office — Person in charge not a member of civil service and not entitled to protection of Article 311. Relationship between Government and was not that of an employer and an employee — It was only contractual — Article 311 cannot apply to termination of contracts. In the case of an alleged breach of contract there is no scope for invoking principles of natural justice. AIR 1961 Mad 166 (169, 170) = 1962 MPLJ 585 (DB).

(35) Termination of service of a probationer appointed in a temporary post — Petitioner selected for promotion to the post of a senior Draftsman in a temporary post, subsequently appointed as probationer in a clear vacancy on a probationary period of one year — Petitioner continuing to work for 5 years — Termination of service on the ground that the post was temporary attracts Article 311 (2) — In the absence of a rule petitioner on completion of probation is deemed to have been confirmed — Termination is illegal. AIR 1970 Assam 16 (19 to 25) (DB).

28. Termination on basis of misconduct, negligence, etc. — (1) Where the termination of service of a temporary Government servant is by way of punishment, (as it will be when the termination is based on the misconduct, negligence, inefficiency or other disqualification of the Government servant and amounts to "dismissal" or "removal" with-

in the meaning of Article 311, Clause (2) then a proper notice as required by that clause must be given. AIR 1958 SC 36 (49) ** AIR 1959 Bom 134 (136) = ILR (1958) Bom 1266 (DB) ** 1958 Jab LJ 187 (198) (DB) ** AIR 1958 Mys 23 (25) = ILR (1957) Mys 139 (DB). ** AIR 1957 Bom 175 (176, 177, 178) = ILR (1957) Bom 616 (DB) ** AIR 1957 J & K 11 (12) ** AIR 1957 Mys 8 (8) = ILR (1956) Mys 143 (DB) ** AIR 1958 SC 232 (236) ** AIR 1957 Cal 4 (8) (DB). (It will amount to punishment notwithstanding that the servant had no right to the post of which he is deprived.) ** AIR 1964 SC 1854 (1860 to 1864) = (1964) 5 SCR 190 ** 1962 Mys LJ (Supp) 487 (490) ** (1959) 1 Lab LJ 245 (248) (Andh Pra) (DB).

(2) Even in the case of a temporary post, where termination of service or transfer to a lower post is actually resorted to as a measure of punishment, for same misconduct, negligence inefficiency etc., action of Government would amount to a dismissal or removal from service in one case and to reduction in rank in the other. AIR 1958 SC 36 (49) = 1958 SCR 828 ** AIR 1957 SC 886 (887) = 1958 SCR 509 ** AIR 1958 All 741 (746) = 1959 All LJ 213 (FB).

(3) The termination of the services of a provisional Government employee on the ground that his character and antecedents are such as to make him unsuitable for employment under the State does not attract Art. 311. Where there is no defect in the process of verification of the antecedents and character adopted by the State, there is no force in the contention that Art. 16 is violated. AIR 1965 Ker 63 (63, 64) = 1964 Ker LT 36 (DB).

(4) If the lapse or misconduct is one which is known to the authority before the person is promoted and not one which comes to light subsequent to the promotion, and if the authority concerned knowing of this lapse or misconduct promotes the civil servant without any reservations, then it must be taken that the lapse or misconduct has been condoned, and thereafter the servant cannot be punished for his lapse or misconduct. AIR 1967 Madh Pra 284 (285, 286) = 1967 MPLJ 526 (DB).

(5) Where an order of discharge is attacked on the ground of mala fides and the authority in justifying the order refers to certain facts relating to the misconduct, negligence or inefficiency of the temporary servant it cannot be said that the order of discharge was made on a consideration of those facts set out in the plea made long after the passing of that order. AIR 1964 SC 449 (453).

(6) Termination of service of Government servant appointed on provisional basis — Order not indicating reason — Government alleging termination due to

Articles 310 & 311 — Note 28 (contd.) character and antecedents having been found unsatisfactory — Record relating to verification not placed before Court — Order quashed. 1963 Ker LJ 1168 (1170).

(7) Person appointed on provisional basis — Service terminated not by way of punishment but because character and antecedents of person not found satisfactory for permanent appointment — Held, provisions of Arts. 16 and 311 are not violated. AIR 1965 Ker 19 (23, 24) = (1966) 2 Lab LJ 93.

(8) Where the Government decides to punish the civil servant by dismissal or removal or reduction in rank on the ground of misconduct, inefficiency or other disqualification, and bases its action on such ground, Art. 311, Cl. (2) will apply even though the Government could have simply terminated his service in the exercise of its right under the contract of employment or under the Service Rules independently of any question of punishment. AIR 1958 SC 36 (49).

(9) Termination of service as punishment for misconduct — Agreement between parties giving discretion to authorities to terminate services without assigning cause — Action proposed, however, was the result of enquiry conducted for misconduct — Mandatory provision in Art. 311 (2) is obligatory notwithstanding the agreement. AIR 1961 All 338 (342) = 1960 All LJ 727 = (1961) 1 Lab LJ 424 (DB).

(10) Government of India Act (1935), S. 240 (3) — Temporary railway servant — Suspension from service on account of bad conduct and absenting from duty — Subsequent termination of service held by way of punishment — No opportunity to show cause given according to railway rules — Termination is illegal and void. 1962 Pun LR 807 (817, 818) (DB).

(11) Temporary servant — Order of discharge of temporary servant stating that he was not suitable for employment and passed without following prescribed procedure including framing of charge etc — Held, order was order of dismissal and was liable to be quashed. (1966) 2 Andh WR 78 (80) = 13 Fac LR 191 **AIR 1964 SC 449 (456, 457). (Order of discharge stating that he was found undesirable to be retained in Government service).

(12) The constitutional requirement of Article 311 should not be allowed to be avoided in a case where a person is sought to be discharged or reverted on the ground that he is undesirable but, failing the charge of misconduct, reliance is placed upon the fact that his service is temporary. This would be a colourable use of the power of discharge of temporary servants and fraud on Article 311. AIR 1959 Tripura 2 (6).

(13-14) Participation by a Railway employee in peaceful strike before it is banned by an order Under Essential Services Maintenance Ordinance (1960) does not infringe Rule 3 of Railway Ser-

vices (Conduct) Rules (1950). His dismissal on a charge of gross misconduct is illegal. AIR 1967 All 457 (459) = 32 FJR 476.

(15) Conviction for an offence outside the course of employment does not ipso facto constitute 'misconduct' entailing a summary termination of employment. Failure to give opportunity to show cause against order proposed violates natural justice. (1960) 70 Cal WN 786 (806) = (1968) 1 Lab LJ 314.

(16) Where the misconduct is of a substantial and serious nature as to undermine the confidence that could be placed in him the employer would be justified in summarily dismissing such employee. Even a single instance of misconduct is sufficient to sustain such dismissal. (1964) 1 Lab LJ 500 (515) (Mad).

(17) An order of discharge of a probationer after an enquiry into charges of misconduct, negligence or inefficiency can generally be regarded as one by way of punishment. But where the enquiry was conducted simply to ascertain whether the probationer was fit to be confirmed or not it cannot be regarded as an enquiry into any charge of misconduct. ILR (1965) 2 Mad 24 (35) (DB).

(18) It is not permissible under law, to dismiss or remove from service for misconduct under a pretended order of termination of service. (1965) 11 FLR 191 (195) (Cal).

(19) Bihar Board of Revenue Miscellaneous Rules, Rule 145 — Departmental proceedings against 'Kanungo' — Kanungo forwarding report of abatement of rent and settlement of lands with new tenants — His duty is not only ministerial — Though settlement is to be made by gazetted officers, it is duty of Kanungo to place correct facts before them to enable them to make proper settlement. 1956 BLJR 825 (831) (DB).

(20) Charges framed against civil servant when he was in civil service can be continued against him after retirement and if they are proved, Government is entitled to reduce his pension after considering the representations made by him as a punishment under Art. 470 (b) of Civil Service Regulations. AIR 1957 Mad 612 (612, 613) = (1957) 2 MLJ 259.

20. Termination in terms of Service Rule or contract of service. — (1) Termination of service by notice or otherwise in accordance with the terms of the contract of service is not "dismissal" or "removal" within the meaning of Article 311 and the condition as to affording of reasonable opportunity to show cause against the action proposed to be taken does not apply in such cases. AIR 1953 SC 250 (251) = 1953 SCR 655 ** AIR 1958 SC 36 (49) ** AIR 1954 SC 632 (634) ** AIR 1957 All 439 (443) (DB) ** AIR 1957 Pat 541 (541) (DB) ** AIR 1956 All 527 (528) (DB) ** AIR 1956 Cal 662 (667) ** 1969 Lab IC 710 (71)

Articles 310 & 311 — Note 29 (contd.)
 712) = 16 Fac LR 418 (All). ** AIR 1963 SC 601 (603, 604, 605) = (1963) Supp 1 SCR 266 = 1963 (1) Cri LJ 491. (AIR 1960 Tripura 31, Reversed.) ** 1968 All LJ 735 (737) = 1968 All WR (HC) 834 (DB) ** 1964 Raj LW 353 (356) = ILR (1964) 14 Raj 565 (DB) ** AIR 1963 Pat 190 (192) = 1963 BLJR 693 ** AIR 1962 Mad 376 (377, 378) = (1962) 1 Mad LJ 373 (DB) ** (1962) Mys LJ (Supp) 487 (489) ** AIR 1962 Tripura 34 (49) ** AIR 1959 Andh Pra 251 (254) = (1959) 1 Andh WR 393 (DB) ** AIR 1959 J & K 136 (137) (DB) ** AIR 1958 Pat 653 (654) = 1958 BLJR 212 (DB) ** AIR 1966 All 92 (94) = ILR (1965) 2 All 755 (DB). (Motive immaterial unless order of termination is tantamount to order of dismissal or removal.) ** 1958 All LJ 503 (504) = (1958) 2 Lab LJ 690 (All) (DB) ** AIR 1964 SC 1854 (1862). (Motive is immaterial.)

(2) A substantive appointment to a permanent post in public service confers normally on the public servant so appointed a substantive right to the post and the Government cannot terminate his service unless it is entitled to do so (i) by virtue of a special term of the contract of employment, for example, by giving the requisite notice provided by the contract, or (ii) by the rules governing the conditions of his service, for example, on attaining the age of superannuation prescribed by the rules, or on the fulfilment of the conditions for compulsory retirement, or (iii) subject to certain safeguards, on the abolition of the post, or (iv) on being found guilty, after a proper enquiry on notice to him, of misconduct, negligence, inefficiency or any other disqualification. AIR 1958 SC 36 (42).

(3) Railway Establishment Code (1951), Vol. 1 Rule 148 (3) — Railway Establishment Code (1959) Vol. I, Rule 149 (3) — Permanent Railway Servant — Termination of his services on notice — Amounts to removal within Article 311 (2) — No provision of enquiry and notice — Rules contravene Article 311 (2) and are invalid. AIR 1964 SC 600 (610, 612, 617, 620, 626) = (1964) 5 SCR 683. (AIR 1956 Pat 221 and AIR 1958 Raj 250 and AIR 1959 All 439 and AIR 1960 Cal 264 and AIR 1962 Mad 379, Overruled; Spe. App. No. 502 of 1958 D/- 15-12-1959 (All) and LPA No. 81 of 1961, D/- 6-4-1961 (Punj) and ILR (1960) 12 Assam 441 and AIR 1963 Assam 94 (FB), Reversed.)

(4-5) If it is sought to dismiss any servant of the Union or the State, the procedure prescribed in Article 311 (2) must be followed. The guarantee conferred by the Constitution, is merely a guarantee that, if the servant is sought to be dismissed or removed from service, then the provisions of Art. 311 shall come into play. Dismissal or removal from service is to

be judged by the consequences that the order brings about and by the tests laid down in *Shyam Lal's Case*, AIR 1954 SC 369. It is open to the Union or the State to enter into a contract of service and to provide for termination of the service by any notice that may be agreed upon as a term of the contract; and if there is termination of service under the terms of the contract, which does not cast a slur on the employee or deprive him of any benefit already earned by him, such termination cannot attract the provisions of Article 311 notwithstanding the fact that there was a suggestion of some misconduct against the servant and a preliminary enquiry was held, but no charge was framed against him. 59 Bom LR 1210 (1215, 1216) = (1958) 1 Lab LJ 456 (Bom.) (Termination under Rule 148 Railway Establishment Code was under the contract of service and, did not attract Article 311.) ** AIR 1963 Mys 193 (198, 199, 200, 201, 202) = 1963 Mys LJ (Supp) 87 (DB). (Termination under Rule 148 (3), Railway Establishment Code — Mention of the employee's disinclination to obey the orders of his superior officers was merely the background indicating the circumstances under which the decision to terminate the services had been taken and the order of termination did not amount to punishment.)

(6) Where the Government does not choose to terminate the service of the Government servant in exercise of its power under the terms of the contract of employment, express or implied, or under the rules regulating the conditions of service of the Government servant, but decides to proceed against the Government servant on the basis of his misconduct, negligence, inefficiency or the like and to inflict on him the punishment of dismissal or removal from service, the Government would be bound to comply with the requirements of Article 311 of the Constitution of India. The right to terminate the service of a servant without any notice on account of misconduct is a right which is inherent in the master under the ordinary law of master and servant and is by its very nature a right which is exercisable by the master against the servant by way of punishment. This exercise of right which is necessarily and always by way of punishment, does not cease to have that character when it is embodied in the contract of service between the master and the servant. The exercise of such a right whether it be a part of the general law of master and servant or whether it be a part of the contract of service must always be in the nature of infliction of punishment and the termination of service of the servant in exercise of such right must necessarily amount to dismissal. (1963) 4 Guj LR 16 (24, 25) = (1963) Lab LJ 509.

(7) In order to determine whether or not a Government servant was entitled to

Articles 310 & 311 — Note 29 (contd.)
the protection of Article 311 (2), the proper legal test is not only imputation of misconduct but also whether evil consequences, such as forfeiture of pay allowance etc. flowed as a result of the order. AIR 1962 Pat 40 (44, 45, 46) = 1961 BLJR 624 (DB). (AIR 1958 SC 36, Rel. on.)

(8-9) Order terminating petitioner's services under service rules for reason which has nothing to do with the charges levelled earlier against him for stopping his annual increment — Order of termination attaching no stigma or entailing no penal consequences — Order of termination cannot be regarded as one of dismissal. AIR 1965 All 252 (252, 253) = 1964 All LJ 1116 = ILR (1965) 1 All 324 (DB). (AIR 1964 SC 1854 at p. 1861, Rel. on; AIR 1964 SC 423, Dis'ing.)

(10) There is no difference in principle between a case where the services of a Government servant are terminated in accordance with the terms of employment contained in the Service Rules and one in which the service is terminated in accordance with the terms of the contract of service. AIR 1958 SC 36 (48) ** AIR 1957 SC 886 (887) ** 1962 Mys LJ (Supp) 457 (DB). (Termination of service under Section 8 of Bangalore Transport Service Act — Does not amount to removal or dismissal within the meaning of Article 311.)

(11) The services of a person can be terminated under the Rules only in the circumstances and in the manner in which the employment of a Government servant in permanent service can be terminated or when the appointing authority certifies that a reduction has occurred in the number of posts available for Government servants not in permanent service. AIR 1957 Pat 555 (556) (DB).

(12) The terms and conditions of service embodied in a contract of service cannot be altered by the Government unilaterally. AIR 1955 Assam 17 (20, 21) = ILR (1954) 6 Assam 383 (DB).

(12a) Appointment of petitioner on provisional basis terminable on one month's notice on either side — Neither a month's notice nor a month's salary in lieu of notice given or offered to petitioner before termination of service — Order of termination held invalid and inoperative. 1963 Ker LT 1168 (1169).

(13) Where the service of a Government employee is terminated on one month's notice according to the terms of the contract of service, an irregularity in the notice will not entitle him to an order of re-instatement although he may be entitled to damages. AIR 1956 Pat 23 (28).

(14) Though in the case of removal from service by way of penalty the employer is not bound to give any notice or to pay any salary in lieu of notice,

he may choose to be more generous to the employee and pay him something to which he is not entitled. The action of the employer in such a case cannot be construed as not enforcing the penalty, which he actually enforced or intended to enforce. AIR 1957 All 439 (445) (DB).

(15) Where, according to the terms of service, it can be terminated on one month's notice and it is so terminated, the mere fact that the Government servant was first charged with some misconduct, which charge was not pursued, does not show that the termination of service was by way of punishment and amounts to dismissal or removal. AIR 1957 All 408 (411) = ILR (1957) 1 All 471 (DB) ** AIR 1957 Cal 4 (8) (DB) ** AIR 1956 Cal 662 (667) ** AIR 1956 Pat 23 (26, 27) (DB) ** AIR 1964 Mad 335 (347) = (1963) 2 Lab LJ 304 ** AIR 1961 All 64 (71, 72) = ILR (1960) 2 All 558 (DB). (Assuming that Article 311 (2) applies, there has been no violation of it because of the failure to issue a second notice.) ** AIR 1957 All 439 (445) (DB) ** AIR 1956 Cal 532 (536).

(16-17) A provision in a contract of service under the Government that the employee can be "dismissed" or "removed" from service without being given an opportunity to be heard in his defence, is inconsistent with Article 311, Cl. (2) and hence ultra vires. AIR 1957 Cal 720 (726) (DB) ** AIR 1954 Cal 566 (568).

(18) Where the Government instead of terminating the services of a person according to the terms of the contract elects to dismiss him, as a punishment for some fault or misconduct, Article 311, Cl. (2) will apply and he will be entitled to a sufficient opportunity to show cause against the dismissal. AIR 1958 SC 36 (49) ** AIR 1958 Mys 23 (25) = ILR (1957) Mys 139 (DB) ** AIR 1957 All 408 (410) = ILR (1957) 1 All 471 (DB) ** AIR 1956 Cal 662 (667) ** AIR 1954 Cal 495 (497).

(19) Where under the Service Rules or under the contract of service the Government has the right to terminate the service of an employee on giving notice and terminates such service in the exercise of the rights, the motive operating on the mind of the Government is immaterial and the fact that the inducing factor is the misconduct, etc. of the servant will not make the step taken a punishment so as to attract the provisions of Article 311, Cl. (2). AIR 1958 SC 36 (49) ** AIR 1956 Bom 455 (458) = ILR (1956) Bom 767 (DB).

(20) A person in a quasi-permanent service means one who has been in continuous Government service for more than three years and in whose favour the appointing authority has issued a declaration that he is a quasi-permanent servant. The services of a quasi-permanent servant can be terminated in the same circumstances as those of a permanent ser-

Articles 310 & 311 — Note 29 (contd.)
 vant. AIR 1958 SC 36 (48) ** AIR 1955
 Punj 229 (230) (DB) ** AIR 1962 Bom
 45 (47) = 63 Bom LR 581 (DB) ** AIR
 1961 Cal 454 (455).

(21) When the termination of service is due to something which the Government servant has done, which enables the authorities, under the Service Rules, to terminate the services without anything further, as for example, absents himself without leave for more than seven days, the termination of service does not amount to dismissal or removal and Article 311, Cl. (2) does not apply. AIR 1955 Hyd 260 (261) = ILR (1955) Hyd 698 (DB) ** 1966 Cur LJ 968 (980) (Punj) (DB). (Rules of justice do not override a valid legislative measure.) ** AIR 1958 Cal 407 (409).

(22) Service under contract — Clause in contract providing for removal without notice for inefficiency, negligence etc. — Removal for misappropriation and tampering of record — Impugned order was one of dismissal in substance — Art. 311 (2) comes into operation as clause does not cover the case. AIR 1969 Cal 164 (166) = 1969 Lab IC 406.

(23) Government servant making aspersions on minister—Minister being in position of master, principles relating to master and servants apply — Dismissal of servant held proper. AIR 1962 Guj 197 (202, 203) = (1962) 3 Guj LR 492 = (1961) 2 Lab LJ 507 (DB).

(24) It is now well settled that even in the case of Government servants, if there be a contract or a rule by which there is a right to terminate the employment of an employee without going through the procedure prescribed for imposing punishment, the authority concerned will be justified in acting in terms of such a contract or rule. 1965 Mad WN 271 (272).

(25) Proceedings taken against the petitioner, a railway employee, under the Railway Services (Safeguarding of National Security) Rules, 1949, for his subversive activities were withdrawn by the authorities and the suspension order was revoked directing the petitioner to resume his duties. The day on which he resumed his duties he was served with an order under Rule 148 of the Indian Railway Establishment Code, Vol. I, terminating his services.

Held, that there was nothing to indicate in the order that it was founded on any ground of misconduct on which Rule 148 of the Establishment Code permitted the action taken by the Authorities. The allegation of subversive activities might have been then the impelling factor but the actual order had been made on the authority of the Service Rules, and not as a measure of punishment against the petitioner. AIR 1959 Assam 120 (121, 122, 123) (DB).

(26) Under Rule 5 (a) of Central Civil Service (Temporary Service) Rules, 1949, notice of termination need be given by the appointing authority to a Government servant in temporary service — Notice by authority who was appointing authority at time of appointment but not at time of notice, is valid. (1965) 11 FLR 191 (193) (Cal).

(27) Contractual right intended to be enforced against employee — Chance of explaining conduct should be given. AIR 1960 Cal 264 (268) = 64 Cal WN 272 (DB). (**Overruled** on another point in AIR 1964 SC 600.)

(28) There is no fixed rule of law defining the degree of misconduct justifying dismissal from service it is a question of fact in each case whether misconduct in question is inconsistent with the fulfilment of the implied or express conditions of service. (1964) 1 Lab LJ 500 (Mad).

(29) Government servant — Contract of employment — Fundamental Rules, R. 49 — Bombay Civil Services Conduct, Discipline and Appeal Rules, Rule 33 — Order appointing employee to post communicated by Deputy Secretary by and in name of Governor — Order published in Government Gazette and communicated to employee — Order amounts to contract of employment — Order is not invalid because sanction of Public Service Commission was not obtained and if his services are terminated before the date up to which he was appointed without giving any reasons the termination is contrary to Article 311 of the Constitution. AIR 1963 Bom 13 (16) = 1962 Nag LJ 569.

(30) Punjab University Act (7 of 1947), Section 31 (2) (c) — University and its employees — Relation between is contractual — Removal of employee — Writ petition for reinstatement — Not maintainable. AIR 1969 Punj 391 (394, 395) = 1969 Lab IC 1406 = 71 Pun LR 1047. (AIR 1968 Cal 206 held no longer good law in view of AIR 1969 SC (Notes) 208.)

(31) The appointment to a permanent post in Government service either on probation or on an officiating basis, is, of a transitory character and in the absence of any special contract or specific rule, the implied term under the ordinary law of master and servant, is that it is terminable at any time. (1959) 1 Lab LJ 245 (247) (DB) (Andh Pra). (AIR 1957 SC 886; AIR 1958 SC 36, Rel. on.)

(32) Termination of service according to terms of contract — Government servant on probation — Explanation asked and warning served for misconduct — Charge not framed and misconduct not mentioned as ground in termination order — Termination from service in accordance with service-contract though motivated by preliminary enquiry is not punishment — Article 311 (2) cannot apply. AIR 1965 Punj 94 (96, 97) = 67 Pun LR 111.

Articles 310 & 311 — Note 29 (contd.)

(33) Defence Accounts Department (Temporary Service) Rules, 1949, R. 5 — Termination of service in terms of R. 5 — Order terminating services not suggesting misconduct or any other stigma — But service certificate granted on demand by employee and issued in accordance with Rules showing ability of employee as below average and conduct unsatisfactory — **Held**, termination under Rule 5, was valid and certificate could not convert plain and simple order of discharge into one of dismissal. AIR 1965 Punj 303 (305) = 67 Pun LR 572.

(34) Since the fact that the petitioner a motor driver was convicted of an offence involving moral turpitude was established under the standing orders regulating the employment of the petitioner, the operation of which was continued even after the Mysore State Road Transport Corporation was established, it was perfectly within the competence of the disciplinary authority whoever he was, to impose the punishment of dismissal from service — The General Manager of the corporation was therefore competent to take disciplinary action though the employee was convicted before he became a servant of the corporation. 1962 Mys LJ (Supp) 498 (502) (DB).

(35) Order stating that Government servant was removed from service under Rule 5 of Central Civil Services (Temporary Service) Rules, 1949 — **Held** mere fact that words 'removed from service' had been used would not convert 'termination of service' into 'removal from service' thereby bringing into operation provisions of Article 311. AIR 1968 Punj 106 (107) = ILR (1967) 2 Punj 826 = 1968 Lab IC 519.

(36) Where the appointment is for a specified period of years, the services of a Government servant cannot be terminated merely at the pleasure of the Government before the expiry of the period and if the Government wishes to terminate his services, he must be given sufficient opportunity to show cause against such termination. The same principle will also apply to the transfer of the Government servant to a lower post. AIR 1958 SC 36 (49).

(37) A Government servant engaged under contract is free to prove that the order of termination is in effect an order of dismissal or removal within the meaning of Article 311 and have it set aside if the safeguards provided by that Article have been ignored. 1962 Ker LT 362 (364) = (1963) 1 Lab LJ 385 (DB).

(38) Appointment made on provisional basis terminable by month's notice on either side — Service terminated without such notice — Order of termination not for misconduct — Order also not indicating any other reason — Petitioner challenging order as capricious, arbitrary and

mala fide on the ground that his juniors were retained in service and a new recruit was appointed in his own place — Government stating in its counter affidavit that the termination was due to the petitioner having been found unsuitable on the ground of character and antecedents — Record regarding verification of character and antecedents not placed before Court — **Held**, that the order should be quashed for the reasons that it violated the terms of appointment and it was arbitrary and mala fide — The Court has to accept the allegation of the petitioner regarding the mala fide of the Government in the absence of proper disclosure by the Government. 1964 (8) Fac LR 72 (73, 74) (All). (AIR 1960 SC 610, Rel. on.)

(39) The termination of service in accordance with the conditions of such service is not "dismissal" or "removal" within the meaning of Article 311, Clause (2) and hence, in such cases, the temporary servant is not entitled to the opportunity of showing against his discharge contemplated by Clause (2). AIR 1958 SC 36 (42) ** AIR 1957 SC 886 (887) ** AIR 1957 Hyd 12 (13) = ILR (1956) Hyd 622 (DB) ** AIR 1957 J and K 11 (12) ** AIR 1957 Orissa 27 (28) (DB) ** AIR 1955 Pat 353 (355) (DB) ** AIR 1968 All 14 (17) = 1967 All WR (HC) 224 ** (1963) 1 Lab LJ 334 (337) = (1962) 5 Fac LR 379 (All). (Temporary appointment by agreement terminated on notice — Notice not based on any charge — Notice held was intended for termination and not for removal from service by way of punishment.) ** AIR 1960 All 647 (649).

(40) Termination of services of temporary Civil Judge, by State Government upon recommendation of High Court, valid. AIR 1970 SC 158 (161).

(41) The Government is free to make special contracts of service with temporary employees and impose special terms in each case provided that they are not inconsistent with the Constitution. AIR 1953 SC 250 (252) = 1953 SCR 655 ** AIR 1955 All 496 (498) = ILR (1956) 2 All 627 ** AIR 1963 Cal 421 (423) = (1963) 2 Lab LJ 569 ** 1962 Mys LJ (Sup) 487. (Contract to terminate services without notice and without assigning reasons — Contract is not hit by Article 311.)

(42) Government's power to terminate temporary service of civil servant at will is not restricted by any rule that it must terminate services of juniormost temporary civil servants first. The fact that enquiries were held were wholly immaterial — Termination of his services with one month's pay in lieu of notice was not mala fide and he could not invoke provisions of Art. 311 (2). AIR 1964 All 278 (280, 284) (DB). (AIR 1963 All 330, Overruled.)

Articles 310 & 311 — Note 29 (contd.)

(43) If the termination of service is founded on the right flowing from contract or the service rules then *prima facie*, the termination is not a punishment and carries with it no evil consequences and so Article 311 is not attracted.

Where the service of the temporary servant was terminated under Rule 5 of the Central Civil Services (Temporary Service) Rules (1949), even if it be possible for the servant to contend that the motive operating behind the termination of his services was the intention to terminate his services for misconduct as punishment that motive becomes entirely irrelevant. ILR (1961) Mys 1129 (1152) (DB) ** AIR 1967 Pat 404 (405) (DB) ** 1964 Raj LW 353 (356) = (1965) 1 Lab LJ 242 (DB) ** AIR 1963 Tripura 38 (43) ** AIR 1960 J and K 97 (100, 101).

(44) U. P. Government Order No. O. 230/II-B-1953 — Temporary post — Appointment to, in substantive capacity — Post made permanent — Appointment to such post in officiating capacity — Termination of service on 30 days' notice held valid. AIR 1961 All 421 (426, 428).

(45) Where the service of a temporary Government servant is terminated after one month's notice in accordance with the terms of contract of service, such termination does not amount to "dismissal" or "removal" within the meaning of Article 311, cl. (2). AIR 1958 SC 36 (49) ** AIR 1959 Bom 134 (136) = ILR (1958) Bom 1266 (DB) ** 1957 Ker LJ 729 (730) ** 1957 BLJR 155 (157) (DB) ** AIR 1955 All 496 (498) = ILR (1956) 2 All 627 ** AIR 1954 Madh B 49 (52, 53) = ILR (1954) Madh B 314 (DB) ** (1966) 1 Lab LJ 224 (225) (Punjab) ** AIR 1960 Tripura 31 (33, 34). (Motive is immaterial — **Reversed** on facts in AIR 1963 SC 601.)

(46) State Government having power under Rules framed under Art. 309 and the Manual of Government orders to remove temporary servants after a month's notice — Government exercising the power under the rules and not on the ground that the servant did not deserve further retention, or with an idea to punish him. The termination did not amount to "dismissal" or "removal" within Article 311. AIR 1964 All 278 (284) (DB). (AIR 1963 All 390, **Overruled**.)

(47) An order of discharge of a civil servant engaged in accordance with the terms of his contract is not treated by Service Rules as an order imposing the penalty of dismissal or removal from service and in fact is not so treated by Rule 7 of the Bengal Subordinate Service (Discipline and Appeal) Rules, 1936. Where the order terminating the employment of a temporary servant stated that the notice was served as he was not considered to be suitable for employment in Government Service, the order of termina-

tion does not inflict any penalty and does not amount to an order of dismissal or removal and there is no contravention of Article 311 (2). The order is an administrative order and, no question of contravention of the principle of natural justice can arise. AIR 1960 Cal 306 (307, 309) ** AIR 1965 Punj 162 (162, 163) (Temporary Government servant — Termination of service according to conditions of service — Condition that service might be terminated "for unsatisfactory work and conduct" — Order of termination making reference to that condition — Order held to be one of discharge simpliciter and not order of 'dismissal'.) ** (1963) 76 Mad LW 164 (165).

(48) Even though a temporary clerk is first charge-sheeted, the termination of his service will be only according to the terms of his employment and not as a punishment if subsequently the charge is dropped and his services are terminated without entering a finding against him. AIR 1957 Madh Pra 133 (134) ** AIR 1956 Him Pra 8 (8).

(49) If a temporary Government servant is removed without any black mark or comment on the ability of the employee, then Article 311 does not apply. AIR 1960 Madh Pra 230 (231) = (1960) 2 Lab LJ 415 ** 1967 All WR (HC) 607 (609) = 1967 All LJ 806.

(50) Servant of Corporation under contract of service — Termination of service by payment of one month's notice pay in terms of contract for unsatisfactory work — Acceptance — Servant cannot subsequently challenge order of termination — Termination held legal and proper. AIR 1961 Cal 108 (111).

(51) Where the petitioner, holding a temporary post, continues in service after the probationary period and his services are terminated with a month's notice, the service rules providing for such notice for temporary hands, the termination is legal. (1969) 71 Punj LR 343 (345).

(52) A probationer can be discharged in the manner provided by Rule 55-B of the Civil Services (Classification, Control and Appeal) Rules. AIR 1961 SC 177 (180, 181) = (1961) 1 SCR 606. (ILR 1958 Cut 77, **Reversed**.)

(53) Services of a railway servant appointed temporarily and not either permanently or for a definite period could be terminated in accordance with the terms of his appointment and when so terminated the servant cannot claim that he has a right to continue in service and that his removal from service is illegal. AIR 1954 All 122 (122, 123) = 1953 All WR (HC) 700 (DB).

(54) Probationer — Termination of service in accordance with rules governing conditions of service — Not a dismissal or removal — Civil servant not entitled to protection under Art. 311 (2). AIR 1963 SC 1552 (1553, 1554) = (1964) 2 SCR 135.

Articles 310 & 311 — Note 29 (contd.)

(55-56) The mere fact that the temporary servant has been given a memorandum informing him of certain charges and asking him for his explanation on the charges as well as to why disciplinary action should not be taken against him cannot prevent the Government from taking action under the service rules, without holding a departmental enquiry if it is otherwise satisfied that his conduct and work are unsatisfactory. AIR 1964 SC 1854 (1863) ** 1968 Lab IC 767 (771-772) (Punj) = ILR (1967) 2 Punj 533 (DB) ** AIR 1967 Punj 238 (240) = 68 Punj LR 806 (DB) ** (1967) 69 Punj LR 50 (55) (DB) ** AIR 1965 Punj 94 (96) = 67 Punj LR 111. (Termination of Government servant on probation.)

(57-59) Probationer — Termination under Rule 9 of Civil Services (Punishment and Appeal) Rules (1952) — Show cause notice as to why her services should not be terminated — Charge that her work and conduct had not been satisfactory — Service terminated after consideration of the explanation — The termination did not amount to dismissal and it did not attach a stigma permanently impairing chances of fresh appointment — Order did not fall under Article 311 (2) as it was not made by way of punishment. AIR 1967 Punj 213 (215, 216) = (1968) 1 Lab LJ 760 (DB).

(60-61) Termination of service of Temporary servant — Termination because of some misbehaviour on his part — Provisions of Art. 311 apply and an enquiry contemplated by that provision has got to be made. 1967 All WR (HC) 607 (609) = 1967 All LJ 806.

(62) Madhya Pradesh Civil Services, (General Conditions of Service) Rules (1961), Rule 8 — Applicant appointed as temporary Sub-Inspector of Police — Service liable to be terminated on one month's notice — Notice of termination signed but not served — Meanwhile order of confirmation passed and gazetted — Notice served and services declared to have been terminated — Notification corrected by issuing corrigendum — Held that order of confirmation was valid and could not be cancelled — Order subsequent to confirmation held ultra vires and quashed. AIR 1965 Madh Pra 208 (210, 211) = 1965 MPLJ 368 (DB).

(63) Government servant holding lien on post under State Government of Punjab — Temporary appointment in Himachal Pradesh on service contract — Termination of service will be governed not by rules but by terms of contract — No legal bar to terminate his services with one month's notice under contract even if he was a direct appointee and not a deputationist. AIR 1965 Him Pra 55 (56, 57).

(64) Temporary Government servant — Order of discharge on ground of insub-

ordination without giving opportunity to show cause held amounted to dismissal and passed in violation of provisions of S. 126, J. and K. Constitution — Protection of Section 126 is available to temporary post when services are terminated by way of punishment. AIR 1959 J and K 13 (14, 15, 16).

(65) If the retrenchment is carried out in pursuance of a specific Service Rule, then, the termination of service would be one in terms of a specific Service Rule, and hence, would not be a punishment so as to constitute a dismissal or removal within Article 311. AIR 1954 Madh B 54 (57) = ILR (1954) Madh B 301 (DB) ** AIR 1958 SC 36 (42, 48).

30. Phraseology of order does not determine its nature.— (1) The form of the order or the language employed therein, e. g., the use of word 'dismissal' was not conclusive on the question whether it constituted 'removal' or 'dismissal' so as to attract Article 311 (2). In order to decide this question, Court was entitled to look into facts antecedent to order as well as its contents and 'substance'. AIR 1969 Cal 164 (166) = 1969 Lab IC 406. (AIR 1961 SC 177 and AIR 1964 SC 449, Rel. on.) ** AIR 1964 SC 1680 (1685, 1686) = (1964) 2 SCJ 300. (If the order though in the form merely of determination of employment is in reality a cloak for an order of dismissal as a matter of punishment, the Court would not be debarred in giving effect to the rights conferred by statutory rules upon the employee.) ** AIR 1964 SC 449 (456).

(2) Order not giving reasons for reversion cannot be held to be innocuous as the real import of the order had to be considered. (1968) Lab IC 1590 (1593) (Punj) = (1968) Serv LR 574.

(3) Notwithstanding the use of such innocuous expressions in the order like 'terminate' or 'discharge' the Court in order to ascertain whether the public servant has been punished must apply two tests viz. (1) whether the servant had the right to the post or the rank and (2) whether he has been visited with evil consequences and hold that he has been punished if either of the tests is satisfied. AIR 1964 SC 1854 (1861) ** 1968 Serv LR 232 (234) (Punj) ** AIR 1966 Orissa 173 (178, 179) = ILR (1965) Cut 893 (DB). (Not form but its substance is to be considered.) ** AIR 1958 SC 36 (49, 50) ** AIR 1957 All 241 (243) = ILR (1957) 1 All 261 ** AIR 1956 Bom 455 (458) = ILR (1956) Bom 767 (DB).

(4-6) Order reverting Government servant from the post to which he was promoted provisionally — Order also demanding refund of difference in salary drawn — Employee not aware of the condition as to refund — Order is one effecting reduction in rank — Order cannot

Articles 310 & 311 — Note 30 (contd.)
become valid by striking out that portion imposing the condition as to refund — Order to be examined as such in the light of Article 311. 1966 Cur LJ 813 (817) = 70 Pun LR 621 (DB).

(7) Even if an order of reversion is wholly innocuous and is not passed by way of punishment but either as a necessary consequence of the order of reversion or in pursuance of it some penal consequences ensue the provisions of Article 311 (2) would be attracted. ILR (1966) 1 Punj 84 (122, 123) = 1965 Punj LR (Supp) 625 (DB).

(8) Mere use of the word "discharge" in the order will not make it any the less a punishment when by such discharge the servant has lost his lien on a substantive post and the order has thus entailed penal consequences for him. AIR 1960 Manipur 45 (48, 49).

(9) Question whether services were properly terminated — Substance of the notice and not the label given to it should be looked into. 1962 Mys LJ (Supp) 457 (458) (DB).

(10) Service of a temporary servant terminated without formal enquiry under conditions of service — The word punishment used in the notes on the file were held to be loosely used — The termination of service was held legal. (1966) 68 Punj LR 452 (463, 464, 465) (DB).

(11) The question whether a particular order falls within one or other of the three categories of punishments mentioned in Article 311, Clause (2) is one of fact to be decided on the facts of each case. It is not the phraseology used by the Government that matters but the actual effect of the order made. Thus, where the Government servant is compulsorily retired a few years after his entertainment in service on the ground of his taking part in subversive activities, it is prima facie an order of "removal" within the meaning of Article 311. AIR 1958 Andh Pra 288 (292) = ILR (1958) Andh Pra 310 (DB).

(12) Where the order of compulsory retirement clearly held the Government servant responsible for the allegations made against him, and it directed the recovery of a certain sum from him and stated that his continuation in service was not considered proper in public interest. Held, that the order of compulsory retirement although it was stated to be made under Rule 244 (2) of the Rules really amounted, in its essence, to a penal order made for charges concluded to have been proved. AIR 1962 Raj 258 (264) = 1962 Raj LW 506 (DB).

(13) In determining whether termination of service amounts to dismissal, the antecedent enquiry made by the employer is not material, but what is material is the actual action taken by him in pursuance of the opinion formed by him. Where the actual order passed was that

the service had been terminated and that one month's salary was to be given in lieu of notice and it also stated that the employee concerned was entitled to know the reasons for the termination of his service and that he could obtain a copy of the finding regarding this if he wanted: Held, that his fact would not warrant the conclusion that the action taken by the petitioner was merely a camouflage. The action taken was not punitive so as to amount to dismissal. 60 Bom LR 72 (74) = 1957 Nag LJ 569 (DB).

(14) First orders by Vice-Chancellor, disapproving appointment of petitioner as lecturer but allowing him to continue for some time passed without notice to petitioner — Subsequent order disapproving appointment passed after issuing show-cause notice — Held, second order must govern petitioner's case as first order though illegal and void was superseded by second order. AIR 1966 Pat 11 (13) = ILR 45 Pat 574 (DB).

31. Automatic termination of service under Service Rules. — (1) Dy. Commissioner refusing leave to clerk in March 1960 and intimating that if he did not report for duty within seven days he would be deemed to have resigned from Government service — Clerk not reporting for duty thereafter, and, instead offering himself as candidate for election to Town Municipal Council in 1964 — Held, failure to report for duty resulted in cessation of employment and acceptance of resignation was superfluous — Clerk, was not holder of office of profit, when he offered himself as candidate. (1966) 2 Mys LJ 479 (480) = (1966) 8 Law Rep 283 (DB).

(2) Service Regulations providing that there is automatic termination of service on overstay — Still removal from service for overstaying leave without giving opportunity to show cause is illegal. AIR 1966 SC 492 (494, 495) = (1966) 1 SCR 825.

(3) Temporary appointment — Upon expiry of the period the incumbent ceases to be in employment and Article 311 does not apply. AIR 1962 Cal 420 (423, 424) = 66 Cal WN 931.

32. Distinction between 'removal' and 'dismissal'. — See also Note 24. — (1) Although both "dismissal" and "removal" connote a penalty, removal does not disqualify a person from future employment under the Government, while "dismissal" does so. AIR 1957 SC 892 (895) ** AIR 1957 Andh Pra 794 (803) = ILR (1957) Andh Pra 80 (DB) ** AIR 1957 Assam 77 (80) (DB) ** AIR 1955 Cal 556 (558) ** AIR 1959 Tripura 51 (56).

33. Removal of honorary servant. — (1) The removal or dismissal of a special constable is covered by Cl. (2) of Art. 311 even though he does not get any

Articles 310 & 311 — Note 33 (contd.)

remuneration, as the removal may have the effect of casting a slur on his character. AIR 1954 SC 369 (374) = 1955 SCR 26 = ILR (1955) 1 All 324 **AIR 1953 SC 250 (251) = 1953 SCR 655 **AIR 1955 Orissa 33 (Pr. 4) = ILR (1955) Cut 53 (DB).

(2) Honorary Magistrate (Special 1st Class) appointed under S. 14 (1) Cr. P. C. holds "civil post" within meaning of Art. 311, even though he is not a salaried officer. 1961 (1) Cri LJ 657 (658) = 1960 Ker LT 708.

(3) Services of Honorary Medical Officer terminated by Government under its right to do so at any time without any notice and without any reason — Motive of Government behind order of termination is not material — Termination not by way of punishment — Officer not entitled to protection under Art. 311 (2). 1961 Ker LT 662 (686, 689) = (1963) 1 Lab LJ 362 (Ker).

34. Discharge. — (1) The word "discharge" has the same meaning as "removal". AIR 1955 Cal 556 (558) **AIR 1953 Cal 188 (192) = ILR (1953) 2 Cal 249.

(2) Discharge from service on the grounds of notoriety for corruption and unsatisfactory service is clearly a punishment. AIR 1960 SC 689 (692).

[See also AIR 1965 Punj 28 (28, 29, 30) = 66 Pun LR 1224. (Order of discharge passed while charge of corruption was pending in criminal court—Court acquitting delinquent officer on merits — Circumstances held revealed that discharge was result of punishment and order amounted to dismissal — Non-compliance with Art. 311 (2) — Order cannot be sustained.)]

(3) Discharge of temporary public servant — Art. 311 does not apply. AIR 1964 SC 449 (453).

(4) Art. 311 would also apply to the case of a temporary servant if his services are terminated by way of punishment.

So long as the authorities do not make an order of discharge for misconduct but merely exercise their right to terminate the services, it is not open to an employee to complain.

In judging of the question whether or not an order of discharge is accompanied by punishment, one must look to the language of the order of discharge. AIR 1960 Bom 9 (10, 11, 12) = 60 Bom LR 624 (DB).

(5) The Government has a right to terminate the services of its temporary servants when the terms of the contract of employment or the specific service rules provide for it, when it will be a mere discharge simpliciter from service. The motive is immaterial and the factor inducing the Government to take action under

the contract of employment such as misconduct, negligence, inefficiency or other disqualification will not make the action a punishment to attract the provision of Art. 311 (2) of the Constitution. Any enquiry conducted prior to such action by the Government will not affect the position. AIR 1967 Punj 129 (130) = (1968) 1 Lab LJ 443 **1962 Mys LJ (Supp) 487 (490). (Discharge in terms of service rules of temporary servant is neither 'removal' nor dismissal) **AIR 1959 Pat 192 (196) = 1958 BLJR 593 (DB). (Discharge according to terms of contract — Absence of opportunity to show cause does not affect validity of discharge.)

(6) An employee coming under the category of "Industrial employee" which is of a temporary character can be discharged from service by the authorities under R. 75 (a) of the Army Instructions issued under the Army Act. Such discharge is not a penalty as contemplated by sub-rule (1) of Rule 212 of Army Instructions. A charge therefore need not be framed against him before such discharge. 1962 Mys LJ (Supp) 254 (257).

(7-8) The discharge of a temporary Government servant who has not attained the status of quasi-permanency even if it is done for misconduct will not amount to dismissal or removal within the meaning of Art. 311. AIR 1959 Manipur 33 (37).

(9) Under 'Sastry award' an order of discharge of an employee of State Bank made under paragraph 521 (10) (c) does not amount to punishment by way of disciplinary action and there is no necessity for giving a hearing to the employee.

An order discharging an employee for inefficiency must be taken to be one passed under para. 521 (10) (c) of the award. The mere fact that certain disciplinary proceedings had preceded the order would not render the order one by way of punishment when it was not made in consequence of such proceedings. AIR 1962 Cal 72 (74, 75) = 65 Cal WN 1101.

(10) An order of discharge with retrospective effect is bad in law. (1957) 61 Cal WN 880 (885).

(11) Authority stating reasons for not giving notice of discharge to employee — Non-compliance of Proviso (b) to S. 126, J. & K. Constitution regarding notice — Sub-clause (3) of S. 126 has no application — Reasons are justiciable. AIR 1965 J & K 53 (56) = 1964 Kash LJ 214 (DB).

(12) Word "discharge" does not occur either in Art. 311 or in the Civil Service Rules (Punjab) in regard to penalties — But definition of the word given in the Punjab Rules shows that it applies where a person's service is terminated for reasons given in (a), (b) and (c) of the explanation under R. 14.10 of the Punjab Rules. AIR 1953 Punj 88 (93, 94) = 55 Pun LR 100 (DB).

Articles 310 & 311 — Note 34 (contd.)

(13) Petitioner allowed to appear for competitive examination, as being duly qualified — Petitioner successful at examination — His appointment as probationer for two years — Discharge of petitioner after expiry of probationary period on ground that he was not qualified to appear for competitive examination — Negligence of Govt. — Petitioner becoming over-age at time of discharge — Principle of estoppel held operated against authorities in circumstances of case — Discharge held illegal. AIR 1966 Andh Pra 59 (62) = (1965) 2 Andh WR 437.

35. Retrenchment.— (1) In the absence of any special contract the substantive appointment to a permanent post gives the Government servant so appointed a right to hold the post until, he attains the age of superannuation or is compulsorily retired after having put in the prescribed number of years' service or the post is abolished. His service cannot be terminated except by way of punishment for misconduct, etc., on proper enquiry after due notice to him: (AIR 1958 SC 36, Rel. on.)

Where the petitioner held substantive post as Sub-Inspector in the Excise Section at the material time, which post was not abolished and he had never worked in the Customs section, but on a direction by the Government to retrench the staff of Customs section, the petitioner was served with the notice of retrenchment:

Held, that the action of the authority concerned in directing retrenchment on the ground of his being of the Customs section clearly amounted to punishment as the retrenchment on administrative grounds was unauthorised and the action contravened Article 311. AIR 1960 Madh Pra 239 (240, 241) = 1960 MPLJ 954.

(2) Miss B, juniormost clerk in the department was retained while A was relieved from service.

Held, that the order was in clear violation of the Government orders; but it could not be said that he had been dismissed or removed as a penal step. This was purely an administrative act. The jurisdiction of the High Court under Art. 226 could not be invoked. AIR 1959 Ker 59 (61, 62) = 1958 Ker LT 639 (DB).

[See 1969 Lab IC 730 (734) = (1968) 2 Mys LJ 479 (DB). (Abolition of posts — Services of juniors should first be terminated.)]

(3) Retrenchment of employee — Contention that retrenchment violates Art. 311 — **Held** on facts that contention must be repelled since no foundation was laid for any such contention at any stage and that employee had not acquired any right to post held by him. AIR 1967 Mys 131 (132) = (1966) 7 Law Rep 129 = (1966) 1 Mys LJ 653 (DB).

(4) If after giving all the possible retrenchees an opportunity to explain the bad record, a selection is made of those who after the inquiry are found to be worse than the others, there can be no objection at least on the ground of contravention of Article 311. But to select the apparently worse without following the principle laid down in Article 311 is wrong, and the element of punishment can be said to have entered into the matter. AIR 1960 Madh Pra 299 (302) = 1960 MPLJ 892 (DB).

(5) Under Merger Agreement the option to continue the State servants in the service of the Union left with Government — Refusal of employee asked to get himself medically examined before being absorbed in Union service and consequent retrenchment — Retrenchment order is not a dismissal or removal. AIR 1961 Tripura 29 (32).

(6) The creation of the new State of Madhya Bharat did not guarantee continuance of service of the former employee of the covenanting State. The retrenchment of such an employee under a scheme of reorganization according to the Retrenchment Rules cannot amount to a removal. 1960 Jab LJ 1089 = 1961 MPLJ 12 (13).

(7) Temporary servant — Retrenchment on basis of selective tests — Selective test held not discriminatory — Retrenchment cannot be questioned, whatever be the motive. AIR 1959 J and K 136 (139) (DB).

36. Discharge on account of abolition of post.— (1) Termination of service consequent upon abolition of posts does not involve 'removal' from service. AIR 1967 Bom 482 (490) = 69 Bom LR 218 (DB). (Observations in AIR 1958 SC 36 (47, 48) relating to such termination held not disapproved in AIR 1964 SC 600 (615).) ** AIR 1969 All 449 (461, 466) (FB). (AIR 1965 J and K 15 (FB), Dissented; AIR 1965 All 406, Reversed.) ** AIR 1970 Delhi 1 (5) = 1970 Lab IC 31.

(1-A) Financial sanction for the post upto certain date — Post stands abolished on that date — No sanction of Council of Ministers is required for abolition. AIR 1970 Punj 112 (122) = ILR (1969) 2 Punj 304 (FB).

(2) When a post, whether permanent or substantive, is abolished, the service of the servant holding the post, either on probation or as officiating automatically comes to an end. It does not amount to a punishment or dismissal or removal from service for the purpose of Article 311. AIR 1958 SC 36 (42, 48) ** AIR 1969 All 449 = 1968 All LJ 448 (FB) ** AIR 1968 Andh Pra 307 = 1968 Lab IC 1293. (AIR 1965 J and K 15 (FB), Dissent from.) ** AIR 1969 Goa 76 (85) = 1969 Lab IC 942.

Articles 310 & 311 — Note 36 (contd.)

(2-a) Fundamental Rules Volume II, Part I, Chapter II, Rule 9 (22) — Permanent post — Abolition of — Opportunity must be given to the permanent incumbent to show cause — No opportunity given and incumbent discharged by abolition of post — Article 311 (2) is contravened. AIR 1965 All 406 (407, 408) = (1967) 1 Lab LJ 357. (AIR 1958 SC 36, Foll; AIR 1964 SC 600, Rel. on.)

(3) Where a temporary post is abolished this does not amount to dismissal of the employee holding the post. AIR 1957 Hyd 12 (13) = ILR (1956) Hyd 622 (DB) ** AIR 1956 Cal 662 (667) ** AIR 1968 Andh Pra 307 (309) = 1968 Lab IC 1293.

(4) If further performance of a contract of service under Government becomes impossible as a result of the abolition of the office by statute, no cause of action for damages for breach of contract arises. (1934) 103 LJPC 41 (43) = 1934 App Cas 176, Reilly v. King.

[See AIR 1958 SC 36 (42, 48).]

(5-6) Article 311 (2) may apply to the case of termination of service as a result of abolition of post when the post is abolished to victimise and punish an individual servant. AIR 1968 Andh Pra 307 (309) = 1968 Lab IC 1293.

(7) Temporary post — Period of appointment expires when post is abolished — Termination of services on abolition of post cannot be by way of punishment — No question of violation of Article 311 (2) arises. 1960 Ker LT 1096 (1099). (AIR 1958 SC 36, Disting.)

(8) The mere fact that a certain post was a temporary one would not necessarily lead to the inference that a permanent appointment could not be made in the grade admissible for such post. The employer may well have in mind to fix up the employee at some other post of equal rank on the abolition of the post to which the latter is initially appointed. AIR 1962 Him Pra 41 (42).

(9) Where a temporarily appointed clerk in Government service is relieved from service on the ground of the termination of the vacancy and on his application to the Public Service Commission for registration, the Commission, purporting to act on the report of his last superior, refuses to entertain the application and further passes an order debarring the applicant from service for two years, such an order clearly amounts to an order of punishment and since the Commission is not empowered to pass such an order it is ultra vires its powers. AIR 1958 Ker 352 (354) = 1958 Ker LT 580 (DB).

37. Termination upon integration of States.— (1) Where on the abolition of the former Indian States as separate units

and their integration into new units under the Constitution persons serving in the former States were absorbed into the services organised under the new set-up, on general principles of international law, all the appointments in the former States would come to an end automatically on the abolition of such States and the persons holding such appointments would have no rights enforceable against the new States which took their place except to the extent that such new States might have undertaken any obligations towards such persons. AIR 1958 SC 228 (232) ** AIR 1960 Manipur 45 (46).

(2-3) Held, that the position of the State employees on 15th October, 1949, was no better than that they were retained in Government service pending decision of the question of their absorption as contemplated in Article 8 of the merger agreement which was entered into by the Maharaja of Tripura. That Article gave the Government the power to either continue the servant or to terminate his services and pay reasonable compensation. Pending decision of that question, the employee could not claim that he was entitled to the post. The Government could discharge him without having to follow the procedure laid down in Article 311 (2). AIR 1960 Tripura 28 (30).

38. Discharge from temporary post — Right of lien on substantive post. See also Note 135.— (1) A person who was holding a substantive appointment in a permanent post in the Hyderabad Municipal Corporation before his services were transferred to the Government Department is entitled to hold a lien on the former post. Under Section 3 of the Hyderabad Local Government Service (Declaration as State Civil Service) Act, such a person must be deemed to be in the civil service of the State. And where the termination of his services was not because of the abolition of his former post or as a result of any disciplinary proceedings taken against him, the termination of his services will attract the provisions of Article 311. In the circumstances his right to the permanent post which he held in the Municipal Corporation cannot be taken away. (1960) 2 Lab LJ 391 = (1960) 1 Andh WR 256 (259) (DB).

39. Discharge of Probationer.— (1) An appointment to a permanent post in Government service on probation means, as in the case of a person appointed by a private employer, that the servant so appointed is taken on trial. Such an employment on probation under the ordinary law of master and servant, comes to an end if during or at the end of the probation the servant so appointed on trial is found unsuitable and his service is terminated by notice. AIR 1958 SC 36 (42) ** ILR (1965) 2 Mad 24 (31, 32) (DB).

Articles 310 & 311 — Note 39 (contd.)

(2) Probationer — Termination of service in accordance with rules governing conditions of service — Not a dismissal or removal — A probationer can be discharged during the period of his probation and such discharge will not amount to a removal or dismissal where it has been done in accordance with the service rules and not by way of punishment — No right to protection under Article 311 (2). **AIR 1963 SC 1552 (1553, 1554) = (1964) 2 SCR 135 ** AIR 1958 SC 36 (49) ** 1967 Ker LT 896 (897) = 1969 Lab LJ 400.**

(3) On expiry of probationary period probationer does not automatically become permanent unless rules so provide. **AIR 1968 Manipur 58 (62) = 1968 Lab IC 1065.**

(4) A probationer's service can be terminated at any time before the expiry of the period of probation without holding any enquiry on the ground of his unfitness for service. Order of termination need not give reasons. If reasons are given and they appear plausible but specious, it does not render the termination illegal, even assuming that the authorities acted mala fide. **AIR 1960 Madh Pra 208 (210, 211) = 1960 MPLJ 515 (DB) ** (1959) 2 Lab LJ 702 (703) (Andh Pra).**

(5) If the Government takes the view that a simple termination of service of a probationer is not enough and the conduct of the probationer has been such that he deserves a punishment entailing penal consequences, in such a case, the Government may choose to proceed against the servant on the basis of his misconduct, negligence, inefficiency or the like and inflict on him the punishment of dismissal, removal or reduction carrying with it the penal consequences. In such a case the servant will be entitled to the protection of Article 311 (2). **AIR 1960 Cal 314 (317).**

(6-7) Person appointed on probation for one year — Person's services can be terminated before expiry of period of one year — No damages can be claimed. **AIR 1954 Mys 175 (176) = 33 Mys LJ 90 (DB).**

(8-9) If the termination of service of a probationer is based on the ground of misconduct, negligence, inefficiency or other disqualification, and is resorted to by the Government as a measure of punishment, it will amount to "dismissal" or "removal" within the meaning of Article 311 and entitle the Government servant to the protection conferred by that provision. **AIR 1958 SC 36 (42).**

(10) Probationer — Discharge from service in terms of employment, but while enquiry for accepting illegal gratification was pending — **Held**, order though motivated by alleged misconduct could not be considered as by way of punishment — Protection of Article could not be claim-

ed. **AIR 1966 Madh Pra 333 (335) = 1966 MPLJ 41 (DB).**

(11) Probationer can be discharged in the manner provided by Rule 55-B of Civil Services (Classification, Control and Appeal) Rules. Mere termination of service does not carry with it any 'evil consequences'. Order discharging public servant, even if a probationer, in an enquiry on charges of misconduct, negligence, inefficiency or other disqualification may appropriately be regarded as one by way of punishment but an order discharging probationer following upon an enquiry to ascertain whether he was fit to be confirmed, is not of that nature and Art. 311 (2) does not apply. **AIR 1961 SC 177 (180) = (1961) 1 SCR 606. (24 Cut LT 441 = ILR (1958) Cut 77 = (1959) 1 Lab LJ 536, Reversed.)**

(12) Probationer holding permanent post in another department and a lien on it; must revert to his permanent post on discharge from probation. **AIR 1963 Manipur 25 (28).**

(13) Petitioner appointed as headmistress on a contractual basis, on probation for a period of one year subject to termination if her work was unsatisfactory — Service of memorandum stating that her work was considered to be unsatisfactory and asked to explain why she should not be discharged—After service of order terminating her services. **Held**, if the management felt that her probation was unsatisfactory, it would be entitled to terminate the probation and discharge her. This they did after asking for her explanation and after giving her a personal hearing. Therefore there was no flaw in the order of discharge. **(1964) 2 Lab LJ 158 (159) (Mad).**

(14-15) The discharge of a probationer, whether during or at the end of probation period, for some specific fault or on ground of his unsuitability for the service amounts to a removal or dismissal. **AIR 1961 Pat 339 (341) = 1961 BLJR 749 (DB).**

(16) Where action against petitioner was prompted by unsatisfactory record or unfavourable reports, if not for specific faults, opportunity to show cause would be necessary. **1965 Pun LR (Supp) 586 (592) (DB).**

(17-18) Probationer—No right to post—Enquiry to decide fitness for confirmation not provided — Discharge of probationer — Article 311 not attracted — Lien on permanent post in another department — Effect — He should be reinstated to such permanent post — Discharge from anterior date not legal. **AIR 1963 Manipur 25 (27, 28).**

(19) Where there is violation of the legal provisions regulating the procedure for the discharge of a public servant, order of dis-

Articles 310 & 311 — Note 39 (contd.)
charge of a probationer must be held ultra vires and illegal. AIR 1961 Pat 339 (341) = 1961 BLJR 749 (DB).

(20) The discharge of a probationer on account of his unsuitability for service amounts to "removal" or "dismissal". AIR 1953 Nag 138 (141) = ILR (1953) Nag 522 (DB).

[But see AIR 1953 Orissa 329 (332) = ILR (1953) Cut 517 (DB).]

(21-22) An officer placed on probation cannot be deemed to be confirmed unless and until an express order of confirmation is passed. The mere expiry of the period of probation does not have the effect of automatically bringing about the confirmation. There has to be some lapse of time between the expiry of the period of probation and an order being passed confirming the officer or extending the period of his probation. It follows, naturally, that there would also be a similar lapse of time even when the competent authority intended to pass an order terminating the probation and reverting the officer. During this period the position of the officer is uncertain. AIR 1963 All 377 (379, 380) = 1962 All LJ 1015 (DB) ** AIR 1961 All 450 (456) (FB). (ILR (1959) 1 All 226 and AIR 1959 All 536, Overruled.)

(23) In the very nature of the probationary period itself, when the period of probation is specified there can be no question of any notice being given for termination of service before the expiry of the probationary period. Even where a notice is required under the contract of his service, the order terminating his services does not become illegal because of the omission to give notice. In that case the probationer can at the most claim salary for the notice period. For that relief he has the remedy of a civil suit. AIR 1960 Madh Pra 208 (212) = 1960 MPLJ 515 (DB).

(24) Punishment — Order of removal from service — Whether by way of punishment, is a question of intention — Order discharging person on probation held was by way of punishment. AIR 1961 J and K 7 (8, 9).

(25) At the time when the appointing authority has to consider the confirmation of probation or the termination of the services of the employee, it is entitled to take into consideration all facts and merely because the authority is dissatisfied with the employee it does not follow that the action in terminating the services is penal in nature.

Under Statute 13 framed under the Institute of Technology Act of 1961 so long as the period of probation has not been completed and declared to have been completed satisfactorily the employee enjoys a status not higher than that of a temporary employee and it is open to the employer

and equally to the employee to put an end to the service relationship by notice. (1964) 1 MLJ 70 (76, 77, 78) = (1964) 2 Lab LJ 311 (Mad).

(26) Probationer has no right to a post. His services may be terminated without enquiry when there is no charge of negligence, misconduct or inefficiency against him. AIR 1961 Pat 339 (340, 341) = 1961 BLJR 749 (DB).

40. Termination on ground of lack of competency or on ground of medical unfitness.— (1) Termination of service on the ground that an employee is lacking in ability or capacity to discharge his duties carries with it an imputation against the officer's conduct which may be controverted or explained by him. AIR 1958 All 141 (144) ** AIR 1966 All 429 (430) = ILR (1965) 2 All 783 (DB). (Termination on ground of incapacity to perform duties is removal for disqualification — Article 311 (2) applies.)

(2) Termination of the services of a temporary employee on the ground of medical unfitness does not amount to a penalty and so does not constitute "removal" within Article 311. AIR 1956 Bom 455 (458) = ILR (1956) Bom 767 (DB) ** AIR 1954 Raj 189 (191) = ILR (1954) 4 Raj 639 (DB) ** 1954 Raj LW 520 (524) (DB).

[But see AIR 1956 All 330 (332) ** AIR 1954 Cal 399 (400) (DB) ** AIR 1956 Bom 455 (458) = ILR (1956) Bom 767 (DB). (It is neither 'removal' nor dismissal.)]

(3-4) Where there is neither service contract nor service regulation, authorising premature termination of service of a permanent employee, such a termination cannot be effected.

Civilians in Defence Services (Classification Control and Appeal) Rules 1952 do not make any provision for termination of services of a permanent employee. Termination of services of a permanent labourer working in an ordnance factory on the ground of his having become permanently incapacitated due to an injury is not legal. (1964) 8 Fac LR 197 (200) (Cal).

(5) It is a condition implied in an ordinary contract of service that it comes to an end in the event of a supervening incapacity of an employee but where an employee is removed for a defect which he had when he was engaged then his removal from service after the probationary period cannot be justified on the basis of an implied condition of his employment, and therefore his discharge, amounts to a punishment. AIR 1958 All 844 (847) = 1958 All LJ 536 (DB). ((1874) 10 CP 125; (1876) 1 QBD 410 and (1907) 24 TLR 89, Rel. on.)

(6) A temporary Government servant who is not employed for a specified period may be discharged on service of reasonable notice. If the discharged Government servant is not visited with evil conse-

Articles 310 & 311 — Note 40 (contd.)

quences, the discharge is not by way of punishment. An enquiry as to the suitability of a temporary incumbent for being made permanent is not one under Article 311 (2). Termination of his service as a result of that enquiry is not by way of punishment with the result that the termination of his service was not a dismissal or removal within the meaning of Article 311 (2). AIR 1967 Cal 262 (265 to 268) = (1968) 2 Lab LJ 210 (DB) ** AIR 1964 SC 449 (453).

(7-8) Simple termination of service of temporary Government servant under R. 5 of Central Civil Services (Temporary Service) Rules, 1949 — In reply to writ petition challenging order, affidavit alleging inefficiency and insubordination made — Held that termination was simple termination without attaching any stigma to the civil servant and Article 311 (2) had no application. AIR 1967 Cal 326 (330) = 70 Cal WN 1141 (DB).

(9) Petitioner failing to pass departmental examination — Services terminated under Rule 5, Central Civil Services (Temporary Service) Rules — Case is not one of removal or dismissal from service so as to attract Article 311. AIR 1960 Cal 314 (317).

(10) Schoolmaster — Termination of service on ground of incompetency — Rule requiring charges to be framed and opportunity to be heard complied with — Committee terminating services irrespective of charges — Termination held null and void. AIR 1957 Mad 561 (563) = (1957) 2 MLJ 24 (DB).

(11) If the ground of termination of the services of the temporary Government servant, is non-selection by the Public Service Commission, and the employee was not told when employed that he was liable to be removed if the Public Service Commission did not select him, then he is entitled to the protection offered by Article 311 (2). AIR 1958 Tripura 28 (33).

(12) It is not necessary for attracting Article 311 (2) that there must be misconduct; it can be attracted on other grounds also. If the reason is inefficiency or incapacity whether physical or mental then also Article 311 will be attracted. AIR 1958 Tripura 28 (33).

(13) An order discharging a public servant, even if a probationer in an enquiry on charges of misconduct, negligence, inefficiency or other disqualification may appropriately be regarded as one by way of punishment. AIR 1961 SC 177 (180). (ILR (1958) Cut 77, Reversed.)

(14) Dismissal on ground of physical unfitness is defective where the employee was removed not on ground of physical unfitness but for misconduct without holding enquiry and affording him opportunity to show cause. 15 Fac LR 267 = 1967 All LJ 558 (564). ((1962) 2 Lab LJ 712, Rel. on.)

(15) Termination of service on reaching age of superannuation — Does not involve allegation of incompetence — Procedure prescribed in Article 311 need not be observed. 1962 Mys LJ (Supp) 457 (459) (DB).

41. Removal on ground of being a member of political party. See also Note 125.— (1) The removal of a Government servant on the ground of his being a member of a political party is a removal as a punishment and is governed by Article 311, Clause (2). AIR 1956 Madh Bha 100 (103) (DB).

42. Withholding of salary.— (1) A teacher appointed by M. B. Government holds civil post and no punishment can be awarded to him outside — M. B. Civil Service (Classification, Control and Appeal) Rules, 1956 — Withholding of pay by way of punishment is ultra vires the Rules of 1956 — Such punishment is against the spirit of Article 23 of the Constitution. AIR 1960 Madh Pra 303 (304) = 1960 MPLJ 836 (DB).

43. Termination after extension of superannuation. See also Note 103.— (1) Kerala Service Rules (1959), Part I, R. 60 (a) (as re-amended in 1967) — Re-amendment of service rules reducing superannuation age — Termination of service occurring therefrom — Termination is not violative of Article 311 (2). AIR 1968 Ker 158 (172, 173) = 1967 Ker LJ 853 (DB).

44. Authority by whom Government servant can be dismissed or removed — Article 311 (1) — General.— (1) A Government servant cannot be removed or dismissed from service by an authority subordinate to that by which he was appointed. AIR 1958 Madh Pra 135 (139) (DB) ** AIR 1957 Andh Pra 197 (200) (DB) ** AIR 1956 Trav-Co 35 (40) ** AIR 1954 Mad 1043 (1045) ** AIR 1967 Pat 347 (350) = 1967 BLJR 344 (DB) ** AIR 1954 Mad 1155 (1158) = (1954) 2 MLJ 254 (DB). (Reversed on another point in AIR 1955 SC 817.)

(2) Dismissal or removal by a subordinate authority will be illegal and ultra vires. AIR 1958 SC 36 (44) ** AIR 1954 SC 245 (247) = 1954 SCR 786 ** AIR 1949 PC 112 (114) = 75 Ind App 343 = 1948 FCR 103 = 50 Cri L Jour 383 ** AIR 1937 PC 27 (30) = 64 Ind App 40 = ILR (1937) Mad 517 ** AIR 1958 Mad 53 (65) = ILR (1958) Mad 158 ** AIR 1957 Pat 100 (101) (DB).

(3) Temporary servant — Removal by authority subordinate to appointing authority — Removal not by way of punishment — Art. 311 (1) does not apply. AIR 1961 All 284 (286) = (1960) 2 Fac LR 558 = (1961) 2 Lab LJ 191.

(4) Petitioner unqualified to hold post — Termination of services by person not authorised — No interference in writ jurisdiction. AIR 1961 All 292 (293).

(5) The scope and ambit of the protection conferred by this provision are that

Articles 310 & 311 — Note 44 (contd.)

the Government servants of the kinds referred to therein are entitled to the judgment of the authority by which they were appointed or some authority superior to that authority and that they should not be dismissed or removed by a lesser authority in whose judgment they may not have the same faith. The underlying idea is that a provision like this will ensure to them a certain amount of security of tenure. AIR 1958 SC 36 (44).

(6) Neither the legislature nor the Governor may enact a rule under Art. 309 vesting power of dismissal in, an authority subordinate in rank to the authority which had appointed the civil servant. Any rule or statute which permits such an action must be held to be *ultra vires* as infringing the provisions of Art. 311 (1). AIR 1969 Mys 41 (44) = (1968) 2 Mys LJ 166.

(7) Where a person is dismissed by an authority subordinate to the appointing authority but an appeal to the appointing authority is preferred against the order of dismissal and the appeal is rejected by such authority, it cannot be said that the order of dismissal is passed by the appointing authority. AIR 1942 FC 3 (6) = 1941 FCR 37 = ILR (1941) Ker (FC) 165 = ILR (1942) Lah 692 **AIR 1949 Nag 118 (119) = ILR (1948) Nag 576.

(8) For the purposes of Article 311 (1) it is not the first appointment which is relevant when a person is in continuous Government service. The last appointment has to be taken into consideration for purposes of ascertaining whether a person was given the constitutional protection afforded by Art. 311 (1) i.e. whether he was dismissed by any authority subordinate to one by which he was appointed. AIR 1960 Cal 278 (280).

(9) An authority superior to the appointing authority can dismiss or remove from service the person appointed. AIR 1958 SC 36 (44) **AIR 1956 Pat 228 (230) (DB) **AIR 1956 Raj 110 (112) = ILR (1956) 6 Raj 335 (DB) **AIR 1967 Assam 28 (30) = (1968) 2 Lab LJ 148 (DB). (Order of retirement passed by authority higher than appointing authority — Legal)

(10-11) A dismissal by a subordinate authority may be validated by ratification by the appointing authority. 1954 All L Jour 515 (520).

(12-13) Where the subordinate authority only acts as the channel through which the order of dismissal is communicated to the dismissed official and the order is actually passed by the proper authority, its validity is not affected. AIR 1952 Sau 40 (42) (DB) **AIR 1950 Lah 59 (62) = Pak LR (1949) Lah 608 **

1962 Mys LJ (Supp) 457 (459) (DB). (A notice of termination of service on attaining a particular age to be given under S. 8 of the Bangalore Transport Services Act need not be issued only by the appointing authority of the employee.)

(14) Where there is no fresh appointment by Government on termination of prior appointment but the permanent employees of the railway company are continued in service on certain terms and conditions after the acquisition of the Railway by the Government, the authority which originally appointed the servant concerned is entitled to remove him from service. AIR 1957 Ker 1 (2) (DB).

(15) Where a Government servant originally appointed in one State is sent on deputation to another State, and is absorbed in the service of that State the authority by whose order he is so absorbed will have the power to remove or dismiss him from service. AIR 1956 Bhopal 36 (39) = 1956 Cri L Jour 975.

(16) This article does not prevent the authority duly and legally substituted in the place of the original authority who appointed the member of a civil service, from dismissing him. AIR 1958 Andh Pra 240 (249, 250) (DB).

(17) The appointing authority himself can clearly dismiss or remove a person from service. AIR 1953 Trav-Co. 130 (139) = ILR (1952) Trav-Co. 884 = 1953 Cri L Jour 752 (FB) **AIR 1954 Cal 60 (62) = ILR (1955) 2 Cal 28 (DB).

(18) When a person is appointed by the head of a department and then transferred to another department, he cannot be dismissed or removed by any one of lower rank than the head of the latter department. AIR 1954 Raj 207 (Pr. 7) = ILR (1954) 4 Raj 733 (DB).

(19) Where the actual appointment in the particular case has been made by a higher authority, he alone can dismiss or remove from service, and not a subordinate authority although under the rules such authority may be competent to make similar appointments. AIR 1957 Madh Pra 126 (128) (DB) **AIR 1957 Manipur 37 (37) **AIR 1956 Bhopal 36 (38) = 1956 Cri L Jour 975 **AIR 1956 Madh B 259 (261) (DB) **AIR 1956 Mad 419 (421).

(20) An authority of equal rank or grade with the one by whom the appointment has been made, may dismiss or remove the person appointed; it is not necessary that the dismissal or removal must be by the same person by whom the appointment was made or by his direct official superior. AIR 1955 SC 70 (73) = 1955 SCR 965 = 1955 Cri LJ 249 **AIR 1957 Madh Pra 126 (128) (DB).

Articles 310 & 311 — Note 44 (contd.)

[See however AIR 1957 Manipur 37 (37) ** AIR 1967 Cal 381 (382) = (1966) 2 Lab LJ 722. (Constable appointed by one Deputy Commissioner — Another Deputy Commissioner who is an authority of equal rank can dismiss him.)]

(21) Order of compulsory retirement signed by Secretary in name of Governor — Order is valid. Secretary being authorised to do so under Rules of business. It is not open to Courts to go behind an order purported to have been made by the Governor so long as that order conforms to the requirements of Art. 166 (2) which lays down the rule of constitutional finality. 1962 Mys LJ (Supp) 437 (442).

(22) Authority competent to dismiss Government servant — Appointing authority is such an authority and question of delegation to such authority of power to dismiss would not arise. AIR 1966 Cal 485 (486) = (1966) 2 Lab LJ 71.

(23) Employment of persons — Right to make appointments is not arbitrary — Powers are subject to Articles 14, 16 and 311. AIR 1968 Ker 244 (247) = 1968 Ker LT 268 = 1968 Lab IC 1159.

(24) Initiation of disciplinary proceedings against Civil Servant suo motu by an authority lower in rank to punishing authority — Entire proceedings are vitiated. (1967) 2 Andh WR 253 (256) = 1968 Serv LR 77 (DB).

45. Delegation of power of dismissal.—

(1) The appointing authority cannot delegate his power of dismissal or removal to a subordinate. AIR 1957 Madh Pra 126 (128) (DB) ** (1957) 61 Cal WN 849 (853) **AIR 1956 Madh B 259 (261) (DB) **AIR 1953 All 17 (20) = ILR (1953) 2 All 344 (DB). ** AIR 1961 SC 751 (761) = 1961 (1) Cri LJ 773 = (1961) 2 SCR 679 **1968 Lab IC 302 (310) = ILR (1967) 1 All 239 (DB) **AIR 1967 All 457 (459) = 32 FJR 476.

(2) Effect of Arts. 154 and 163 of the Constitution is that, a Governor rarely passes executive orders personally. He acts through his Ministers and subordinate officers. The words 'President' and 'Governor' appearing in Art. 310 should not be understood as the President and Governor in person. Even where an authority (not being the Governor) duly empowered on this behalf dismisses a subordinate civil servant, Art. 310 will be attracted. AIR 1959 All 771 (774).

(3) Any legislative provision or rule empowering such delegation will be ultra vires. AIR 1937 PC 27 (30) = 64 Ind App 40 = ILR (1937) Mad 517 **AIR 1949 PC 112 (113, 114) = 75 Ind App 343 = 1948 FCR 103 = 50 Cri L Jour 383 **AIR 1957 Madh Pra 126 (128) (DB) **AIR 1956 Bhopal 36 (38) = 1956 Cri L Jour 975. ** AIR 1963 Mys 66 (73) = 1962 Mys LJ (Sup) 49 (DB).

(4) It is the appointing authority who can initiate disciplinary action — Power cannot be delegated in absence of statutory provision. AIR 1966 Madh Pra 193 (195, 196, 197) = 1966 MPLJ 145 (DB).

(5) What cannot be delegated is the ultimate responsibility to dismiss or remove a civil servant so as to destroy a protection like the one afforded by Art. 311 (2). Any other power, in regard to which there is no constitutional protection or mandatory provision of law or rule having force of law, may be validly delegated. Such matter is entirely in the discretion of appointing authority — Power to initiate inquiry can be delegated. 1966 MPLJ 325 (327) = 1965 Jab LJ 1102 (DB) ** (1968) 1 Lab LJ 396 (399) (Ker) (Dy. I. G. of Police appointing authority — Enquiry held by Superintendent by his order valid.) **AIR 1960 Andh Pra 473 (475, 476) = (1960) 1 Andh WR 408 (DB).

(6-7) Where a Government delegates its powers to hold departmental enquiries against its defaulting officer to the Vigilance Commissioner appointed by it, such delegation is permissible in the context of the exercise of powers under Art. 311 (2).

The amendment to Art. 311 (2) by the Constitution (Fifteenth Amendment) Act. 1963 does not make any difference to the principle stated above whatever its other implication might be. AIR 1968 Mys 296 (300) = (1968) 1 Mys LJ 113 (DB).

(8) As regards the inquiry into the charges against the civil servant it is not necessary that the notice to show cause must be issued only by the authority competent to dismiss, remove or reduce the civil servant. Nor is it necessary that the departmental inquiry must be held only by the authority competent to dismiss, remove or reduce the civil servant. AIR 1956 SC 285 (292) = (1955) 2 SCR 1331 **AIR 1956 Cal 662 (666) **AIR 1956 Sau 14 (18) (DB).

[See AIR 1952 Pepsu 69 (72) = ILR (1952) Patiala 110.]

(9) Power to impose penalty given by head to subordinate authority — Power of head to impose penalty himself not affected. AIR 1958 Manipur 35 (37, 38).

(10) Domestic Tribunal — Delegation of its essential functions of hearing and applying its mind to materials collected and to come to a conclusion by designated authority will render its decision invalid — Authority taking decision may appoint another person to collect material. AIR 1968 Delhi 26 (28) = 1968 Lab IC 24 (DB) **ILR (1965) Andh Pra 482 (501) (DB) **AIR 1963 Mys 66 (73, 75, 76) = 1962 Mys LJ (Sup) 49 (DB).

(11) Competent authority — Decision to terminate services — Approval of proposal for terminating services together with draft order put up for approval before competent authority — Authority writing

Articles 310 & 311 — Note 45 (contd.)
word 'seen' on proposal — Word 'seen' held indicated approval of proposal and constituted authority for issuing dismissal order — No violation of Art. 311 (1). AIR 1962 All 471 (472) (DB).

(12) When the authority competent to punish a delinquent civil servant entrusts the enquiry to a subordinate officer, that officer should himself make the enquiry and not delegate this duty to any other. However, such delegation is only an irregularity which does not vitiate the enquiry unless it appears that it has prejudiced the civil servant. AIR 1964 Madh Pra 318 (319, 320) = 1964 MPLJ 493 (DB).

(13) In departmental enquiry the administrative agency making the findings must address itself to the evidence and on the evidence before it, conscientiously reach a conclusion which it deems to be just. A delinquent officer can only succeed if he is able to establish that the order challenged was made by punishing authority without directing its mind to the evidence in the case. ILR (1965) Andh Pra 482 (503) (DB).

46. Appeal from dismissal. — (1) Government of India Act, S. 246 — Civil Services (Classification, Control and Appeal) Rules (1930)—Punishment of civil servant in employment of State Government — Order made by Government — Appeal in regard to matter coming under Sch. VII List 2, cannot be taken to Governor-General (now President of India). ILR (1956) Punj 1213.

(2) Certiorari — Territorial jurisdiction — Dismissal of Government servant confirmed in appeal — Doctrine of merger not applicable — Punishing authority amenable to territorial jurisdiction of High Court while appellate authority functioning and residing outside territorial jurisdiction — Original order of dismissal can be examined. (1961) 3 Fac LR 25 = (1962) 1 Lab LJ 7 (All).

47. "Subordinate" meaning of. — (1) The word 'subordinate' in Art. 311 (1) of the Constitution means subordinate in rank and not with reference to the functions exercised. Consequently when no officer of equal rank to the appointing officer is available then the order of dismissal or removal will have to be passed by an officer of superior rank. In no circumstances can such an order be passed by an officer lower rank. Any rule or statute which permits such an action, must be held to be ultra vires as infringing the provisions of Art. 311 (1) of the Constitution. AIR 1963 Punj 370 (371, 372) = 65 Pun LR 964 (DB). (AIR 1949 PC 112 and AIR 1937 PC 27, Rel. on; AIR 1957 All 439, Dist.; AIR 1957 Raj 148, Doubt.) ** AIR 1957 Madh Pra 128 (128) (DB) ** AIR 1954 Pat 285 (286) = ILR 33 Pat 148 (DB). (Lino operator appointed by Superintendent of

Government Press cannot be dismissed by Deputy Superintendent.)

(2) Subordination refers to rank and not to powers and duties — Commissioner of Income-tax, Calcutta, not subordinate in rank to Commissioner of Income-tax, West Bengal. If a civil servant was originally appointed by the head of one department, he cannot be removed except by a person not lower in rank to the head of the department to which he is transferred. AIR 1962 Cal 3 (6, 7, 8) = (1961) 3 FLR 391.

(3) Article 311 (1) does not require that the dismissal must be by the very same officer who appointed him. The competent authority can be either the officer who initially made the appointment or any other officer who is co-ordinate in rank to him. No subordinate officer has jurisdiction to inflict any of the punishments contemplated by the Madras Civil Services (Classification, Control and Appeal) Rules.

Requirements of Art. 311 (1) are not satisfied where the order of compulsory retirement of the petitioner was passed by District Prohibition Officer, holding the rank of the Excise Assistant Commissioner, when the petitioner was appointed by the Commissioner of Excise. AIR 1960 Andh Pra 29 (30) = (1959) 1 Lab LJ 558 (DB).

(4) An officer who is inferior in rank to the appointing authority is not necessarily subordinate to him. 1954 All L Jour 515 (517) (DB).

(5) The constitutional requirement in Article 311 that the dismissing authority should not be subordinate to the appointing authority operates when the former appointing authority exists and some other authority subordinate to it wants to exercise the power of dismissal over a civil servant. The constitutional expression 'an authority subordinate' indicates an existing subordination. But this sensible constitutional rule need not be converted into a senseless fetish by seeking to apply it to a situation where the authority dismissing the civil servant suffers no subordination because the post of the former appointing authority had ceased to exist. AIR 1958 Cal 356 (358, 359) = 62 Cal WN 531.

[But see AIR 1969 Mys 41 (44) = (1968) 2 Mys LJ 165. (AIR 1959 Madh Pra 43, AIR 1960 Madh Pra 254 and AIR 1958 Cal 356, Dissented from.)]

(6) Where the petitioner was appointed as a police constable by the D. I. G. of Police of the erstwhile Indore State and he was continued in service of Madhya Bharat State without any order of fresh appointment, his removal from service by the Superintendent of Police, Indore, was not bad as violating the provisions of Art. 311 (1). Under the rules in

Articles 310 & 311 — Note 47 (contd.)
force in the Madhya Bharat State, a police constable could be removed from service by the Superintendent of Police. In the absence of any statutory rules creating a notional subordination it could not be held that the Superintendent of Police in the State of Madhya Bharat was an authority actually subordinate to the Dy. Inspector-General in the erstwhile Indore State. AIR 1960 Madh Pra 254 (254, 255) = 1960 MPLJ 85 = (1960) 2 Lab LJ 413. (AIR 1958 SC 228, Rel. on.)

(7-8) A person is subordinate to another when he is bound under the law to carry out the orders of the latter or when he is under his control. 1954 All L Jour 515 (517) (DB).

(9) An official may be regarded as being subordinate to another also when the latter has appellate authority over him. 1954 All L Jour 515 (517) (DB).

(10) Deputy General Manager of Mysore Government Road Transport department cannot remove or dismiss any employee appointed by the General Manager or other authority to whom he is subordinate in rank. AIR 1963 Mys 66 (76) = 1962 Mys LJ (Sup) 49 (DB).

(11) Where a public servant alleges that he has been suspended by an officer subordinate in rank to his appointing authority, the onus to prove the same lies on him. (1963) 6 Fac LR 225 (227) = (1963) 2 Lab LJ 177 (Cal). ** AIR 1959 Madh Pra 43 (46) = (1959) 2 Lab LJ 187 (DB). (Where the appointing authority, namely, the I. G. of Police of the erstwhile Gwalior State has ceased to exist it does not follow that a person appointed by that defunct authority cannot at all be removed.)

(12) Applicability — Appointment of librarian of Bengal Secretariat Library by Assistant Secretary — Dismissal by Deputy Secretary — Dismissal is not by an authority subordinate to that by which he was appointed — Librarian not entitled to the safeguard provided in the Article. AIR 1960 Cal 278 (283).

(13) Divisional Commercial Superintendent is competent to inflict punishment on non-pensionable Class III Railway staff including a Travelling Ticket Examiner. AIR 1967 All 112 (113) = (1968) 1 Lab LJ 301.

(14) Where in accordance with the standing order passed under the Tripura (Council of Advisers) Order, 1953, the Chief Commissioner of Tripura allotted the Department of Relief and Rehabilitation to one of the Advisers and the adviser terminated the services of the petitioner who was appointed by the District Magistrate as being the head of the Department, by no stretch of imagination can it be said that the Adviser in charge

was an authority subordinate to the District Magistrate. AIR 1958 Tripura 38 (40).

(15) Permanent Assistant Clerk in Office of Secretary Board of High School and Intermediate Education — Temporary appointment in higher scale—Transfer by Director of Education as noter and drafter to office of District Inspector of Schools — Assistant clerk disregarding such order — Removal from service — Transfer and removal sanctioned by Governor — Transfer and removal could not be questioned on ground that they were by authority subordinate to appointing authority as such transfer and removal were sanctioned by the Governor. AIR 1962 All 413 (419, 420, 421) = 1962 All LJ 446 (DB).

(16) Appointment of Inspector of the Patiala State Bank by Board of Directors of Bank with sanction of Maharaja of Patiala — After integration of Pepsu State with Punjab State order of dismissal passed by Punjab Government cannot be said to have been passed by an authority subordinate to the one appointing him. AIR 1960 Punj 646 (650, 651) (DB).

48. Appointing authority. — (1) Where an officer has the power of confirmation of a servant and issues the letter of confirmation, even though the letter is issued under the orders of a higher authority, he should be taken to be the confirming officer, and as such the appointing authority for the purposes of Art. 311, Cl. (1). AIR 1957 All 439 (443) (DB) ** AIR 1959 Manipur 33 (36). (Petitioner appointed for fixed period by Chief Commissioner — Petitioner continuing in service after fixed period — No specific order of appointment after expiry of fixed period by Home Secretary who had then authority to make appointments—Petitioners held continued in service on original appointment by Chief Commissioner.)

(2) Appointing power implies power of dismissal — Appointing authority taking action and removing an employee — Objection under Art. 311 (1) cannot be taken. AIR 1962 All 166 (172, 173).

(3) Where a civil servant is appointed as a probationer by one authority and is subsequently confirmed in that post by another authority the latter and not the former would be the appointing authority for the purpose of this Article. AIR 1957 Raj 148 (150) (DB).

(4) Where a person is appointed to a temporary post by one authority but is subsequently appointed as a probationer by another authority and also confirmed in that post by the latter authority, the appointing authority for the purpose of this Article would be the latter authority and not the authority who made the original temporary appointment. AIR 1957 Madh Pra 52 (53)

Articles 310 & 311 — Note 48 (contd.)

(5) Where at the time of the integration of the Princely States with the rest of India, persons serving in the Princely States were absorbed in the services of the relative new States that came into existence as a result of the integration, the authority by whom such persons were appointed to the integrated service or who would have been competent to make the appointment in case there was no actual fresh appointment, must be deemed to be the appointing authority. AIR 1957 Madh Pra 126 (130, 131) (DB) ** AIR 1956 Vindh Pra 22 (24) ** ILR (1954) Patiala 696 (709, 710) (DB) ** AIR 1954 Raj 207 (210) = ILR (1954) 4 Raj 733 (DB).

(6) Officer in one Department later transferred to another department — Head of the department to which the employee is transferred is the appointing authority — The Department from which the employee has gone away will have nothing to do with him any longer. AIR 1962 All 166 (171, 172).

(7) Railway employee appointed by District Traffic Superintendent — Divisional Operating Superintendent, who replaced District Traffic Superintendent after merger of Railways was not lower in rank and had authority to punish employee by reducing him in rank. AIR 1966 Raj 37 (38, 39) = 1965 Raj LW 115 (DB).

(8) When a Government servant is finally assigned to a particular post without retaining a lien on a previous post to which he was originally appointed, the appointing authority in such a case is the person who has the authority to make appointments to the new post. AIR 1956 All 476 (477) (DB).

(9) A petitioner can obtain relief under Art. 226 only if he can show that he has been dismissed by an authority subordinate to that by which he had been appointed, but not if he merely shows that he has been dismissed by an authority subordinate to that by which he ought to have been appointed. AIR 1959 Cal 103 (104) = 62 Cal WN 782 (DB).

(10) So far as Railway servants are concerned, they are governed by the rules embodied in the Railway Establishment Code which is now accepted as being a body of rules promulgated by the President under Article 309. The Code itself lays down that in the case of non-gazetted posts the appointing authority is the General Manager or such other officer to whom he may delegate his power.

Though there is also provision in the Code, for the execution of a service agreement in the name of the President, a service agreement of this description is a mere formal document, and does not abrogate the rules embodied in the Code, which prescribes the 'appointing authority' for a staff belonging to class III or a non-gazetted staff.

Where the appointing authority was a delegate of the General Manager, being a senior scale officer, and the dismissing authority was not subordinate in rank to him, there was no violation of the provisions of Art. 311 (1). (1961) 3 Fac LR 344 (348) (Cal).

(11-12) Plaintiff was appointed to the temporary post of a mistry in Railway on the recommendation made by the Executive Engineer to the Chief Engineer who accepted it but the actual order of appointment was made by the Executive Engineer.

No evidence to show that other Executive Engineer passed orders appointing temporary mistries no proof that the Executive Engineer was empowered to appoint a temporary mistry — Held that the appointment of the plaintiff was in fact made by the Chief Engineer. AIR 1962 Raj 244 (246) = 1962 Raj LW 296.

(13) A permanent railway employee was removed from office but was re-appointed under the directions of the General Manager for a period of six months in his initial grade with the same seniority with a direction that after this period a special report regarding his work and conduct was to be submitted in order to consider his being continued in service. His re-appointment, according to confidential letter, was to be treated as fresh appointment, though he was given his old rate of pay and seniority.

Held that it could not be said that his re-appointment was by the General Manager though it was made at his direction. AIR 1966 Punj 297 (300) = ILR (1965) 1 Punj 671 (DB).

(14) According to instruction under Orissa Panchayat Samiti and Zilla Parishad Act, Zilla Parishad chairman has power of appointment and dismissal of a primary school teacher. 1968 Lab IC 80 (81) = 33 Cut LT 171 (Orissa) (DB).

49. Who can dismiss or remove or order compulsory retirement or suspension — Illustrative cases.—(1) Article 311 (1) of the Constitution does not apply to a case of termination of service of a temporary employee. Rule 5 of the Central Civil Services (Temporary Service) Rules permits the Appointing Authority to terminate such service. The Director of the Department if he is an Appointing Authority for Class III employees on the relevant date and the Government servant is a Class III employee, termination of service of the Government servant by such an Appointing Authority is valid, even though the said servant was appointed by the Chief Commissioner. AIR 1963 Tripura 38 (43).

(2) Superior authority can inflict penalty though it is not appointing authority—Held on facts that though petitioner was appointed by Post-Master, Imphal Post Office, he could be removed by Superintendent of Post Offices, Sibsagar Division

Articles 310 & 311 — Note 49 (contd.)

at Jorhat who was superior authority and who alone could impose major penalties contemplated by R. 13 of Civil Services (C. C. & A.) Rules — **Held** further that the superior authority could appoint Inquiry Officer to make enquiry and submit his report and that right of appeal of petitioner was not thereby lost. 1968 Lab IC 1145 (1147) (Manipur).

(3) District Traffic Superintendent issuing appointment letter to plaintiff on basis of a letter from the Traffic Manager of a railway — District Traffic Superintendent held to be appointing authority who was competent to dismiss the plaintiff. AIR 1964 Pat 102 (106) = 1964 BLJR 523 (DB).

(4) Though under Section 14 (3) (iii) of Assam Elementary Education Act (XXX of 1962). Assistant Secretary has to appoint teachers on the advise of Board, he is still appointing authority and can dismiss those appointed by him with aid of Section 18 — He cannot, however, dismiss those that have been appointed before Act 30 of 1962 came into force — Appointments made under Assam Act (26 of 1964) cannot also be deemed to have been made by him. AIR 1967 SC 459 (462, 463, 464) = (1967) 1 SCR 499. (AIR 1965 Assam 101, **Reversed** in part.)

(5) Where a company-managed railway is taken over by the State and the old employees are re-employed under the State, their service under the company is terminated and they can be removed from service by the authority who makes the re-appointment or his official superior. AIR 1953 All 17 = ILR (1953) 2 All 344.

(6) The authority appointing the petitioner to the Rajasthan State Service being the I. G. of Police, Rajasthan, he could not be removed by any authority subordinate to him. 1959 Raj LW 287 (288) (DB).

(7) By an agreement entered into between the State of Punjab and the Union of India, the Bank of Patiala belongs to the State of Punjab and hence the State of Punjab was authorised to pass orders of dismissal on any officer of the said Bank. AIR 1960 Punj 646 (652) (DB). (AIR 1959 Punj 440, **Relon.**)

(8) Where a person is appointed a permanent tahsildar by the Collector but by a subsequent notification of the State Government he is appointed as an additional First Class Magistrate under Section 12 of the Criminal Procedure Code, he still continues to be a person who must be deemed to have been appointed by the Collector and can be dismissed by him. AIR 1957 Mad 41 (43, 44) = ILR (1956) Mad 1338 (DB).

(9) Where a person was brought on the approved list of candidates for appointment by the Post Master General but was actually appointed by the Superintendent of Post Offices, he can be discharged by

the Superintendent of Post Offices. AIR 1955 Pat 381 (384) = 34 Pat 608 (DB).

(10) The District Superintendent in regard to the area over which he has jurisdiction is the head of the department when there is approval of the Chief Commercial Manager to terminate the services of an employee the order terminating the services cannot be impugned. (1960) 2 Lab LJ 384 (386) (DB) (Andh Pra).

(11) Appointment of P as Extension Officer by State Government — Contention that under G. O. Misc. No. 1110 of 21-7-1960, appointment of extension officer can be done by Inspector-General of Local Administration and therefore Inspector General is competent to remove P from service — **Held**, authority competent to remove P was State Government — Fact that officers of his rank could be appointed by Inspector General did not affect position that in fact P was appointed as 'public servant' by State Government in first instance. ILR (1963) AP 1040 (1044, 1045).

(12) Petitioner appointed by Principal, Police Training College — Dismissal by Deputy Commissioner of Police, Calcutta — Both belong to same grade, so far as Bengal is concerned — Art. 311 not violated. 62 Cal WN 437 (443) = ILR (1958) 2 Cal 623.

(13) **Held**, on facts that when the bye-laws of a Co-operative Society (a Co-operative Bank) did not provide any special procedure to be followed for the dismissal of an employee of the Bank, then the ordinary law of Master and Servant would apply. The Board of Directors had power to suspend and dismiss the officer of the Bank and the resolution was not *ultra vires* of the powers of the Working Committee. AIR 1963 MP 298 (299, 300) = 1963 Jab LJ 677 (DB).

(14) In respect of a public servant who had been appointed by the Raja of Mandi, an order of compulsory retirement of such servant after the erstwhile State of Mandi merged in the Union of India but before the commencement of the Constitution of India can be made by the Chief Commissioner only. A Deputy Chief Commissioner, who is not authorised to do so, if passes such an order, the order being without jurisdiction is void, illegal and inoperative. AIR 1959 Him Pra 32 (34, 35, 36).

(15) Removal to be by appointing authority itself — Appointment by Development Commissioner, Madhya Bharat in 1953 — Removal from service in 1957 by Director, Panchayat and Samaj Sewa, Madhya Pradesh, is valid — The appointing authority has taken a new name — What the Court has to see is not the name but the substance, that is to say, the actual duties and responsibilities and status. AIR 1962 Madh Pra 50 (56) = 1961 MPLJ 1465 (DB).

Articles 310 & 311 — Note 49 (contd.)

(16) Person joining service in State of Pepsu and confirmed by Rajpramukh of Pepsu — Such person transferred to office of Financial Commissioner Revenue, after formation of Punjab State under the States Reorganisation Act Section 116 the officer is deemed to be appointed by appropriate authority which in the case of the concerned officer was the Financial Commissioner (Revenue) and hence dismissal by him is valid. 1966 Cur LJ 968 (976) (Punj) (DB).

(17) Under Section 14 of the Punjab Agricultural University Act the appointing authority of the Stores Purchase Officer is the Vice-Chancellor though the appointment is to be approved by the Board and therefore the Vice-Chancellor has got the authority to terminate the services of the officer. 1966 Cur LJ 930 (932) (Punj).

(18) Appointment by Controller of Supplies — Dismissal by Deputy Commissioner who was equal in rank — Held that it could not be said that the Deputy Commissioner was an authority subordinate to the Controller for the purpose of Article 311 (1) though there may be subordination in the functions of the Deputy Commissioner. Hence, the order of dismissal did not contravene the provision of Art. 311 (1). AIR 1963 Orissa 8 (9, 10, 11) = (1962) 4 Orissa JD 259 (DB).

(19) Removal of Government servant — Petitioner appointed by Superintending Engineer — Order of removal passed by Executive Engineer — Order, held not in pursuance of directions by Superintending Engineer — Executive Engineer, the Appointing Authority for post had no authority at time of removal — Removal held invalid. AIR 1966 All 232 (234) = (1966) 2 Lab LJ 841 = 14 Fac LR 229.

(20) Madras Police Subordinate Service (Discipline and Appeal) Rules, 1950, Rr. 2 (g) and 4 — Compulsory retirement of member — Higher authority contemplated by R. 4, need not be authority higher in rank — State Government is authority higher than Deputy Inspector-General of Police, though authority higher in rank is Inspector-General of Police — State Government is competent to order compulsory retirement. AIR 1965 SC 1103 (1106) = (1965) 2 SCJ 662.

(21) Police Sub-Inspector appointed by Holkar Government — Dismissal by Deputy Inspector-General subsequent to merger of Holkar State in Madhya Bharat — After merger, previous service in Holkar State came to an end — Rules framed under M. B. Police Act applied to petitioner and the dismissal cannot be challenged as ultra vires. 1959 MPLJ 534 (536) = 1960 Jab LJ 181. (AIR 1957 MP 126 Held Reversed).

(22) Authority to order compulsory retirement — State Government is the proper authority till 3-5-1960. AIR 1962 Raj 258 (262) = 1962 Raj LW 506 (DB).

(23) Accountant General who was the appointing authority was competent to terminate the services of an employee. ILR (1961) Mys 1129 (1145) (DB).

(24) Appointments and punishments of members of judicial service — Appointment by Government — Punishment by High Court — Whether punishment contravenes Art. 311 (Quaere). AIR 1965 Orissa 183 (185, 186) = (1965) 7 OJD 74 (DB).

(25) Dismissal not to be by authority subordinate to appointing authority — Subordinate appointed by Inspector-General of Police — Dismissal by Deputy Inspector-General of Police appointed to hold charge of current duties of Inspector General of Police in addition to his own without being clothed with his rank — Dismissal bad. AIR 1964 Madh Pra 114 (116, 117, 118) = 1964 MPLJ 86 = (1964) 8 Fac LR 210 (DB).

(26) Appointment by head of department — Rule framed under Section 309 empowering officer below rank of head of department to dismiss — Employee cannot be dismissed by such officer. The test whether Art. 311 (1) is contravened or not, is not that the authority should be performing same functions but that it should not be lower in rank than the authority that appointed a civil servant. AIR 1960 Madh Pra 183 (183, 184) = 1960 MPLJ 169 (DB).

(27) Appointment made by Divisional Accounts Officer — Dismissal order, passed by Deputy Chief Accounts Officer who is his superior, is a valid order. AIR 1967 Assam 28 (29) = (1968) 2 Lab LJ 148 (DB).

(28) States Reorganization Act (1956), Section 116 (1) — Sub-Inspector in Consolidation Department in Pepsu holding same office after its merger with Punjab — No appointment made for posts of Sub-Inspectors in Punjab — Appointment must be held to have been made by State Government — Dismissal by Director of Consolidation of Holdings is bad. AIR 1964 Punj 480 (481) = 1964 Cur LJ 325 (DB).

(29) Police Act (1861), Sections 7 and 1 — Dismissal of constable — Dismissing Officer neither appointed as Deputy Superintendent of Police nor empowered by general or special order to perform his duties — Dismissal invalid. AIR 1966 Punj 370 (371) = (1966) 68 Punj LR (D) 186 (DB).

(30) A promoted as officiating Assistant Sub-Inspector of Police by the Deputy Inspector-General of Police — Dismissal by Superintendent of Police violates Art. 311. (1966) 68 Pun LR 317 (319) = 1966 Cur LJ 82 (DB).

Articles 310 & 311 — Note 49 (contd.)

(31) An employee appointed by Governor — Dismissal by Chief Secretary by an order neither expressed to be made in the name of nor by the order of Governor — Order of dismissal is invalid. 1968 Lab IC 302 (313) = ILR (1967) 1 All 239 (DB).

(32) Petitioner appointed as revenue clerk by Maharaja — His services continued even after merger of State — Order of dismissal passed by Deputy Commissioner held was in violation of Art. 311 (1). AIR 1963 Manipur 51 (54, 55, 56). (AIR 1957 Madh Pra 126, Held no longer good law in view of AIR 1958 SC 228.)

(33) Dismissal of employee — Special Deputy Commissioner issuing charge sheet, holding enquiry, giving personal hearing, recommending to dismiss and that recommendation approved by Commissioner — Order is invalid. (1967) 14 Fac LR 395 (399) (Cal).

(34) Temporary Exhibition Assistant under Directorate of Industries—Appointment made by Director of Industries — Additional Director with power of control over schemes and not over the personnel, has no power to terminate his services. (1963) 7 Fac LR 50 (52) = (1964) 1 Lab LJ 149 (Cal).

(35) Petitioner removed from service by authority subordinate to authority appointing him — Order quashed as violative of Art. 311. 1959 Ker LR 1117 (1118).

(36) Bengal Subordinate Services (Disciplinary and Appeal) Rules (1936), R. 4. 5 and Schedule — Police Regulations—Regn. 768 (b) — Typist appointed by Special Superintendent of Police in Intelligence Branch and C. I. D. — Disciplinary action by Superintendent, Government Railway Police not valid. AIR 1965 Cal 169 (173, 176) (DB).

(37) Compulsory retirement Rules vesting absolute authority in Government — Only Governor and Chief Minister competent to exercise power — Order not in conformity with Rajasthan Service Rules. ILR (1961) 11 Raj 536 (539) (DB).

(38) Inspector General of Police appointing authority— Dismissal by Deputy Inspector General of Police — Dismissal by subordinate authority is illegal. AIR 1966 Pat 364 (368, 369) = 1966 BLJR 480 (DB) **AIR 1969 All 466 (471).

(39) Transfer of servant from one department to another — Lien kept in parent department — Transferee department not competent to dismiss him. AIR 1969 Manipur 36 (41) = 1969 Lab IC 561.

50. Who can order reduction in rank. —

(1) Railway Board Act (1905), Section 3 — A, officiating as Deputy Chief Engineer of Railway since 7-4-1962 — Order D/-3-8-1968 reverting him to post of District Engineer, senior scale, signed by Deputy Chief Personnel Officer on behalf of General Manager — General Manager

being himself a delegate from Railway Board could not further delegate — Order of reversion was without jurisdiction. AIR 1969 Assam 112 (115) = 1969 Lab IC 1192 (DB).

(2) A non-gazetted railway servant who was promoted to officiate in Class II service by an order passed by the General Manager cannot be reverted to his substantive post by an order passed by the Chief Engineer. (1957) 61 Cal WN 849 (853).

(3) The officer issuing the orders of reversion should not surrender his own judgment and carry out the behests of the higher authorities. AIR 1966 Andh Pra 116 (120, 121) = (1964) 2 Andh WR 477 (DB).

(4) Article 311, Cl. (1) applies only to dismissal or removal and not to reduction in rank or to suspension. AIR 1953 Hyd 201 (204) = ILR (1953) Hyd 155 (DB) ** AIR 1954 Cal 60 (65) = ILR (1955) 2 Cal 28 (DB).

51. Prevention of Corruption Act — Who can sanction prosecution. —

(1) Under Section 6 of the Prevention of Corruption Act, 1947, the sanction of the authority competent to remove the officer from service is necessary for his prosecution under the Act. AIR 1956 Bhopal 36 (37) = 1956 Cri L Jour 975.

(2) Prosecution of Assistant Medical Officer of Railway under Prevention of Corruption Act — Sanction of Head of the department who is not competent to remove the accused from service is not valid. AIR 1968 SC 1292 (1298, 1299) = (1968) 3 SCR 563. (Cri. Appeal No. 455 of 1965, D/- 4-5-1967 (Pat) Reversed.)

(3) Appointment made by Divisional Personnel Officer in exercise of power delegated by General Manager — Divisional Medical Officer cannot sanction prosecution under S. 6 (1) of the Prevention of Corruption Act. AIR 1968 Punj 120 (125) = 1968 Cri LJ 372.

(4) Servant of former Bikaner State Railway absorbed in Northern Railway — Authority competent to remove is General Manager, Northern Railway — Sanction for prosecution under Prevention of Corruption Act (1947), S. 6 granted by Divisional Engineer is invalid. AIR 1963 Raj 126 (129) = 1962 Raj LW 682

(5) Prosecution of a civil servant — Sanction for — Sanction to be from competent authority — Competency to be determined with reference to appointing authority under Art. 311 (1). AIR 1962 Ker 50 (52) = 1962 (1) Cr. LJ 334.

(6) Conferment and imposition of powers and duties of Commissioner of Labour upon Deputy Commissioner of Labour under Section 4 (2) of Bombay Industrial Relations Act (11 of 1947) — Sanction given by him under Section 6 (1) (c) — Prevention of Corruption Act (1947) is not valid. 1970 Lab IC 148 (154) (Bom).

Articles 310 & 311 (contd.)

52. Officers and servants of High Court — Power to appoint and remove. — See also Note 4. — (1) Appointments and punishments of members of judicial service — Ultimate authority to pass order of punishment, even in case of subordinate Judge, is State Government. AIR 1965 Orissa 183 (185, 186) = (1965) 7 Orissa JD 74.

(2) The Chief Justice of a High Court can dismiss the Registrar, Original Side, of the High Court. AIR 1956 SC 285 (291) = 1955-2 SCR 1331.

(3) Punjab Civil Services Rules, Vol. I, Part 1, Rule 1.8, Note 2 — Persons on the staff of High Court — Power to interpret change or relax the rule vests in the Chief Justice and not in the Finance Department of Punjab Government. AIR 1964 Punj 285 (288) = ILR (1964) 1 Punj 377 (DB).

(4) For the exercise of the powers to remove a subordinate judicial officer or to dismiss him or to reduce him in rank, the authority must have power to initiate disciplinary proceedings against such officer, though he may exercise this power of taking proceedings in consultation with the High Court. (1965) 2 Mys LJ 215 (221, 222) = (1965) 3 Law Rep 356 (DB).

(5) Control vested in High Court over District Judges is complete subject only to power of Governor in matter of appointment (including dismissal), posting and promotion. AIR 1966 SC 447 (453, 455) = (1966) 1 SCR 771.

(6) As Governor is the appointing authority of all subordinate judicial officers like District Judges and persons holding posts inferior to that of District Judges, it is he who can dismiss or remove them. (1965) 2 Mys LJ 215 (221) = (1965) 3 Law Rep 356 (DB).

(7) High Court have complete disciplinary jurisdiction over the members of the subordinate judicial service and can initiate disciplinary enquiry even where the probable consequence may be dismissal or removal from service. 1966 RLW 359 (364) = ILR (1966) 16 Raj 326 (DB).

53. Enquiry and report by authority different from that empowered to dismiss. —

(1) The question of imposing punishment can only arise after enquiry is made and the report of the Enquiry Officer is received. It is for the punishing authority to propose the punishment and not for the enquiring authority. AIR 1962 SC 1130 (1134, 1135) = 1962 Supp (1) SCR 968.

(2) A rule authorising any authority other than the appointing authority to hold an enquiry or appoint an Inquiry Officer is not invalid as it does not contravene Art. 311. 1968 Lab IC 1597 (1598) = 1968 Raj LW 559.

(3) Regulation 229 of the Police Regulations is not mandatory. It only lays down a procedure for the transmission of papers

concerning dismissal, removal, compulsory retirement etc. A violation of such a procedural rule cannot give to the aggrieved person any ground for contending that the order of removal from service is bad. AIR 1961 Madh Pra 365 (366) = 1961 MPLJ 700 (DB).

(4) Dismissal of servant — Co-operative association — Managing Committee invested under bye-laws with power to dismiss Manager — Charges of misconduct against Manager — It is not necessary that enquiry into charges should be held by Managing Committee itself — Enquiry into charges by Secretary, who had previously filed criminal complaint against Manager, Managing Committee cannot be said to have delegated its functions merely by deputing Secretary to enquire and report. AIR 1960 Madh Pra 273 (277) = 1960 MPLJ 433 (DB).

(5) Punishing authority can direct enquiring officer to make a re-inquiry or a fresh enquiry. AIR 1960 Ker 294 (294, 295) = 1960 Ker LT 450.

(6) Dismissal by superior authority on evidence recorded by subordinate officer is not bad provided the superior authority has applied his mind to the evidence. AIR 1961 Ker 299 (301) = 1961 KLT 35 (DB) ** (1963) 67 Cal WN 859 (867) (DB).

(7) Punishing authority not bound by recommendations of Enquiry Officer. 1968 Lab IC 735 (741) = 1968 Serv LR 625 (Cal). (AIR 1962 SC 1130, Rel. on.) ** AIR 1970 SC 158 (161) = (1969) 1 SCWR 1115. (Termination of services by State Government upon recommendation of High Court is valid.)

(8) Punishment to Government Servant — Reasons need not be given wherever the Government agrees with the enquiring Tribunal — In case of dissent, reason should be given. AIR 1966 SC 1827 (1831) = (1967) 1 SCJ 855 = (1966) 2 SCWR 524 ** ILR (1964) Andh Pra 464 (473) = (1962) 2 Lab LJ 586 (DB).

(9) Government competent to differ from Enquiring Officer — Action based on such contrary view resulting in dismissal of the Government servant does not contravene Article 311. AIR 1964 SC 364 (368, 369) = (1964) 1 SCWR 28.

(10) The exercise of power to appoint or dismiss an officer is the exercise not of a judicial power but of an administrative power and a statutory functionary like the Chief Secretary to the Government of Assam exercising such a power cannot be said to have delegated his function merely because he has deputed a responsible and competent official to enquire into alleged acts of misdemeanour and report. AIR 1962 Assam 88 (90) (DB). (Reversed on another point in AIR 1963 SC 1612.)

(11) Enquiry against employee of bank belonging to Government can be conducted by Director of bank. AIR 1960 Punj 646 (652) (DB).

Articles 310 & 311 — Note 53 (contd.)

(12) Rule 10 of the U. P. Disciplinary Proceedings (Administrative Tribunal) Rules, 1947 in so far as it requires the Governor to accept the recommendation of the tribunal in the matter of punishment is invalid as being inconsistent with the Constitution. AIR 1961 SC 1245 (1252).

(13) In disciplinary proceedings, where enquiry was held by person not duly authorised, order of dismissal based upon such inquiry is invalid. High Court will quash it under Article 226. AIR 1965 Manipur 46 (47).

54. Authority who can issue notice. See Note 80.— (1) The punishing authority must apply his mind to the findings recorded by the enquiry officer and after indicating his acceptance of those findings must inform the delinquent officer about his acceptance of those findings as well as the proposed action. 1966 Ker LT 141 (147) = (1966) 2 Lab LJ 403.

(2) The object of an enquiry is to find the truth, and all steps which are conducive or may be conducive to this end, must be deemed necessary steps and any unjustified interference with any of those steps must necessarily bring about prejudice and must be held to amount to a denial of a reasonable opportunity to the charged officer to show cause against the action proposed to be taken against him. AIR 1963 All 94 (98, 99, 100) = 1962 All LJ 905 (DB).

55. Order of suspension pending final order of dismissal by another authority.—

(1) Mere order of suspension by the High Court pending final order by Government is not one of dismissal or removal and is not bad. AIR 1957 SC 246 (249) = 1957 SCR 414.

(2) Suspension can be of two types, one by way of punishment and the other as an interim step pending enquiry into the conduct of the Government servant concerned. AIR 1959 All 629 (631).

56. Service Rules — General — See also Article 309.— (1) It is open to the Court to consider the validity of Service Rules under which the Government servants are punished. See AIR 1958 SC 232.

(2) A Court can look into the Service Rules in order to determine what the status of the Government servant was according to the rules and whether the particular order in question in the case might be regarded as one of reduction in rank so as to attract the application of Article 311. AIR 1957 SC 886 (887).

(3) Civil Service Rules could be looked into by the Court in order to determine the proper authority by whom the services of an officer could be terminated. AIR 1956 SC 285 (291) = (1955) 2 SCR 1331.

(4) Article 309 is subject to Article 310 — Rule under Article 309 elaborating guarantee under Article 311 (2) does not

cut down pleasure tenure. AIR 1966 Cal 252 (257) = (1967) 1 Lab LJ 318 (DB).

(5) Member of Public Service — Tenure of office — Parliament or legislature of State can make law regulating conditions of service, including proceedings by way of disciplinary action without affecting the President's or the Governor's powers under Article 310 read with Article 311. AIR 1961 SC 751 (758, 761) = 1961 (1) Cri LJ 773.

(6) Service Rules — Established practice growing up on basis of interpretation given by higher administrative authorities — High Court can use them as useful guides while interpreting rules. AIR 1964 Orissa 65 (67) = 30 Cut LT 49 (DB).

(7) Statutory rules — Departmental instructions cannot override statutory rules. AIR 1968 Punj 436 (439) = 70 Punj LR 590.

(8) Paragraph 376 of the U. P. Manual of Government orders is not a statutory rule. Para 376 does not authorise the higher authority to set aside an order of appointment once it has been lawfully made. 1968 Lab IC 1357 (All). (1961 All LJ 170. Foll.)

(9) Bank of Patiala (Staff) Rules (1954). Rule 27 — Rule does not offend Article 311. AIR 1966 SC 1607 (1613) = (1966) 3 SCR 486.

(10) Statutory Rules — Government has no right to make concession in favour of a particular officer to detriment of and discrimination against other officers governed by same Rules. (1967) 14 Fac LR 72 = (1967) 2 Lab LJ 289 (Cal).

(11) It is necessary for the Government to follow the statutory rules made by the Governor so as to inspire confidence in the administration. 1966 Raj LW 262 (267) = ILR (1965) 15 Raj 664.

(12) Difference in instructions relating to medical fitness of direct recruits and promoted candidates does not suffer from any defect under Art. 14. AIR 1958 Raj 242 (245) = ILR (1958) 8 Raj 37 (DB).

(13) Service conditions of employees in public sector undertakings are not analogous to those of Government employees. AIR 1967 SC 948 (959, 960) = 1967 1 SCR 652.

(14) Employment of a Government servant does not require a formal document in writing as prescribed by Article 299. AIR 1960 Pat 366 (369) = 1960 BLJR 312 (DB).

(15) Bombay Police (Punishments and Appeals) Rules, (1956), Rule 17 is not violative of Article 20 (2) of the Constitution. ILR (1966) Guj 1050 = (1966) 7 Guj LR 1091 (DB).

(16) Provisions of Chapter 14 of Maharashtra Act 5 of 1962 — Do not contravene Article 310. AIR 1967 Bom 482 (503) = 69 Bom LR 218 (DB).

(17) The principle of 'next below' rule is that if a person working in one sphere of employment is deputed to work in

Articles 310 & 311 — Note 56 (contd.)

another, every advancement which the person immediately next below him in his parent department acquires or secures must also be made available to the person who was sent on deputation. AIR 1967 Mys 253 (254) = (1967) 1 Mys LJ 102 (DB).

(18) Before a Government servant in temporary appointment can claim the protection of Rule 6 of Central Civil Services (Temporary Service) Rules, 1949 he must succeed in establishing that he is a Government servant in quasi-permanent service. (1959) 1 Lab LJ 245 (247) (Andh Pra).

(19) Chief Engineer's Screening Committee — Case of Officiating Engineers reviewed by it under Rule 8 of Punjab Service of Engineers Class I PWD (Irrigation Branch) Service Rules (1966) — List prepared by such committee, and order passed thereon would not be of any legal value. 1969 Lab IC 795 (799) = 1969 Cur LJ 30 (Punji) (DB).

(20) Employment of a medical practitioner under Employees' State Insurance (Medical Benefit) Scheme, West Bengal does not constitute a 'Service' under the Government. 1969 Lab IC 887 (889) = 18 Fac LR 44 (Cal).

(21) The registration of Bank by itself did not confer on it an authority to take decision on questions of rights or impose on Bank, duty to act judicially in deciding any question under bye-laws. AIR 1963 MP 298 (300) = 1963 MPLJ 631 (DB).

(22) The rules relating to service integration are not justiciable. AIR 1960 Ker 231 (234) = 1960 Ker LT 55.

(23) Violation of ancillary, incidental and unessential rules are not material. 70 Mad LW 965 (969) = (1957) 2 Lab LJ 668.

(24) Seniority and confirmation — Determination of — Orders are not final and are revisable — No time limit can be fixed for revision of orders. AIR 1968 All 276 (279) = 1968 Lab IC 1027.

57. Rules contravening Article 311 (2).—

(1) Service Rules framed by the Government or other authority with regard to departmental enquiries and disciplinary action against a civil servant will be ultra vires to the extent to which they are inconsistent with Article 311, Clause (2). AIR 1956 Cal 662 (667) ** AIR 1956 Mad 460 (462) = 1956 Cri LJ 1081 ** AIR 1954 Cal 566 (568) ** AIR 1954 Cal 399 (400) (DB) ** AIR 1954 Cal 383 (386).

(2) Rule 14 (c) of the Revised Leave Rules 1933, cannot be regarded as ultra vires Article 311. AIR 1958 Cal 407 (411).

(3) J. and K. Constitution (1956), Section 126 — Orders passed for compulsory retirement of permanent civil servant under Arts. 225 and 226 of the Jammu and Kashmir Civil Service Regulations — Order under Art. 226 being inconsistent with provision of S. 126 of the State Constitu-

tion are invalid. AIR 1964 J and K 92 (95, 96, 97) = 1964 Kash LJ 271 (FB).

(4) Life Insurance Corporation Act (1956), Sections 11, 49 — Order under Section 11 (2) — Life Insurance Corporation Field Officers (Alteration of Remuneration and other Terms and Conditions of Service) Order 1957 (also known as Blue Order), Clauses 10, 11, 5 — Regulation under Section 49 as envisaged by Clause 11 of the Order — Services of Field Officer, coming under Blue Order can be terminated only in accordance with Clause 10 of the Blue Order — Para 4 (h) of circular under Clause 4 (3) of Regulation does not give power independent of Clause 10 of the Order. AIR 1964 SC 847 (854, 855) = (1964) 5 SCR 528.

(5) Hyderabad Civil Services (Classification, Control and Appeal) Rules — Rules cannot be so interpreted as to permit encroachment on powers conferred on the President etc. under Article 310. AIR 1960 Andh Pra 479 (483) = ILR (1960) 2 Andh Pra 148 (DB).

(6) Public service — Rules relating to — Cannot trespass on rights guaranteed by Article 311. AIR 1964 SC 600 (610).

(7) Rule 293 of the Hyderabad Civil Service Rules, 1954, does not contravene Article 311 (2) of the Constitution of India. AIR 1966 Mys 61 (65) = (1965) 1 Law Rep 293 (DB).

(8) By virtue of paragraph 2 of Rule 17 (2), of Kerala Civil Services (Classification, Control and Appeal) Rules shutting out of oral evidence on behalf of accused officer is a defect and the said paragraph is hit by Article 311 (2). 1959 KLT 141 (145) = 1959 (1) Lab LJ 611.

(9) The Hyderabad Civil Services (Classification, Control and Appeal) Rules do not override the express provisions of the Constitution and when action is taken under the express provisions of the Constitution the non-compliance with the Rules cannot be taken exception to. AIR 1960 Andh Pra 479 (483) = ILR (1960) 2 AP 148 (DB).

(10) Member of Secretary of State's Service known as Indian Police — Institution of inquiry against him by State Government is not invalid on the ground of violation of Rule 55 of the Civil Services (Classification, Control and Appeal) Rules, 1930. preserved to him by Article 314. AIR 1968 SC 1372 (1376, 1377, 1378) = (1968) 2 SCA 268.

(11) Central Civil Services (Conduct) Rules are neither illegal nor unconstitutional. AIR 1967 Pat 347 (350) = 1967 BLJR 344 (DB).

(12) Railway Establishment Code (1959) Vol. 1, Rule 149 (3) — Validity — No provision for enquiry and notice — Rules contravene Article 311 (2) and are invalid. AIR 1964 SC 600 (610, 611, 612, 617, 618, 620, 626, 642, 643) = (1964) 5 SCR 683. (AIR 1956 Pat 221, AIR 1958 Raj 250, AIR 1959 All 439, AIR 1960 Cal

Articles 310 & 311 — Note 57 (contd.)
264 and AIR 1962 Mad 379, **Overruled**;
ILR (1960) 12 Assam 441, AIR 1963
Assam 94 (FB), **Reversed.**)

(13) Inspector of State Co-operative Bank removed from service — Contention that the regulation or bye-law of Bank under which he was removed without being given opportunity to show cause is void under Article 13 read with Article 19 (1) (g) — Held that regulation was reasonable under Article 19 (6). AIR 1955 Pat 223 (225) (DB).

(14) Order withholding increment of railway servant passed in contravention of paras 1702 and 1712 of Railway Code — Authority under Payment of Wages Act holding loss of wages resulting from order as unauthorised deduction under S. 7 (1), Expl. II, Payment of Wages Act — Order of Authority does not contravene Article 310 of Constitution — Section 7 (1), Expl. II not ultra vires of Article 310. AIR 1964 Punj 242 (244, 245) = ILR (1963) 2 Punj 623 = (1964) 1 Lab LJ 671 (DB).

(15) Rule 2046 (2) (a) of Railway Establishment Code does not require authorities imperatively to retain ministerial servants in service upto age of sixty years. It only makes servants eligible for retention and only gives a direction to authorities that they should ordinarily be retained. AIR 1958 Cal 657 (659) = 62 Cal WN 352 (DB).

(16) Service condition that person overstaying after expiry of leave shall be deemed to have resigned from such date of expiry — Amounts to removal from service as punishment for absence — Condition violates Article 311 and hence invalid — Fundamental Rules, Rule 14 (c). 1969 Lab IC 117 (118) = (1968) 2 Mys LJ 426.

(17) Service rules made under Art. 309 cannot be valid if they contravene provisions of Article 311 (1) and (2). AIR 1967 Pat 81 (89) = (1968) 1 Lab LJ 376 (DB).

(18) Rule 1725 (b) of Discipline and Appeal Rules framed under Section 47 (e) of Railways Act, in so far as it contravenes Article 311 (2) of the Constitution is invalid. AIR 1961 Cal 93 (95) = 65 Cal WN 94.

(19) President has power to make rules having force of law in respect of Union Territory of Pondicherry — Pondicherry Judicial Officers (Qualifications) Rules proclaimed by the President are valid. AIR 1968 Mad 298 (308, 309) = (1967) 2 Mad LJ 85 (DB).

(20) The words 'dismissal and 'removal' have a technical meaning and those words do not embrace in their ambit all sorts of termination of service. Guarantee under Article 311 (2) extends to those cases of termination of services where order of removal or dismissal has been

passed by way of punishment. AIR 1959 All 643 (650, 652).

58. Two types of Rules.— (1) Orissa Disciplinary Proceedings (Administrative Tribunal) Rules, 1951, are intended to be supplementary to the Civil Services (Classification, Control and Appeal) Rules, 1930. In respect of enquiries against gazetted Government servants there is practically very little difference between these two sets of rules. AIR 1957 Orissa 70 (72, 73) = ILR (1957) Cut 177 (DB).

59. Rules, whether "laws in force" — See also Article 313. — (1) A resolution of the Government fixing the scale of dearness allowance under Rule 44 of the Fundamental Rules is "law" within Article 13 and can be declared void if it infringes Article 14. AIR 1954 SC 493 (495) = 1955 SCR 599.

(2) "Laws in force" — Continuance of operation of U. P. Disciplinary Proceedings (Administrative Tribunal) Rules, 1947 and U. P. Police Regulations framed under Police Act, 1861 — Police Officer can be dismissed by Governor and not only by I. G. of Police or other Police authority. AIR 1961 SC 1245 (1250).

(3) Where the Superintendent of Police who conducted the departmental trial did not observe the provisions of paragraph 486 of the U. P. Police Regulations which have the force of law, the dismissal of an officer as the result of such a departmental proceeding would be illegal. AIR 1958 All 584 (586, 587) = (1958) All LJ 410 = 1958 Cri LJ 994 (DB).

(4) The rules governing disciplinary proceedings cannot be treated as administrative directions, but shall have the same effect as the provisions of the statute, whereunder they are made in so far as they are not inconsistent with the provisions thereof. AIR 1961 SC 751 (763) = 1961 (1) Cr LJ 773.

(5) Person affected by any law or rule in conflict with pleasure under Article 310 (1) is entitled to protection under Article 311 — Executive instructions have status of rules and cannot be judicially enforced. 1968 Lab IC 1377 (1381, 1382) = (1968) 1 Mad LJ 348.

(6) Merely because a rule or legal provision has been made under Article 309 or has been continued in force under Article 313 or Article 372 will not make it an "express provision of the Constitution," for the purpose of Article 310, Clause (1). AIR 1958 Mad 243 (247) = ILR (1958) Mad 295.

(7) Even statutory provisions not being constitutional provisions relating to conditions of service of a Government servant cannot control the "pleasure" of the President or the Governor under Art. 310, Clause (1) and his power to terminate the services of a Government servant. AIR 1956 Bom 601 (605).

(8) Rules under Article 309 — Bombay Allocated Government Servants (Absorp-

Articles 310 & 311 — Note 59 (contd.)
 tion, Seniority, Pay and Allowances) Rules, 1957 — Bombay Government Resolution, dated 25-10-1957 regarding equation of posts — Confer legal rights enforceable in Court of law. AIR 1965 Guj 23 (42, 50, 51) = ILR (1963) Guj 1204 (FB).

(9) Purely executive instructions will not have the status of rules and will not be capable of judicial enforcement. AIR 1956 Madh B 40 (42) (DB) ** AIR 1955 Cal 543 (547) (DB) ** AIR 1955 Pat 353 (355).

(10) Service Rules whether legally enforceable — Every violation of statutory rule governing service condition cannot give rise to a right in favour of aggrieved person, for the service is at the pleasure of the executive—Remedy of civil servant lies within domain of administration and resort cannot be had to civil Court — But violation of provisions of Article 311 (2) will give rise to right in favour of the aggrieved person, enforceable in a Court of law. AIR 1961 Mad 486 (494) = (1961) 1 Mad LJ 273 (DB).

(11) Bye-laws of registered Co-operative Society answer the tests of 'laws' and stand on the same footing as statutory rules so far as enforcement is concerned. AIR 1961 Madh Pra 289 (291, 292) = 1961 MPLJ 1059 (DB).

(12) Instructions in M. P. High Court's memorandum No. 1375/766-I (iii) dated 4th July 1963 are administrative instructions. They do not clothe a civil servant with any right. 1965 MPLJ 990 = 1965 Jab LJ 1087 (DB).

(13) Dismissal from service Pleasure doctrine embodied in Articles 309, 310 — Limitations of — Rules under Article 309 designed purely for administrative guidance — Madras Police Order No. 90 (3) (b) though considered as one under Article 309, is directory. AIR 1966 Mad 203 (210, 211, 212, 213) = (1965) 2 Mad LJ 421 (FB). (W. P. No. 1516 of 1956 dated 11-11-1958 (Mad) Reversed.)

60. Alterability of Rules — See also Note 20.— (1) Welfare Officer appointed by Government in factory — Rules of 1949 superseded by Rules of 1955 — Rules of 1955 govern service condition of Welfare Officer in service though appointed earlier. AIR 1964 All 411 (413, 414, 415).

(2) Article 311 merely protects a Government servant from arbitrary removal or dismissal. In all matters other than removal or dismissal it is always open to the State and its servants to enter into special contracts. 1962 Mys LJ (Supp) 487 (490).

(3) Rules regarding conditions of service of Government servants — Rules apply even to Government servants who joined service prior to framing of rules. AIR 1966 Mys 61 (64) = (1965) 1 Law Rep 293.

(4) Under Article 309 the legislature would be competent to provide for and to

regulate the conditions of service by even altering them and putting end to the service subject to provisions of Art. 311. AIR 1960 Punj 284 (285, 286) = 62 Punj LR 268.

(5) Pepsu Secretariat Service, Recruitment, Promotion, Punishment and Seniority Rules (1952), Rule 15 — Clerks appointed in Pepsu Government Service for whom Pepsu Rules were applicable — On States Reorganisation clerks transferred to Punjab — Their reversions on ground of not passing tests prescribed by administrative instructions, were held bad. 1968 Cur LJ 72 (80, 81) = 70 Punj LR 943 (DB).

(6) Punjab Government issuing memorandum containing directions regarding confirmation of Assistant Consolidation Officers — Some officers subsequently allocated to Haryana — Services of such officers not confirmed by Haryana Government — Non-confirmation held did not amount to variation of service conditions to their disadvantage. 1968 Lab IC 1342 (1343, 1344) = 1968 Cur LJ 331 (Punj).

61. Rules not legally enforceable.— (1) Rules and provisions, which fetter the power of the Government to terminate the service of an official at will, whether such termination refers to his entire official career or to his position in a certain rank, will be regarded as conflicting with the rule of "pleasure" laid down in Article 310, Clause (1) and hence, not enforceable against the Government in a Court of law. AIR 1958 SC 36 (47) ** AIR 1958 All 532 (537).

(2) A mere violation of one of the service rules regulating conditions of service of a civil servant, who holds his office at the pleasure of the President or the Governor cannot confer any justiciable rights on the civil servant, enforceable in a Court of law. AIR 1961 Mad 35 (39) = 73 Mad LW 585. (Reversed on another point in AIR 1962 SC 36.) ** AIR 1961 Assam 74 (76, 77) (DB).

(3) The dismissal or removal of a civil servant in violation of the rules would not by itself entitle him to come to the High Court, but would leave him to appeal to the administrative authorities. AIR 1959 All 771 (773, 775).

(4) The breach of Service Rules and Regulations as to assignment of seniority to Government servants is not a justiciable matter. AIR 1958 Mad 243 (247) = ILR (1958) Mad 295 ** AIR 1958 Mad 53 (67) = ILR (1958) Mad 158 ** AIR 1956 Pepsu 26 (29) = ILR (1955) Patiala 703 ** AIR 1954 Punj 142 (142) ** 1958 Ker LJ 1070 (1074).

(5) The Government's failure to observe important and fundamental rules in the matter of promotion will not give rise to a cause of action. AIR 1954 Punj 134 (135) = ILR (1954) Punj 899.

(6) The Service Rules prescribing the procedure to be followed, while taking

Articles 310 & 311 — Note 61 (contd.)

disciplinary action against Government servants, including dismissal, removal and reduction in rank, are only of an administrative character and non-compliance with such rules by itself, will not be a matter justiciable in a Court of law. AIR 1951 Mad 882 (883) (DB) ** AIR 1953 Trav-Co 130 (139) = ILR (1952) Trav-Co 884 = 1953 Cri LJ 752 (FB) ** AIR 1958 Mad 53 (67) = ILR (1958) Mad 158 ** AIR 1957 All 217 (218).

(7) It is not the failure to adhere strictly to Rules relating to enquires into misconduct that confers the right on a civil servant to complain against the punishment and so long as Article 311 is not violated, it is not competent for the High Court to punish a civil servant even though the enquiry may not be strictly in accordance with the Rules. AIR 1960 Ker 224 (225, 226) = 1959 Ker LT 1273.

(8) The issue of a circular relating to conditions of service of civil servants by the Government contrary to the Service Rules is not a justiciable matter. AIR 1953 Hyd 298 (301, 302) = ILR (1953) Hyd 498 (DB).

(9) Departmental rule fixing age-limit for appointment not having statutory force — Appointment in contravention of rule not invalid. 1961 All LJ 170 (172) (DB).

(10) Although the Rules and Regulations relating to the termination of service of Government servants are binding on the Government as much as on the Government servant, the breach of such Rules and Regulations will not render the action taken by the Government invalid, where no grave prejudice has been caused to the Government servant in consequence of such breach. AIR 1958 Andh Pra 240 (245, 246) (DB) ** AIR 1957 Andh Pra 197 (202) (DB) ** ILR (1957) Andh Pra 715 (730, 731) (DB).

(11) Reading of Rules 322 and 323, printed at p. 116 of the Manual of Executive Rules and Orders in force in Assam, printed in the year 1954 clearly indicates that the rules providing for the procedure of appeal against an order dismissing a civil servant are subsidiary to the rules framed under Section 96-B (2) of the Government of India Act, 1919 and thereafter continued under the provisions of Article 313. AIR 1962 Assam 28 (30) (DB).

(12) The Court can issue a writ to enforce Service Rules relating to conditions of service and where action is taken adversely affecting the interest of a Government servant in regard to his increment and such action is contrary to the Service Rules, the Court can intervene with an appropriate writ. AIR 1954 Cal 187 (187, 188).

(13) The Court cannot interfere in matters which are purely within the discretion of the Government, or Govern-

mental authorities. AIR 1957 J & K 29 (30) (FB) ** AIR 1957 J & K 8 (9) (FB) ** AIR 1957 Nag 95 (96) (DB) ** AIR 1955 Nag 289 (290) = ILR (1955) Nag 800 (DB).

(14) Where an officer has been exonerated in a departmental enquiry against him, a fresh enquiry cannot be ordered against him on the same facts in the absence of a specific rule permitting a review of the order of exoneration. AIR 1958 Raj 38 (39) (DB).

(15) Notification providing for service conditions of municipal Commissioners — Notification has no force of law — Its violation is not amenable to judicial review. 1958 Ker LJ 1070 (1074).

(16) Violation of procedure prescribed by Kerala Civil Service (C. C. A.) Rules, (1957), Rule 17 (2), Para 1, by itself does not amount to denial of reasonable opportunity. AIR 1960 Ker 279 (280 to 284) = 1960 Ker LT 222 = (1960) 2 Lab LJ 398.

(17) Government's failure to observe important and Fundamental Service Rules in the matter of promotion can give no cause of action to the aggrieved Government servant. AIR 1954 Punj 134 (134) = ILR (1954) Punj 899.

(18) Indian Railway Establishment Code — Rules therein are for mere guidance — They are not enforceable in Court of Law. AIR 1960 Bom 14 (18) = 60 Bom LR 1302 (DB).

(19) Railway Establishment Manual, Para 66 — Appointment of Class IV servant by Personnel Officer — Held appointment was not invalid ab initio and employee was entitled to protection under Article 311 (2). 1967 All LJ 558 (563, 564) = 15 Fac LR 267.

(20) Scope — Contravention of rules under Article 309 — Decision of Government is not justiciable unless case falls under Article 311. 1961 Ker LT 461 (462) (DB).

(21) The Rajasthan Police Regulations, 1948, do not have the force of any law, as they are not stated to have been issued in pursuance of any Act. ILR (1958) 8 Raj 760 = 1959 Raj LW 300.

62. Rules legally enforceable.— (1) The Rules and Regulations regarding the procedure to be followed while taking disciplinary action against a Government servant, including dismissal, removal and reduction in rank, are binding on the Government, and the breach of such Rules and Regulations will be justiciable in a Court of law. AIR 1958 SC 36 ** AIR 1958 All 141 (145) ** AIR 1958 Andh Pra 240 (245, 246) (DB) ** AIR 1959 Cal 1 (5) ** AIR 1958 Raj 38 (39) (DB) ** AIR 1957 Andh Pra 794 (804) = ILR (1957) Andh Pra 80 (DB).

(2) Rules such as deal with conditions of service and not tenure of employment and may have statutory force and any violation of them may be enforced by

Articles 310 & 311 — Note 62 (contd.)
means of writ petitions. AIR 1958 All 532 (538).

(3) Mere non-compliance with the rules without proof of prejudice is not a sufficient ground for quashing the order of the Government. 1959 Lab LJ 569 (673) (DB) (Andh Pra).

(4) Government may direct that the pleasure referred to in Article 310 of the Constitution must be exercised in accordance with rules made in that behalf under the proviso to Article 309. 69 Punj LR 377 (387).

(5) Madras Civil Services (Classification, Control and Appeal) Rules — Rules are binding on Government — Rules ignored — High Court will direct Government to make enquiry according to rules. AIR 1961 Andh Pra 289 (292) = (1960) 2 Lab LJ 285.

(6) The Court can enter into the question of the validity of Rule 3 of the Railway Services (Safeguarding of National Security) Rules, 1949, which empower the Government to terminate the services of a Railway servant on the ground of his being involved in subversive activities. AIR 1958 SC 232 (238).

(7) An I. C. S. Officer was held entitled to a mandamus against the Accountant-General ordering him to pay passage money for his wife and children according to the Service Rules applicable to him. AIR 1957 Pat 515 (527) = ILR 36 Pat 557 (DB).

(8) Suspension of member of All-India Service — R. 7 (1) of All-India Services (Discipline and Appeal) Rules (1955) — Section 7 (1) not complied with — Suspension held invalid. AIR 1967 Pat 81 (88, 89) = (1968) 1 Lab LJ 376 (DB).

(9) It was held by the Supreme Court that the Government servant did not hold a post in the permanent and regular establishment of the Director-General of Health Services, and hence was not entitled to claim seniority in the department. AIR 1958 SC 113 (117, 118, 119).

(10) Where a Government servant was compulsorily retired under Article 465-A, Note 1 of the Civil Service Regulations, 1920, and it was contended inter alia by the Government servant that the above article and note were not applicable to and binding on him, held that the article and note were applicable to the Government servant and that he was bound by them. AIR 1954 SC 369 (373) = 1955 SCR 26 = ILR (1955) 1 All 324.

(11) The scales of pay of Government servants cannot be altered to their detriment when such alterations are contrary to the Service Rules. AIR 1958 All 345 (347).

(12) Procedure laid down under Sections 5 (1) (b) and 5 (2) of Minimum Wages Act not followed with regard to Notification — All procedure in the Act

must be strictly complied with by Government — Notification held to be invalid and must be quashed under Article 226. 1969 Lab IC 338 (340) = 1969 All LJ 261 (DB).

(13) Enforceable conditions of service — Transgression of — Remedy whether lies in Court — (Quaere). AIR 1961 Mys 247 (255) = 38 Mys LJ 212 (DB).

63. Termination of service according to terms of contract or conditions of service — See also Note 29.— (1) R. 6 of Orissa Welfare Officers (Recruitment and Conditions of Service) Rules 1951 framed by Government under Factories Act applying to Welfare Officer — Rule 6 not in terms providing for any enquiry in case of discharge or dismissal — Dismissal of Welfare Officer on ground of disobedience of superior authority — Order supported by materials on record — Held, no error apparent on face of record — Order cannot be interfered with under Article 226. AIR 1967 Orissa 26 (28, 29) = (1965) 1 Lab LJ 349 = 31 FJR 198 (DB).

64. Reasonable opportunity to show cause against proposed action — General.— (1) The object of Article 311, Clause (2) is that no one should be condemned unheard rather than the protection of the services. AIR 1956 Madh B 100 (102) (DB) ** AIR 1954 Madh B 177 (180) (DB).

(2) Civil servant cannot be deprived of the protection of Article 311 on the ground of convenience of the government. AIR 1961 All 336 (338) (DB).

(3) The right to reasonable opportunity broadly stated, implies opportunity to deny guilt alleged, and to establish innocence to defend himself by examining himself and his witnesses and to make representation against proposed punishment. AIR 1969 Delhi 145 (149) = 1969 Lab IC 539 (DB).

(4) The constitutional guarantee afforded to a public servant is that he shall not be dismissed or removed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him. AIR 1967 Pat 347 (350) = 1967 BLJR 344 (DB).

(5) The requirement of reasonable opportunity is a statutory protection that is afforded to the servant and a statutory obligation cast upon the State irrespective of whether the protection is claimed by the servant or not. If reasonable opportunity was not given the order of dismissal must be set aside. AIR 1960 Punj 8 (11) (DB) ** AIR 1954 Bom 351 (355) = ILR (1954) Bom 915.

(6) The stage for compliance with Article 311, clause (2) came after the departmental enquiry. AIR 1955 Pat 305 (315) = 34 Pat 625 (DB).

Articles 310 & 311 — Note 64 (contd.)

(7) Where the order of removal was passed without considering explanation of the petitioner to the show cause notice served on him the petitioner must be said to have been removed without complying with the mandatory provision of Article 311 (2). AIR 1959 All 795 (798).

(8) The onus of proving that a reasonable opportunity was given to the civil servant before he was dismissed, removed or reduced in rank is on the Government. AIR 1954 Bom 351 (355) = ILR (1954) Bom 915 (DB).

(9) Order under Rule 91 (5) of Orissa Civil Service Code — Opportunity to show cause must be afforded. AIR 1969 Orissa 224 (227) = 1969 Lab IC 1221 (DB).

(10) For the purpose of making a reference under the Andhra Civil Services (Disciplinary Proceedings Tribunals) Rules (1953), the status of the officer at the time of reference and the enquiry following it are the deciding factors and not what the delinquent officer was at the time of the alleged misconduct. AIR 1962 Andh Pra 303 (305) = (1961) 2 Lab LJ 536 (DB).

(11) Procedure under Public Servants (Inquiries) Act followed — Compliance with Civil Services (Classification, Control and Appeal) Rules is not essential — Constitutional guarantee is satisfied. AIR 1960 Pat 116 (121, 122, 123) (DB).

(12) Rule 8 (2) of the Rules framed under Sections 7 and 8 of the Madras Hereditary Village Offices Act, requires that at the enquiry, oral evidence should be heard as to such of the allegations as are not admitted by the person charged and he should be entitled to cross-examine the witnesses. (1960) 2 An WR 94 (96, 97) (DB).

(13) The presumption under Rule 11 (d) of the Assam Government Servants Conduct Rules, 1937, is a rebuttable presumption and only gives power to the Government to take necessary action against the Government servant. AIR 1962 Assam 17 (19) (DB).

(14) Rule 1709 of Railway Establishment Code which attempts to deny a Government servant a right to have reasonable opportunity of showing cause against the action proposed to be taken against him within the meaning of that clause, must be held to be ultra vires and unconstitutional, as it does not satisfy etc. AIR 1963 Raj 57 (60) = 1963 Raj LW 128.

(15-16) Railway Establishment Code Rule 148 — Termination of service of railway employee under Rule 148 — Rule dispensing with compliance of provisions of Article 311 (2) is itself invalid and therefore, termination of service in

accordance with provisions of Rule 148 cannot be sustained. AIR 1965 Pat 374 (377) = 1965 BLJR 503 (DB).

(16-A) Declaration by Railway Board — Subsequent cancellation without notice — No violation of Article 311 (2). AIR 1970 Delhi 71 (75) (DB).

(17) Railway Services (Safeguarding of National Security) Rules, 1954 cannot override the provisions of Article 311. 1967 All LJ 645 (648) = 15 Fac LR 199 = (1967) 2 Lab LJ 767.

(18) Enquiry started with a view to dismiss Government servant — Suspension ordered — Regular enquiry should be held. (1963) 2 East LR 1 (3) (DB) (Orissa).

(19) The effect of Pepsu Government's order intimating position of temporary and officiating Government servants was held to be that on integration in service of Pepsu Government temporary and officiating Government servants became confirmed and no specific and separate orders were required in Departments concerned for confirmation of such Government servants — Held, further that reversion of Government employee without compliance with Article 311 was illegal. 1968 Lab IC 1439 (1441) = 70 Pun LR 761 (DB).

(20) Reasonable opportunity to show cause — Question as to — Not a pure question of law but both a question of law and fact. (1960) 62 Bom LR 1038 = 1961 Nag LJ 26.

(21) Explanation II to sub-section (1) of Section 9 of Payment of Wages Act is valid under it the deductions under service rules are subject to qualification mentioned in it viz. that before passing an order of deductions, the employee must be informed in writing of the proposed action and must be given opportunity to show cause — No such opportunity given — Order of withholding increments held not legal. AIR 1964 Punj 242 (244, 245) = ILR (1963) 2 Punj 623 (DB).

(22) Disciplinary proceedings started by former Bombay State against Government servant — Proceeding may be continued by State of Gujarat. (1966) 7 Guj LR 897 (910) (DB).

(23) Two charges framed against petitioner — Mere fact that one charge alone was made out would not vitiate order of dismissal if on charge made out authority could impose punishment of dismissal. (1968) 2 Mad LJ 226 (228) = (1968) 2 Lab LJ 804.

65. Scope and ambit of right conferred by Article 311 (2). — (1) Article 311, cl. (2) corresponds to Section 240, sub-section (3) of the Government of India Act, 1935. The provision is mandatory. AIR 1948 PC 121 (126) = 75 Ind App 225 = 1948 FCR 44 ** AIR 1958 SC 300 (304) ** AIR 1949 PC 112 (114) = 75

Articles 310 & 311 — Note 65 (contd.)

Ind App 343 = 1948 FCR 103 = 53 CrLJ 383 ** AIR 1957 Madh Pra 118 (122) (DB) ** (1967) 15 Fac LR 320 (322) (All).

(2) Contravention of Article 311 (2) will make the action taken against the civil servant illegal and ultra vires. AIR 1958 Mys 23 (26) = ILR (1957) Mys 139 (DB) ** AIR 1956 Madh B 172 (174) (DB) ** AIR 1956 Orissa 219 (222) = ILR (1956) Cut 537 (DB) ** AIR 1952 Orissa 285 (289) = ILR (1952) Cut 326 (DB).

(3) Applicability depends on whether charge amounts to punishment and not on whether charge is capable of explanation. AIR 1965 All 142 (150) = 1964 All LJ 791 (FB).

(4) It is clear from the provisions of Article 311, Clause (2) that under it the Government servant is entitled to show cause against the punishment after the Government has provisionally decided upon the punishment to be awarded to him and that this opportunity cannot be dispensed with. AIR 1948 PC 121 (126, 127) = 75 Ind App 225 = 1948 FCR 44 ** AIR 1955 SC 160 (164) = 1955 SCR 1011 ** AIR 1945 FC 47 (58) = 1945 FCR 103 = ILR (1945) Kar (FC) 101 ** AIR 1958 Orissa 96 (97) = ILR (1958) Cut 11 (DB) ** AIR 1958 Orissa 74 (75) = ILR (1957) Cut 673 (DB) ** AIR 1958 Raj 153 (154) (DB).

(5) The reasonable opportunity envisaged by Article 311 (2) includes an opportunity to deny his guilt by the Government servant and establish his innocence. AIR 1958 SC 300 (307, 308).

(6) The only requirements of Art. 311 (2) are that the delinquent officer should be afforded sufficient opportunity of showing cause against the action proposed to be taken, that he must be told of the charges that are levelled against him and the allegations on which they are based and that he must be given an opportunity to deny his guilt and establish his innocence. He should also have an opportunity to make his representations as to why the proposed punishment should not be inflicted upon him. (1961) 2 Andh WR 4 (8) (DB).

(7) The object of Article 311, Clause (2) is that no one should be condemned unheard rather than the protection of the services. AIR 1954 Madh B 177 (180) (DB) ** AIR 1956 Madh B 100 (102) (DB).

(8) There is no warrant to hold that the "opportunity" under Article 311 does not include "common law" opportunity. AIR 1962 Punj 400 (402).

(9) Every police officer holds office during the pleasure of the Governor, and is entitled under Article 311 (2) to a reasonable opportunity to show cause to

the satisfaction of the Governor against the action proposed to be taken in regard to him. AIR 1961 SC 1245 (1252, 1253) = (1962) 1 SCR 151.

(10) Effect of non-compliance — Show cause notice — Absence of — Order of discharge is null and void and not merely irregular. AIR 1965 Andh Pra 188 (191) = (1964) 2 Andh LT 257.

(11) A person cannot be removed from service after his unconditional reinstatement relying on the proceedings which had ended in such reinstatement. AIR 1960 All 164 (174).

(12) Officiating civil servant — Reversion to substantive post not in usual course but as punitive measure — Servant is entitled to protection under Article 311 (2). AIR 1966 Pat 364 (366) = 1966 BLJR 480 (DB).

(13) When it is proposed to take action against a public servant by way of punishment and that will entail forfeiture of benefits already earned by him, he should be heard and given an opportunity to show cause against that order. ILR (1968) Cuttack 341 (351) (DB).

(14) Reversion from higher to lower post — Requirements of Article 311 (2) not followed — Order is not valid and legal. AIR 1966 Orissa 173 (179, 184, 186) = (1966) 8 OJD 211 (DB).

(15) Competent authorities, while considering the case of suitability of subordinate Government servants for promotion to a higher post and in taking a decision in regard to such suitability do not act judicially. (1964) 1 Mys LJ 226 (233) (DB).

(16) Where the Governor appoints under U. P. Disciplinary Proceedings (Administrative Tribunal) Rules, 1947, the Tribunal for enquiry against a Sub-Inspector of Police before commencement of the Constitution, but the order of dismissal is passed after the Constitution comes into force, Sub-Inspector is entitled to protection of Article 311 (2). AIR 1961 SC 1245 (1253, 1254).

66. Temporary civil servants. — (1) "Reasonable opportunity" allowed to a temporary Government servant is not different from that allowed to a permanent Government servant. AIR 1961 All 45 (49, 50) = ILR (1960) 2 All 259. (Reversed on another point in AIR 1963 All 94.)

(2) Temporary civil servant — Services terminated for misbehaviour and bad work — No reasonable opportunity given — Order of termination cannot be maintained. AIR 1965 Raj 108 (109) = 1964 Raj LW 635 (DB).

(3) Even temporary employee is entitled to protection under Article 311 if order terminating his service is of punitive nature. 1969 BLJR 441 (442) = 1969 Pat LJR 130 (DB).

Articles 310 & 311 — Note 66 (contd.)

(4) In the case of discharge of a temporary Government servant, the question that he was dismissed by an authority subordinate to that by which he was appointed and that he has not been given any reasonable opportunity of showing cause against his removal does not arise. AIR 1959 Manipur 33 (38).

67. Charge-sheet, right of civil servant to. — (1) The materials on which the charges are based must be disclosed to the civil servant and he must be given an opportunity of meeting the same. AIR 1957 Madh Pra 126 (132) (DB) ** AIR 1957 Nag 18 (19) ** AIR 1957 Orissa 184 (188) = ILR (1957) Cut 258 (DB) ** AIR 1955 Cal 183 (188).

(2) Order of suspension not followed by charge-sheet within reasonable time — Order liable to be quashed. AIR 1965 Cal 13 (16) = (1964) 9 Fac LR 294.

(3) In order that it can be said the Government servant had a reasonable opportunity he must have been told what the charges levelled against him are and the allegations on which the charges are based. AIR 1958 SC 300 (307) = 1958 SCR 1080.

(4) Charge of mala fides against P and enquiry under Rule 7 — Imposition of penalty under Rule 8 not for mala fides but for acts of omission — **Held**, after stating object of representation under Rule 8, that order imposing penalty could not sustain as attention of P was never invited during enquiry to his acts of omission and he was not given any opportunity under Rule 8 — Rules 7 and 8 were similar to what was provided in Article 311 (2). 1967 Cur LJ 439 (444) (Punj).

(5) Failure to supply allegations of fact resulting in prejudice — Finding on a matter not related to the charge — Enquiry, held, vitiated due to non-compliance of Rule 16, Rajasthan Civil Services (C. C. & A.) Rules 1950. 1967 Raj LW 266 (270) = 1969 Lab IC 330 = (1968) 1 Lab LJ 475.

(6-7) Detailed charge sheet with all particulars furnished to delinquent — Reply submitted without objection — Such a finding of fact cannot be set aside at appellate stage — The mere omission to follow Rule 7 (2) of the Punjab Civil Services (Punishment and Appeal) Rules, 1952 held could not be deemed enough to offend Article 311 (2). (1963) 65 Punj LR 945 (949).

(8) Enquiry against Government servant — Order of removal from service — Finding based on matters outside scope of charge-sheet — **Held**, no reasonable opportunity was afforded and hence order was liable to be quashed. 1965 Cur LJ 289 = 67 Punj LR 513 (516).

(9) Where there must be something against an officer to warrant his dismissal, an officer cannot be lawfully dismissed without first telling him what is alleged against him and hearing his defence or explanation. AIR 1968 SC 292 (298) = (1968) 1 SCR 434.

68. Charges not to be vague. — (1) Where the charges against the civil servant are too vague to enable him to make his representation with regard to them, the opportunity given to him to show cause against the proposed action will not be a reasonable one. AIR 1956 Cal 662 (665) ** AIR 1956 Mad 220 (224) ** AIR 1954 Assam 18 (22) = ILR (1954) 6 Assam 107 = 1954 Cri LJ 31 (DB) ** AIR 1963 Tripura 20 (28).

(2) Departmental inquiry — Charges must be definite. AIR 1961 Tripura 1 (2).

(3) Where the charge and statement of facts accompanying the charge-sheet formed part of single document on the basis of which proceedings are started against delinquent merely because the ground of reprehensible conduct was not included in the charge sheet, the enquiry could not be held vitiated. AIR 1963 SC 1723 (1728).

(4) The mere charge that the civil servant work was unsatisfactory is not enough as it does not give him a sufficient idea as to what he has to meet. AIR 1953 Nag 138 (141) = ILR (1953) Nag 522 (DB).

(5) A plea that the charges were too vague to enable the civil servant to offer any explanation in regard to them cannot be met by the contention that the findings of the enquiring body cannot be questioned in a court of law. AIR 1956 Mad 220 (225).

(6) 'Reasonable opportunity' presupposes that charges must be clear and sufficiently detailed. (1966) 79 Mad LW 428 (431, 432) = ILR (1965) 2 Mad 508.

(7) It is not necessary to mention in the charge particulars of the statements made by witnesses on which the charge was based. AIR 1956 Sau 14 (16, 17) (DB).

(8) In disciplinary proceedings against the servants of Local Bodies, no inflexible rule can be laid down that in every case, the charge must state the evidence in support of the charge. AIR 1969 All 11 (13) = 1969 Lab IC 1.

(9) Departmental enquiry — Charge memo asking delinquent to answer not the allegations constituting the charge but punishment of dismissal that may follow on proof of said allegations — **Held**, charge-memo was vitiated. (1967) 2 An WR 121 (129) = (1967) 2 Andh LT 198.

(10) Where it is clear from the order of dismissal itself that the past record of delinquent was not taken into consideration either delinquent could not take objection that the charge-sheet did not contain allegation that his past record was undesirable and that he was not

Articles 310 & 311 — Note 68 (contd.)
given an opportunity to explain it. 1959
MPLJ 534 (537) = 1960 Jab LJ 181.

(11) Proposed punishment mainly based on previous record of the Government servant — Second notice to Government servant must disclose this. AIR 1964 SC 506 (509, 510) = 1963 Cur LJ (SC) 166 = (1964) 1 SCWR 7 = (1964) 1 SCA 305.

(12) A charge-sheet is an accusation based on allegations which may be integral part of the charge-sheet or charge-sheet may refer to statement of allegations to be found in separate document. (1965) 10 Fac LR 8 (11) = (1966) 1 Lab LJ 190 (Cal).

(13) Statement of fact accompanying charge-sheet — Both form a single document — Ground of reprehensible conduct mentioned in statement of facts but not included in charge-sheet — Enquiry held not vitiated. AIR 1963 SC 1723 (1726, 1727, 1728) = (1964) 3 SCR 25.

(14) Railway servant charge-sheeted for misconduct — But penalised for negligence coupled with violation of rules — Held, as conduct of servant did not amount to misconduct, charge-sheet must be treated as vague and penal order must be quashed. (1965) 10 Fac LR 263 (Cal).

(15) Reversion from officiating post on the ground of unsatisfactory conduct — Details of unsatisfactory conduct not specified and explanation from public servant not sought — Order offends Article 311 (2). AIR 1964 SC 423 (430, 431).

(16) Procedure — Reversion of probationer to substantive post for unsatisfactory work — Notice to show cause not mentioning instances of adverse entries — Rule 55 (3) of Civil Services (Classification, Control and Appeal) Rules was not complied with — Order terminating services quashed. AIR 1959 All 437 (439).

(17) Departmental enquiry — Charge that servant abused his officer — In charge of abuse exact words used are material and hence copy of original complaint of Officer must be supplied to servant. 1968 Lab IC 584 (586) (Cal).

(18) Where stopping of work would amount to a strike if done under certain circumstances the charge-sheet must mention the evidence on which the department wishes to rely to show that the stopping of work amounted to a strike. AIR 1959 All 614 (617, 618) = 1957 All LJ 480.

(19) Charges not to be too vague — Government servant repeatedly extending leave even after refusal of such leave and being asked to resume duty — Such employee dismissed from service — Charge-sheet given to such employee giving all details of refusal of leave and stating that he deliberately defied orders — In such cases, substance of accusation and not the mere words used is to be seen. 1968 Cur LJ 968 (982) (DB) (Punj).

(20) Reasonable opportunity of showing cause — Charges against railway servant being very vague — Held, he was deprived of reasonable opportunity of his defence. AIR 1962 Raj 265 (271, 272) ** 1962 Raj LW 246 (DB).

(21) Vague charge — Charge that Government servant had done some act 'with ulterior motive' not sufficient. AIR 1960 All 543 (544) (DB).

(22) The civil servant has a right to be informed of the charge or charges levelled against him and must be given a reasonable opportunity, and it cannot be said that the petitioner had suffered any prejudice by reason of the cancellation of the original charge-sheet and the issue of a fresh one. AIR 1959 Andh Pra 618 (619) = 1959 Andh LT 135 (DB).

(23) Service Rules — Hyderabad Civil Services (Classification, Control and Appeal) Rules (1955), Rule 22 — Departmental enquiry under — Procedural instruction in Appendix I — Instruction No. 2 — Mention of proposed punishment in charge-sheet not necessary. (1960) 2 Lab LJ 165 (167) (DB) (Andh Pra).

(24) All charges read over and explained to the railway servant by the Enquiry Officer and he being informed that one of the charges was dropped — Fact that a fresh list of charges had not been given to the petitioner at the time of the commencement of the inquiry was hardly sufficient to vitiate the inquiry which was held against the petitioner. AIR 1962 Raj 265 (268) = 1962 Raj LW 246.

69. Notice to specify particular punishment to be awarded and grounds thereof. — (1) An opportunity of showing cause against the proposed punishment can be given only after the action proposed has been tentatively decided upon. AIR 1961 All 122 (124, 125) = 1960 All LJ 762. (AIR 1948 PC 121 and AIR 1958 SC 300 and AIR 1953 Trav-Co 130 (FB) Rel. on.)

(2) The Government servant must be given an opportunity to make his representations as to why the proposed punishment should not be inflicted on him. AIR 1958 SC 300 (307) = 1958 SCR 1080.

(3) Notice to a civil servant under Article 311, Cl. (2) to show cause why he should not be punished is not enough unless the notice specifies the proposed punishment. 1957 MPLJ 469 (478) (DB) (Nag).

(4) Reasonable opportunity to show cause against proposed punishment — Notice regarding proposed punishment on basis of alleged six charges — Guilt only under one charge established — No fresh notice regarding proposed punishment — Punishment inflicted on basis of notice already issued cannot be sustained. AIR 1963 Ker 151 (152) = 1962 Ker LJ 1302 = (1963) 1 Lab LJ 359 (DB).

Articles 310 & 311 — Note 69 (contd.)

(5) Madhya Bharat Panchayat Rules (1951). Rule 145 — Compliance — Order of removal mentioning several grounds — Authority guided by only one ground — **Held** mention of other grounds is immaterial. AIR 1962 Madh Pra 50 (55) = 1961 MPLJ 1465 (DB).

(6) Acts of misconduct charged in earlier proceedings dropped and Government servant reinstated unconditionally — Subsequent charge not including those acts of misconduct — Dismissing authority cannot take into consideration those acts in determining the punishment. AIR 1960 All 270 (273).

(7) Show-cause notice on certain grounds — Subsequent addition of ground — Dismissal on former grounds — Addition of ground will not invalidate dismissal. AIR 1960 Madh Pra 80 (81) = (1960) 1 Lab LJ 333 = 1960 MPLJ 403.

(8) At the initial stage when charges are framed and served upon the delinquent officer, the punishing authority or the inquiring officer should not propose what punishment ultimately he is to be given. That is not the stage when any opinion as to the punishment can either be formed or expressed. Expression of such opinion amounts to prejudging the issue which is likely to create misapprehension in the mind of the delinquent officer. AIR 1969 Andh Pra 234 (235) ** AIR 1961 Cal 626 (633) = 65 Cal WN 607 (DB). (**Overruled** on another point in AIR 1966 SC 951.)

(9) First show cause notice framing charges as well as proposed punishment is invalid — Even if authority issues another notice, requiring show cause against the proposed punishment invalidity is not cured. 1968 Lab IC 735 (738, 739, 741) = 1968 Serv LR 625 (Cal).

(10) The mention of punishment in the charge would not by itself indicate any prejudice on the part of the enquiry officer much less on the punishing authority. The enquiry would not be vitiated by a memorandum accompanying the charge calling upon the delinquent to show cause why he should not be punished. (1966) 79 Mad LW 422 (423, 425) = ILR (1966) 1 Mad 365 (DB).

(11) Second notice — Absence of express statement that the dismissing authority has accepted findings of enquiry officer — Officer cannot complain denial of opportunity where the dismissing authority has purported to issue the notice after accepting the enquiry report in its entirety and has also enclosed a copy of the report with the notice. AIR 1963 SC 1612 (1615, 1616, 1618) = (1964) 2 SCR 1. (AIR 1962 Assam 88, **Reversed**; AIR 1957 Orissa 184 and AIR 1960 Orissa 37, **Overruled**; AIR 1957 Andh Pra 370, Criticised.)

(12) It is when definite conclusions have been come to as to the charges and

a provisional decision is taken as to the punishment to be imposed that the show cause notice is given to him to explain why the proposed punishment should not be imposed on him. 1966 Ker LT 180 (187, 188) = 1965 Ker LJ 687 (DB).

(13) The failure to state in the notice to show cause against the proposed action, that the Government have accepted the findings of the Disciplinary Proceedings Tribunal and have arrived at the provisional conclusion in regard to the penalty to be imposed does not amount to an infraction of the provisions of R. 8 (b). AIR 1960 Andh Pra 15 (16) = (1959) 1 Lab LJ 560 (DB).

(14) Where the punishment ultimately imposed is more severe than the one which was mentioned in the notice as the proposed punishment, the notice will not be according to Article 311, Cl. (2). AIR 1955 Orissa 33 (35) = ILR (1955) Cut 53 (DB).

(15) Where the original charges themselves were sufficiently serious to justify the dismissal of the civil servant on the proof of the charges and the authority has proposed to dismiss him on those charges, the failure to give fresh notice in regard to the additional charges will not invalidate the order of dismissal. AIR 1956 Pat 228 (232) (DB).

(16) Show Cause Notice need not specify separate punishments for separate charges. AIR 1963 Madh Pra 115 (120) = 1963 MPLJ 139 (DB).

(17) Dismissing authority differing from findings in enquiry report either wholly or in part — Statement as to the provisional conclusions reached by the dismissing authority in the second notice is necessary. AIR 1963 SC 1612 (1615, 1616, 1618). (From the fact that enquiry report had suggested punishment of withholding of three increments while in show cause notice, action proposed was removal from service, it cannot be inferred that dismissing authority did not accept findings recorded by enquiring officer in favour of delinquent. AIR 1962 Assam 88, **Reversed**; AIR 1957 Orissa 184 and AIR 1960 Orissa 37, **Overruled**.)

(18) In issuing the second notice the dismissing authority has to come to a tentative or provisional conclusion about the guilt of the officer as well as about the punishment. AIR 1963 SC 1612 (1614, 1615).

(19) When the civil servant concerned receives a notice to show cause under Article 311 (2), he is entitled to challenge the correctness and propriety of the findings reached by the officer competent to punish him and of issuing a notice to show cause against the action proposed to be taken against him. AIR 1963 Madh Pra 115 (118, 119, 120) = 1963 MPLJ 139 (DB).

(20) In cases which involve one of the punishments mentioned in Article 311

Articles 310 & 311 — Note 69 (contd.)

(2), it is not open to the enquiring or the punishing authority to waive the enquiry under Rule 17 (i) (b) of the Civil Service, Classification, Control and Appeal Rules. Where the show cause notice does not clearly indicate the nature of the punishment proposed it is a serious defect and constitutes violation of principles of natural justice. AIR 1965 Mad 155 (156, 157) = (1964) 1 MLJ 397.

(21) Government servant cannot claim that notice to show cause against the action proposed to be taken against him should have been issued after the expression of opinion by the Public Service Commission and not before. AIR 1960 Mad 393 (393, 394) = (1961) 1 MLJ 46 (DB).

(22) C. P. and Berar Home Guards Act (XV of 1947) — C. P. and Berar Home Guards Rules (1947), Rule 12 (6) — Procedure— Enquiry Officer holding charges proved but upon certain extenuating circumstances recommending lenient punishment — Government agreeing with finding but not with recommendation— **Held**, notice to show cause against proposed punishment not necessary — Recommendation by Enquiry Officer for award of light punishment not binding on the Government. AIR 1961 Madh Pra 261 (271, 272, 273) = 1961 MPLJ 558 (DB).

(23) Punishment based on gravity of charges proved against the Government servant but was not based mainly on his past record which was also considered — Non-disclosure in the second notice, of past record and intention of punishing authority to take into account such record — Punishment awarded is valid. AIR 1967 Madh Pra 207 (209) = 1966 MPLJ 1111 (DB).

(24) Reasonable opportunity to show cause — Punishment can be based on previous record of servant — Authority, however, must give reasonable opportunity to him to explain adverse remarks in previous record. ILR (1965) Cut 147 (153) = (1965) 7 OJD 136 (DB).

(25) Where in the show cause notice sent to the plaintiff, a D. S. P. before he was dismissed from service, the Government informed the plaintiff that after considering the report of the I. G. P., the inquiry officer, they had found the plaintiff guilty of the charges levelled against him and they had also accepted the recommendation of the I. G. P. that the plaintiff should be dismissed from service, the notice is vitiated. AIR 1963 Guj 244 (249, 250).

(26) Show cause notice as to why petitioner should not be discharged from service — Petitioner showed cause — Orders passed dismissing petitioner from service— Punishment of discharge is lesser than punishment of dismissal — **Held**, provisions of Article are contravened. 1967 BLJR 58 (59) = 15 Fac LR 95 (DB).

(27) Where compulsory retirement amounts to dismissal or removal second opportunity to show cause against proposed action is imperative and in absence of such notice the order is invalid and ineffective. AIR 1966 Pat 97 (105) = ILR 45 Pat 1019 (DB).

(28) Loss of seniority or forfeiture of portion of pay and allowances amounts to reduction— Punishment by such reduction contemplated by Government — Second notice is necessary. AIR 1962 Orissa 140 (140, 141) = (1962) 4 Orissa JD 74 (DB).

(29) The competent authority should consider the explanation of the employee and after a clear finding of the guilt and tentatively deciding upon the proposed punishment, should issue the second notice. Discharge order without prior to issue of such notice was invalid. (1963) 2 East LR 18 (20) (DB) (Orissa).

(30) Where the notice to show cause reveals that the competent authority has accepted the findings of the Enquiring Officer it is unnecessary for him to deal with the matter once again and indicate the reasons for the findings. It is not necessary for him to discuss the evidence afresh and to indicate his own reasons for the proposed punishment in the show cause notice. (1962) 2 Lab LJ 586 = ILR (1964) Andh Pra 464 (473, 474) (DB).

(31) Where the petitioner had submitted an explanation questioning the findings arrived at by the Tribunal and also the punishment proposed to be inflicted on him it was held as regards the notice served by the Government that there was no defect in the notice and that it gave him the reasonable opportunity contemplated by Art. 311. (1957) 2 Andh WR 425 (429, 430) (DB).

(32) If the enquiring authority thinks it proper, he can suggest punishment, specially when charge sheet makes a reference thereto. (1963) 67 Cal WN 859 (DB).

70. Enhancement of punishment by higher authority. — (1) Appellate authority can pass dismissal order in place of reversion passed by original authority — But before doing so it must give fresh notice that it proposed to inflict higher penalty. AIR 1962 Pat 276 (279) = 1962 BLJR 453 (DB).

(2) Decision of Government to revert the delinquent employee — Government later reopening the question and deciding to dismiss him — They have no power to do so. AIR 1963 SC 395 (397).

(3) Police head-constable reduced to rank of constable by order of Deputy Inspector-General of Police — Inspector-General of Police enhancing punishment to one of removal in appeal — Order is without jurisdiction. AIR 1960 Raj 56 (58) = 1959 Raj LW 523 (DB).

(4) Rajasthan Police Regulation (1948), Rule 100 was superseded on relevant date by Rajasthan Civil Services (Classifica-

Articles 310 & 311 — Note 70 (contd.)

tion, Control and Appeal) Rules, 1950 — These Rules have no provision for enhancement of punishment awarded to ministerial officer — I. G. of Police cannot enhance punishment awarded by D. I. G. AIR 1958 Raj 284 (285) = 1959 Raj LW 641 (DB).

(5) Enhancement of punishment by varying or modifying earlier order — Article 311 (2) must be complied with. AIR 1968 Andh Pra 153 (155 & 156) = (1967) 2 Andh WR 219.

(6) Enhancement of punishment made in exercise of revisional jurisdiction does not amount to a second punishment. AIR 1960 Bom 225 (230) = 61 Bom LR 1625.

(7) I. G. of Police could impose higher punishment only when the authority imposing the minor punishment has not got the powers to impose the major punishment. AIR 1958 Raj 284 (285) = 1959 Raj LW 641 (DB).

(8) Punjab Civil Service (Punishment and Appeal) Rules (1952), Rule 14 — Penalty inflicted upon public servant by subordinate authority — Government or head of department has power under Rule 14 to enhance it, after giving the public servant opportunity to be heard against it. AIR 1966 Punj 175 (178) = ILR (1965) 1 Punj 651.

71. Additional charges and amendment of charges.— (1) Where additional charges are framed after a prior notice to show cause, a fresh notice to show cause with respect to the additional charges should be given. AIR 1956 Pat 228 (232) (DB).

(2) Tribunal can amend or alter charge. AIR 1965 Orissa 183 (186) (DB).

(3) Power of enquiry officer to frame fresh charges — No bar to such power. AIR 1960 Punj 147 (149) = 62 Punj LR 102.

72. Powers of revising authority.— (1) Where a superior disciplinary authority in exercise of revisional power proposes to impose a penalty higher than the one originally imposed, it is at liberty to propose one of the more severe penalties but only tentatively and must keep an open mind, until consideration of the cause shown by delinquent against proposed penalty, whether or not to impose that penalty or any other major penalty. (1962) 66 Cal WN 54 (62) = 1962 (2) Cri LJ 529 = (1961) 3 Fac LR 274.

73. Bias and want of bona fides — See also Note 75 (d).— (1) If there are good reasons to think that the mind of tribunal or authority was prejudiced against person whose conduct was subject to scrutiny, by reason of something preceding it, then the tribunal's finding should not be allowed to stand. 1962 (2) Cri LJ 529 (531 to 533) = 66 Cal WN 54 (58, 60).

(2) Indication of punishment in charge memo by enquiry officer — Amounts to prejudging the case — Whole proceedings are vitiated. (1967) 2 Andh WR 253 (257) = 1968 Serv LR 77 (DB).

(3) All the stages of enquiry against a Government servant, are quasi-judicial in character and the delinquent officer is entitled to unbiassed enquiry at both stages. ILR (1965) 1 Mad 487 (493) (DB).

(4) Punishment indicated even in charge framed — Not sufficient to indicate any bias in the disciplinary authority. AIR 1963 Manipur 28 (32, 33).

(4-A) Mere delay, though of a long period, between suspension and dismissal, is not sufficient to impute mala fides. AIR 1970 Delhi 52 (55) (DB).

(5) Where the enquiring officer only appraises the evidence and submits his conclusions along with the record of enquiry to the authority competent to impose the punishment, there is no decision which is reached by the enquiring authority which can be challenged as being tainted by bias or for other like reasons. ILR (1965) 1 Mad 487 (495) (DB).

(6) Representation by the petitioner officer addressed to Chief Minister, Punjab — President's rule in Punjab when office notes were put up before Secretary of the Department — Representation ordered to be filed by Secretary — It cannot be said that Secretary had mala fide intention in withholding representation from the Chief Minister. AIR 1970 Punj 112 (125) = ILR (1969) 2 Punj 304 (FB).

74. Reasonable opportunity, what amounts to — General.— (1) The tests to be applied to find out whether a departmental enquiry was conducted in accordance with the principles of natural justice and whether the delinquent had reasonable opportunity or not are as follows: (i) Whether an opportunity to deny the guilt and establish his innocence had been given by framing definite charges and by disclosing the allegations on which the charges were based. (ii) Whether opportunity to defend himself by cross-examining the witnesses produced against him and examined in his presence and to examine himself or any other witnesses in support of his defence was given; (iii) Whether no materials had been relied on against the delinquent in the enquiry without his being given an opportunity to explain the same; (iv) Whether opportunity to make his representation as to why the proposed punishment should not be inflicted upon him had been given. 1968 Lab IC 1268 (1270) (Tripura) ** 1967 Raj LW 24 (27) = ILR (1966) 16 Raj 740 (DB) ** AIR 1963 Tripura 20

Articles 310 & 311 — Note 74 (contd.)
(26, 27, 28) ** AIR 1960 Pat 116 (123) (DB).

(2) What is reasonable opportunity has not been defined in the Constitution or the General Clauses Act. But the words have acquired a legal meaning and it cannot be left to the vagaries of each individual. The word 'reasonable' must therefore mean according to rules of natural justice which are rules of law. AIR 1958 All 532 (539, 540) = ILR (1958) 1 All 577.

(3) The essential element of reasonable opportunity is that the petitioner must know the precise charge against him and the evidence on which it is based. AIR 1960 All 323 (330).

(4) It is only when an action of the type, namely, dismissal or removal or reduction in rank is proposed that there should be an opportunity. This opportunity should be a reasonable one and therefore, the opportunity to show cause should cover both the points, namely, the question of guilt and the nature of punishment. A reasonable opportunity contemplated by Article 311 of the Constitution must refer to the opportunity to show cause against the truth of the charges framed and the opportunity must also cover the question of the nature of punishment. AIR 1963 Guj 244 (247, 248).

(5) All enquiries, judicial, departmental or other, into the conduct of individuals must conform to certain standards. (1959) 2 Mad LJ 15 (24, 25) = 1959 MLJ (Crl) 433.

(6) That the opportunity to show cause must be reasonable implies that the finding arrived at in the enquiry against the public servant and on which action is taken against him is a bona fide one and it is open to examination by the Court to see whether it is such that it could possibly be reached by any reasonable person. AIR 1956 Mad 220 (225) ** AIR 1956 Pepsu 19 (26).

(7) What Clause (2) of Article 311 stipulates is "a reasonable opportunity of making representation on the penalty proposed". Such an opportunity should naturally permit not only a representation that penalty proposed is excessive in quantum or character but also a representation that he is innocent of charge and that the penalty proposed should not hence be imposed at all. AIR 1969 Ker 244 (245, 246) = 1969 Lab IC 1110 = 1968 Ker LJ 718 (FB). (1964 Ker LT 180, Overruled.)

(8) Question of reasonable opportunity to show cause is dependent on peculiar facts of each case. What is reasonable is not necessarily what is best but, what is fairly appropriate under all circumstances of case. AIR 1969 Delhi 145 (147) = 1969 Lab IC 539 (DB) ** AIR 1956 Punj

58 (62) = ILR (1956) Punj 236 (DB) ** AIR 1954 Bom 351 (355) = 56 Bom LR 172 (DB). (Impliedly Overruled on another point in AIR 1963 SC 375.)

(9) What constitutes a 'reasonable opportunity' will generally depend on the facts and circumstances of each case. AIR 1959 Madh Pra 322 (327) = 1959 MPLJ 623 (DB) ** AIR 1945 FC 47 (58) = 1945 FCR 103 = ILR (1945) Kar (FC) 101 ** AIR 1958 Raj 1 (6) (DB) ** AIR 1957 All 274 (275) (DB) ** AIR 1957 Andh Pra 414 (417) = ILR (1957) Andh Pra 402 (DB) ** AIR 1957 Andh Pra 197 (200) (DB) ** ILR (1957) Andh Pra 715 (738) ** AIR 1969 All 11 (14) = 1969 Lab IC 1 ** AIR 1958 All 532 (537, 538) = ILR (1958) 1 All 577.

(10) Where orders were made against a person, it becomes duty of the authority to hear judicially that is to say, in an objective manner impartially and after giving reasonable opportunity to parties concerned in dispute, to place their respective cases before it passing an order which affects a person. without giving him an opportunity of being heard would be held to be vitiated as being contrary to principles of natural justice. 1969 Lab IC 712 (716) = (1968) 1 Andh WR 86 (DB).

(11) If the safeguards provided by Article 311 are not to be rendered illusory, the words 'reasonable opportunity' must be deemed to mean 'a real and adequate opportunity which is not merely nominal or a sham one.' AIR 1958 Punj 327 (329, 330) = 59 Punj LR 532 (DB). (Delinquent asked to defend himself before person who is already biased against him — Order of dismissal quashed.)

(12) Where reasonable opportunity has been given the failure to give "reasonable facilities" is not a ground of complaint. AIR 1955 Pat 305 (315) = ILR 34 Pat 625 (DB).

(13-14) Reversion on ground of antecedents and unsatisfactory character — Confidential information — Exclusion from service on ground of antecedents and unsatisfactory character may affect his reputation and make him ineligible for future employment — This entitles the civil servant to opportunity to defend himself. AIR 1965 Ker 149 (152) = 1964 Ker LT 1066.

(15) Order of removal from service which denied to non-applicant reasonable opportunity of defending himself in disregard of protection afforded by Article 311 (2), was a nullity and non-existent in eye of law. (1968) Jab LJ 1036 (1039).

(16) It is not for the delinquent Government servant to dictate the manner in which an enquiry shall be held in respect of his misbehaviour. He cannot even claim an enquiry as of right. All that he is entitled to under Art. 311 (2) of the Constitution is

Articles 310 & 311 — Note 74 (contd.)

to have a notice of the charges levelled against him with opportunity to submit his explanation thereto and a further notice of the punishment that is proposed to be inflicted on him with a like opportunity to submit whatever he has to say in answer thereto. AIR 1962 Ker 43 (47) = (1961) 2 Lab LJ 50 = 1961 Ker LT 486 (DB).

(17) In the context of Article 311 (1) of the Constitution which forbids removal of a civil servant from service by way of punishment 'by an authority subordinate to that by which he was appointed' it is reasonable to construe the provision in paragraph 1 of Rule 17 (2), Kerala Rules, as implying that it is the same authority that can initiate and pursue the steps enjoined by it. Article 311 (2) does not purport to define what is reasonable opportunity; it does not leave it to be defined by rules either. What reasonable opportunity means, has therefore, to be determined by the Court. It means reasonable according to the rules of natural justice which are rules of law. AIR 1960 Ker 279 (280 to 284) = 1960 Ker LT 222 = 1960 Ker LJ 239 = (1960) 2 Lab LJ 398.

(18) In answer to a second show-cause notice under Article 311 (2), a Government servant is entitled to make his representation both on the merits as well as on the quantum of punishment. In other words he is entitled to show two things viz., (1) that he is not guilty and (2) that the punishment is severer than warranted. AIR 1961 Guj 130 (135, 136, 137) = (1961) 2 Guj LR 331 (DB).

(19) Memo of charge mentioning proposed punishment violates Article 311 (2) — It shows that even before the charges were enquired into and a finding arrived at on the basis of the enquiry the Government servant had been prejudged. AIR 1964 Mad 375 (375, 376) = (1963) 2 Lab LJ 62.

(20) A punishment of suspension for a short period of six months as a result of departmental proceedings is not one of the type of punishments covered by Article 311 and where it is proposed to inflict such a punishment it is unnecessary to issue a second show cause notice to the person proceeded against. AIR 1964 Mad 518 (518) = (1964) 2 MLJ 97.

(21) Question whether sufficient opportunity under Article 311 (2) was given to Government servant before his dismissal is one of fact — Concurrent finding by Courts below that sufficient opportunity was given — Finding is binding on High Court in second appeal. ILR (1961) 2 All 90 (93) (DB).

(22) The question whether reasonable opportunity has or has not been afforded to Government servant must depend on facts of each case. AIR 1960 SC 1302

(1304) = 1969 Lab IC 534 = (1969) 2 SCJ 779.

(23) Departmental Enquiry — Person who had not given evidence at preliminary investigation as witness examined as witness at close of departmental enquiry — Prayer of delinquent for short adjournment for cross-examination of witness refused — Delinquent had not even time to copy out deposition in chief before he had to cross-examine — Held delinquent was not given reasonable opportunity to defend himself. (1963) 6 FLR 26 (34) = (1963) 1 Lab LJ 708 (Cal).

(24) When the Government servant concerned did have the opportunities referred to envisaged in Art. 311 (2) the mere fact that the show cause notice at the second stage mentioned all the three punishments referred to in Art. 311 will not make the notice bad. AIR 1969 SC 538 (539, 540, 541) = 1959 Supp (1) SCR 892 ** AIR 1969 Delhi 145 (149) = 1969 Lab IC 539 (DB) ** AIR 1964 Cal 68 (71, 73) = 68 Cal WN 720 (DB).

(25) The reasonable opportunity contemplated by Article 311 (2) has manifestly to be in accordance with the rules framed under Article 309. AIR 1963 SC 779 (785, 786) = (1963) Supp (1) SCR 648.

(26) In determining the reasonableness of opportunity to show cause against action proposed, court cannot be influenced by considerations which are extraneous to legal issue involved viz. resort to hunger strike and similar extra-legal methods for enforcement of legal rights. AIR 1969 Cal 397 (401, 402) = 1969 Lab IC 1094 = 73 Cal WN 803.

(27) Compliance with Rule 55 of the Civil Services (Classification, Control and Appeal) Rules is necessary. The person proceeded against should have an opportunity of rebutting evidence that is proposed to be used against him. ILR (1957) 9 Assam 223 (242) (DB).

(28) Under Article 310 the tenure of an employee under State Government is at the pleasure of the Governor. This pleasure being restricted by the provisions of Article 311 of the Constitution, an order of dismissal can only be set aside on the ground that the provisions of Art. 311 (2) have been violated. AIR 1962 Assam 17 (18) (DB).

(29) The protection granted to the petitioner under Article 311 of the Constitution is confined to an opportunity being given to him to disprove the charges and establish his innocence. AIR 1960 Assam 141 (143, 147, 148) (DB).

(30) Dismissal order passed without giving reasonable opportunity to dismissed teacher to defend himself — Order is against the principles of natural justice and invalid and therefore, liable to be quashed under Articles 226 and 227. 1968 Lab IC 80 (81) = 33 Cut LT 171 (DB).

(31) Restrictions in regard to the right of representation as provided in Clause 5

Articles 310 & 311 — Note 74 (contd.) of the Rule 11 of the Civil Services (Classification, Control and Appeal) Rules are not unreasonable and do not amount to a denial of fair and reasonable opportunity to the delinquent Government servant to defend himself. A Government servant is in a responsible and privileged position. The opportunity that can be afforded to him to explain the charges against him need not be identical with that which is allowed to an ordinary accused. It is sufficient if the opportunity is a reasonable opportunity: (1964) 1 Mys LJ 333 = (1964) 9 FLR 98 (DB).

(32) The expression giving reasonable opportunity means opportunity, the vital elements of which are timely notice and full opportunity to the person concerned, to present all the evidence and arguments which he deems important for the purpose of his case. The enquiry officer must conduct the hearing with open-mindedness, fairness and impartiality and must approach the hearing without bias and without prejudgment of the issues. AIR 1958 Punj 402 (412, 413) = 61 Punj LR 167 (DB).

(33) A Government servant cannot claim a right to be associated with the investigation which culminates in the enquiry against him either under any statute or rules or even under the principles of natural justice. (1965) 67 Punj LR 763 (766).

74 (a). Two opportunities.— (1) There must be two enquiries or opportunities, the one as regards charges and another as regards the punishment. AIR 1955 SC 160 (164) = 1955 SCR 1011 ** AIR 1958 Andh Pra 269 (272) = ILR (1957) Andh Pra 780 (DB) ** AIR 1958 Raj 1 (3) (DB) ** AIR 1957 All 439 (447) (DB) ** AIR 1963 SC 1612 (1614, 1615) = (1964) 2 SCR 1 ** 1957 All LJ 62 (67) = 1956 All WR (HC) 759.

(2) Two opportunities are essential — the first is a matter of natural justice, the second is a constitutional injunction. AIR 1958 Andh Pra 269 (272) = ILR (1957) Andh Pra 780 (DB).

(3) Under Article 311 there are two stages in the proceedings, the first being when the charges are enquired into and at this stage the person required to meet the charges should be given a reasonable opportunity to enter into his defence; and the second stage is when after the enquiring authority has come to the conclusion on the charges and there arises the question of the proper punishment to be awarded. A notice has then again to be given to show cause against the punishment proposed. AIR 1964 Pat 168 (171) ** 1968 BLJR 815 (821, 822) (DB) ** 1959 Andh Pra 497 (503) (DB) ** AIR 1961 J and K 25 (26, 27) (DB).

(4-5) The opportunity under Clause (2) should include opportunity to show cause

not only against the punishment but also against the grounds on which it was proposed to award the punishment. AIR 1958 Andh Pra 240 (251) (DB) ** AIR 1957 Andh Pra 370 (373) = ILR (1957) Andh Pra 26 ** AIR 1956 Bom 483 (489) ** AIR 1956 Pat 228 (232) (DB).

(6) A further opportunity to show cause as contemplated by Article 311 (2) implies that reasons for coming to conclusion about civil servant's guilt must be communicated to him. AIR 1964 Madh Pra 318 (320) = 1964 MPLJ 493 (DB).

(7) Under Section 126 of the State Constitution, the civil servant against whom a departmental enquiry is held is entitled to have an opportunity of showing cause at two stages, once at the enquiry stage against the charges brought against him and again after he is found guilty and punishment is provisionally proposed — against the punishment so proposed upon the finding. AIR 1958 J and K 28 (29) (DB).

(8) Reasonable opportunity as contemplated by Article 311 (2) envisages (a) an opportunity to deny guilt and establish innocence, which the petitioner can only do if he is told what the charges levelled against him are and the allegations on which such charges are based; (b) an opportunity to defend himself by cross-examining the witnesses produced against him and finally (c) an opportunity to make his representation as to why the proposed punishment should not be inflicted on him, which he can only do if the competent authority, after the enquiry is over tentatively proposes to inflict one of the three punishments and communicates the same to the Government servant. AIR 1960 Ker 63 (65, 66) = 1959 Ker LT 961 = (1960) 1 Lab LJ 311 ** (1959) 2 Lab LJ 271 (272) (DB) (Andh Pra).

(9) Finding of inquiry officer or summary thereof should be supplied along with show cause notice. AIR 1965 Orissa 81 (84, 85, 86, 87) = (1965) 7 OJD 93 (DB).

(10) Judicial officer in State service — Enquiry started against him by appointing Enquiry Commissioner — Enquiry conducted properly — Show cause notice issued by punishing authority — Officer is not entitled to be heard orally at this stage — This is so even when punishing authority differs in some respects from Enquiry Commissioner. AIR 1963 Ker 92 (98, 99).

(11) Reasonable opportunity should be given to a civil servant to show cause against the charges made against him and that is also a protection afforded to a civil servant under Article 311, though it does not provide in express terms for any notice to show cause against the charges. AIR 1958 All 532 (537) = ILR (1958) 1 All 577.

(12) The opportunity of showing cause contemplated by Art. 311 is the oppor-

Articles 310 & 311 — Note 74 (a) (contd.)
 tunity after the issuing of the show cause notice and it is always open to a Government servant against whom an enquiry has already been held to urge before the dismissing or removing authority that on the basis of the material on the record the proposed punishment should not be awarded to him. AIR 1959 All 47 (49) = 1958 All LJ 280 = 1958 All WR (HC) 429.

(13) Opportunity to show cause against proposed punishment — Mere mention of proposed punishments in charge-sheet not sufficient — Second opportunity to show cause against proposed punishment must be given when Authority decides to punish delinquent officer after considering enquiry report. AIR 1965 All 492 (493, 494) = (1968) 1 Lab LJ 427.

(14) If reasonable opportunity has not been afforded at the first stage, it can be afforded afterwards, before the second stage is entered upon. AIR 1957 Madh Pra 126 (132) ** AIR 1957 Punj 42 (45) = ILR (1957) Punj 198 (DB) ** AIR 1956 Madh B 257 (258) (DB).

(15) The words 'but only on the basis of the evidence adduced during such enquiry' occurring at the end of the amended Cl. (2) of Article 311 leave no doubt that the Government servant is not entitled to adduce fresh or additional evidence at the second stage. At the second stage the Government servant can also urge that the charges levelled against him have not been proved or established and that no penalty of any kind should be imposed on him or that on the findings reached at the enquiry the proposed penalty should not be imposed on him. AIR 1968 Madh Pra 132 (134, 135) = 1968 Lab IC 939 = 1968 MPLJ 14 (DB).

(16) As regards the second notice, namely, the notice to show cause against the proposed punishment under Art. 311, Clause (2), it has been held that the proper authority to give such notice would be the authority competent to dismiss, remove or reduce. AIR 1954 All 487 (489) ** AIR 1953 Trav-Co 130 (139) = ILR (1952) Trav-Co 884 = 1953 Cri LJ 752 (FB) ** AIR 1956 All 151 (152) (DB) ** AIR 1953 Nag 69 (70) = ILR (1952) Nag 955 (DB).

[But see AIR 1955 Assam 171 (174) = ILR (1955) 7 Assam 104 (DB).]

(17) So long as the civil servant has been given a fair opportunity of defending himself any irregularity in the enquiry will not make the order of dismissal, removal or reduction invalid. ILR (1957) Andh Pra 715 (721) (DB) ** AIR 1955 Andhra 168 (171) ** AIR 1955 Pepsu 172 (175) = ILR (1955) Patiala 314 ** AIR 1954 Bom 351 (354, 355) = ILR (1954) Bom 915.

(18) Where second opportunity is afforded to delinquent to establish his innocence under Article 311, defect of men-

tioning penalties in charge-sheet becomes meaningless. 1968 Raj LW 272 (277) = (1969) 1 Lab LJ 382.

(19) When the Government servant concerned did have the reasonable opportunities envisaged in Article 311 (2) the fact that the show cause notice at the second stage mentions all the three punishments referred to in Article 311 will not make the notice bad. AIR 1959 SC 536 (542).

(20) Article 311 (2) has been incorporated in Rule 8 of Punjab Civil Services (Punishment and Appeal) Rules 1952 — The 'adequate opportunity of making any representation' envisaged by Rule 8 has to be a real opportunity to represent against the alleged guilt of the official as well as against the quantum of punishment proposed if any such proposal has been made in the show cause notice. 1967 Cur LJ 439 (444) (Punj).

(21) After the opportunity under Article 311, Clause (2) has once been given, a further opportunity need not be given to the civil servant after the opinion of the Public Service Commission has been received under Article 320, Cl. (3) and the Government finally decides on the punishment to be awarded. (1956) 2 Mad LJ 145 (147).

(22) The impression that Article 311 particularly as it stood before its amendments required that every disciplinary proceeding must consist of two inquiries one before issuing the show cause notice to be followed by another inquiry thereafter, is not correct. Such is not the requirement of the principles of natural justice. AIR 1969 SC 198 (204) = (1969) 1 SCJ 543.

(23-24) It is the duty of the authority empowered to dismiss or remove the delinquent civil servant to come to a conclusion as to the particular penalty he proposes to inflict on the servant and to call upon him to show cause against that particular penalty.

However, there is nothing in Article 311 (2) stating that the show cause notice should specify the particular penalty. AIR 1959 Tripura 51 (54, 56).

(25) It will have to be seen whether the enquiry at both the stages has been conducted substantially according to the principles of natural justice and whether the civil servant concerned has been given a fair opportunity to present his case to the competent authority and convince him about its justice. AIR 1956 Cal 278 (279) ** AIR 1957 Andh Pra 794 (823) = ILR (1957) Andh Pra 80 (DB) ** AIR 1957 Andh Pra 414 (417) = ILR (1957) Andh Pra 402 ** AIR 1957 Orissa 184 (187) = ILR (1957) Cut 258 (DB).

(26) If departmental enquiry had been duly held under the Service Rules the process need not be repeated again after the punishment to be awarded has been provisionally determined upon. AIR 1957

Articles 310 & 311 — Note 74 (a) (contd.)
 All 767 (770) (DB) ** AIR 1957 All 634
 (635, 636) ** AIR 1957 All 439 (447)
 (DB) ** AIR 1957 All 274 (275) (DB).

(27) Where by the same order in which findings as to the charges were given and punishment was imposed, held that there was no compliance with the provisions of sub-section (3) of the said section. ILR (1966) 1 Mad 206 (221, 222).

(28-29) Reasonable opportunity to show cause against proposed action — Opportunity to show cause against charges levelled given and availed of by Government servant — Second notice to show cause against proposed punishment — Government servant not entitled to challenge finding of competent authority on evidence in the case. AIR 1963 Bom 269 (271, 272) = 65 Bom LR 444.

(30) Government servant has right to plead his innocence, at the hearing of show cause notice against proposed punishments. 1965 Ker LT 554 (559, 560) = ILR (1965) 1 Ker 536 ** AIR 1963 SC 1612 (1615) ** AIR 1960 All 323 (330).

(31) The Departmental Enquiry under the Police Rules nor the provisions about reasonable opportunity in Article 311 (2) contemplate two proceedings. (1965) 2 Lab LJ 645 (652) = (1966) 7 Guj LR 56 (DB).

(32) Show-cause notice issued by officer not authorised to do so — Subsequent show-cause notice against punishment of dismissal issued by authorised officer — Full opportunity given to petitioner to put forward his defence — No illegality. AIR 1969 Delhi 145 (149) = 1969 Lab IC 539 (DB).

(33-34) Civil Servant — Termination of service — Reasonable opportunity of showing cause against action proposed to be taken in regard to him is condition precedent. AIR 1954 Mad 1155 (1158) = (1954) 2 MLJ 254 (DB). (Reversed on another point in AIR 1955 SC 817.)

(35) Previous record of public servant taken into account in giving punishment — Further opportunity essential. AIR 1967 Pat 184 (185) = 1966 BLJR 732 (DB).

(36) Departmental enquiry — Charges admitted — Second notice of proposed punishment has to be given, otherwise entire proceedings would be vitiated. AIR 1961 Tripura 1 (3).

(37) Two opportunities to show cause not given — Order of discharge from service vitiated. AIR 1966 J and K 73 (74, 75) = 1966 Kash LJ 142.

(38) Held on facts that having consulted the Tribunal once again and having accepted its conclusion, the Government should at that stage, call upon the officer to show cause against the punishment, because it was only then that they could be said to have come to definite conclusions on the charges and the actual

punishment to allow that provisionally determined. (1959) 2 Lab LJ 569 (574, 575) (DB) (Andh Pra).

(39) Punishment to Government servant — Reasons need not be given whenever the Government agrees with enquiring Tribunal. AIR 1966 SC 1827 (1831) ** (1959) Lab LJ 569 (574) (DB) (Andh Pra).

(40) Madras Civil Service (Disciplinary Proceedings Tribunal) Rules (1955), R. 9 — Disciplinary proceeding against delinquent officer — Government seeking advice of Tribunal — It need not inform officer before doing so. (1959) Lab LJ 569 (574) (DB) (Andh Pra).

(41) Combined notice to show cause against charge as well as against proposed punishment — Not valid — Punishment not operative. AIR 1961 Cal 626 (633) = 65 Cal WN 607 (DB). (Overruled on another point in AIR 1966 SC 951.)

(42) Charge-sheet calling upon railway servant to show cause against punishment and also granting oral enquiry, if desired by him did not amount to prejudging of the issue and oral enquiry could not be termed as mere farce. 1965 Ker LT 554 (557) = ILR (1965) 1 Ker 536.

(43) Employee asked in charge-sheet itself to show cause why he should not be punished — Enquiry not tainted with bad faith. AIR 1967 Cal 29 (30) = (1969) 1 Lab LJ 300.

(44) The law both in England and India today is that, except in extreme cases where statute itself bars incursion of natural justice by express provision to that effect or by laying down that office must be held at pleasure, opportunity must be given to employee before order of dismissal. (1966) 70 Cal WN 786 (803) = (1968) 1 Lab LJ 314.

(45) A plea of innocence and the consequent prayer that no penalty should be imposed at all is open to a Government servant in showing cause against the penalty proposed under Article 311 (2). 1968 Ker LT 718 (721) (FB).

(46) Issue of notice under Article 311 (2) to petitioner to show cause against action proposed — Petitioner not allowed to challenge findings of enquiry officer but asked only to show cause against proposed punishment — Provisions held not followed. AIR 1958 Madh Pra 326 (329, 330) = (1959) 1 Lab LJ 41 = 1959 MPLJ 128.

(47) It is only in cases where the quantum of punishment is determined not on gravity of charges proved but mainly on past record, that it is incumbent on punishing authority to give to the Government servant at the second stage a reasonable opportunity to show cause against proposed punishment by disclosing in the notice the past record and intimating the Government servant that it would be taken into consideration in determining

Articles 310 & 311 — Note 74 (a) (contd.)
the punishment to be awarded. AIR 1967 Madh Pra 207 (209) = 1966 MPJL 1111 (DB).

(48) Where the dismissing authority differs wholly or partially from the findings in the enquiry report in respect of the charges against a Government servant, such authority should state its provisional conclusions on the charges in the notice issued to the Government servant proposing punishments so that the Government servant may have reasonable opportunity to show cause against those conclusions. (1966) 7 Guj LR 897 (913) (DB).

(49) Civil servant — Removal from service for failure to report on duty — Two opportunities guaranteed under Article 311 (2) not given — Order could not be sustained. AIR 1962 Mys 84 (85) = 39 Mys LJ 1066 (DB).

(50) Modification of standing order requiring the giving of second show cause notice at stage of imposing punishment of removal cannot be considered as fair or reasonable and should be set aside under Article 136. AIR 1969 SC 513 (523).

(51) If there was an enquiry either under Rule 55 of the Classification Rules, or under any analogous rule such as Rule 7 (1) and (2) of the Disciplinary Proceedings (Administrative Tribunal) Rules, the delinquent Government servant is not entitled to a second opportunity to defend himself after the notice under Article 311 (2) is served on him. AIR 1960 Orissa 68 (72) = (1959) 1 OJD 157 (DB). (ILR (1956) Cut 305, **Disting; Reversed** on another point in AIR 1963 SC 779.)

74 (b). Right to copy of findings of enquiry and other documents. — (1) Non-supply of copy of enquiry report amounts to denial of reasonable opportunity. AIR 1969 SC 1302 (1303) = 1969 Lab IC 534 = (1969) 2 SCJ 779 ** (1969) 1 SC WR 968 (971) = (1969) 2 SCC 128 ** (1969) 1 SC WR 868 (872) = (1969) 1 SCC 804 ** 1969 Lab IC 1441 (1443) (Goa). (Rule 15 of Central Civil Services (Classification, Control and Appeal) Rules (1965) are mandatory — Removal of delinquent servant from service — Disciplinary authority must supply copy of report of Inquiring authority along with show cause notice.) ** AIR 1967 Punj 344 (345) = 1967 Cur LJ 127 ** (1967) 14 Fac LR 449 (456) (Cal) ** AIR 1963 Bom 137 (142) = 65 Bom LR 54 (DB) ** AIR 1960 Mys 159 (161, 162) = 38 Mys LJ 79 (DB) ** AIR 1959 All 47 (49).

(2) Enquiry Officer relying on report in preliminary enquiry to the prejudice of delinquent without giving copy of it and opportunity to meet allegations contained therein — **Held**, enquiry was vitiated. 1968 Lab IC 1268 (1272) (Tripura).

(3) Departmental enquiry — Preliminary enquiry — Report — Demand of, may be refused. AIR 1960 Madh Pra 178 (179) = 1960 MPLJ 110 (DB).

(4) Omission to supply the delinquent a copy of the findings of the enquiry relating to one of the charges — Fatal to the order of dismissal. 1968 Lab IC 302 (314) = ILR (1967) 1 All 239 (DB).

(5) **Held** on facts that there was transgression of rules and the punishment could not be sustained. One of the steps which should have been taken by the Government before it disagreed with the finding of the Inquiring Authority in which case alone it could impose a punishment on the petitioner was to comply with the requirements of Rule 11 (10) of the Mysore Civil Services (C. C. A.) Rules, as provided in Rule 14-A (1) (f). (1963) (1) Mys LJ 167 (169, 170) (DB).

(6) The supply to the delinquent of a copy of the report of enquiry is not a matter of statutory rule, but is in conformity with rules of natural justice which require that he should be put in a position to defend himself. (1962) 1 Lab LJ 468 = (1961) 3 Fac LR 442 (444) (Cal) ** AIR 1970 Punj 81 (83) = ILR (1968) 1 Punj 368.

(7) Supply of copy of enquiry officer's report at the punishment stage is not essential in every case. (1958) 60 Pun LR 16 (19, 20).

(8) Whether the opportunity afforded to a public servant in a particular case is reasonable must depend upon the circumstances of that case. AIR 1969 All 11 (13) = 1969 Lab IC 1.

(9) The report of a fact-finding Enquiry Committee, preparatory to the issue of a charge-sheet, is not something which has to be disclosed to the delinquent in a departmental proceeding, unless such a report is actually relied on for the purpose of the finding and the report. (1961) (3) Fac LR 344 (345) (Cal).

(10) Failure to supply copy of report made by investigating officer — Charge-sheet containing almost everything stated in report — No prejudice caused to defence of delinquent servant — Plea of failure to afford reasonable opportunity is not tenable. AIR 1969 All 542 (546) = 1969 Lab IC 1318.

(11) Where the civil servant is not supplied with a copy of the findings of the Enquiry Committee, he is not given the opportunity assured to him by Article 311 (2), as he is deprived of a valuable right to submit satisfactory reply to the notice issued against him on the basis of the findings of the Enquiry Committee. AIR 1961 All 338 (341, 342) = 1960 All LJ 727 = (1961) 1 Lab LJ 424 (DB) ** AIR 1967 All 111 (112) = 1966 All LJ 835. (AIR 1957 All 274 held impliedly **overruled** by AIR 1964 SC 364.) ** AIR 1961 All 276 (278) ** AIR 1960 All 543 (544) (DB).

Articles 310 & 311 — Note 74 (b) (contd.)

(12) Departmental enquiry — Section 145 of the Evidence Act — Denial to supply previous statements of witnesses — No adequate opportunity to defend. AIR 1960 Madh Pra 178 (179) 1960 MPLJ 110 (DB) ** AIR 1968 Punj 312 (323, 324) = ILR (1967) 5 Punj 649 = 1968 Lab IC 967 (FB) ** 1967 Cur LJ 401 (406) (Punj) ** (1966) 68 Pun LR 174 (180) ** (1959) 2 Mad LJ 15 (25).

(13) Delinquent charged for receiving illegal gratification — Failure to supply copy of complaint forming basis of departmental enquiry to the delinquent in spite of his request — His dismissal is illegal. AIR 1970 Pat 23 (25) (DB) = 1969 BLJR 405 = 1970 Lab IC 53 (DB) ** 1965 MPLJ 204 (206, 207) = 1965 Jab LJ 465 (DB).

(14) In a disciplinary proceeding, Evidence Act does not apply. Inquiring officer is entitled to receive any relevant fact in evidence, which may not strictly be evidence under Evidence Act. But even then it is not proper for inquiring officer to make local inspection after completion of enquiry so as to collect independent knowledge for finding out for himself which of the two discrepant versions of evidence is correct. (1963) 6 FLR 26 (35) = (1963) 1 Lab LJ 708 (Cal).

(15) Statements of witnesses made at preliminary enquiry preceding departmental enquiry — Delinquent is entitled to copies of such statements, only if those witnesses are examined at the departmental enquiry and only if he asks for such copies. AIR 1967 Madh Pra 215 (216, 217) = 1967 MPLJ 174 (FB) ** AIR 1960 Madh Pra 178 (179) = 1960 MPLJ 110 (DB).

(16) Where adjournment is asked for inspection of deposition of witnesses examined at local inspection, it should be granted. If time is not granted, it can be held that delinquent was not allowed proper and reasonable opportunity of defending himself in disciplinary proceedings taken against him. AIR 1964 Cal 184 (188, 189) = 68 Cal WN 203 (DB).

(17) Departmental inquiry — Officer proceeded against is not entitled to copies of correspondence between officer holding preliminary inquiry and superior officer on question of starting departmental inquiry. AIR 1963 Madh Pra 115 (117) = 1963 MPLJ 139 (DB).

(18) The dropped charges were revived by Government on a confidential report by the Public Service Commission, which gave reasons for its view. The delinquent officer had no access to this report. Even if he was not entitled to such access, he was at least entitled to know the grounds upon which the Government disagreed with the explicit findings of the head of the department. The officer was not given any reasonable opportunity to show

cause against not merely the enhancement of the penalty, but also the revival of the charges. AIR 1963 Mad 14 (15) = (1962) 2 MLJ 339 (DB).

(19) Police Rules under Police Act (1861), Sections 7 and 12, R. 16.24 (Punjab) — Delinquent official already having requisite copies of statements of witnesses to be examined in departmental enquiry and neither disputing the fact nor asking for another set — Another set of those very copies is not required to be furnished. AIR 1969 Punj 131 (138) = 1969 Lab IC 573.

(20) Disciplinary proceedings against Government servant — Refusal to give copies of relevant documents to delinquent, at initial stage before, he puts in defence, not violative of principles of natural justice. AIR 1964 Cal 184 (187 to 189) = 68 Cal WN 203.

(21) Conduct of enquiry without supplying copies of documents or without allowing opportunities to inspect the same was bad. (1966) 12 Fac LR 213 (219) (Cal) ** AIR 1961 SC 1623 (1629) ** (1966) 7 Guj LR 897 (911) (DB).

(22) Documents and statements on which charges were based not supplied though called for — Reasonable opportunity to meet charges held not given. AIR 1963 Tripura 20 (Pr 15) ** AIR 1962 Raj 265 (269) = 1962 Raj LW 246 (DB).

(23) Non-production of certain relevant documents which the delinquent called for in order to enable him to cross examine a witness, was a serious lacuna in the enquiry. (1966) 12 Fac LR 164 (169) = (1966) 2 Lab LJ 532 (Cal).

(24) Disciplinary proceeding against Government servant — Servant asking for copies of certain documents — Copies not supplied — Documents not produced at time of enquiry — Report of enquiring officer referring to these documents — This is highly irregular. AIR 1962 Tripura 15 (17).

(25) A document cannot be withheld from delinquent officer on the ground of privilege under Section 123 Evidence Act unless the State shows that the claim of privilege strictly falls within four corners of provisions of law. AIR 1967 Punj 387 (389) = (1968) 1 Lab LJ 446.

(26) Government employee challenging his reversion from officiating post — Official Communication dealing with his fitness to hold post — Employee seeking its production — Non-disclosure of such documents necessary for proper functioning of public service — Production not ordered. AIR 1969 Delhi 246 (257) = 1969 Lab IC 974 (DB).

(27) Delinquent refused copies of statements of vigilance staff — However, indications of nature of evidence of each witness given — Held that it cannot be said that he is prejudiced in any way. AIR 1968 Orissa 14 (16, 17) = 33 Cut LT 1120 (DB).

Articles 310 & 311 — Note 74 (b) (contd.)

(28) Public servant given opportunity to meet all evidence on record — Anti-corruption Department Report of confidential inquiry held before framing charge not referred to by Inquiry Commissioner — There is no denial of reasonable opportunity if public servant is not allowed to meet the contents of the report. AIR 1960 Pat 116 (121) (DB).

(29) Appointment to Government service — Right of applicant to compel Government to disclose materials in the consideration of antecedents and character of applicant — **Held** applicant had no such right. AIR 1965 Ker 19 (26) = (1966) 2 Lab LJ 93.

(30) Reasonable opportunity of showing cause — Charge that railway servant concerned failed to show improvement in working in spite of bad reports against him — Such report must be made available to him. AIR 1962 Raj 265 (269) = 1962 Raj LW 246 (DB).

(31) **Held** on facts that the Departmental Promotion Committee went wrong in acting upon the confidential records which were not shown to the petitioner. 1966 Ker LT 372 (373, 375) = 1966 Ker LJ 525.

(32) The notice to show cause under Article 311, Clause (2) cannot be given on the basis of an unauthorised report by an inquiry officer who had no jurisdiction under the Service Rules to make the inquiry. AIR 1955 Nag 160 (163) = ILR (1955) Nag 93 = 1955 Cri LJ 974 (DB).

(33) Investigation by C. I. D. into charges of corruption against police officer — Investigation started at instance of pseudonymous petition — There would be no question of confronting any of prosecution witnesses with the statement in it and therefore, refusal to supply copy of it to delinquent officer will not amount to not giving fair opportunity to defend. AIR 1966 Mad 203 (215, 216, 217) = (1965) 2 Mad LJ 421 (FB).

(34) **Held**, on facts that the civil servant who was dismissed was clearly entitled to copies of the earlier statements of the witnesses who gave evidence before the Enquiry Officer. Those statements were relevant. As copies of those statements were plainly not given to him, the enquiry conducted by the officer was not in accordance with rules of natural justice and the dismissed civil servant was denied a reasonable opportunity of defending himself against the charges. 1964 MPLJ 765 (771, 772) = 1964 Jab LJ 537 (DB) ** (1967) 1 Lab LJ 455 (460) (DB) (Guj).

(35-36) Reasonable opportunity for defence — Enquiry into sixteen charges against officer — Officer found guilty of fourteen charges — Officer not supplied with copy of document relating to one charge out of sixteen — Even assuming

that this document should have been summoned to give an opportunity to the officer for his defence it would have affected only one of the 14 charges, and could not be construed as a document which had prejudiced the disposal of the rest of the charges. AIR 1966 Mad 203 (215, 216, 217) = (1965) 2 Mad LJ 421 (FB).

(37) Inquiry Officer not relying on preliminary inquiry report of Sub-Inspector against civil servant concerned — Such report not referred to either in the charges levelled against civil servant or in statement of allegations supplied to him — Non-supply of copy of such report to civil servant is not a vital flaw so as to vitiate inquiry proceedings. AIR 1961 Guj 130 (134, 135) = (1961) 2 Guj LR 331 (DB).

(38) Petitioner demanding inspection of certain documents — Relevant documents furnished — Prayer for irrelevant documents disallowed — Petitioner not shown to be prejudiced — Enquiry not vitiated. AIR 1969 Delhi 145 (148, 149) = 1969 Lab IC 539 (DB).

(39) Though it is competent to take into consideration the record of the past service of civil servant in order to determine the appropriate punishment, the civil servant concerned must be apprised of that record before taking it into consideration and also of the fact that it would be so taken into consideration. AIR 1957 Madh Pra 126 (133) (DB). (AIR 1954 Nag 90, **Rel. on.**) ** AIR 1967 Ori 49 (50, 51) = 7 OJD 136 (DB) ** AIR 1965 Manipur 46 (48, 49).

(40) Civil Servants — Service book — Service book is maintained by the head of office and Government servant cannot be fastened with notice of contents thereof. AIR 1962 Him Pra 41 (42).

(41) In cases of wrongful dismissal normal rule is that the dismissed employee is entitled to reinstatement but there can be cases where it would not be expedient to follow the normal rule and to direct reinstatement. (1965) 10 Fac LR 223 (226) (Cal).

(42) Departmental enquiry — Petitioner requiring copies of certain documents before replying to charges — Petitioner informed about offices where documents were available for his inspection — No prejudice held was caused to him. AIR 1966 Punj 175 (178) = 67 Pun LR 404.

74 (c). Right to personal hearing.— (1) Rule that a party to whose prejudice an order is intended to be passed is entitled to a hearing applies alike to judicial tribunals and bodies of persons invested with authority to adjudicate upon matters involving civil consequences. AIR 1969 Ker 317 (319) = 1969 Lab IC 1476 = 1969 Ker LT 72 (FB). (AIR 1953 Trav-Co 140 and AIR 1954 Trav-Co 32 and AIR 1957 Trav-Co 124 and AIR 1958 Ker 1 and 1959 Ker

Articles 310 & 311 — Note 74 (c) (contd.)
 LT 553 held not applicable in view of
AIR 1967 SC 1269.)

(2) The right which is envisaged by Rule 32 of the Kashmir Civil Services Rules is an important and substantive right and denial of this right to the petitioner vitiates the proceeding against him. AIR 1958 J and K 28 (28, 29) (DB).

(3) Rules affording personal hearing to delinquent officer at enquiry stage and at appellate stage — No such hearing given — Enquiry is vitiated. 1969 Lab IC 896 (898) = 35 Cut LT 391 (DB) ** AIR 1965 Cal 557 (560, 561) = (1964) 9 Fac LR 174 ** 1967 Cur LJ 156 (166) = ILR (1967) 2 Punj 471.

(4) Dismissal of public servant — Appeal — No rule that personal hearing should be given, though it is better to give such hearing. AIR 1969 All 11 (14) = 1969 Lab IC 1.

(5) The right to be heard is, broadly speaking, the right to represent his case and a denial of this right may in some cases, amount to a denial of reasonable opportunity. AIR 1963 All 94 (100) = 1962 All LJ 905 = (1963) 1 Lab LJ 478 (DB).

(6) Affording a personal hearing is a part of the reasonable opportunity guaranteed under the Constitution. A personal hearing includes a right to argue the case. AIR 1961 All 45 (50) = ILR (1960) 2 All 259. (AIR 1958 SC 300 and AIR 1959 SC 308, **Foll.**; AIR 1959 Punj 402, **Rel. on;** **Reversed** on another point in AIR 1963 All 94.)

(7) Northern Railway Discipline and Appeal Rules, Chapter VI, Rules 51 and 53 and Rule 21 (c) Note 2 — No oral inquiry necessary in cases of punishment other than dismissal, removal or reduction in rank. AIR 1967 All 112 (114) = (1968) 1 Lab LJ 301.

(8) Administrative Tribunal — Quasi-judicial proceedings — Police Official — Disciplinary proceedings — Punishment confirmed in appeal — Denial of opportunity by appellate authority to appellant to be heard in person — Appellate order being quasi-judicial cannot be upheld. AIR 1963 Assam 183 (184) = ILR (1963) 15 Assam 373 (DB).

(9) Personal hearing given to servant by the Tribunal — State Government not giving any personal hearing before passing of order of removal — Removal is not illegal. 1968 Lab IC 1333 (1334, 1335) = 34 Cut LT 884 (DB) (Orissa).

(10) No rules were framed by the Government of West Bengal as contemplated by the Indian Police Cadre Rules, but rules framed by the Centre were followed by the State Government as ad hoc rules and a Selection Committee was appointed which went into the merits of the various officers and decided as to whether they could be promoted or not. The petitioner

who was acting as Additional Superintendent of Police, having been reverted to the rank of Deputy Superintendent of Police by this Committee, he applied under Article 226:

Held, that, as the reversion was done by way of punishment, the petitioner ought to have been served with a charge-sheet and heard in defence. The order of reversion should have been made after giving him an opportunity to be heard. AIR 1958 Cal 546 (548, 549, 550) = 62 Cal WN 546.

(11) Even if refixation of the date of birth of the officer cannot be construed as amounting to penalty, nevertheless such refixation could be made only after complying with the principles of natural justice by giving her an adequate opportunity of being heard (*audi alteram partem*) and prove her correct age. AIR 1965 Orissa 81 (85, 86) = (1965) 7 Ori JD 93 (DB).

(12) Punishing authority should give a personal hearing to person charged and next, the punishing authority should pass final orders. AIR 1959 Cal 1 (4, 5) = 62 Cal WN 842 (DB).

(13) Reasonable opportunity to show cause against proposed action — Removal of Officers from office of Co-operative Bank for default in repayment of loan without giving an opportunity to explain their position, is opposed to natural justice and hence wrong. 1966 Cur LJ 405 (406) (Punj).

(14) Though it is not necessary that an opportunity for a personal hearing should be given by the dismissing authority to constitute a reasonable opportunity under Article 311, Clause (2), yet, it may be desirable in some cases that the dismissing authority should afford an opportunity of a personal hearing to the civil servant concerned. AIR 1956 Orissa 219 (222) = ILR (1956) Cut 537 (DB).

(15) Where a public servant, against whom a departmental enquiry has been held, on receipt of the usual notice of punishment, shows a written cause and further prays that he may also be personally heard, the failure, to give a personal hearing does not cause irregularity or prejudice. AIR 1963 Madh Pra 216 (218) = 1963 Jab LJ 98 (DB).

(16) An opportunity of making oral representation is not a necessary postulate of an opportunity of showing cause within the meaning of Article 311 (2). AIR 1964 Madh Pra 114 (116) = 1964 MPLJ 86 = (1964) 8 Fac LR 210 (DB).

(17) An opportunity of showing cause against the action proposed to be taken against a public servant must be reasonable opportunity. AIR 1960 SC 493 (500).

(18) A Government servant against whom charges are held proved after enquiry and punishment is proposed to be imposed is not entitled to a personal hear-

Articles 310 & 311 — Note 74 (c) (contd.)
ing at that stage. (1966) 7 Guj LR 897 (915, 916) (DB).

(19) Government servant — Dismissal on ground of disobedience — Finding of appellate authority based on admission in petition of appeal itself — No inquiry is necessary. AIR 1967 Orissa 26 (28) = (1965) 1 Lab LJ 349 (DB).

(20) Notice calling upon servant to show cause against proposed punishment and also granting oral enquiry, if desired by him — Notice not mentioning that punishment was also based on adverse remarks in his confidential character roll — Confidential roll found discussed with him in personal hearing — **Held**, servant was given reasonable opportunity to explain adverse remarks. ILR (1965) Cut 147 (150, 151) = (1965) 7 Ori JD 136 (DB).

(21) Tribunal giving personal hearing — State not giving opportunity for making oral representation — There is no denial of reasonable opportunity. AIR 1964 Orissa 241 (244, 245) = (1965) 7 OJD 147 (DB).

(22) Personal hearing — Appellate authority's discretion to give — High Court cannot control the exercise of that discretion. AIR 1959 Punj 643 (645).

(23) Reasonable opportunity — Personal hearing not necessary — All that is needed is that reasonable opportunity to show cause against action to be taken must be given — Permission to be represented by counsel is discretionary with Enquiry Officer. AIR 1966 Punj 175 (178) = 67 Punj LR 404.

74 (d). Right to be represented.— (1) It cannot be said that the denial to be represented by a lawyer will amount to a violation of the principles of natural justice. AIR 1963 Tripura 20 (31).

(2) Ordinarily, the right to a hearing has always included the right to the aid of counsel. The right does not apply to cases where agency is engaged in reaching a purely executive action. 1959 Ker LT 141 (146) = (1959) 1 Lab LJ 611.

(3) Whether to allow or not a lawyer to represent the delinquent public servant is a matter discretionary with the authority concerned. 1966 BLJR 825 (829) (DB).

(4) Charges, pure questions of fact, and within knowledge of delinquent — Enquiry only by police officials — Refusal to allow engagement of lawyer not discriminatory. AIR 1968 Orissa 14 (15, 16) = 33 Cut LT 1120 (DB).

(5) Reasonable opportunity — Denial of legal assistance — No complexity of facts — Public servant capable to cross-examine witnesses and meet charges — No denial of reasonable opportunity. AIR 1964 Orissa 241 (244) = (1965) 1 Lab LJ 173 = (1965) 7 OJD 147 (DB).

(6) Though in a departmental proceeding a delinquent public servant is not en-

titled to be represented by a lawyer, nevertheless, there may be special circumstances which may indicate that without legal assistance he may not be able to adequately cross-examine the witnesses or establish his innocence: AIR 1965 Orissa 183 (187) = (1965) 7 OJD 74 (DB).

(7) In the absence of a specific rule requiring permission to be given to a civil servant to engage counsel to defend him, refusal to grant such permission will not be a denial of reasonable opportunity to show cause. AIR 1956 Mad 460 (461) = 1956 Cri L Jour 1081 ** AIR 1954 Cal 335 (337) ** AIR 1948 Mad 379 (380) (DB) ** AIR 1966 Punj 175 (178) = 67 Punj LR 404 ** 1961 Raj LW 104 (106, 107) = ILR (1960) 10 Raj 1419 (DB) ** AIR 1966 Mys 220 (221, 222) = (1965) 2 Mys LJ 490 (DB) ** AIR 1966 Mys 218 (219) = (1964) 1 Mys LJ 333 (DB) ** AIR 1963 Punj 90 (91) = 1962 Cur LJ 541 ** 1964 MPLJ 765 (771) = 1964 Jab LJ 537 (DB) ** AIR 1960 Assam 141 (148, 149) (DB).

[See however AIR 1957 Andh Pra 414 (418) = ILR (1957) Andh Pra 402.]

(8) Constituent elements of "reasonable opportunity" — Departmental proceedings — Delinquent's right to be represented by lawyer — Charges pure questions of facts and within knowledge of delinquent — Enquiry only by police officials — Refusal to allow engagement of lawyer not discriminatory. AIR 1968 Orissa 14 (15, 16) = 33 Cut LT 1120 (DB).

(9) Reasonable opportunity — Personal hearing not necessary — Permission to be represented by counsel is discretionary with Enquiry Officer. AIR 1966 Punj 175 (178) = 67 Punj LR 404.

(10) Though a public servant has no absolute right to be represented by a lawyer in a departmental enquiry on charges levelled against himself, the denial of the assistance of a lawyer may in certain circumstances amount to denial of a reasonable opportunity within the meaning of Article 311 (2). (1965) Jab LJ 1102 = 1966 MPLJ 325 (328) (DB).

(11) The denial to a workman of his request of being represented through a lawyer in a disciplinary enquiry is not opposed to principle of natural justice. (1964) 1 Mys 333 (336) = (1964) 9 FLR 98 (DB).

(12) Article 311 which enjoins a reasonable opportunity for defence does not in terms speak of an opportunity personal to him. Nor does it expressly forbid its exercise through counsel. AIR 1964 Mys 250 (254) = (1963) 2 Mys LJ 1 (DB).

(13) There is no distinction between the expressions "reasonable opportunity" and "adequate opportunity". A thing which would not be adequate would not be reasonable and a thing which is reasonable would be adequate. 1969 Lab IC 1149 (1154) (All) ** AIR 1968 Ker 34 (35) = 1968 Cri LJ 165 = 1967 Ker LT 743 **

Articles 310 & 311 — Note 74 (d) (contd.)
(1967) 2 An. WR 253 (256, 257, 259, 260) = 1968 Serv. LR 77 (DB).

(14) If Government servant is not really capable of entering on his defence with any degree of efficiency, except with the assistance of lawyer, an opportunity given to him to defend case by himself cannot be regarded as opportunity in real sense of the term. (1967) 2 An. WR 253 (260) = 1968 Serv. LR 77 (DB).

(15) Case being of unusual complexity — Petitioner having no experience of law — Refusal to permit him to be represented by lawyer held amounted to denial of reasonable opportunity of showing cause. AIR 1962 Orissa 78 (82, 83, 84) = 27 Cut LT 266 (DB).

74 (e). Right to call witnesses. — (1) Public servant neither given opportunity to adduce evidence in enquiry nor to cross-examine witnesses deposing against him — Enquiry vitiated due to violation of Art. 311 (2). AIR 1967 Pat 184 (185) = 1966 BLJR 732 (DB) **AIR 1958 SC 300 = 1958 SCR 1080.

(2) The Government servant must be given an opportunity to defend himself against the charges, examine witnesses, and cross-examine witnesses, etc. AIR 1954 Vindh Pra 50 (51).

(3) By Art. 311 a public servant is entitled to show cause against the action proposed to be taken in regard to him, but exercise of the authority to pass an order to the prejudice of a public servant is not conditioned by the holding of an enquiry at which evidence of witnesses viva voce, notwithstanding an earlier fair and full enquiry before the Enquiry Commissioner is recorded. AIR 1960 SC 493 (500) = (1960) 2 SCR 569.

(4) Enquiry against police officer for misdemeanour — Enquiry held under special procedure prescribed by Rules — After Constitution he is entitled to examine himself and other witnesses in support of his defence. AIR 1961 SC 1245 (1253, 1254).

(5) Departmental enquiry — Enquiry held behind the back of delinquent — Delinquent not called upon to call his witnesses or to examine himself as witness or to cross-examine witnesses — Enquiry held vitiated. (1967) 2 An. WR 121 (130) = (1967) 2 Andh LT 198.

(6) Omission to give opportunity to officer to produce his witnesses and lead evidence in defence — Whole proceeding held vitiated. AIR 1968 SC 158 (160, 161) = (1967) 3 SCR 848 **AIR 1962 Punj 355 (359, 360) = 64 Punj LR 431 ** AIR 1962 Raj 265 (269, 270) = 1962 Raj LW 246 (DB).

(7) In order that a civil servant may have an adequate opportunity of examining witnesses he will be entitled to ask the enquiring officer to summon witnesses cited by him. AIR 1956 Punj 58 (63) =

ILR (1956) Punj 236 (DB) ** (1955) 68 Mad LW 683 (685).

(8) If a witness, cited by a person facing disciplinary enquiry, is under the Control of disciplinary authority and if the evidence of the witness is material for purposes of enquiry, then the authority should arrange for the production of that witness at enquiry. (1963) 6 FLR 214 (217) = (1963) 2 Lab LJ 174 (Cal).

(9) It is not for enquiring officer to pick and choose witnesses on behalf of delinquent. (1963) 6 FLR 26 (34) = (1963) 1 Lab LJ 708 (Cal).

(10) Where the evidence of a high official, is on the face of it relevant, there is no power in the enquiring tribunal to exclude such evidence. (1956) 60 Cal WN 692 (699).

(11) Enquiry Officer not allowing civil servant to produce witness to prove the nature of letter received by him (the officer) from his superior officer, on ground that witness could not be presumed to know the contents of official communication, the witness being a private person — Held that this amounted to pre-judging evidence of witness and that refusal to examine witness constituted serious irregularity. AIR 1963 Madh Pra 115 (118) = 1963 MPLJ 139 (DB).

(12) Where the enquiry was conducted in the presence of petitioner who was given a right to cross-examine witnesses and right to file his written statement criticising evidence led against him, held that there was no violation of principles of natural justice merely because enquiry officer did not voluntarily give petitioner opportunity to produce his witnesses. AIR 1966 J & K 43 (45) = 1966 Kash LJ 204.

(13) Often delinquent asks authorities to produce witnesses at the enquiry. There is no law which requires authorities to produce any witness when required by delinquent to do so. But when such a witness is within control of the authorities and when the delinquent cannot produce him and evidence appears to be relevant, the authorities must extend all help to delinquent to produce such evidence. (1963) 6 FLR 26 (34) = (1963) 1 Lab LJ 708 (Cal).

(14) Employee in office of Accountant-General stating that he was absent from duty without permission and had joined strike by employees — Employee admitting facts — Held, no grievance could be made of the fact that the petitioner was not given opportunity to cross-examine Senior Deputy Accountant-General and that opportunity could not be given as he was not examined in support of the charge. AIR 1963 Bom 121 (131, 132) = 65 Bom LR 65 (DB).

(15) Ordinarily, prior notice is given to the delinquent of the names of witnesses to

Articles 310 & 311 — Note 74 (e) (contd.) be examined. Omission to give such a notice would not vitiate the proceeding as being illegal or without jurisdiction. 1968 Lab IC 1333 (1335) = 34 Cut LT 884 (DB).

(16) Dismissal of police constable from service — Departmental enquiry—Departmental authorities bound to examine at such enquiry only such witnesses as are under their control. AIR 1967 Cal 381 (382) = (1966) 2 Lab LJ 722.

(17) Enquiring officer himself examining defence witnesses in absence of delinquent officer and without noticing him — Enquiry is opposed to natural justice. AIR 1966 Mad 203 (218, 219) = (1965) 2 Mad LJ 421 (FB).

(18) Probationer has right to be personally present before enquiry officer and cross-examine Government witnesses where allegations against him invoke stigma on his competence affecting future career. AIR 1967 Cal 461 (468) = (1969) 1 Lab LJ 290 (DB).

(19) Departmental enquiry — Natural justice — Person charged, desiring to call and examine witnesses — He has liberty to call only relevant witnesses. AIR 1965 Cal 557 (560, 561) = (1964) 9 Fac LR 174.

(20) Non-production of a witness who is not a material witness cannot be non-observance of rules of natural justice. AIR 1964 Cal 184 (188) = 68 Cal WN 203 (DB).

(21) The petitioner must be considered to have been prejudiced by refusal of Enquiring Officer to call two of witnesses cited by him on the ground that the petitioner was not prepared to disclose the points on which he wanted to examine them. (1965) 10 Fac LR 263 (268) (Cal).

(22) There is violation of rules of natural justice where the officer charged was not afforded an opportunity to rebut the evidence of a witness who was examined after the close of the enquiry. AIR 1962 Madh Pra 15 (17) = 1961 MPLJ 757 (DB).

(23) Delinquent officer cannot insist upon enquiring officer following any particular order for examination of witnesses cited by him. AIR 1966 Mad 203 (217) = (1965) 2 Mad LJ 421 (FB).

(24) Charged officer asked the nature of evidence of witness he proposes to examine — Officer intimating that witness is to be examined in respect of only one charge — Witness not allowed to be examined — Charge subsequently held not proved — That fact would not warrant the holding the view in all cases that the officer was not prejudiced or that he had a reasonable opportunity for showing cause. AIR 1963 All 94 (100, 101) (DB).

(25) An opportunity to show cause is reasonable even if it does not contemplate a further opportunity to examine

witnesses before the authority competent to impose punishment provided there has been a fair and full enquiry at an earlier stage before the Enquiry Officer. AIR 1962 SC 1344 (1347, 1348) = (1961-62) 21 FJR 478 = (1962) 1 Lab LJ 656.

74 (f). Right to cross-examine. — (1) The Government servant who is charged must be given an opportunity to defend himself by examining the witnesses produced against him. AIR 1958 SC 300 (309) = 1958 SCR 1080 **AIR 1961 SC 1623 (1629) ** AIR 1954 Vindh Pra 50 (57).

(2) At the enquiry stage of the disciplinary proceedings the public officer is entitled to test the evidence led against him by cross-examination and also to lead his own evidence. AIR 1963 SC 1612 (1614).

(3) Sub-rule (1) of Rule 55 of the Civil Services (Classification, Control and Appeal) Rules provides for a full-blooded enquiry which is the counter-part of a regular trial: witnesses have to be examined in support of the allegations, opportunity has to be given to the delinquent officer to cross-examine them and to lead evidence in his defence. AIR 1968 SC 158 (160, 161) = (1967) 3 SCR 848.

(4) The witnesses who give evidence in support of the charges at the enquiry must be examined in the presence of the civil servant and he must be allowed to cross-examine them. AIR 1957 All 634 (635, 636) **AIR 1957 All 217 (218) ** AIR 1957 Orissa 222 (223) = ILR (1957) Cut 419 (DB) ** AIR 1956 Cal 662 (665) **AIR 1956 Sau 14 (16) (DB) **AIR 1959 Raj 113 (114) (DB) ** AIR 1966 Him Pra 13 (16).

(5) The civil servant must have an adequate opportunity of examining witnesses and tendering documentary evidence in his defence. AIR 1937 PC 31 (33) = 64 Ind App 55 = ILR (1937) Mad 532 ** AIR 1958 Andh Pra 240 (244) (DB) ** AIR 1958 Cal 49 (51) ** AIR 1957 All 634 (635, 636).

(5-A) Demand for recalling witnesses and their cross-examination made long before amendment of Art. 311 (2) by Constitution (15th Amendment) Act, 1963 — Cross-examination cannot be denied by resorting to amendment — Refusal to permit cross-examination at the second stage after show cause notice amounted to a denial of reasonable opportunity. AIR 1970 Delhi 52 (56) (DB).

(6) Disciplinary tribunals should not adopt a technical attitude and refuse opportunity to delinquent to cross-examine a witness. (1966) 12 Fac LR 164 (168) = (1966) 2 Lab LJ 532 (Cal).

(7) Where the delinquent was clearly guilty on his own basic admissions no question arose of affording him any opportunity to cross-examine or to produce witnesses in respect of pleas which could

Articles 310 & 311 — Note 74 (f) (contd.) in no way alter his guilt. (1966) 12 FLR 49 (50) (All).

(8) The rules of natural justice require that a party should be given the opportunity of cross-examining the witnesses produced against him. AIR 1962 Madh Pra 15 (17) = 1961 MPLJ 757 (DB).

(9) Reasonable opportunity — Inquiry against civil servant — Ex parte examination-in-chief — Opportunity to cross-examine given with access to evidence given in examination-in-chief — No irregularity. AIR 1960 Madh Pra 254 (255) = 1960 MPLJ 85 = (1960) 2 Lab LJ 413.

(10) The opportunity to show cause does not imply merely an opportunity to explain, but it must also be a reasonable opportunity and a substantial one such as to enable the delinquent to meet the charges and to know directly and in his own presence, especially when witnesses are examined to prove the charge, what is being substantially alleged against him by those witnesses. AIR 1961 Guj 63 (66, 67) = (1961) 2 Guj LR 202 (DB).

(11) Departmental inquiry — Statement of witness not examined before inquiry officer and in regard to whom civil servant concerned had no opportunity to cross-examine — Use of such statement as corroboration of evidence of main witness in inquiry — Vitiates proceedings. AIR 1961 Guj 130 (132, 133, 134) = (1961) 2 Guj LR 331 (DB).

(12) Witnesses not examined in presence of officer charged — Witnesses' earlier statements read out to the witnesses and on their acknowledgment of having made the statements charged officer asked to cross-examine — No adequate opportunity. AIR 1963 All 94 (100, 101) = 1962 All LJ 905 (DB). (AIR 1961 All 45, Reversed.)

(13) An opportunity to cross-examine or to adduce evidence is an occasion that arises, and is to be availed of. AIR 1959 Madh Pra 404 (406) = 1960 MPLJ 153 (DB) **AIR 1967 Pat 184 (185) = 1966 BLJR 732 (DB).

(14) Enquiry Officer relying on evidence of subordinate officer, A and handwriting expert to show that entries in Correspondence Register were fabricated and falsified by delinquent officer with the help of A — A and handwriting expert not examined at the enquiry — Delinquent officer should have been given opportunity to cross-examine them — Officer held had no opportunity of meeting charge of fabrication. AIR 1963 Madh Pra 115 (117, 118) = 1963 MPLJ 139 (DB).

(15) A mere statement, whether it is by a relation of delinquent or stranger, if used as evidence against him must be proved and the delinquent must be given every opportunity of testing the evidence. (1963) 6 FLR 26 (35) = (1963) 1 Lab LJ 708 (Cal).

(16) Where in a departmental enquiry witnesses not mentioned in the charge-sheet against the delinquent servant have been examined in his presence, he has been given opportunity to cross-examine them and he has not asked for time to cross-examine them it cannot be said that the servant is prejudiced so as to vitiate the enquiry especially when the evidence of such witnesses relates only to one of the charges of which the servant has been found guilty. AIR 1965 Mys 283 (285) = (1965) 1 Mys LJ 422 (DB).

(17) Where the Government servant had no opportunity of hearing the evidence given by these witnesses relating to the charges against him and had no opportunity to cross-examine them with reference to the evidence given by them in respect of the charges at the preliminary inquiry: **Held** that there had been very serious irregularity in the enquiry. AIR 1962 Tripura 15 (18, 19).

(18) Examination-in-chief conducted in absence of person charged — Witnesses however allowed to be cross-examined — Natural justice violated inasmuch as no effective cross-examination could be had, when examination-in-chief was held behind the back of the person charged. AIR 1962 Punj 496 (497, 498) = 64 Punj LR 461.

(19) Enquiry against railway employee — Enquiring officer importing personal recollection of what happened during fact finding inquiry held by him — No opportunity given to employee to cross-examine enquiring officer — Request for examining two railway servants refused — Whole procedure held defective. (1961) 3 Fac LR 112 (114) (Cal).

(20) Where no prejudice was shown to have been caused by non-cross-examination of a person who made the report, enquiry cannot be said to be vitiated. AIR 1965 Raj 140 (142) = 1965 Raj LW 26 (DB).

(21) Even on reasonable suspicion Government may be entitled to take departmental action against a public servant. But the grounds of suspicion should be communicated to him and he should be given an opportunity to cross-examine the witnesses on whose evidence those suspicions are based and to adduce evidence on his own behalf. AIR 1963 Orissa 73 (78) = ILR (1962) Cut 125 (DB).

(22) Once the employee charged expresses the desire not to take further part in the proceeding before the Enquiry Officer, that Officer is entitled to proceed ex parte and to act upon the materials placed before him. If reasonable opportunity has been given to an employee charged to substantiate his defence at the departmental enquiry, it is not necessary that there should be a repetition of the same after the notice as regards the proposed punishment is served on him. AIR

Articles 310 & 311 — Note 74 (f) (contd.)
1964 Pat 102 (108) = 1964 BLJR 523 (DB).

(23) Reasonable opportunity to show cause — Notice calling upon servant to show cause against proposed punishment and also granting oral enquiry, if desired by him — Notice not mentioning that punishment was also based on adverse remarks in his confidential character roll — Confidential roll found discussed with him in personal hearing — **Held**, servant was given reasonable opportunity to explain adverse remarks. AIR 1967 Orissa 49 (50) = 7 Orissa JD 136 (DB).

(24) Department enquiry — Person proceeded against not entitled to cross-examine co-accused — Refusal by Enquiry Officer to allow him to so cross-examine — Not an illegality. (1962) 2 Lab LJ 586 = (1962) 5 Fac LR 507 (Andh Pra.)

(25) Enquiry commenced against police officer for misdemeanour under special procedure before commencement of constitution — On the commencement of Constitution he is entitled to cross-examine witnesses produced against him. AIR 1961 SC 1245 (1253, 1254).

74 (g). Reasonable opportunity given. — Illustrative cases. — (1) Appellant's prayer for engaging counsel of his choice at enquiry rejected by tribunal and counsel representing other three civil servants allowed to represent appellant also — Counsel's inability to conduct defence properly not proved and no prejudice was alleged to have been caused to appellant — **Held** appellant had reasonable opportunity to defend himself and he had been lawfully dismissed. AIR 1966 SC 951 (952, 953) = (1966) 2 SCR 204.

(2) Departmental proceedings started against plaintiff — Ample opportunity to defend himself, cross-examine witnesses, given — Copy of report of Enquiring Officer supplied — Asked to show cause against proposed punishment — Plaintiff submitted elaborate statement — Plaintiff's suit against order of reversion to substantive post in lower rank — **Held** that plaintiff had been afforded opportunity to defend himself and the order could not be questioned. AIR 1966 Cal 42 (49) = (1968) 2 Lab LJ 617 (DB).

(3) Petitioner asking for opportunity to cross-examine Deputy Development Commissioner through a lawyer on account of petitioner's diffidence as a subordinate to cross-examine his superior officer — Refusal of enquiry officer to allow assistance of lawyer, in circumstances, would not amount to denial of reasonable opportunity of being heard. AIR 1967 All 384 (389) = (1968) 2 Lab LJ 586.

(4) In an enquiry into the charges preferred against him, the petitioner was supplied with copy of the charges. His attention was also drawn to the circumstances against him and he was given

ample opportunity to disprove those allegations and to produce evidence and to cross-examine witnesses.

Held, that there was no denial of reasonable opportunity to him as envisaged under Art. 311 of the Constitution. AIR 1962 Assam 17 (19) (DB).

(5) All charges read over and explained to the railway servant by the Enquiry Officer and being informed that one of the charges was dropped — Fact that a fresh list of charges had not been given to the petitioner at the time of the commencement of the inquiry was hardly sufficient to vitiate the inquiry which was held against the petitioner. AIR 1962 Raj 265 (268) = 1962 Raj LW 246 (DB).

(6) Where the petitioner had full opportunity to defend himself against the charges made against him before the enquiry committee, and the person on whose letter the proceedings were initiated against him was also examined before the enquiry committee in his presence it cannot be said that the refusal to permit the petitioner to look into that letter in any manner prejudiced his defence. AIR 1950 Assam 112 (114, 115).

(7) Full opportunity to defend himself given at enquiry — Second notice to show cause against removal given — Railway servant giving written explanation to second notice — Removal without giving personal hearing held not unconstitutional. — Meaning of. AIR 1964 Cal 68 (71, 73) = 68 Cal WN 720 (DB).

(8) Enquiry of charges against a Government servant by a Commissioner — Full opportunity given to the servant at the enquiry — No fresh opportunity to be given when Commissioner's report is accepted by Government. 1964 Ker LT 180 (186, 187) = (1964) 2 Lab LJ 381 (DB).

(9) Where the charge against the applicant that he was not really ill but applied for leave on the ground of illness in order to attend law classes and the applicant had substantial opportunity to meet the charge which was established.

Held, that there was substantial compliance with Art. 311. AIR 1958 Raj 284 (286) = 1959 Raj LW 641 (DB).

(10) **Held** on facts that although there was initial defect of service of notice under Art. 311 (2), yet the Government while considering the appeal of the petitioner directed the Registrar to give a fresh notice, and thereafter to submit his recommendation. Thus the provisions of Art. 311 (2) had been substantially complied with. ILR (1958) 8 Raj 580 = 1959 Raj LW 429 (431).

(11) Reasonable opportunity at inquiry stage — Charges against D. S. P. serious but not complicated — 6 days' time given before commencement of inquiry — Refusal to postpone inquiry to change place from town to city and engage pleader — **Held**, not sufficient to render opportunity unreasonable. AIR 1963 Guj 244 (248).

**Articles 310 & 311 — Note 74 (g)
(contd.)**

(12) Investigation by C. I. D. into charges of corruption against police officer — Investigation started at instance of pseudonymous petition — There would be no question of confronting any of prosecution witnesses with the statement in it and therefore refusal to supply copy of it to delinquent officer will not amount to not giving fair opportunity to defend. AIR 1966 Mad 203 (215, 216, 217) = (1965) 2 Mad LJ 421 (FB).

(13) The order granting time for submitting explanation could not be served on the delinquent officer as he was absconding — The authorities waited long to enable the officer to submit his explanation if he wanted to make any — The Enquiry Officer proceeding ex parte — It could not be said that the officer was not afforded adequate opportunity. (1967) 15 Fac LR 320 (321) (All).

(14) Police Act (1861), Section 7 — Copy of enquiry report given to delinquent Police Officer along with show cause notice indicating that his past record was taken into consideration — Delinquent cannot say that he was not given opportunity to offer explanation on question of past record. AIR 1969 SC 1020 (1022) = 1969 Lab IC 1402 = (1969) 2 SCJ 541. (S. A. No. 1271 of 1962, D/- 2-3-1965 (All), Reversed.)

(15) Enquiry into misconduct — Charge framed under R. 11 (2) by disciplinary authority — Powers of Board of enquiry — Board cannot frame fresh charge and give finding thereon — Nor can it give finding on a charge which was never framed by it — Order of dismissal. AIR 1964 Mys 221 (224, 225) = (1963) 1 Mys LJ 80 (DB).

(16-17) Non-production of witness, who, inspite of efforts of disciplinary authority does not appear, does not amount to denial of reasonable opportunity to delinquent. 1968 Raj LW 272 (281) = (1969) 1 Lab LJ 382 (DB).

(18) Non-availability to delinquent of report of enquiry officer holding preliminary enquiry does not amount to denial of reasonable opportunity, when that report is neither relied on nor exhibited in regular enquiry. 1968 Raj LW 272 (281) = (1969) 1 Lab LJ 382.

(19) Second order, on representation by college giving petitioners time to acquire requisite qualification to act as principal, passed after giving full hearing to petitioners by University Service Commission, in pursuance of show cause notice — Held this order must be taken to be only order governing the case and there was no violation of principles of natural justice. AIR 1965 Pat 11 (14, 15) (DB).

(20) In the case of a probationer discharged in the circumstances described in Explanation II to R. 2 of the Bihar and Orissa Rules it will be sufficient if the probationer is given an opportunity to show cause in writing against the discharge. AIR 1961 Pat 339 (341) = 1961 BLJR 749 (DB).

(21) Whether a particular Government servant has been given a reasonable opportunity or not must be decided on the entire evidence in the case and the facts disclosed therein. AIR 1961 Andhra Pra 289 (295) = (1960) 2 Lab LJ 285.

(22) Period of six months to show cause held reasonable — If petitioner did not avail himself of this opportunity and asked for time again and again competent authority was justified in refusing to grant him further time. AIR 1962 Orissa 78 (80) = 27 Cut LT 266 (DB).

(23) Reasonable statements of witnesses recorded on spot and attested by delinquent servant — Petitioner not asking for examination of witnesses at enquiry stage but merely stating that his attestation was taken under threat — Statements shown to him at enquiry — Petitioner not asking for copies — Held there was no denial of reasonable opportunity. (1960) 2 Lab LJ 165 (169) (Andh Pra) (DB).

(24) Only when a copy of previous statement of witnesses is asked for and refused the question of fair opportunity can arise — Petitioner was allowed to inspect the file and take down copies — No demand for copies of statements — Reasonable opportunity could not be said to have been denied. (1967) 69 Punj LR 56 (58).

(25) Delinquent officer allowed to peruse statements of witnesses made earlier in investigation by C. I. D. Inspector — Refusal to allow perusal again at subsequent stage — Delinquent cannot say that he was not given reasonable opportunity for defence. AIR 1966 Mad 203 (215, 216, 217) = (1965) 2 Mad LJ 421 (FB).

(26) Disciplinary enquiry — Case not complicated or difficult — Government servant cross-examined the witnesses without any protest — Specific permission to be represented by lawyer not prayed for — Inability of the servant not to express in English did not prejudice him — It could not be said that because he was not represented by a lawyer he had no opportunity to explain his case. (1964) 1 Mys LJ 333 (336) = (1964) 9 FLR 98 (DB).

(27) Departmental enquiry against petitioner — He was informed what was the charge against him — He was given opportunity to put his explanation, to cross-examine witnesses against him, to adduce his defence and to give further explanation and representation — Permission

Articles 310 & 311 — Note 74 (g) (contd.)

to be represented by lawyer refused — Held under the circumstances the refusal of permission did not amount to a denial of a reasonable opportunity for the purposes of Art. 311 (2). (1964) 2 Mys LJ 65 (75) (DB).

(28) The petitioner had an opportunity to refer to the opinion of the Special officer and to offer his explanation — Held petitioner was given reasonable opportunity. (1965) 1 Mys LJ 323 (328) = (1965) 2 Lab LJ 588 (DB).

(29) Petitioner found guilty of charges in departmental enquiry — Penalty of withholding two increments imposed upon him — Appeal not preferred by petitioner — Subsequent notice issued by Government to show cause why penalty imposed should not be enhanced to that of dismissal — In reply to this notice petitioner assailing findings of Enquiry Officer on number of grounds — His submissions thoroughly examined and considered by Government before passing order of dismissal — Petitioner held was given opportunity to deny guilt and establish his innocence — There was no violation of Art. 311. AIR 1966 Punj 175 (178) = 67 Pun LR 404.

(30) Reasonable opportunity of being heard — Petitioner charge-sheeted for breach of Rules 45 and 46 of Posts and Telegraphs Manual Vol. IV and Rules 103 and 106 of Posts and Telegraphs Financial Handbook Vol. I — Departmental Enquiry — Copies of statements of witnesses examined in preliminary enquiry not supplied — No witness examined by Enquiry Officer to prove charges — Prejudice not caused to petitioner by non-supply of copies — Punishment passed by Authorities on admission of breach of Rules by petitioner — Punishment order based on evidence — Enquiry and order held proper. AIR 1966 Punj 409 (412).

(31) Reasonable opportunity — Enquiry conducted by a subordinate officer and findings submitted by him to the appointing authority — Appointing Officer issuing show cause notice and sending along with enquiry officer's report — Omission to mention by the appointing authority in the show cause notice his concurrence with the conclusions of the enquiring officer does not amount to denial of reasonable opportunity. AIR 1967 Madh Pra 91 (93) = 1966 MPLJ 1032 (DB).

(32) Whether opportunity afforded to a Government servant in a particular case is reasonable depends upon the circumstances of each case. A right of appeal is not a necessary postulate of an opportunity of showing cause within the meaning of Art. 311 (2). AIR 1964 Ker 87 (88) = 1963 Ker LJ 728 = (1964) 1 Lab LJ 584 (DB).

(33) Selection of appropriate punishment under Civil Services Rules is discre-

tionary — Any punishment for any misdemeanour not illegal — Imposition of lighter punishment than proposed — No violation of guarantee of reasonable opportunity. AIR 1962 SC 1130 (1132, 1133, 1134) = 1962 Supp (1) SCR 908.

(34) Disciplinary proceedings — Combined notice to show cause against proposed penalty and charges levelled — No departmental enquiry held — Notice liable to be quashed but not the charges. 1968 Lab IC 1476 (All).

(35) Statement of witnesses not recorded in the presence of civil servant — Merely allowing exhaustive cross-examination is not sufficient. AIR 1958 All 532 (540, 541) = ILR (1958) 1 All 577.

74 (h). Reasonable opportunity not given — Illustrative cases. — (1) Disciplinary proceedings against petitioner — Copies of previous statements of witnesses not supplied — Confessional statement not brought on record — Enquiry against petitioner held was in violation of principles of natural justice — Enquiry held contravened Art. 311 (2). AIR 1966 Him Pra 13 (16).

(2) Explanation by employee to show cause notice, reaching enquiry officer late, for no fault of employee — Explanation not considered — Held that there was no proper opportunity to show cause. (1961) 3 Fac LR 112 (114) (Cal).

(3) Reasonable opportunity of showing cause — Does not necessarily imply permission to engage lawyer — Question depends on facts and circumstances of each case. AIR 1962 Guj 197 (200, 201, 202) = (1962) 3 Guj LR 492 = (1962) 2 Lab LJ 507 (DB).

(4) The refusal to afford a reasonable opportunity to take legal advice when viewed in the light of the other circumstances of the case may legitimately lead to the inference that he was not given a reasonable opportunity to defend himself. AIR 1958 All 532 (543) = ILR (1958) 1 All 577.

(5) Railway employee given 7 days' time, applying for extension — Removal from service without even informing him of decision on application amounts to denial of reasonable opportunity. AIR 1964 Orissa 279 (280) = ILR (1964) Cut 286 (DB).

(6) The giving of notice to show cause against charges of misconduct in a disciplinary proceeding is not merely a matter of form, but of substance. Thus to give only one day's time to show cause to a person residing abroad is not giving him notice; it merely satisfies a formality. AIR 1961 Cal 626 (629) = 65 Cal WN 607 (DB). (Overruled on another point in AIR 1966 SC 951.) ** AIR 1966 SC 1313 (1317) = (1966) 2 SCJ 777 ** 1966 Cur LJ 318 (340) (Punj) ** AIR 1965 Punj 342 (346) = 1965 Cur LJ 104 (DB) ** AIR 1964 Cal 503 (518, 519) = 68 Cal WN 215

Articles 310 & 311 — Note 74 (h) (contd.)

**** (1963) 6 FLR 26 (36) = (1963) 1 Lab LJ 708 (Cal).**

(7) A Government servant who is asked to show cause why he should not be dismissed for having accepted bribes but is not supplied with particulars of any specific acts of misconduct, will not be deemed to have been given a reasonable opportunity of showing cause as required by Art. 311 (2). AIR 1960 All 323 (330, 331, 332).

(8) Departmental inquiry against police Sub-Inspector — Charge of inefficiency based on adverse reports of superior police officers — Failure to examine such officers — Denial of right of cross-examination — Refusal to bring on record good reports — Bias of Inquiry Officer — Inquiry held not in accordance with fair play and natural justice. AIR 1963 Punj 503 (508 to 510) = 64 Pun LR 1157.

(9) Departmental Enquiry — Charge of embezzlement — Dismissal on the ground of inefficiency not proper. 1966 Cur LJ 19 (22) (Punj).

(10) The omission of the disciplinary authority to furnish the petitioner with a copy of its findings held vitiated the order removing the petitioner. AIR 1963 Punj 390 (391, 392) = 65 Punj LR 209.

(11) Adjournment on ground that copies of necessary documents had not been supplied to delinquent officer to enable him to effectively cross-examine witness against him — Adjournment refused — Held there was denial of reasonable opportunity. 12 Law Rep 556 (561) = (1967) 2 Mys LJ 632 (DB).

(12) Punjab Government Servants Conduct Rules (1955), Rules 19, 22 (1) (i) — Punjab Civil Services (Punishment and Appeal) Rules (1952), Rule 4 — Dismissal of petitioner on ground that he had taken part in activities of R. S. S. — Omission to mention in charge-sheet that R. S. S. was a political organisation and that petitioner's membership of R. S. S. amounted to his taking part in political movement within Rule 22 amounted to not giving reasonable opportunity in respect of charges and, therefore, order was liable to be set aside. (1968) 70 Pun LR 315 (318) = 1968 Cur LJ 174.

(13) Enquiry Officer relying on past record indicating that some punishment had been imposed on delinquent officer as shown in his confidential file — No chance given to officer concerned to explain his past record — Held it resulted in denial of reasonable opportunity. 12 Law Rep 556 (562) = (1967) 2 Mys LJ 632 (DB).

(14) The Enquiry Officer should not refuse the reasonable request of the petitioner that he may be permitted to make use of the services of a colleague to defend him in the enquiry and the action of the Enquiry Officer in refusing the

request amounted to denial of reasonable opportunity to petitioner. 12 Law Rep 556 (561) = (1967) 2 Mys LJ 632 (DB).

(15) Charges framed against Government servant — Demand by him for holding oral enquiry — Oral enquiry as prescribed by Rule 55 of Civil Services (Classification, Control and Appeal) Rules not held — Order of reduction in rank of Government servant is ultra vires. 1962 BLJR 805 (808, 809) = 1 East LR 91 (DB).

(16) Provisions of Rule 55 of Civil Services (Classification, Control and Appeal) Rules were not strictly complied with — As the principles of Rule 55 have been bodily incorporated in Art 311 (2) of the Constitution, the contravention of the provisions of R. 55 held had violated a valuable constitutional protection given to a public servant. AIR 1966 Pat 244 (245) = 1965 BLJR 956 (DB).

(17) One Government servant promoted to higher post in preference to another — Appeal by latter against order — Former is entitled to notice and a reasonable opportunity of being heard before he is reverted — Order passed without notice is against principles of natural justice — Order is vitiated. 1969 Lab IC 712 (715) = (1968) 1 Andh WR 86 (DB).

(18) Reversion on grounds, involving a stigma and entailing penal consequences — Opportunity of showing cause not given — Order is invalid. (1967) 12 Law Rep 363 (367) = (1967) 1 Mys LJ 455 (DB).

(19) Reasonable opportunity — Premature expression of opinion on charge amounts to a denial of a reasonable opportunity to the Civil servant to defend himself. AIR 1958 All 532 (543) = ILR (1958) 1 All 577.

(20) Where notice to show cause against action proposed was contained in findings recorded by enquiring officer long before papers reached authority and no opportunity was given to delinquent after authority had made up his mind about the guilt of delinquent and the punishment which he proposed to inflict, there is clear infringement of Art. 311 (2). AIR 1961 All 122 (125).

(21) Copies of documents relevant for purposes of enquiry not given to delinquent officer — Documents found to be of great importance for effective cross-examination — Held, reasonable opportunity was not given. 12 Law Rep 556 (559, 561) = (1967) 2 Mys LJ 632 (DB).

(22) After completion of enquiry enquiring officer obtaining some information and utilising same in support of his findings against the petitioner — Held, the findings suffered from the infirmity of having been based on evidence taken behind the back of the petitioner and must be set aside. AIR 1962 Orissa 78 (80, 81) = 27 Cut LT 266 (DB).

Articles 310 & 311 — Note 74 (h) (contd.)

(23) Enquiry Officer different from punishing authority — Report of enquiry officer not supplied with notice to show cause against dismissal — Order of punishing authority not stating whether he agreed with findings of enquiry officer or his own conclusion — **Held** reasonable opportunity to explain was not given. AIR 1960 Punj 8 (10, 11) (DB).

(24) Constitution of Jammu and Kashmir, Section 126 (2) and Proviso (b) — Discharge of employee after holding departmental inquiry — Opportunity was given to employee to defend his case at the stage of departmental inquiry — But the same was not given before order of discharge was issued — Order was void and inoperative. AIR 1965 J & K 53 (54, 55, 56) = 1964 Kash LJ 214 (DB).

(25) Where the plaintiff was called upon to appear and did appear before a 'Reviewing Committee' which Committee found the plaintiff to be unsuitable.

Held, that this did not satisfy the requirement of Art. 311. AIR 1958 Cal 551 (557) = 62 Cal WN 622.

(26) Where no Enquiry Committee or Enquiring Officer was ever appointed and all that happened was that the appellant was summoned for interview with his superior Officer, it cannot be said that having had an opportunity to call evidence, the appellant had not claimed it and that therefore, he is estopped. AIR 1959 Cal 100 (102, 103) = 1959 Cal LJ 125 (DB).

(27) Enquiry against railway employee — Explanation by employee to show cause notice, reaching enquiring officer late, for no fault of employee — Explanation not considered — **Held** that there was no proper opportunity to show cause. (1961) 3 Fac LR 112 (114) (Cal).

(28) Where the competent authority came to a definite conclusion that the charge had been found proved after he asked the officer to show cause against punishment — **Held** that the officer had not been given reasonable opportunity to show cause against the punishment proposed to be inflicted on him. AIR 1960 Punj 8 (10) (DB).

(29) Failure to supply copies of statements of all witnesses examined at the investigation stage and of first information report and photo-stat copies of alleged forged signatures, and failure to allow petitioner to engage a counsel or having assistance of a hand writing expert to cross-examine the Government handwriting expert, amounted to denial of reasonable opportunity to petitioner to show cause as to why he should not be removed from service. (1965) Pun LR (Sup) 456 (460).

(30) Delinquent was asked to be present on a particular date when witnesses would be examined — Delinquent not

told who would be examined and what they were going to state. **Held**: no reasonable opportunity was given. AIR 1968 Bom 290 (293) = 69 Bom LR 568.

(31) Authority taking action on the basis of secret instructions from superior authority — Government servant cannot be said to have reasonable opportunity of showing cause against action taken. AIR 1963 Bom 121 (133, 135) = 65 Bom LR 65 (DB).

(32) Where there was no evidence to show that the enquiring officer who framed the charges and issued show cause notice, was appointed by punishing authority or appointed under authority of punishing authority, enquiry was held vitiated. 1968 Lab IC 302 (317) = ILR (1967) 1 All 239 (DB).

(33) Failure to permit the delinquent to cross-examine witness amounts to denial of reasonable opportunity to defend himself. 1968 Lab IC 302 (315) = ILR (1967) 1 All 239 (DB).

(34) Departmental enquiry — Allegation against railway servant of incivility to a passenger — Charge of using disgraceful language based on complaint complaining of awkward behaviour — Exact language used not stated — Findings based on contents of complaint — Copy of complaint not made available to petitioner — Overwhelming evidence establishing petitioner's innocence rejected — Opportunity to cross-examine the complainant not given — Charge held vague — Findings, held, based on no evidence — Proceedings held vitiated. (1961) 3 Fac LR 25 (31) = (1962) 1 Lab LJ 7 (All).

(35) Where the charge against the petitioner, who was the Assistant Permanent Way Inspector, N. E. F. Railway, was that the derailment of certain train was caused by the excessive creep in the rails and the existence of excessive creep was the most important factor in the case and the enquiry committee took that fact for granted on the basis of the report submitted by the Government Inspector of Railways.

Held, that reasonable opportunity was not given to the petitioner under Article 311 (2) and the order of his removal could not be sustained. AIR 1960 Assam 51 (54, 55) (DB).

(36) Order of discharge based on new ground not mentioned in second notice — Past record taken into account while inflicting punishment — No opportunity given to employee to meet the new ground or offer explanation for past record — **Held** proceedings contravene Article 311 (2). 1968 BLJR 815 (823, 824) (DB).

(37) Charge-sheet containing 16 charges served on petitioner while still on hunger strike — Petitioner growing weak — Inspector's ex parte report on which charges were framed not supplied

Articles 310 & 311 — Note 74 (h) (contd.)

— Charge-sheet allowing only three days to show cause — Petitioner not having even piece of paper to make defence — No opportunity to study relevant documents — Time allowed to show cause held not sufficient — No reasonable opportunity held given to show cause. AIR 1969 Cal 397 (401) = 1969 Lab IC 1094 = 73 Cal WN 803.

(38) Having regard to the manner in which the enquiry was held in this case, it was held that the petitioner was not given a reasonable opportunity of defending himself and thereby denied the protection afforded by Article 311 (2). AIR 1964 Madh Pra 318 (320) = 1964 MPLJ 493 (DB).

(39) Services of applicant, a temporary Government servant, transferred to newly established university — Post offered to applicant — Applicant writing to Head of Department for one year's leave without pay or accept resignation—No reply in spite of reminder—Acceptance of university post and confirmation—Government after considerable time refusing leave and refusing to accept resignation and asking university (Vice-chancellor) to restore services of applicant to original Government post — Appointment to university post held legal — Vice-chancellor's order returning services back to Government without hearing applicant held bad as being against natural justice — Order quashed. AIR 1965 Pat 417 (421 to 424) (DB).

(40) Enquiry against employee of State Transport Authority — Under R. 15 (4) & (6) of Orissa Civil Services (Classification, Control and Appeal) Rules 1962, it is the right of delinquent to know time and place of evidence to be led on behalf of employer Authority — Held that petitioner was not afforded reasonable opportunity in the instant case. AIR 1970 Orissa 1 (2) = 1970 Lab IC 47 = 35 Cut LT 931 (DB).

(41) Government servant making certain statements in enquiry against others — Though statements did not amount to clear and unambiguous admissions of his own guilt authority wrongly treating them as such and removing him from service without a formal enquiry — Held the employee had no opportunity of showing cause against the charge framed against him. AIR 1961 SC 1070 (1073, 1074) = (1963) 1 Lab LJ 325 = 1961 Jab LJ 414. (AIR 1957 Madh B 15, Reversed.)

(42) Statutory departmental inquiry into railway accident — Penalty of reduction in rank imposed on railway servant found responsible for accident — No separate departmental enquiry directed against him in respect of the charge — Order of reduction in rank held must be

set aside on the ground that no reasonable opportunity was given to the servant. AIR 1960 SC 992 (993, 994) = (1960) 1 Fac LR 52 = 1960 BLJR 407 = (1960) 2 Lab LJ 61.

75. Departmental enquiry — General.—

(1) Departmental disciplinary enquiry is not criminal proceeding. AIR 1967 Punj 450 (463) = 69 Pun LR 337 (FB).

(2) Departmental enquiry — Departmental Tribunals are not real Courts of law — Their powers, procedure and duty are usually prescribed by rules under which they work. AIR 1961 Cal 1 (12, 13) = 65 Cal WN 361 (SB).

(3) To record the findings on the several charges and to forward them together with a copy of the report of the inquiry to the civil servant is of course the obvious duty of the punishing authority under Rule 17 (5) of Kerala Rules. AIR 1960 Ker 279 (284) = (1960) 2 Lab LJ 398.

(4) The circumstances under which a disciplinary action for misconduct should be started against a public servant must be left to the sole discretion of the disciplinary authority. A disciplinary authority should exercise such discretion in a bona fide and responsible manner. AIR 1964 Cal 506 (516, 517) = 68 Cal WN 215.

(5) Administrative tribunal — Powers and duties of — Must act bona fide and with sense of responsibility. AIR 1964 Cal 503 (510) = 68 Cal WN 215.

(6) The two stages of a departmental enquiry, namely the enquiry involving the decision about the truth or otherwise of the allegations and later the taking of action are both equally judicial. AIR 1963 SC 395 (397) = (1962) Supp 3 SCR 713.

(7) Charge-sheet containing allegations of fraud not giving particulars of it — Witnesses whose evidence was relied upon not produced at inquiry — Held that the departmental inquiry was conducted in a manner contrary to law and therefore the order of dismissal based on such inquiry should be set aside. AIR 1961 Cal 40 (41, 42) = (1962) 2 Lab LJ 537.

(8) The departmental inquiry in a case which is fraught with grave consequence to the person sought to be proceeded against is a serious proceeding intended to give the officer concerned a chance to meet the charge and to prove his innocence. AIR 1963 Raj 57 (62) = 1963 Raj LW 128.

(9) Proceedings under Article 311 — Scope — Common law principle that one cannot both be a prosecutor and judge cannot be applied fully to such proceedings. AIR 1967 Madh Pra 81 (83) = 1966 MPLJ 990 (DB).

(10) Departmental superiors can initiate disciplinary proceedings against their subordinates. 1966 Ker LT 141 (147) = (1965) 2 Lab LJ 403.

Articles 310 & 311 — Note 75 (contd.)

(11) The power of taking disciplinary action is vested in the disciplinary authority. The civil or criminal Court has no such powers. AIR 1969 SC 30 (32) = 1969 Cri LJ 267 = 1969 Lab IC 194 = (1968) 2 SCJ 955.

(12) Departmental enquiry — Enquiry cannot be taken up by one not duly entrusted with it. AIR 1966 Madh Pra 58 (59, 60) = 1965 MPLJ 699 (DB).

(13) Departmental enquiry — The actual conduct of an inquiry can be delegated by the head of the department concerned, though the power as such is not susceptible of delegation. AIR 1964 Andh Pra 407 (410, 411) = ILR (1963) Andh Pra 778 (DB).

(14) The Civil Services (Classification, Control and Appeal) Rules of 1952 do not require the minister who is the appointing authority to make the enquiry himself. The power to appoint or dismiss an officer being an administrative one and not a judicial power which could be delegated only if there is an express or implied sanction, the enquiry by the Superintending Engineer under the delegation of the power by the minister and the subsequent order of dismissal passed by the minister acting on the report submitted by the Superintending Engineer, are not vitiated. AIR 1958 Andh Pra 112 (115, 116) (DB).

(15) Committee for enquiring into the misconduct of railway servants — Charges relating to conduct of railway employees in connection with strike of loco shed staff — Fact-finding enquiry committee appointed first — Member of fact-finding committee not disqualified from sitting on departmental enquiry. AIR 1963 Pat 38 (42) (DB).

(16) It is not every infringement of any rule in the conduct of the enquiry that would attract Article 311 (2). The Tribunal for Disciplinary Proceedings merely holds an enquiry and submits its report and that is not binding on the Government. It is a mere expression of the authority and it lacks both finality and authoritativeness which are essential tests of a judicial pronouncement. (1961) 2 Andh WR 4 (8) (DB).

(17) The High Court will not quash the order of Government on the basis of mere infringement of rules if a reasonable opportunity was given to the Government servant to defend himself and he is not otherwise prejudiced. (1957) 2 Andh WR 425 (434) (DB).

(18) The fact of holding an enquiry against a temporary Government servant is not by itself decisive of the question whether Art. 311 is attracted or not. An answer to this question depends on the facts and circumstances of each case and the type of the order passed. 1969 Serv LR 160 = 1969 Cur LJ 109 (111) (Punj).

(19) In a departmental enquiry held against a Government servant, the enquiring officer has, when so required to ap-

praise the evidence, to record its conclusion and, if he thinks proper, to suggest the appropriate punishment. (1963) 67 Cal WN 859 (866) (DB).

(20) Withholding of documents required by the petitioner before the Inquiry Officer may amount to denial of reasonable opportunity to defend. (1967) 2 An WR 253 (257, 258) = 1968 Serv LR 77 (DB).

(21) The evidence of an accomplice can be made the basis of a disciplinary order in a departmental enquiry. (1965) 2 Lab LJ 519 (520) = (1964) 2 Mys LJ 153 (DB).

(22) Matter finally disposed of by competent authority cannot be reopened by his successor unless expressly provided by law. Principle applies to all judicial cases, civil or criminal whether decision is in favour of one party or other. Same principle governs executive matters like departmental inquiries. AIR 1954 Pepsu 129 (131) = ILR (1953) Patiala 639.

(23) Termination order did not cast any stigma on the character and integrity of the appellant — No disciplinary proceedings were required to be held under Rule 12 of Madhya Pradesh Government Servants (Temporary and Quasi-permanent Service) Rules 1960 — Informal enquiry against the appellant's conduct does not fall within the mischief of Article 311. (1969) 1 SCWR 1115 = 1969 SCC 240.

(24) A disciplinary proceeding against a Government servant comes to an end when he retires and there is no power in Government to retain him in service so that a punishment may be imposed on him in a pending disciplinary proceeding. AIR 1968 Mys 206 (207) = (1967) 2 Mys LJ 612 (DB) ** AIR 1967 Raj 82 (84) = 1966 Raj LW 619 (DB).

(25) The control which is vested in High Court over Courts is complete control, subject only to power of Governor in matter of appointment (including dismissal and removal), postings and promotions of District Judges. It can hold enquiries, impose punishments other than dismissal and removal, subject to conditions of service and right of appeal if granted thereby and to giving of an opportunity of showing cause. AIR 1967 J and K 98 (103, 104, 105, 106) = 1967 Kash LJ 368 (FB).

(26) A High Court in exercise of its powers of superintendence and control of the Courts subordinate to it and by virtue of the rules having the force of law under proviso to Art. 309 read with Art. 313 is vested with the power to hold an enquiry into the conduct of judicial officers and to determine provisionally the punishment which should be imposed upon them after affording them a reasonable opportunity of showing cause under Article 311. AIR 1959 Andh Pra 497 (503) (DB).

Articles 310 & 311 — Note 75 (contd.)

(27) Departmental Enquiry — Violation of merely departmental instructions — No ground for quashing order of dismissal. (1962) 2 Lab LJ 586 = (1962) 5 Fac LR 507 (Andh Pra).

(28) Procedure — Delinquent officer admitting charges and not desiring enquiry — Enquiry is not necessary either under Article 311 or under Civil Service Rules, AIR 1961 Tripura 1 (3).

(29) Where a public servant refuses to take part in the inquiry proceedings against him, the Enquiry Officer could, proceed *ex parte*, but the finding against the absentee employee could be recorded only after examining evidence oral or documentary, against him. AIR 1965 Raj 87 (90) = 1964 Raj LW 613 (DB).

(30) Enquiry — Conduct of — Examination of delinquent officer at the commencement of the enquiry and several times thereafter — Examination of witnesses subsequently — Enquiry held not fair and that the delinquent officer not afforded a reasonable opportunity. AIR 1967 Madh Pra 91 (93, 94) = 1966 MPLJ 1032 (DB).

(31) Master and Servant — Misconduct of Civil servant — Right to proceed departmentally—Does not subsist after relationship of master and servant has come to an end. AIR 1963 Cal 359 (302, 303, 304) = (1962) 2 Lab LJ 541.

(32) Under the provisions of Rule 145 (1) and (3) of the Railway Establishment Code, the authorities are under no statutory obligation to effect an alteration in entry about date of birth (in service record) where they are not satisfied that any ground exists. It cannot be contended that orders of the authority turning down employee's representation about the correction regarding his date of birth without holding an enquiry or affording an opportunity to substantiate the real date of birth, are liable to strike down as invalid on the ground that they were in violation of principles of natural justice. 1968 Lab IC 1326 = 1968 MPLJ 466 (468, 469) (DB) (MP).

(33) Where the reinstatement by the Government was made as a consequence of the setting aside of the order of dismissal alone, and not because the inquiry had been irregular, or the findings were not accepted, but because the dismissal was thought to be by an authority that was really not competent to order it, it could not be said that the setting aside of the order of dismissal and the reinstatement had the effect of quashing of the entire proceedings and the cancellation of the old charge-sheet. AIR 1959 Madh Pra 404 (405, 406) = 1960 MPLJ 153 (DB).

(34) Dismissal from service — Petitioner, head constable, charged with neglect of duty — After preliminary enquiry explanation was called for as to

why he allowed arrested persons to go away — Petitioner replied that the persons were not traced and prepared false panchnama — Notice under Article 311 (2) served on him as to why he should not be dismissed — After evidence was led on both sides and after consideration of evidence charge was held to be proved — Held there was no contravention of provisions of the Constitution. ILR (1956) Hyd 326 (327) (DB).

(35) The mere fact that the District Superintendent of police had acquitted the delinquent would not deprive the State Government of its power under Sec. 25 (1) of the Bombay Police Act (1951) to hold him guilty of the offence of having demanded a bribe and dismiss him. (1960) 62 Bom LR 1038 (1042, 1043) = 1961 Nag LJ 26 (DB).

(36) Two employees working in Road Transport Department of the erstwhile State of Hyderabad dismissed from service for misconduct — Business of road transport taken over by Corporation and hence the petitioners in petitions challenging their orders of dismissal substituted the Corporation in the place of Government — Orders of dismissal quashed and the employee reinstated — Corporation instituted fresh inquiry and ultimately dismissed the employees— Held that it was not open to the petitioners to contend that it was the Govt. that was empowered to initiate fresh departmental proceedings and not the Corporation because it was they that had sought the substitution of the Corporation in the place of the Government — The acceptance of the salaries and subsistence allowances by the petitioners from the Corporation would debar them from turning round and claiming that all along they were employees of the Government and that the Corporation had no jurisdiction to take disciplinary action against them. AIR 1964 Andh Pra 407 (410) = ILR (1963) Andh Pra 778 (DB).

(37) The fact that a particular act attributed to the delinquent officer amounts to an offence under the Penal Code does not necessarily entail a duty on the part of Road Transport Corporation to take proceedings in a criminal Court. It is left to the choice of the Corporation either to prosecute the delinquent or to proceed against him departmentally. AIR 1964 Andh Pra 407 (412) = ILR (1963) Andh Pra 778 (DB).

(38) It cannot be said that without recourse to criminal Court, the delinquent officer cannot be proceeded against in a departmental enquiry. (1964) 2 Mys LJ 65 (71) (DB).

(39) Where a departmental inquiry is started against a civil servant on the ground that with the instrumentality of his brother, he was taking bribe, the discharge of his brother, in a criminal proceeding on the charge under Sec. 162.

Articles 310 & 311 — Note 75 (contd.)

I. P. Code, is not conclusive against the civil servant in the departmental inquiry against him. AIR 1959 Andh Pra 497 (504) (DB).

(40) Government servant — Departmental enquiry against — Servant acquitted of offence by High Court — Departmental enquiry started against same servant on same facts — It is not barred — There is no contempt of Court. AIR 1966 Guj 233 (235, 236) = (1966) 7 Guj LR 409 (DB).

(41) Choosing of the venue of an enquiry against an employee suo motu by the enquiring officer does not vitiate the enquiry and does not violate the principles of natural justice. There cannot be any hard and fast rule as to where the enquiry against an employee is to be held and the only thing to be seen is whether the employee is in any way denied the opportunity of defending himself because the enquiring officer suo motu chooses the venue of the enquiry. When such opportunity is not denied, the enquiry is not vitiated. AIR 1967 Cal 29 (30, 31) = (1969) 1 Lab LJ 300.

(42) Officiating post — Reversion to substantive post — Government acting on advice of ad hoc committee — Order not bad on that account. AIR 1966 Cal 402 (408) = (1968) 1 Lab LJ 633 (DB).

(43) Servant of District Board — Termination of service for long continued absence without leave and without any justification — Absence of conditions of service under District Board — Ordinary law of contract between master and servant applies — District Board entitled to terminate service under Sec. 39, Contract Act — Termination not by way of punishment for misconduct — Principles of natural justice not applicable. AIR 1962 Pat 452 (458) = 1962 BLJR 519 (DB).

(44) Admission of guilt by the Government servant — Such admission used only to corroborate independent evidence led to prove charges against such servant — Enquiry proceedings not vitiated. AIR 1967 Cal 381 (382) = (1966) 2 Lab LJ 722.

(45) Disciplinary proceedings — Propriety — Charges against officer amounting to not mere error in respect of orders passed in suits but to abuse of authority as Mamlatdar consisting in bias in favour of one party — Executive action against officer not illegal. (1962) Mys LJ (Sup) 480 (487) (DB).

(46) Disciplinary proceedings — Propriety — Disciplinary proceedings and prosecution when can be taken stated. 1962 Mys LJ (Supp) 480 (484) (DB).

(47) Charges not borne out from statement of allegation — Dates of acts of omissions and commissions not given — Name of person making the allegations given — None of the above facts is indi-

cative of the facts that framing of the charges was mala fide. AIR 1963 Punj 298 (318) = ILR (1962) 2 Punj 642 (DB).

(48) Dismissal on ground of disobedience — Finding of appellate authority based on admission in petition of appeal itself — No inquiry is necessary. AIR 1967 Orissa 26 (28) = (1965) 1 Lab LJ 349.

(49) Preliminary enquiry held to satisfy whether there is reason to dispense with services of temporary employee or to revert him to substantive post — Such enquiry is not a departmental enquiry and can be held even ex parte. AIR 1964 SC 1854 (1862).

(50) Rule 4 (2) of the U. P. Disciplinary proceedings (Administrative Tribunal) Rules, 1947, imposes an obligation on the Governor to grant a request made by the gazetted government servant that his case should be referred to the Tribunal under the Rules and not by an appropriate authority under R. 55. AIR 1963 SC 1618 (1620) = 1963 All LJ 617 = (1963) 1 SCWR 553 = (1964) 1 SCJ 399 = ILR (1963) 2 All 843 = (1964) 2 SCR 197 = 1963 SCD 606 = (1963) 2 Lab LJ 444.

75 (a). Findings of. — (51) Where law expressly recognises alternate forms of relief, it impliedly recognises exercise of discretion in choosing which form of relief should be granted where a Court or tribunal is invested with discretion, exercise of it must be regulated by established principles of justice. (1965) 10 Fac LR 223 (226, 227) (Cal).

(52) Police Standing Order No. 95 (4) prescribes the procedure with regard to the recording of findings by the enquiry officer. Under this Order, the enquiry officer records his findings on the basis of the evidence produced by both sides. The finding of the enquiry officer is more in the nature of a report to the competent authority to enable it to pass final orders. AIR 1960 Andh Pra 473 (477, 478, 479) = (1960) 1 An WR 408 (DB).

(53) The Enquiring Officer to whom actual conduct of enquiry is delegated is not entrusted with the power of imposing the punishment. His duties commence and end with finding the facts. He is merely a fact finding authority. AIR 1964 Andh Pra 407 (411) = ILR (1963) Andh Pra 778 (DB).

(54) It is the punishing authority who is to decide on the report of the enquiring officer as to what action is to be taken against the employee. How he arrives at the decision is no concern of the delinquent. Even if the punishing authority decides in consultation with any officer, the decision is not open to challenge and it cannot be said that the punishing authority did not apply his mind to the enquiring officer's report merely because he adopts the decision of

Articles 310 & 311 — Note 75 (a) (contd.)
another officer. AIR 1967 Cal 29 (30, 31) = (1969) 1 Lab LJ 300.

(55) The finding of Enquiry Officer should not be too short and should contain discussion as to how he came to his conclusions. (1966) 12 Fac LR 80 (86) (Cal).

(56) In a disciplinary proceeding the accuracy of proof must not be judged by the standard of criminal trial — Dismissal of servant for allowing misuse of privilege pass by his brother — Finding based on circumstantial evidence — Dismissal not improper on ground of absence of direct evidence to prove handing over of pass by servant to his brother. 1968 Lab IC 1535 (1539) (Cal).

(57) An appeal Committee should record their own findings, apart from referring to findings in enquiry report. (1965) 10 Fac LR 223 (227) (Cal).

(58) Disciplinary proceedings — Inquiry Officer travelling beyond scope of charges and giving findings on material not forming part of record — Order of removal based on such report vitiated as not giving reasonable opportunity to Government servant. AIR 1962 Punj 289 (292) = 1962 Cur LJ 120. (AIR 1960 All 618. Dist.)

(59) Powers and duties of statutory bodies — Orders of authorities conducting departmental proceedings against delinquent public servants are not like judgments in law Courts and may not necessarily indicate nature of evidence in support of every finding. 1966 BLJR 825 (830) (DB).

(60) Charge of particular kind of misconduct on basis of certain facts — Consideration of extraneous facts and character of person charged in arriving at finding and imposing punishment — Findings cannot be maintained. AIR 1959 Cal 1 (6) = 62 Cal WN 842 (DB).

(61) A civil servant can question the correctness of the findings in showing cause against the penalty proposed to be inflicted on him. AIR 1960 Andh Pra 473 (477) = (1961) 1 Andh WR 408 (DB).

(62) Order of dismissal based on only one finding — Finding given in violation of rules of natural justice — Dismissal illegal. 1968 Lab IC 1345 (1348) = 1968 Cur LJ 417 (Punj) (DB).

(63) Enquiry against railway employee — Order of removal based on two charges — One of charges found to be unsustainable — Order can be sustained. AIR 1960 SC 966 (969) = 1969 Lab IC 1368 = (1969) 2 SCJ 513. (AIR 1963 Punj 336. Reversed.)

(64) Dismissal of civil servant after departmental enquiry — Writ proceedings challenging dismissal order — Findings of tribunal on some charges vitiated — Dismissal order cannot be upheld on remaining findings. AIR 1961 Cal 1 (15, 19, 21) = 65 Cal WN 361 (SB).

(65) Removal of railway employee — Material evidence not considered by Inquiry Officer or Punishing authority — Order of removal is liable to be set aside. 1969 Lab IC 773 (778) = 16 Fac LR 484 (Cal).

(66) Departmental enquiry against servant for misconduct — Charge that delinquent gave threat of assault to Officer — Mere obstruction may not amount to threat of assault. 1968 Lab IC 584 (586) (Cal).

(67) Enquiry Officer was wrong in giving a finding on a matter without any charge regarding it and without evidence in support of the finding. (1966) 12 Fac LR 213 (219) (Cal).

(68) Compulsory retirement of civil servant — Enquiry by Tribunal for Disciplinary proceedings — Recommendations by Public Service Commission agreeing with findings of Tribunal and also mentioning that evidence in enquiry left suspicion about officer being corrupt — Order Held, was passed not on mere suspicion. AIR 1966 SC 1827 (1830, 1831, 1832). (W. A. No. 78 of 1961, dated 1-11-1962 (Mad). Reversed.)

(69) Enquiry against public servant on several charges of serious misconduct, negligence in duty, etc. — Main charges of serious misconduct proved — Dismissal of public servant is lawful. AIR 1967 Pat 43 (49) = (1967) 2 Lab LJ 540 (DB).

(70) Moneys recovered from house of Government servant, disproportionate to his salary — Burden of proof is on the public servant. AIR 1963 Orissa 73 (77, 78) = ILR (1962) Cut 125 (DB).

(71) Findings in departmental enquiry is not binding on Government who are the final authority. AIR 1963 Orissa 73 (77, 78) = ILR (1962) Cut 125.

(72) Civil Court is not competent to sit in judgment over decision of competent authority provided the public servant has been afforded opportunity to defend himself consistent with the constitutional guarantee. AIR 1964 Pat 102 (109) = 1964 BLJR 523 (DB).

(73) Normally for one charge there should not be more than one punishment and if when there are more charges than one and more punishments are proposed to be inflicted than one, it is the duty of the disciplinary authority to state for which charge he proposed to inflict which punishment. AIR 1962 Tripura 15 (19, 20).

75 (b). Evidence. — (74) Departmental proceedings are not in the same category as criminal prosecutions or even a civil proceeding in court and provisions of Evidence Act do not apply. Nevertheless, ordinary principles of proof and also rules of natural justice must be applied. Charges must be proved by prosecution and it is not duty of delinquent to prove any part of it. (1959) 63 Cal WN 702 (704).

Articles 310 & 311 — Note 75 (b) (contd.)

(74-A) Even in disciplinary proceedings, the charge framed against the public servant must be held to be proved before any punishment can be imposed on him. AIR 1966 SC 1827 (1832).

(75) The Enquiry Officer in stating that the judgment of the Magistrate in a criminal trial against the public servant could not always be regarded as binding in a departmental enquiry against that public servant does not commit any error. AIR 1963 SC 1723 (1726, 1727, 1728) = (1964) 1 SCJ 402. (Writ Petn. No. 922 of 1956, D/- 18-11-1959 (A. P.), Reversed.)

(76) Witness stating in his chief examination that his earlier statement during investigation was taken under duress and making it unnecessary for accused to cross-examine him — Even then rule of natural justice can be said to have been complied with if opportunity to cross-examine witness was given. (1966) 79 Mad LW 428 (433) = ILR (1965) 2 Mad 508 **AIR 1962 SC 1344 (1346, 1347) = (1961-62) 21 FJR 478 = (1962) 1 Lab LJ 656. (When the public servant declined to take part in the proceedings and failed to remain present, it was open to the Enquiry Officer to proceed on the materials which were placed before him.) ** (1967) 15 Fac LR 80 (83) (All) ** AIR 1967 Madh Pra 81 (84) = 1966 MPLJ 990 (DB).

(77) Rules of evidence which may be nothing but rules of justice may be relevant in deciding whether sufficient opportunity was or was not given to show cause against the charges. AIR 1958 All 532 (538).

(78) Standard of proof in criminal case is fundamentally different from that in departmental proceedings — In latter, authorities can accept previous report of accomplice which, according to them, was supported by other pieces of evidence. 1966 BLJR 825 (834) (DB) ** AIR 1967 Pat 43 (49) = (1967) 2 Lab LJ 540 (DB).

(79) Witnesses' earlier statements read out and charged officer asked to cross-examine — No adequate opportunity. AIR 1963 All 94 (100, 101) (DB). (AIR 1961 All 45, Reversed.)

(80) Departmental disciplinary proceeding against public servant — Though technical rules of criminal trial do not apply yet mere suspicion should not take place of proof. 1969 Lab IC 896 (898) = 35 Cut LT 391 (DB).

(81) Criminal P. C. (1898), S. 162 — Not applicable to departmental enquiries against civil servants. (1960) 2 Lab LJ 464 (466) (DB) (Andh Pra).

(82) Confession not strictly in accordance with Section 164, Criminal P. C. — It can be used in departmental enquiry. AIR 1959 Tripura 51.

(83) The inquiry officer is not bound to see that the provisions of Section 173 (4), Criminal P. C., are observed before he proceeds to record evidence in the inquiry. AIR 1958 Punj 27 (29) = 1958 Cri L Jour 94.

(84) If the circumstances established by the department in the departmental enquiry can be explained on a hypothesis which may be consistent with the innocence of the person charged, then the Court in the exercise of its writ jurisdiction can rectify the error committed by the disciplinary authority. 1968 Raj LW 272 (285) = (1969) 1 Lab LJ 382 (DB).

(85) An enquiry by the Tribunal is of a quasi-judicial nature. And it is implicit in Rule 7 of the Tribunal Rules that the findings of the Tribunal must be based on some evidence adduced before it. If there is no evidence then its findings are liable to be quashed by the High Court. ILR (1959) Cut 425 (434) = (1959) 1 Orissa JD 226 (DB). (AIR 1958 SC 300, Rel. on.)

(86) The power of a Court and an enquiring officer to shut out evidence can only relate to relevancy or where there is a legal bar or even a moral bar to permitting the evidence being led. AIR 1963 All 94 (99) (DB).

(87) There is no doubt that there must be adequate legal evidence in departmental inquiry, to support the finding of the tribunal concerned. But this rule does not permit Courts to appreciate the evidence at a Departmental inquiry or before a domestic tribunal. AIR 1962 Guj 197 (200) = (1962) 3 Guj LR 492 = (1962) 2 Lab LJ 507 (DB).

(88) The enquiring officer must not import his personal knowledge of the facts of the case while enquiring into the charges against the civil servant. AIR 1958 SC 86 (91) = ILR (1957) 2 All 422 **AIR 1956 Cal 278 (279) ** (1954) 58 Cal WN 988 (989).

(89) Witnesses, who are under the control of the disciplinary authorities and whom the delinquent desires to examine should be produced for examination. The authorities, however, have a discretion in the matter. (1963) 67 Cal WN 966 (976) = 1963 (6) Fac LR 422 (Cal).

(90) According to U. P. Police Regulations, hearsay evidence inadmissible — Finding based on inadmissible evidence cannot be sustained — Dismissal of Police officer. AIR 1959 All 223 (224) = 1959 Cri LJ 411 = 1958 All LJ 700 (DB).

(91) The delinquent officer cannot insist upon the enquiring officer following any particular order for the examination of the witnesses cited by him. AIR 1966 Mad 203 (217) = (1965) 2 Mad LJ 421 (FB).

(92) No evidence to show that delinquent communicated information to Press — Correspondent and authority framing

Articles 310 & 311 — Note 75 (b) (contd.) charge not examined on ground that they would not like to disclose the source — **Held**, delinquent was denied of reasonable opportunity to defend himself. 1956 MPLJ 325 (329) = 1965 Lab LJ 1102 (DB).

(93) In order to find a person guilty on circumstantial evidence the circumstance or the circumstances must be such as would irresistibly lead to an inference of the guilt of the person charged with the offence. AIR 1954 Cal 503 (512, 515, 519) = 68 Cal WN 215.

(94) Departmental enquiry — Disciplinary authority is not bound by conclusion reached by enquiry committee—Conclusion of Disciplinary Authority supported by evidence and one which could have been reached by reasonable man—High Court in certiorari jurisdiction would not interfere with that conclusion. AIR 1969 SC 966 (968) = 1969 Lab IC 1368: (1969) 2 SCJ 513. (AIR 1963 Punj 336, Reversed.)

(95) In simple and devoid of complexity cases where there is no likelihood or probability of the purport or the effect of evidence being misunderstood or forgotten by the enquiring officer, evidence to reduce to writing the evidence does not vitiate the enquiry unless recording of evidence is made obligatory by some statutory provision. (1966) 2 Mys LJ 97 (102) = (1966) 7 Law Rep. 302 (DB).

(96) Order of dismissal based on finding in ex parte enquiry recorded without examining evidence—Article 311 (2) can be invoked and order quashed. AIR 1965 Raj 87 (90) = 1964 Raj LW 613 (DB).

(97) All evidence in support of the charges against the officer should be recorded on the date of hearing and in the presence of the officer accused. Where the statements of some of the witnesses were not recorded in the presence of the officer and the inquiry officer, but were recorded by some other officer and the witnesses were produced only for being cross-examined, there is non-compliance with Rule 245 of the General Circulars and Standing Orders. AIR 1960 Mys 159 (160, 161) = 38 Mys LJ 79 (DB).

(98) Disciplinary proceedings against Government Servant — Burden of proof — It is for the Government to prove the charges levelled against his servant and not for the servant to substantiate his defence. AIR 1962 Tripura 15 (17, 18).

(99) Prosecuting agency leading no evidence — Delinquent Officer not required to lead any evidence. AIR 1963 Raj 57 (62) = 1963 Raj LW 128.

(100) If State relies only on documentary evidence, no oral enquiry is necessary — If without oral evidence finding cannot be given, then oral enquiry must necessarily be held before a finding

can be given against the officer. AIR 1968 Bom 290 (293) = 69 Bom LR 568.

(101) It cannot be laid down as a general rule that an enquiring officer has the power to fix a day by which the charged officer must summon his defence witnesses and if they are not summoned by that date then the enquiring officer has the right to refuse to let the charged officer examine those witnesses in his defences at the enquiry. AIR 1963 All 94 (99) = (1963) 1 Lab LJ 478 (DB).

(102) Charged officer, though given adequate opportunity for calling witnesses, found guilty of laches or of resorting to dilatory tactics — Enquiry officer may refuse to examine defence witnesses. AIR 1963 All 94 (99) (DB).

75 (c). Natural justice, rules of. —

(103) Natural justice — Opportunity to show cause against action proposed must be given to the employee. AIR 1968 SC 240 (243) = (1968) 1 SCR 355. (Misc. Petn. No. 267 of 1962. D/- 18-1-1963 (Madh Pra). Reversed.) ** AIR 1959 Punj 402 (412) = 61 Punj LR 167 (DB).

(104) Every Tribunal has its own procedure. Whatever the construction or composition of a tribunal may be, it is expected to follow the principles of natural justice. 1968 Lab IC 743 (745, 746) = 33 FJR 43 (Mad).

(105) Natural justice is a very elastic term. Its rules vary from Tribunal to tribunal and one cannot universally apply the same principles in all cases or to determine the question with reference to any preconceived notions. AIR 1968 Delhi 269 (272) = 1968 Lab IC 1402.

(106) By making it obligatory on enquiring authority to observe rules of natural justice, it cannot be said that protection under Art. 311 is made applicable to those not entitled to it. (1966) 70 Cal WN 925 (937, 948) = (1967) 2 Lab LJ 782 (DB).

(107) Though Art. 311 (2) simply speaks of 'reasonable opportunity' being offered to delinquent employee, substance of constitutional guarantee is nothing but compliance with principles of natural justice. 1968 Lab IC 584 (585) (Cal).

(108) By natural justice is meant that which is founded in equity, in honesty and right and its principles are: (1) a person must not be a judge of his own cause; (2) a person must not be condemned unheard and (3) the decision must be made in good faith. (1957) 2 Lab LJ 668 = 70 Mad LW 965 (971, 972).

(109) Tribunals conducting departmental enquiries should observe rules of natural justice such as, (i) party should have opportunity of adducing all relevant evidence on which he relies; (ii) evidence of the opponent should be taken in his presence; (iii) he should be given the opportunity to cross-examine the witnesses and (iv) no material should be relied on against him without his being given

Articles 310 & 311 — Note 75 (c) (contd.)

an opportunity of explaining them. AIR 1969 Manipur 36 (39) = 1969 Lab IC 561
 **AIR 1963 Orissa 73 (77) = ILR (1962) Cut 125 (DB).

(110) Two of the principles of natural justice which generally apply to all departmental enquiries are (1) a person must be clearly and specifically told the offences with which he is to be charged and (2) he must not be condemned unheard. AIR 1958 All 532 (539).

(111) Rule 55 of the Civil Services (Classification, Control and Appeal) Rules (1930) lays down that if it is desired by the charge-sheeted officer, or if the authority concerned so directs, an oral enquiry shall be held. The requirement that such an oral enquiry shall be held is mandatory and it is based upon consideration of natural justice and fairplay. AIR 1966 SC 269 (273, 274, 275) = (1965) 2 SCWR 667.

(112) It is only in cases falling within Art. 311 that the Government as an employer is bound to conform to certain rules of natural justice indicated in that Article. 1957 Ker LT 772 (773, 774) = (1958) 2 Lab LJ 82.

(113) It is true that the proceedings of a departmental enquiry are not strictly speaking judicial proceedings but the rules of natural justice do apply to these proceedings with as much force as they apply to all judicial proceedings. AIR 1958 Punj 327 (329, 330) = 59 Punj LR 532 (DB).

(114) Any procedure indicated in a departmental rule which, after the Constitution of India came into force, was continued to be followed in enquiry proceedings against a defaulter resulting in an order of dismissal from service should not be justifiable if it is found violative of principles of natural justice and has operated to deprive a delinquent of a reasonable opportunity of defence. AIR 1961 Guj 63 (66) = (1961) 2 Guj LR 202 (DB).

(115) The duty to act judicially is implicit in the exercise of power to dismiss an employee on charges of misconduct even though the statute which confers such power is silent about procedure to be adopted. AIR 1969 Cal 397 (404, 405) = 1969 Lab IC 1094 = 73 Cal WN 803. (Dismissal under Bengal Primary Education Act (4 of 1919) — No rules for enquiry or dismissal under Act or rules thereunder — Rules of Natural justice should be followed. AIR 1950 SC 222 held no longer good law in view of AIR 1967 SC 1269.)

(116) Doctrine of natural justice, known as Audi Alteram Partem, requires that before reliance can be placed on any document, (complaint, in this case) the same must be placed before the person charged for his information, comment

and criticism and also for rebuttal by him. (1966) 12 Fac LR 80 (86) (Cal).

(117) The ambit of natural justice is not limited by Art. 311 (2) but rather demonstrated by exceptions which had to be engrafted in order to exclude it on paramount considerations of collective security. (1966) 70 Cal WN 786 (804) = (1968) 1 Lab LJ 314.

(118) The requirements of natural justice must depend upon the circumstances of the case, the nature of the enquiry, the rules under which the Tribunal is acting, the subject matter that is being adjudged. (1964) 2 Mys LJ 65 (71) (DB).

(119) The application of the doctrine of natural justice depends upon the nature and the jurisdiction conferred on the concerned authority, upon the character of the rights of the person attacked the scheme and policy of the statute and other circumstances disclosed in the particular case. 1969 Lab IC 893 (894) (Mys) = (1969) 1 Mys LJ 325.

(120) Strictly speaking, neither the provisions of the Evidence Act nor those of the Criminal Procedure Code apply to departmental enquiries, but some of those provisions which are based on rules of natural justice may be held to apply. If statements had been recorded in a regular police investigation under Chapter XIV of the Criminal Procedure Code, the delinquent officer should be given copies of those statements even though there was no regular criminal case, inasmuch as the spirit of Section 162 of that Code should be followed. Similarly, if there was a preliminary enquiry (not of a confidential nature) preceding the holding of a regular departmental enquiry, the delinquent officer should be given copies of statements made by witnesses during that preliminary enquiry. AIR 1959 Orissa 152 (155) = ILR (1959) Cut 95 (DB).

(120-A) The rules of evidence are not applicable to inquiries conducted by the Tribunal for disciplinary proceedings. Such Tribunals are required to follow only rules of natural justice in the conduct of inquiries. (1960) 2 Lab LJ 464 (466) (Andh Pra) (DB).

(121) Strict laws of evidence are not applicable to departmental proceedings. Violation of ancillary, incidental and unessential rules are not material. (1957) 2 Lab LJ 668 = 70 Mad LW 965 (969).

(122) Department not bound to supply copies of documents to accused officer in departmental enquiry, when inspection and extracts are permitted. AIR 1968 Delhi 85 (87) = 1968 Lab IC 495.

(123) Departmental enquiry — Denial of opportunity to public servant to cross-examine witnesses who gave evidence against him — Copies of documents to which public servant was entitled not supplied — Enquiry not in accordance with principles of natural justice and

Articles 310 & 311 — Note 75 (c) (contd.)

Art. 311 (2) violated. AIR 1961 SC 1623 (1628, 1629) = 1961 Jab LJ 702.

(124) Appeal against dismissal from service — Personal hearing at appellate stage not required by Police Regulations or Rules of natural justice. AIR 1967 Cal 321 (323) = 1967 Cri LJ 738.

(125) Departmental enquiry against servant for misconduct — When delinquent servant is served with second notice to show cause against proposed punishment, delinquent has right to challenge not only question of punishment but also the finding of guilt — Hence to show that the finding does not follow from the evidence he has right to have access to the evidence if it has not already been supplied to him. 1968 Lab IC 584 (587) (Cal).

(126) It is the punishing authority who is to decide on the report of enquiring officer as to what action is to be taken against employee. How he arrives at the decision is no concern of delinquent. AIR 1965 Cal 577 (561) = (1966) 1 Lab 300.

(127) Departmental enquiry — Petitioner's witnesses not examined and certain records which he wanted enquiry officer to obtain were not summoned — **Held**, order being against principle of natural justice was void. 1968 Cur LJ 476 **AIR 1967 Cal 29 (31) = (1969) 1 Lab LJ 300.

(128-129) Admission by railway servant of illegal use of his privilege pass by his brother — Similar statement by brother to Ticket Examiner when detected — Brother's statement can be relied on without examining him — No violation of principles of natural justice. 1968 Lab IC 1535 (1538) (Cal).

(130) In the oral enquiry held under Rule 55, Civil Services (Classification, Control and Appeal) Rules, 1930 it is obligatory on the authority to record oral evidence led by the charge-sheeted officer if he so wants it. AIR 1966 SC 269 (273, 274) = (1965) 3 SCR 135.

(131) Right of public servant to be represented by counsel — Denial of opportunity to inspect documents — Rights of adjournment for cross-examining material witnesses — Breach of principles of natural justice. AIR 1961 Cal 1 (13, 14, 15, 18, 19, 21) = 65 Cal WN 361 (SB).

(132) Enquiry Officer should not rely on the statement of a person not examined at the enquiry, even though the delinquent officer has no strained relationship with the person giving the statement. AIR 1967 Madh Pra 91 (94) = 1966 MPLJ 1032 (DB).

(133) It is against all rules of natural justice to draw adverse inferences against a delinquent officer in a departmental enquiry on the basis of certain letters by

withholding the writer of those letters from the witness box and thus denying the officer an opportunity to cross-examine the writer. ILR (1959) Cal 425 (435) = (1959) 1 Orissa JD 226 (DB).

(134) Order of punishment is vitiated by taking into consideration the past punishment given to the servant when it was not intimated to him in the show cause notice that the said punishment will be taken into consideration in deciding the punishment against him thus not allowing him an opportunity to submit his explanation about it. AIR 1962 Tripura 15 (20).

(135) Show-cause notice against proposed punishment — Previous conduct of officer taken into consideration — No notice given to petitioner that his previous conduct would be taken into consideration in inflicting punishment — Principle of natural justice held violated — Order of punishment held should be quashed. AIR 1960 Mys 159 (162) = 38 Mys LJ 79 (DB).

(136) If no enquiry had been held either under Rule 55 or under the provisions of the Public Servants (Inquiries) Act, 1850 or if the enquiry which was held was not held in consonance with the rules of natural justice delinquent is entitled to claim a thorough and sifting enquiry into the charges to enable him to clear himself. AIR 1956 Punj 58 (64) = ILR (1956) Punj 236 (DB).

(137) Charge of accepting illegal gratification from a firm — Petitioner not demanding production of books of accounts of firm — **Held** though books were not produced, there was no violation of principles of natural justice. AIR 1968 Delhi 26 (28) = 1968 Lab IC 24 (DB).

(138) Preliminary enquiry held ex parte — Enquiry officer not placing any reliance on preliminary enquiry — **Held**, there was no violation of principles of natural justice. AIR 1968 Delhi 26 (28) = 1968 Lab IC 24 (DB).

(139) Departmental enquiry — Complaint of misconduct against servant — Copy of complaint though demanded not furnished to servant — Assertion that complaint of personal misconduct was confidential document cannot stand in law. 1968 Lab IC 584 (586) (Cal).

(140) Departmental enquiry — Confidential reports — Use of — Government servant — Removal from service — Appeal to President of India — President reducing punishment — Amongst documents perused by President there being Confidential reports — Plea of use of adverse material without reasonable opportunity to explain — Confidential reports always communicated to Government servant who also has a chance to represent against adverse remarks — Use of Confi-

Articles 310 & 311 — Note 75 (c) (contd.)

dential reports by President held was not adverse to Government servant and was proper 1968 Lab IC 1116 (1121) (Delhi).

(141) Document on basis of which charges of misconduct were framed against servant not supplied to him for inspection — Plea that substance of complaint had been incorporated in statement of allegations is not tenable. 1968 Lab IC 584 (586) (Cal).

(142) Where Rule 1712 (2) of Railway Establishment Code, expressly prohibits the appearance of a professional lawyer before Enquiry Officer, action of Railway Department refusing accused officer such assistance cannot be said to vitiate the enquiry. AIR 1968 Delhi 85 (88) = 1968 Lab IC 495.

(143) In spite of several adjournments granted to delinquent to produce evidence in his defence, he failed to do so — Enquiry closed — No violation of rules of natural justice. 1966 Cur LJ 981 (982, 983) (Punj) (DB).

(144) Departmental enquiry against Railway servant — Proposal for punishment though not accompanied with findings of enquiry committee, is not defective when such findings are subsequently served upon the servant — There is no violation of either Art. 311 (2) or natural justice. (1966) 12 Fac LR 169 (172) = (1966) 2 Lab LJ 290 (Cal).

(145) By proceeding on the basis of undisclosed personal knowledge on material point. Enquiring officer must be held to have prejudiced petitioner. (1965) 10 Fac LR 263 (269) (Cal).

(146) Departmental Enquiry — At no stage of inquiry delinquent was supplied by Government authorities with documents he had asked for and in respect of which inquiring officer had ordered production — Not contended by Government that documents are irrelevant — Evidence concluded without production of documents — **Held**, principles of natural justice were not observed and order of dismissal passed by inquiring officer was quashed. (1963) 6 FLR 26 (31, 32) = (1963) 1 Lab LJ 708 (Cal).

(147) It is obligatory on the authority concerned to record evidence in support of charges as well as evidence which charge-sheeted officer may lead in support of his plea and failure to hold such an oral enquiry is a serious infirmity depriving charge-sheeted officer of a reasonable and adequate opportunity of defending himself against charges. 1968 MPLJ 754 (756) = 1968 Jab LJ 1059 (DB). (**Held** enquiry conducted was in contravention of mandatory provisions of Rule 3 of the rules framed under M. P. Local Government Act and order imposing punishment of reduction in rank was illegal and could not be sustained.)

(148) Departmental enquiries into charges of misconduct against Civil Servants — Principle that prosecutor cannot be judge is not applicable to departmental enquiries. AIR 1962 Madh Pra 372 (374) = 1962 MPLJ 717.

(149) Departmental proceedings are subject to rules of natural justice. In departmental proceedings it is unnecessary to import the strict procedure applicable to judicial trials. But the procedure adopted is to a certain extent like a judicial trial. AIR 1958 Cal 470 (472) = 62 Cal WN 690 ** (1963) 67 Cal WN 966 (977) = 1963 (6) Fac LR 422.

(150) Superior official of delinquent acting as Chairman of Board of inquiry — Such official present during police investigation against delinquent — No personal animosity of official against delinquent nor pecuniary interest alleged — **Held**, from mere fact of official's presence at police investigation, he could not be held to have prejudged the issues or of having any personal interest in case and that there was no bias. AIR 1967 Madh Pra 81 (83) = 1966 MPLJ 990 (DB).

(151) When an Enquiring Committee has the duty to come to a conclusion as to the guilt of delinquent upon an evaluation or assessment of evidence, it is absolutely necessary that the members of the committee should hear evidence of witnesses. (1964) 68 Cal WN 1112 (1115) = (1964) 9 Fac LR 208.

(152) Departmental Enquiry — Officer who ultimately decided the case did so on evidence recorded by his predecessor — No infringement of rules of natural justice, so long as such evidence was taken in the presence of person charged after giving him a fair opportunity to cross-examine those witnesses. AIR 1965 Mad 316 (317, 318) = (1965) 2 Mad LJ 98 (DB).

(153) The fact that a particular officer held a preliminary enquiry before it was decided to hold a departmental enquiry against the delinquent officer does not debar him from conducting the departmental enquiry; nor can it be regarded as in any way indicative of bias against the delinquent officer. AIR 1963 Madh Pra 115 (117) = 1963 MPLJ 139 (DB).

(154) An objection on the ground of prejudice to the holding of the departmental enquiry by an officer who first directs the alleged misconduct or irregularity must be raised as soon as the public servant receives the notice about enquiry. AIR 1963 Madh Pra 216 (218) = 1963 Jab LJ 98 (DB).

(155) Fact finding committee finding prima facie case against servant — Member of fact finding committee appointed chairman of enquiry committee — **Held** that from this it could not be held that

Articles 310 & 311 — Note 75 (c) (contd.)

the chairman had a closed mind — The charge of bias must not be too readily assumed but must be proved by the person alleging the same. (1964) 68 Cal WN 1112 (1114) = (1964) 9 Fac LR 208.

(156) Departmental enquiry — Dismissing authority figuring as witness — There is violation of natural justice. 1963 MPLJ 28 (31) = 1963 Jab LJ 94 = ILR (1962) Madh Pra 288 (DB).

(157) When the report of the enquiry officer is itself made as one of the pieces of evidence on the basis of which the charge is sought to be proved, the enquiry officer may not be expected to hold the scales even or keep an independent and open mind. If the enquiry officer is to be examined as a witness, then there would be a gross violation of natural justice. (1967) 1 Lab LJ 455 (461, 462) (DB) (Guj).

(158) Collector acting as authority competent to award punishment — Collector subsequently appearing as witness in enquiry on basis of facts which had come to his knowledge before commencement of enquiry — There is violation of the rules of natural justice and disregard of all canons of fair play. AIR 1962 Madh Pra 15 (16, 17) = 1961 MPLJ 757 (DB).

(159) It is one of the essential requirements of natural justice that no enquiry should be made behind the back of a petitioner and the evidence which is relied upon by the enquiring officer ought to be made available to the petitioner and a reasonable opportunity must be provided to him to say what he has to say in that regard. ILR (1967) Andh Pra 215 (222) (DB).

(160) Natural justice — Enquiring officer himself examining defence witnesses in absence of delinquent officer and without issuing notice to him — Enquiry is opposed to natural justice and must be quashed. AIR 1966 Mad 203 (218, 219) = (1965) 2 Mad LJ 421 (FB) ** AIR 1960 Ker 294 (294) = 1960 Ker LT 450.

(161) Dismissal of servant — Co-operative association — Managing Committee invested under bye-laws with power to dismiss Manager — Charges of misconduct against Manager — Enquiry into charges by Secretary, who had previously filed criminal complaint against Manager, in his official capacity — Enquiry is not biased — Ultimate decision of dismissing Manager taken by Managing Committee and not by Secretary — Managing Committee cannot be said to have delegated its functions merely by deputing Secretary to enquire and report. AIR 1960 Madhya Pra 273 (277) = 1960 MPLJ 433 (DB).

(162) Punishment awarded to public servant in departmental proceeding — High Court setting aside punishment after investigating into charges on merits and

not upon jurisdictional or other ground — Commencement of fresh proceeding against the public servant upon same allegations offends the principles of natural justice. AIR 1964 Madh Pra 155 (156) = 1965 MPLJ 315 (DB).

(163) Mode of enquiry in appeal — Central Civil Services Rules, 1957 not contemplating personal hearing of appellant — Omission to hear appellant, held, did not violate rules of natural justice. AIR 1968 Delhi 269 (271, 272) = 1968 Lab IC 1402.

(164) Where the enquiry officer exhibited lack of impartiality, the enquiry was vitiated by a disregard of one of essential elements of natural justice. AIR 1966 Madh Pra 58 (60) = 1965 MPLJ 699.

(165) Procedure of quasi-judicial body — Principles of natural justice — Requirements of, stated. AIR 1962 Ker 43 (47) = 1961 KLT 486 (DB).

(166) Reasonable opportunity to show cause does not necessarily include the right of personal hearing at every stage. AIR 1960 All 551 (556, 557) = (1960) 1 Fac LR 477 = 1960 All LJ 288 = (1960) 2 Lab LJ 146.

(167) Date of birth accepted and entered in service register according to horoscope — Correction in date of birth on basis of school register without giving opportunity to employer to show cause — Principles of natural justice have to be observed by holding an enquiry. AIR 1969 Ker 317 (319) = 1969 Lab IC 1476 = 1969 Ker LT 72 (FB).

(167-A) Termination of services — Order involving punishment not depriving Government servant of any vested right to office — No question of following principles of natural justice arises. AIR 1970 SC 158 (161) = (1969) 1 SCWR 1115.

(168) Disciplinary proceeding — Prosecution not examining certain cited witnesses — Delinquent's prayer for attendance of such witnesses for examination as defence witnesses — Trial vitiates if prayer is not granted even if prayer is made at the hearing only. 1969 Lab IC 773 (776, 777) = 16 Fac LR 484 (Cal).

(169) Charge-sheet not mentioning the evidence on which it wishes to rely to show the stopping of work amounted to a strike — That the employee participated in strike assumed without giving him an opportunity to rebut the assumption — Principle of natural justice is violated. AIR 1959 All 614 (617).

(170) Where, without holding an enquiry, charges against the delinquent were decided as established mainly on the basis of evidence collected in a preliminary enquiry prior to framing of charges Article 311 was held to have been infringed. 1968 Lab IC 720 (721, 722) = 1968 BLJR 522.

Articles 310 & 311 — Note 75 (c)
(contd.)

(171) The officers whose cases are to be screened by the Committee constituted under Rule 8 of Punjab Service of Engineers Class I, P. W. D. (Irrigation Branch) Service Rules are entitled to an opportunity of hearing and if the same is not given, to them then the rules of natural justice and fair play are infringed. 1969 Lab IC 795 (799) = 1969 Cur LJ 30 (DB) (Punj).

(172) In a statutory appeal, the parties must be given a hearing and the order passed must be a speaking order. Where the appellate order is a cryptic one and the appeal is disposed of summarily, the order is liable to be set aside. AIR 1968 Assam 52 (53) = 1968 Lab IC 1396 (DB).

(173) Railway Establishment Code, Rule 1721 — Departmental enquiry — Delinquent officer has right to be assisted by another railway employee or official of trade union who is not a professional lawyer — Refusal on ground that he was not member of recognised trade union — Delinquent officer is prejudiced. AIR 1965 Cal 557 (561) = (1966) 1 Lab LJ 194.

(174) Petitioner charged with receiving illegal gratification from a firm in Germany — Request to allow him to visit Germany to collect evidence for his defence refused — Dates fixed for enquiry not intimated — Defence and prosecution witnesses examined in his absence — Request to allow him to engage counsel to cross-examine prosecution witness who was a lawyer refused — Chairman of Board of Enquiry was already biased. **Held:** there was denial of natural justice. 1966 Cri LJ 353 (358) (Punj).

(175) The question whether principles of natural justice had been violated in not giving due and proper weight to findings of Criminal Court can only depend on the facts of each case. (1966) 13 Fac LR 405 (407) = (1967) 1 Mad LJ 146 ** 1968 Lab IC 63 (65) = 79 Mad LW 635.

(176) Where under the bye laws of Co-operative Bank registered under Co-operative Societies Act, the employees held their offices "at pleasure" and not during "good behaviour", the employees were clearly subject to dismissal at sole discretion of appointing authority and rules of natural justice had no applicability. AIR 1963 Madh Pra 298 (300) = 1963 MPLJ 631 (DB).

(177) Railway Establishment Code R. 1712 (2) — Refusal of Inquiry Officer to adjourn inquiry to enable accused employee to have assistance of another railway servant as defence counsel, constituted denial of effective opportunity to employee to defend himself — Vitiating inquiry. AIR 1968 Delhi 85 (89) = 1968 Lab IC 495.

(178) Where the petitioner who was serving as a temporary Moharir was pro-

moted to the post of temporary revenue clerk by the Commissioner but subsequently after two years the order of promotion was set aside behind the back of the petitioner by the Commissioner himself on representation made by the other persons who were not so promoted, the order of the Commissioner deserves to be quashed. (1966) 12 Fac LR 264 (270) (Cal).

(179) Junior given promotion overlooking his senior — Senior should be told grounds therefor. AIR 1965 Ker 108 (109) = 1964 Ker LJ 832 = (1964) 2 Lab LJ 378 (DB).

(180) Dismissal of appellant, a Police constable — Findings of enquiry officer not communicated to him, orally told that it was proposed to dismiss him — No real attempt made to explain on what grounds findings proceeded and what the findings themselves were — **Held:** no due compliance with requirements of Article 311 (2). 1968 SLR 131 (134) (SC).

(181) Disciplinary proceedings against delinquent for making allegations against superior authority — Enquiry by superior authority through one of his subordinates — Opportunity to be heard given not reasonable — Principles of natural justice. AIR 1964 Guj 139 (143 to 145) = (1964) 5 Guj LR 175 (DB).

(182) When the delinquent, in his reply to show cause notice, complained that there was no enquiry and he had no opportunity of defending himself, the authority (Government) ought to order a fresh enquiry and offer him reasonable opportunity. AIR 1964 Madh Pra 318 (320) = 1964 MPLJ 493 (DB).

(183) Punishment awarded to public servant in departmental proceedings — High Court setting aside punishment after investigating into charges on merits and not upon jurisdictional or other ground — Commencement of fresh proceeding against the public servant upon same allegations offends the principles of natural justice. AIR 1964 Madh Pra 155 (156) = 1965 MPLJ 315 (DB).

(184) Reversion of Government servant — Show cause notice as to reversion served on him after actual reversion — Principles of natural justice violated. AIR 1968 Punj 255 (264) = 70 Pun LR 65.

(185) It is a principle of natural justice that once a public servant is exonerated of a charge levelled against him after an enquiry, he should not, in the absence of any statutory rules to that effect be allowed to be vexed and harassed again on the same charges by an officer who is not even superior in rank to the one who originally exonerated him. 1967 Cur LJ 156 (164) = ILR (1967) 2 Punj 471.

(186) Doctrine of double jeopardy has no application — Exercise of administra-

Articles 310 & 311 — Note 75 (c)
(contd.)

five power of taking disciplinary action even though it may have to be done judicially, could not be considered as exercise of judicial power of the State. ILR (1968) Guj 1030 = (1968) 7 Guj LR 1065 (1076) (DB).

(187) Dismissal order set aside by Court not on merits but on ground that principles of natural justice were not observed — Fresh enquiry in respect of same allegations not illegal — No question of double jeopardy. AIR 1963 Manipur 28 (31, 32).

(188) Departmental enquiry against P. — Superior officer issuing instructions to Enquiry Officer to proceed in particular way—**Held**, that instructions to enquiry officer indicated that enquiry was not fair and officer was not unbiased. ILR (1963) Andh Pra 308 (315) (DB).

(189) Enquiring officer placing burden of establishing his innocence on the public servant concerned — Action of officer held was opposed to rules of natural justice. AIR 1962 Orissa 78 (80, 81) = 27 Cut LT 266 (DB).

(190) Where the petitioner was at no stage called upon to explain why punishment of suspension should not be imposed upon him on the ground that his antecedent record was adverse to him, order of suspension partly based on that ground could not be sustained as it amounted to contravention of rule of natural justice. AIR 1962 Mys 84 (86) = 39 Mys LJ 1066 (DB).

(191) Inquiry against Government Servant — Finding against him based on evidence recorded in enquiry against other delinquents — Opportunity to meet evidence denied — Violation of natural justice—Dismissal is illegal. 1968 Lab IC 1485 (1486) = 34 Cut LT 1011 (Ori) (DB).

(192) Enquiry by Domestic Tribunal of Life Insurance Corporation against its employee — Principles of natural justice not followed — Enquiry vitiated — Dismissal pursuant to such enquiry illegal. 1968 Lab IC 1421 (1424, 1425) = (1968) 2 Mad LJ 21.

(193) To charge a man with a definite misconduct, to ask him to show cause against that definite misconduct, and thereafter to find him guilty of another misconduct which the delinquent was not called upon to explain is violative of principles of natural justice. (1966) 12 Fac LR 66 (69) (Cal).

(194) Departmental enquiry against servant for misconduct — Court would never encourage a servant or anybody else to commit act of indiscipline or other misconduct but there must be fair enquiry consonant with natural justice before delinquent may be punished on finding that such charge has been established. 1968 Lab IC 584 (586) (Cal).

(195) Delinquent not called upon to meet specific charges — No opportunity given to look into copies of documents and records — **Held**: principles of natural justice were violated. 1968 BLJR 815 (823) (DB).

(196) Departmental enquiry against police officers — Departmental finding against officers on basis of their admissions made prior to commencement of inquiry — Copies of admissions and report submitted after preliminary inquiry, not supplied to officers. **Held**, there was violation of principles of natural justice. AIR 1962 Assam 34 (36, 37) = ILR (1962) 14 Assam 155 = 1962 (1) Cri LJ 265 (DB).

(197) Apart from Article 311, the rules of natural justice require that before reducing an employee to a lower scale of pay and ordering him to refund the alleged over payment with retrospective effect, an opportunity ought to be afforded to him to show cause against the proposed reduction or cut in his pay. 1969 Cur LJ 4 (7) (Punj).

(198) Petitioner, a Headmaster, appointed by the then Managing Committee of School—Managing Committee has jurisdiction to dismiss him — Petitioner is only a private employee of an aided Institution and not a Government employee — Article 311 not attracted — Managing Committee not a statutory body and has no statutory duties — No obligation to act judicially in dismissing him. ILR (1966) 18 Assam 98 (108, 110) (DB).

(199) Petitioner neither answering charges levelled against him nor participating in enquiry against him — But after completion of enquiry asking for copies of certain documents relied on in enquiry — **Held** there was no violation of principles of natural justice in not complying with request for copies of documents made after completion of enquiry. AIR 1966 Cal 485 (486) = (1966) 2 Lab LJ 71.

(200) Misconduct by Police Officer in investigation of crime — Enquiry into, entrusted to D. S. P. — No allegation that D. S. P. was in anyway biased or prejudiced — No violation of principles of natural justice. AIR 1965 Mad 103 (107) = 77 Mad LW 586 (DB).

(201) Petitioner boycotted enquiry and the enquiry proceeded ex parte — Notice to show cause against proposed penalty issued — Too late a stage to seek opportunity to show cause against charges themselves. (1966) 12 Fac LR 169 (179) = (1966) 2 Lab LJ 290 (Cal).

(201-A) Departmental Enquiry — Time of 48 hours given to delinquent to submit his explanation to charges — Petitioner not asking for more time nor complaining about it — It is too late for him to contend in writ proceedings that

Articles 310 & 311 — Note 75 (c) (contd.)

rules of natural justice were violated. AIR 1963 Cal 116 (121) = 67 Cal WN 361.

(202) The mere fact that an enquiry was conducted by an officer subordinate to punishing authority, held did not violate the enquiry — Existence of bias or prejudice against employee not alleged. AIR 1968 Delhi 269 (271) = 1968 Lab IC 1402.

(203) Where in answer to a notice to a public servant to show cause why he should not be dismissed from service the public servant himself puts forward his past record of service with specific instances and asked them to be considered by the dismissing authority, it is not open to him to turn round and say subsequently that the authority should not have considered them. AIR 1958 Cal 356 (360) = 62 Cal WN 531.

(204) Quasi-judicial body — Departmental inquiry against Government servant — Servant not asking for opportunity to cross-examine witnesses — No violation of natural justice. AIR 1962 Ker 43 (47) = 1961 KLT 486 (DB).

(205) Removal of railway employee for violating Rules 329 and 79 of General Rules — Petitioner supplied with all documents before submitting his representation — Fact-finding body arriving at certain findings — Reasons therefor not supplied to delinquent, finding being tentative—No denial of natural justice. 1969 Lab IC 773 (776) = 16 Fac LR 484 (Cal).

(206) Appellant a temporary Civil Judge — Informal enquiry against his conduct in having relations with a young girl — High Court recommending termination — Rule 12 of M. P. Government Servants (Temporary and Quasi-permanent Service) Rules 1960, did not require that a show cause notice should be given to the appellant — No violation of rules of natural justice. (1969) 1 SCWR 1115 = (1969) 2 SCC 240.

(207) Services of temporary servants or for a fixed period can be terminated at the end of the period or at the pleasure of the master without assigning any reason. The rules of natural justice therefore do not apply to the case of a temporary servant. 59 Pun LR 185 (187) = ILR (1957) Punj 731.

(208) Fresh enquiry for same offence — Order of removal without giving opportunity to defend — Order withdrawn reserving right to direct enquiry — Fresh enquiry on same grounds not hit by principle of double jeopardy. 66 Pun LR 1227 (1229) = 1964 Cur LJ 489.

(209) Enquiring officer himself getting and gathering all material against the accused officer — All proceedings held in the presence of the accused official in conformity with judicial norms — Accused officer informed what material is

likely to be used against him — No violation of rules of natural justice. (1966) 68 Punj LR 174 (178).

(210) Departmental inquiry — Natural justice — Fair opportunity — Observations by High Court on report of Enquiry Officer or on reply to show cause notice, are privileged and need not be disclosed to Officer proceeded against. AIR 1965 Bom 156 (167, 168) = 67 Bom LR 170 (DB).

(211) Rules of natural justice do not require that an enquiry against a person necessarily be held at spot. AIR 1967 Pat 160 (165) = 1966 BLJR 770 (DB).

(212) Departmental inquiry against public servant on charge of general reputation for dishonesty — Evidence of touring officer relied upon — Civil Court will not interfere — Principle of natural justice not violated. AIR 1963 Orissa 73 (81, 82) = ILR (1962) Cut 125 (DB).

(213) Natural Justice — Non-observance of rules — Every non-observance will not constitute violation of natural justice—Only when non-observance prejudices the officer in his defence, then it can be said that principle of natural justice was not observed. AIR 1963 Manipur 51 (56).

(214) Appointment of nominees of and subordinate to Managing Director of Bank as enquiry officers is not in violation of rules of natural justice. AIR 1962 Punj 355 (358) = 64 Pun LR 431.

(215) Refusal of petitioner to co-operate and fully participate in departmental inquiry would not show denial of proper opportunity to defend or violation of rules of natural justice. AIR 1960 Punj 646 (652).

(216) Charge-sheet — Indication of proposed punishment in charge sheet does not vitiate departmental enquiry or indicate any bias against the delinquent officer — Enquiry Officer, after departmental enquiry is entitled to reach any conclusions. AIR 1967 Madh Pra 91 (93) = 1966 MPLJ 1032 (DB).

(217) Departmental instructions not strictly complied with — Inference is not necessarily that action taken by Government against petitioner is mala fide. AIR 1963 Punj 298 (317, 318) = ILR (1962) 2 Punj 642 (DB).

(218) Departmental enquiry against — Civil servant — Right to be represented by lawyer — Denial of legal help is no violation of Article 14 nor was it denial of natural justice. AIR 1959 Orissa 152 (154) = ILR (1959) Cut 95 (DB).

(219) The statement that if orders made in regard to the Government servant are otherwise legal, the fact that the same have been passed because of ill will or malevolence of executive authority will not vitiate or render the same illegal, appears to be an opinion in relation to civil injuries or torts. AIR 1963 Punj 298 (318, 319) = ILR (1962) 2 Punj 642 (DB).

Articles 310 & 311 — Note 75 (c)
(contd.)

(220) Anything that the government servant did to create circumstances themselves from which an inference is sought to be drawn that thereby the Chief Minister has become hostile to him cannot be available to the government servant because if that was so any Government servant anticipating an enquiry against himself will start making allegations, in this manner, founded or unfounded just to escape an enquiry. AIR 1963 Punj 298 (317) = ILR (1962) 2 Punj 624 (DB).

(221) Railway servant not objecting to enquiry against him conducted by particular officer though he was aware of his right — He cannot in writ petition contend that enquiry was biased. 1965 Ker LT 554 (557) = ILR (1965) 1 Ker 536.

(222) Removal of pradhan of Gaon Sabha under Section 95 (1) (g) (iii) of U. P. Panchayat Raj Act (26 of 1947) — Regular enquiry not contemplated in Act — Petitioner had not demanded opportunity to be heard and to defend himself — Explaining to petitioner, charge framed against him was sufficient compliance with principles of natural justice and provisions of Act. AIR 1965 All 370 (371, 372) = 1964 All LJ 1073 (DB).

75 (d). Bias and bona fides. — See also Note 73 — (223) The authorities entrusted with departmental enquiry are bound by the principles governing the "doctrine of bias." The principles are: (i) no man shall be judge in his own cause: (ii) justice should not only be done but manifestly and undoubtedly seem to be done. AIR 1969 Assam 1 (3) = 1969 Lab IC 4.

(224) The rule that the bias vitiates the finding is a rule of natural justice. AIR 1960 Assam 141 (149) (DB).

(225-226) The officer making the departmental enquiry into the charges against the civil servant or passing final order against him must be free from bias. AIR 1961 All 45 (47-48) = ILR (1960) 2 All 259. (Reversed on another point in AIR 1963 All 94.) ** AIR 1957 Andh Pra 414 (417) = ILR (1957) Andh Pra 402 (DB) ** AIR 1956 Cal 662 (666) ** AIR 1956 Punj 58 (63) = ILR (1956) Punj 236 (DB) ** AIR 1956 Vindh Pra 14 (15) ** AIR 1955 Pepsu 172 (176) = ILR (1955) Patiala 314 ** AIR 1954 Vindh Pra 50 (53).

(227) The enquiring officer must not be one who has already formed an opinion about the guilt of the civil servant. AIR 1956 Punj 102 (105) = ILR (1956) Punj 361 ** AIR 1956 Vindh Pra 14 (15, 16) ** AIR 1954 Cal 335 (337).

(228) Simply because the enquiring officer is in subordinate position to officer framing charge, it cannot be said that he would be influenced by the latter and sit with a bias. AIR 1967 All 384 (389) = (1968) 2 Lab LJ 586.

(229) Bias of the enquiring authority is, fatal to its decision and the position is not different where only one of those constituting the tribunal is shown to have prejudged the issue. AIR 1958 Andh Pra 636 (637) = (1958) 2 An WR 281.

(230) Disciplinary action — Show cause notice itself containing conclusion of enquiry officer about punishment to be awarded to delinquent officer — Held enquiry officer had not started his enquiries with open mind but had prejudged the very issue before him. (1967) 2 Andh WR 253 (257) = 1968 Serv LR 77 (DB).

(231) Disciplinary proceedings against public servant on charges of serious misconduct, misappropriation of Government money, neglect of duty etc. — Prior knowledge of enquiring officer of facts about such charges — Bias cannot be alleged. AIR 1967 Pat 43 (46) = (1967) 2 Lab LJ 540 (DB).

(232) Administrative order of suspension passed by authority — No question of bias arises in regard to such order. AIR 1963 Punj 298 (318, 319) = ILR (1962) 2 Punj 642 (DB).

75 (e). Procedure. — (233) The procedure contemplated in an enquiry against a public servant under Article 311 of the Constitution of India is (1) to inform the delinquent of the charges levelled against him and the allegations on which the charges, are based, and (2) to provide an opportunity for the delinquent to cross-examine, to examine himself and to adduce defence evidence, and (3) to afford an opportunity to make representations as to why the proposed punishment should not be inflicted on him. The delinquent should be given a reasonable opportunity to show cause twice before a punishment is inflicted. When the charges are enquired into he should be given a reasonable opportunity to defend himself and again when after an enquiring authority has come to its conclusion on the charges and when the question of proper punishment to be awarded is being considered. (1966) 79 Mad LW 422 (423) = ILR (1966) 1 Mad 365 (DB) ** AIR 1963 Orissa 73 (76, 77) = ILR (1962) Cut 125 (DB).

(234) Disciplinary proceedings against a civil servant cannot be equated completely to judicial trials and rules of procedure applicable to judicial trials need not be applied in toto to such proceedings. AIR 1962 Tripura 15 (16).

(235) Where in an enquiry against the conduct of a police officer, witness was examined after the close of the case but the officer was given an opportunity to cross-examine him, there cannot be any grievance on this ground. ILR (1960) 1 All 214 = 1960 Cr LJ 1290 = AIR 1960 All 618 (620) (DB).

(236) In preliminary enquiry the explanation of the Government servant may be taken and documentary and even oral

Articles 310 & 311 — Note 75 (e)
(contd.)

evidence may be considered. (1967) 1 Lab LJ 718 (721) (SC).

(237) Once specific charges, involving such a serious punishment as dismissal, are framed against a public servant and he is called upon to submit his explanation the enquiring officer must first hold an enquiry if the delinquent servant denies the charges. (1960) 28 Cut LT 133 (134, 135, 136) (DB).

(238) Under Rule 23 of the Madras Civil Services (Classification, Control and Appeal) Rules, the State Government, as an appellate authority, has no power in appeal against the punishment imposed on a delinquent officer to revive the charges abandoned by the authority competent to punish the delinquent officer, as not held proved and to find the officer guilty thereof and to award him heavier punishment. AIR 1963 Mad 14 (16) = (1962) 2 Mad LJ 339 (DB).

(239) Departmental enquiry against Government servant — Kerala Civil Services (Classification, Control and Appeal) Rules, 1957, coming into force after close of enquiry but before final order in enquiry — Rule promulgated after close of enquiry does not apply to enquiry. AIR 1962 Ker 43 (47) = (1961) 2 Lab LJ 50 = 1961 Ker LT 486 (DB).

(240) Departmental enquiry — Charges relating to 1963-64 — Enquiry entrusted to Mysore State Vigilance Commissioner — Vigilance Rules framed subsequently in 1965 — Enquiry under Vigilance Rules, 1965, held valid — No vested right to procedure. AIR 1968 Mys 296 (301) = (1968) 1 Mys LJ 113 (DB).

(241) A departmental enquiry should be in accordance with rules of natural justice and if such rules are substantially followed and no prejudice is caused to the concerned officer, a mere failure to observe a particular rule should not be enough to quash the enquiry. (1961) Raj LW 104 (106) = ILR (1960) 10 Raj 1419 (DB).

(242) Civil Service — Bihar Government Servants' Conduct Rules (1956), R. 15 (5) — Rule applied to transactions prior to coming into force of the Rules — There is no illegality. AIR 1967 Pat 43 (48) = (1967) 2 Lab LJ 540 (DB).

(243) The fact that the Collector of Baroda did not follow the instructions given in the Manual prepared by the Government of Bombay containing instructions for officers holding departmental inquiries, is not material as the Manual does not consist of statutory rules but merely consists of departmental instructions. AIR 1962 Guj 197 (200) = 3 Guj LR 492 = (1962) 2 Lab LJ 507 (DB).

(244) In cases governed by Art. 311 the question of indicating the punishment does not arise when charges are to be enquired into. The procedure adopted in

indicating the penalty in the memorandum of charges, therefore offends Art. 311 and also contravenes G. O. Ms. No. 4730, Home, dated 6th November, 1950. (1967) 1 An WR 156 (158) = 14 Fac LR 232.

(245) Madras Services Manual, Vol. 1, 1954, R. 17 — Disciplinary Action — Only punishing authority can initiate and conduct enquiry proceedings — Held, District Agricultural officer had no authority to initiate proceedings against Agricultural assistant. (1967) 2 An WR 253 (256) = 1968 Serv. LR 77 (DB).

(246) Under Rule 31A of Fundamental Rules, any error or mistake in the appointment or promotion could only be corrected before the authority decides to confirm the incumbent in the particular post in question — Once a confirmation order is made that confirmation could only be interfered with by applying the procedure indicated in Art. 311. AIR 1968 Assam 18 (19) = 1968 Lab IC 919 (DB).

(247) Disciplinary Proceedings (Administrative Tribunal) Rules (1951), R. 3 (4) (before its amendment in 1955) — Sub-r. (4) is mandatory — Amendment in 1955 making sub-r. (4) discretionary is not retrospective — Dispensation of assistance of assessor during enquiry against civil servant is without jurisdiction — Findings against and dismissal of civil servant deserve to be set aside. AIR 1960 Orissa 58 (60, 61) = ILR (1959) Cut 573 (DB).

(248) Disciplinary Proceedings (Administrative Tribunal) Rules, 1951, R. 3 (4) (as amended in 1955) — Tribunal conducting proceedings without aid of assessor — No direction to contrary by Governor — Proceedings not invalid. AIR 1965 Orissa 183 (186, 187) = (1965) 7 OJD 74 (DB).

(249) Enquiry officer orally hearing parties and giving findings without recording any evidence — Government setting aside his report and appointing another officer unconnected with the office of the delinquent servant and accepting his findings — Order of Government held was within its powers and no mala fides could be attributed. AIR 1969 Manipur 36 (40) 1969 Lab IC 561.

(250) Although in a case of departmental enquiry if the enquiring authority has the duty to come to a conclusion as to the guilt of the delinquent upon an evaluation or assessment of the evidence it is entirely necessary that he should be the person who should hear the evidence of the witnesses but the correct test to be adopted is whether the procedure adopted by the Inquiry Officer has led to any prejudice or not. AIR 1963 Raj 203 (207) = 1963 Raj LW 374.

(251) The right given to a charge-sheeted officer to cross-examine the departmental witnesses or examine his own witnesses can be legitimately examined

Articles 310 & 311 — Note 75 (e)
(contd.)

and controlled by the enquiry officer. So as to prevent its proceedings being unduly or deliberately prolonged. AIR 1966 SC 209 (274).

(252) An enquiry cannot be considered to be open to challenge on the ground that procedure laid down in Evidence Act for recording evidence or in Code of Criminal Procedure for trial of offences has not been strictly followed. AIR 1969 Delhi 145 (147) = 1969 Lab IC 539 (DB).

(253-254) Government servant — Departmental enquiry — Proceeding to be followed — Evidence taken in absence of servant — Procedure not violative of natural justice. AIR 1962 Ker 43 (45) = (1961) 2 Lab LJ 50 = 1961 Ker LT 486 (DB). (AIR 1960 Ker 63, Dissent. from.)

(255) Procedure — Where a departmental enquiry is after recording of evidence of a few witnesses, conducted by another officer, refusal by the officer to start the enquiry de novo does not vitiate the enquiry. AIR 1963 Punj 90 (91, 92) = 1962 Cur LJ 541.

(256) Procedure — U. P. Police Regulations, Reg. 490 (5) — Departmental enquiry — Discretion to refuse to call defence witness — High Court will not interfere with the exercise of that discretion so long as it is not exercised arbitrarily or in an unjudicial manner. AIR 1958 All 607 (608) = 1958 All LJ 205 (DB).

(257) Enquiry against delinquent officer — Change of personnel of enquiring officer due to transfer — Delinquent officer is not entitled to de novo enquiry as of right in absence of rule. AIR 1966 Mad 203 (215, 216, 217) = (1965) 2 Mad LJ 421 (FB).

(258) Under the Constitution it is the High Court that could direct an enquiry against a subordinate judicial officer and appoint one of the judges as the enquiry officer, but, according to the law in force in Hyderabad on the relevant date, it was the Administrative Bench that could hold the enquiry or direct it to be held, by one of the Judges. Since the appointment of the enquiry officer in the instant case, was admittedly not by the Administrative Bench the enquiry is wholly unauthorised, and the report which formed the basis is without jurisdiction. (1969) 2 An WR 79 (92) (DB).

(259) Though the Tribunal Rules by their own force, may not apply to officers of the Judicial Service because they are officers under the administrative control of the High Court by virtue of Art. 235, nevertheless as they are also entitled to the protection of Art. 311, there could be no legal bar if the High Court applies the provisions of the Tribunal Rules to the delinquent officer while deciding to hold the departmental enquiry. AIR 1965 Orissa 183 (186) = (1965) 7 OJD 74 (DB).

(260) Enquiry officer has to decide the case independently without being influenced in any manner by the remarks of some other officer. It is not permissible for the Government to send the charge-sheet and the explanation to the Collector and ask for the remarks and act thereon. It is the Government which alone must apply its mind to the facts and circumstances of the case. ILR (1967) Andh Pra 215 (219, 220) (DB).

(261) Procedure followed in respect of main charges but not in respect of minor additional charges — Entire proceedings are not vitiated. AIR 1963 Orissa 73 (82) = ILR (1962) Cut 125 (DB).

(262) Even where the Government does not intend to take action by way of punishment against a temporary servant on a report of bad work or misconduct, a preliminary enquiry is usually held to satisfy Government that there is reason to dispense with the services of the temporary employee. (1967) 1 Lab LJ 718 (721, 722) (SC).

(263) Even in a case where a formal departmental inquiry is initiated against a temporary Government servant it is open to the authority to drop further proceedings in the departmental enquiry and to make an order for discharge simpliciter against the temporary Government servant. (1967) 1 Lab LJ 718 (722) = 15 Fac LR 347 (SC).

(264) Authority to act quasi-judicially — No provision regarding procedure in the statute concerned — Authority can devise its own procedure — Procedure should not be inconsistent with the principles of judicial procedure. AIR 1968 Mys 296 (300) = (1968) 1 Mys LJ 113 (DB).

(265) An order passed by a quasi-judicial tribunal should contain in itself, the necessary material to assure the superior Courts that the Tribunal had satisfied the requirement of the relevant provisions pertaining to the exercise of its jurisdiction whether appellate or otherwise. (1966) 2 Mys LJ 70 (73-74) = (1966) 7 Law Rep 251 (DB).

(266) Two separate notices and separate enquiries are not necessary and one notice at the time of punishment is enough. AIR 1957 All 439 (447) (DB) ** AIR 1955 Assam 171 (172, 173) = ILR (1955) 7 Assam 104 (DB) ** AIR 1955 Hyd 240 (241) = ILR (1955) Hyd 714 (DB).

75 (f). Departmental enquiry after acquittal in criminal prosecution — See also Note 126. — (267) Even if a criminal prosecution has commenced and is continuing against an officer, a disciplinary proceeding in respect of the accusation which forms the subject-matter of the charge in the Criminal Court is not forbidden and it can be commenced and concluded so long as the prosecution has not ended in an acquittal. AIR 1967 Mys 220 (221) = (1967) 1 Mys LJ 12 (DB).

Articles 310 & 311 — Note 75 (f) (contd.)

(268) Graft charge — Acquittal by Criminal Court — Departmental enquiry not barred thereby — Right to exercise disciplinary jurisdiction always exists when charge of sufficient gravity is alleged against an employee. AIR 1967 Mad 315 (316, 317) = 78 Mad LW 692 (DB).

(269) It is not a true position of law to state that whenever it is possible to prosecute a Government servant in Court of law, authorities would be precluded from proceeding against him departmentally under any conceivable circumstances. AIR 1967 Mad 315 = (1966) 1 Mad LJ 306 (308) (DB).

(270) Civil servant committing offence under Penal Code — It is at the discretion of Government to start departmental enquiry without initiating criminal prosecution. AIR 1958 Madh Pra 326 (328, 329) = 1959 MPLJ 128 = (1959) 1 Lab LJ 41.

(271) Where a person was convicted by Court-martial of an offence, he must be deemed to have been convicted on a criminal charge by a competent tribunal and falls within the mischief of proviso (A) of Art. 311 (2) of Constitution. (1963) 6 Fac LR 134 (135) (Cal).

(272) U. P. Disciplinary Proceedings (Administrative Tribunal) Rules (1947), Rule 8 — Procedure for trial under — Not more onerous or less favourable than that under Civil Service Rules. AIR 1960 All 754 (759).

(273) Acquittal of police officer in a criminal Court on technical ground — Departmental enquiry under Police Rule 16.3 is not barred. AIR 1969 Punj 131 (135) = 1969 Lab IC 573.

(274) Criminal proceedings started against employee without launching a Departmental enquiry, resulting in acquittal — Not proper for the Department to proceed against on the same charges. AIR 1968 Pat 300 (301) = 1968 Lab IC 1074 = 34 FJR 249 **AIR 1963 Orissa 73 (78) = ILR (1962) Cut 125 (DB).

(275) The principle of *autrefois acquit* is contained in Section 403, Cr. P. C. It applies only to a second prosecution for the same offence in a criminal Court. It cannot apply to a departmental enquiry on the same charge after acquittal in a criminal court. AIR 1959 Tripura 51 (54).

(276) Statement by the enquiry officer that the judgment of the magistrate in a criminal trial against the public servant could not be always regarded as binding in a departmental enquiry is not erroneous. AIR 1963 SC 1723 (1727).

(277) Prosecution on charges for embezzlement — Evidence found insufficient to warrant conviction — Subsequent Departmental proceeding based on same allegations resulting in discharge of the Government servant — Order if based on some evidence and not mere conjectures cannot be set aside merely because the

evidence was found to be insufficient to warrant conviction. AIR 1967 Pat 133 (135, 137) = (1968) 1 Lab LJ 703 (DB).

(278) Employee dismissed after departmental enquiry — Fact that criminal complaint was subsequently dropped is no ground for reinstatement. 1968 Lab IC 1145 (1148) (Manipur).

(279) Dismissal order set aside in writ petition — Delinquent re-instated — Fresh enquiry into old charges without keeping delinquent under suspension — Second enquiry held not illegal on ground that there was exoneration and condonation of misconduct — Order of dismissal following such enquiry not invalid. AIR 1964 Manipur 8 (9).

(280) Discharge of Government servant — Prosecution on charges for embezzlement — Evidence found insufficient to warrant conviction — Subsequent Departmental proceeding based on some allegations resulting in discharge of the Government servant — Order if based on some evidence and not mere conjectures cannot be set aside merely because the evidence was found to be insufficient to warrant conviction. AIR 1967 Pat 133 (Prs. 5, 9, 13, 14) = (1968) 1 Lab LJ 703 (DB).

(281) Acquittal by criminal Court — Disciplinary proceedings on same charge improper in the circumstances. AIR 1962 Mys 84 (85, 86) = 39 Mys LJ 1066 (DB).

(282) Central Reserve Police Rules (1955), Rule 27 — Police charged under Section 10 (m), Central Reserve Police Force Act, 1949, acquitted by Appellate Court not on merits of case but on ground that trial was vitiated — Acquittal is no bar for institution of departmental enquiry. AIR 1965 Raj 140 (141) = 1965 Raj LW 26 (DB).

(283) A Civil Court can pass a decree setting aside a dismissal order on the ground of non-compliance with the provisions of the Constitution of India or Rules relating to Service Conditions. Such a decree cannot in any case be treated as an exoneration of the person from the charges levelled against him. 1960 Raj LW 385 (388) = ILR (1960) 10 Raj 952.

75(g). Powers of appellate authority. — (284) Departmental appeal against punishment — Only the Central Civil Services (Classification, Control and Appeal) Rules will apply — The appellate authority has only got to study the records and see whether the rules have been complied with and if not, whether the non-compliance has resulted in violation of the provisions of the Constitution or in failure of justice and whether the findings are justified and whether the penalty imposed is proper. AIR 1961 Tripura 1 (4).

(285) Personal hearing to delinquent during stage of appeal — Delinquent has no right to such hearing — Police constable dismissed — Personal hearing refus-

Articles 310 & 311 — Note 75 (g)
(contd.)

ed during appeal — Dismissal not bad on ground of such refusal. AIR 1969 Guj 260 (267) = 1969 Lab IC 1103. (AIR 1963 Assam 183, Dissented.)

(286) Decision based on misreading of documents and erroneous view of Art. 311 — Decision not binding in second appeal. AIR 1969 All 542 (544) = 1969 Lab IC 1318.

(287) When in a departmental matter a higher authority just dittoes, usually by using the words 'as proposed' or 'approved' and the like, it should be deemed that the operative portion alone has been approved. 1960 MPLJ 1063 (1073) = 1960 Jab LJ 1160 (DB).

76. Waiver of enquiry and objections to defects in it. — (1) Appeal to Prime Minister against order of reduction in rank and communication of Prime Minister's decision is not procedure contemplated by Art. 311 (2). The fact that petitioner appealed to Prime Minister cannot be treated as waiver of his constitutional rights in the absence of any evidence of intentional relinquishment of a known right. AIR 1969 Cal 180 (193) = 1969 Lab IC 409 (DB).

(2) Where infirmities in the enquiry go to the root of the matter, they cannot be deemed to have been waived by omitting to show cause against the notice with regard to proposed punishment. 1968 Lab IC 302 (317) = ILR (1967) 1 All 239 (DB).

(3) Where the public servant accepted, without raising any objection to the defects in the notice terminating his services, the arrears of his pay plus three months' pay in lieu of discharge notice, it would show that he waived all objections regarding notice and enquiry and it would not be open to him to challenge the order of termination on ground of such defects. AIR 1956 Tripura 33 (34).

(4) Departmental enquiry — Acquiescence and submission to jurisdiction of Enquiry Officer without raising any objection — Petitioner cannot be allowed to challenge jurisdiction of Enquiry Officer after the enquiry is over and the officer found against him. AIR 1965 Mys 283 (285) = (1965) 1 Mys LJ 422 (DB) ** AIR 1962 All 114 (116, 117) (DB).

(5) Misconduct — Inquiry — Government servant given choice to resign or face enquiry — Servant tendering resignation and Government accepting — Government cannot start enquiry into misconduct. AIR 1955 TC 245 (247) = 1955 Ker LT 386 (DB).

77. Opportunity given but not availed of. — (1) The provisions of Clause (2) of Article 311 though mandatory are meant for the benefit of civil servant concerned and, therefore, can be waived by him. AIR 1957 Assam 77 (81) (DB).

(2) Where a civil servant who has attained the age of 55, for some reason or other, confesses his inability to continue in service and seeks permission to retire, it would be a useless formality to ask him to show cause as to why his services should not be terminated. AIR 1954 SC 584 (586).

(3) Where reasonable opportunity against the proposed action has been given to a civil servant but has not been availed of by him, the order of dismissal, removal or reduction in rank passed against him will not be rendered invalid. AIR 1955 SC 160 (164) = 1955 SCR 1011 **AIR 1953 Him Pra 125 (126) **ILR (1957) Punj 1695 (1701) **AIR 1953 Punj 137 (141) = ILR (1953) Punj 472 (DB) ** AIR 1960 Orissa 26 (28) = (1959) 1 Orissa JD 550 (DB) ** AIR 1968 Madh Pra 132 (133) = 1968 Lab IC 939 = 1968 MPLJ 14 (DB).

[See however AIR 1958 Bom 204 (205) = ILR (1958) Bom 343 (DB).]

(4) Reasonable opportunity — Government servant pleading guilty to charge-sheet given — Enquiry to prove charges against him becomes unnecessary — Government servant deliberately refusing to accept second show cause notice against proposed punishment — Reasonable opportunity cannot be said to have been denied. ILR (1961) 2 All 90 (93, 94) (DB).

(5) Copies of documents relied on by Enquiry Officer given to the employee before report of enquiry is made — Employee not availing of the opportunity to file additional statement of defence — No denial of opportunity. (1965) 10 Fac LR 8 (11) = (1966) 1 Lab LJ 190 (Cal).

(6) After closure of inquiry, certificate by delinquent to enquiry committee to the effect that he had been given all reasonable facilities to defend himself and consult records — No explanation as to how that certificate came to be given — Certificate did not amount to waiver of objection against reconstitution of enquiry committee. (1964) 68 Cal WN 1112 (1116) = (1964) 9 Fac LR 208.

(7) Punjab Civil Services (Punishment and Appeal) Rules (1952), Rule 7 (2) — Departmental enquiry under — Plaintiff afforded opportunity to challenge evidence adduced by Department — Plaintiff not availing of it cannot find fault with Enquiry Officer's report on ground that it was not based on evidence but on affidavits. (1963) 65 Punj LR 945 (951).

(8) Where a person does not deem it necessary to make use of the opportunity or refuses to take part in the enquiry, he cannot as of right demand the enquiry to be held over again at the final stage. (1963) 65 Punj LR 945 **59 Punj LR 472 (475) = ILR (1957) Punj 1695.

(9) Departmental inquiry against delinquent public servant — Opportunity

Articles 310 & 311 — Note 77 (contd.)
 given to him to cross-examine witnesses — Opportunity not availed of — Principle of natural justice is not violated. AIR 1963 Orissa 73 (79, 80) = ILR (1962) Cut 125 (DB).

(10) If a person has been given complete opportunity of cross-examining the prosecution witnesses and of adducing his defence at the stage of the inquiry held against him and he voluntarily refuses to do so he cannot be entitled to another opportunity at a later stage when notice is issued to him to show cause against the punishment proposed. AIR 1960 Punj 646 (651, 652) (DB).

(11) Head Clerk of university — Dismissal of — Opportunity given to servant to produce defence — Opportunity not availed of — No violation of natural justice. AIR 1960 J & K 80 (82, 83) (DB).

78. Apology by civil servant — Effect. — (1) When a Government servant in a departmental inquiry tenders an unqualified apology, there is no necessity of holding an oral inquiry into the allegations made against him. AIR 1963 Raj 57 (61, 62) = 1963 Raj LW 128 **AIR 1956 Raj 28 (30) = ILR (1955) 5 Raj 887 (DB).

(2) The fact that the apology of some of the Government servants charged with the same misconduct is accepted but is not accepted in the case of others does not amount to a breach of the equal protection clause of the Constitution. AIR 1956 Raj 28 (30) = ILR (1955) 5 Raj 887 (DB).

(3) Notice of discharge not given to employee — Employee offering apology when departmental inquiry against him concluded — Tendering apology could not dispense with notice contemplated by Section 126 (2) — Giving notice is constitutional provision and has to be complied with. AIR 1965 J & K 53 (56) = 1964 Kash LJ 214 (DB) **AIR 1956 Raj 28 (30) = ILR (1955) 5 Raj 887 (DB).

79. Public Service Commission, reference to. — See also Note 136 and Art. 320. — (1) Where the Government passes an order of reversion exclusively on the basis of the opinion given to that effect by the Public Service Commission, without applying its own independent mind to the merits of the case, that order can be validly challenged as vitiated by mala fides and not binding in law. AIR 1966 Orissa 173 (183) = ILR (1965) Cut 893 (DB).

80. Show cause notice, by whom to be given. — (1) Show cause notice under Rule 1707 of Rly. Est. Code should be in the name of punishing authority or with its authority, consent or approval. AIR 1958 Cal 633 (634) = 62 Cal WN 189.

(2) Notice issued by authority not competent to dismiss public servant — Subse-

quent approval of competent authority cannot cure defect. AIR 1960 Orissa 37 (38, 39) = ILR (1960) Cut 13 (DB). (Overruled on another point in AIR 1963 SC 1612.)

81. Authority who can frame charges. — (1) The framing of charges, the holding of an enquiry into them, the suspension of the civil servant during the enquiry, the notice to show cause, are all steps in the exercise of the disciplinary powers. All these steps are required to be taken by the disciplinary authority and not by a delegate of that authority. AIR 1969 Assam 1 (2) = 1969 Lab IC 4 (DB).

(2) Though Rule 15, C. C. S. (C. C. A.) Rules says that the disciplinary authority has to frame the charges it will amount to the same thing if he directs the persons who conducted the preliminary enquiry to draft the charges and after the drafting approves of the same. AIR 1962 Tripura 15 (16).

82. Order must show that authority applied its mind. — (1) Appointing authority wrongly stating that the evidence of a particular witness was recorded while he was not examined by the enquiry officer — Appointing authority placing reliance on the statements recorded in the presence of the delinquent officer alone — Factors sufficient to indicate that appointing authority has failed to apply his mind to the material on record. AIR 1967 Madh Pra 91 (94) = 1966 MPLJ 1032 (DB).

(2) Railway Establishment Code, Rule 1721 — Departmental inquiry — Appeal against punishment order — Order of appellate authority cryptic in extreme not showing that it considered facts on which order was based — Order held did not fit in requirements of R. 1721. AIR 1965 Cal 557 (560, 561) = (1964) 9 Fac LR 174.

(3) Appellate order which does not show that the appellate authority applied his mind to the points envisaged in the Rule 1731 (2) of Discipline and Appeal Rules for Non-Gazetted Railway Servants cannot be sustained. (1965) 10 Fac LR 8 (12) = (1966) 1 Lab LJ 190 (Cal).

(4) Railway Establishment Code, Rules 1716 (e) and 1731 — Imposition of minor punishment — Order imposing punishment and appellate order confirming it omitting to state reason for holding charges proved — Orders are vitiated and have to be quashed. AIR 1968 All 91 (93) = 1968 SLR 265.

(5) Order of termination of services passed without taking into consideration the explanation of the delinquent — Held, enquiring officer did not apply his mind to the case and the order could not be sustained. 1966 Cur LJ 87 (91) (Punj).

83. Reinstatement — Effect of. — (1) Order of reversion during pendency of

Articles 310 & 311 — Note 83 (contd.)

departmental enquiry — Criminal proceedings ending in acquittal of delinquent — Departmental enquiry dropped — Delinquent officer entitled to full pay and allowances pending his reinstatement by virtue of Rule 10 (7) of Central Civil Services (Classification, Control and Appeal) Rules. (1967) 12 Law Rep 363 (364) = (1967) 1 Mys LJ 455 (DB).

(2) On the ending of the suspension, the officer is simply allotted his job and there is no question of any "re-instatement" in the proper sense of the term, as the question of "re-instatement" can only arise in case of dismissal or removal from service, or termination of service in any other manner. AIR 1958 Cal 239 (241).

(3) Contention that civil servants who were reverted should have asked for their reinstatement in particular post and removal of another occupying that post instead of asking to quash order of reversion — Held, contention was not acceptable. AIR 1967 Mys 225 (231) = (1966) 8 Law Rep 448 (DB).

(4) Suit for salary by Government servant — Consequences of setting aside order of dismissal of Government servant were that he could have been reinstated on the date of the suit and could have asked for arrears of salary. AIR 1960 Cal 278 (282) (AIR 1954 SC 245, Foll.).

(5) Where promotion was delayed only on account of pending departmental enquiry, which resulted in exoneration of the petitioner, it was held that he ought to have been promoted with effect from the date other officers were promoted and ought to have been placed at the top of the list according to his seniority. AIR 1967 Mys 136 (138) = (1966) 2 Mys LJ 584 (DB).

(6) Since no punishment at all was imposed on the petitioner on the basis of a finding that he was guilty of the charges which were framed against him, the direction that the petitioner should be treated as being on leave without allowance for the interim period held could not be sustained, and the petitioner was right in claiming his salary for that period. AIR 1962 Mys 43 (44) = 39 Mys LJ 576 (DB).

84. Domestic enquiry. — (1) Domestic enquiry cannot be equated to enquiries under Art. 311. AIR 1968 SC 236 (238) = (1968) 1 SCR 307.

(2) A domestic inquiry against a Government servant is in a way of a quasi-criminal nature. It is for the prosecution to produce evidence to establish the guilt of the person charged. 1965 Punj LR (Supp) 66 (78) = ILR (1965) 2 Punj 319.

(3-4) Domestic enquiry — Dismissal of civil servants — Charge cannot be sustained if not based on any evidence, or if proved facts cannot possibly lead to conclusion of proof of charge or if the charge sought to be established against employee at the bar is not the one he

has been called upon to meet. 1968 Lab IC 259 (263) (Delhi).

(5) In a domestic enquiry, Evidence Act does not apply and the Enquiry Officer is entitled to collect evidence not hedged in any way by limitations prescribed under Evidence Act (e. g. leading questions.) (1966) 12 Fac LR 80 (84) = (1966) 2 Lab LJ 282 (Cal).

(6) Natural justice — Domestic enquiry — Examination of witness — Reading out his statement already recorded behind the back of delinquent servant — Procedure, though irregular, does not vitiate enquiry. 1969 Lab IC 1441 (1447) (Goa).

(7) Domestic enquiry — Statements need not be recorded as questions and answers — There is no rule that statement recorded in narrative form would prejudice worker in such enquiry. 32 FJR 214 (216) = (1967) 2 Mad LJ 199.

(8) Domestic inquiry — Principles of natural justice — Enquiry Officer not bound to tell employee about his right to lead evidence in defence or ask him whether he wants to adduce evidence — Failure on the part of Enquiry Officer to do so, not violative of principles of natural justice. AIR 1967 Bom 147 (152) = 68 Bom LR 749 (DB).

(9) Domestic enquiry — Matters of record — Leading questions about them, put to delinquent — Not improper. AIR 1968 SC 236 (239) = (1968) 1 SCR 307.

(10) Domestic enquiry — It is wise to ask the delinquent whether he would like to make a statement first or wait till the evidence is over; but failure to question him in this way does not ipso facto vitiate the enquiry unless prejudice is caused. AIR 1968 SC 236 (239) = (1968) 1 SCR 307.

(11) It is not an invariable rule that in a domestic enquiry all the evidence against a delinquent must be led before he is asked anything. AIR 1968 SC 236 (239) = (1968) 1 SCR 307.

(12) It is not fair in domestic enquiries against a Government servant just as against industrial employees that the said servant should be closely cross-examined at the very commencement of the enquiry, even before any other evidence is led against him. 1965 Pun LR (Supp) 66 (77, 78) = ILR (1965) 2 Punj 319.

(13) Domestic enquiry — Report by Enquiry Officer regarding findings and recommending mode of punishment — Supply of report along with show cause notice to delinquent — Part of report relating to punishment cannot be withheld. AIR 1969 SC 1204 (1296) = 1969 Lab IC 1547 = (1969) 2 SCJ 740.

(14) Domestic inquiry into misconduct of employee during pendency of a parallel inquiry before Court in the absence of stay order does not amount to contempt. AIR 1969 SC 30 (32, 33) = 1969 Cr LJ 267 = 1969 Lab IC 194 = (1968) 2 SCJ 955.

Articles 310 & 311 — Note 84 (contd.)

(15) Domestic enquiry — Charge against petitioner of accepting illegal gratification — Defence that the amount was subsequently reimbursed but no receipt for reimbursement produced — Held, though party paying gratification was not required to produce receipt for payment of gratification, punishment of petitioner relying on non-production of receipt for reimbursement, could not be interfered with on the ground that different standard of proof was adopted. AIR 1968 Delhi 26 (28) = 1968 Lab LC 24 (DB).

(16) Per Sen J. :— Civil Court cannot sit in appeal over decision of an Enquiring Officer, a domestic tribunal. Enquiring Officer is not bound to follow strict rules of law of evidence. The scope of reasonable enquiry cannot be extended in the manner suggesting that reasonable opportunity implies correct decision by enquiring officer. AIR 1966 Cal 42 (49) = (1968) 2 Lab LJ 617 (DB).

(17) Enquiry officer orally hearing parties and giving findings without recording any evidence — Government setting aside his report and appointing another officer unconnected with the office of the delinquent servant and accepting his findings — Order of Government held was within its powers and no mala fides could be attributed. AIR 1969 Manipur 36 (40) = 1969 Lab IC 561.

(18) Domestic Tribunal — Delegation of its essential functions by designated authority will render its decision invalid. AIR 1968 Delhi 26 (28) = 1968 Lab IC 24 (DB).

85. Fresh proceedings in respect of same matter. — (1) If a disciplinary proceeding is commenced with respect to an accusation and that disciplinary proceeding has reached the stage when an enquiry has been completed that disciplinary proceeding must end either in the imposition of a punishment or in exoneration. If that disciplinary proceeding has not been terminated in that way, the commencement of another disciplinary proceedings with respect to these charges is plainly incompetent. (1969) 1 Mys LJ 405 (406) = 1969 Serv LR 362 (DB).

(2) Where the circumstances in which the first disciplinary proceeding was discontinued support no other inference than that the discontinuance was the outcome of the acceptance of the explanation offered by the petitioner, it is not within the competence of the disciplinary authority to exhumate those charges and to make them the subject-matter of another disciplinary proceeding. 1968 Lab IC 756 (757) (Mys) = (1966) 2 Mys LJ 324.

(3) Where a Government servant is censured departmentally for a certain matter, the punishment may be enhanced by a higher authority in revision even assuming that a fresh departmental proceed-

ing cannot be drawn up against a Government servant on the same material. AIR 1955 Assam 240 (242) = 1955 Cri L Jour 1474 (DB).

(4) Where a certain decision has been taken with regard to a Government servant by a competent authority and it has been acted upon and is in effective operation, the successor-in-office of the authority cannot reopen the matter and give a totally different decision. AIR 1937 PC 27 (29) = 64 Ind App 40 = ILR (1937) Mad 517 ** AIR 1958 Raj 38 (39) (DB) ** AIR 1955 Assam 240 (242) = 1955 Cri L Jour 1474 (DB).

(5) Departmental enquiry — Proceedings quashed by Civil Court on ground of irregularity in procedure — Fresh departmental enquiry can be held on same facts. AIR 1962 SC 1334 (1336).

86. ARTICLE 311 (2), PROVISOS
Proviso (a).

(1) Under Proviso (a), where a Government servant has been convicted on a criminal charge and is subsequently dismissed from service on the same accusation it is not necessary that he must be again given an opportunity to defend himself before he is so dismissed. AIR 1957 Orissa 51 (54) = ILR (1956) Cut 615 (DB) ** AIR 1957 Punj 97 (98) ** AIR 1966 Andh Pra 72 (76) = (1965) 2 Andh WR 423.

(2) The Proviso to Art. 311 (2) will apply only when a person while in Government service was convicted on a criminal charge and he was dismissed on the ground of conduct which led to such conviction. AIR 1960 Tripura 31 (34). (Reversed on another point in AIR 1960 SC 601.)

(3) The whole object of the proviso is to avoid duplication of enquiry in the matter where already there has been a regular trial by a competent court and the person has had ample chance of defending himself. AIR 1959 Assam 134 (135) (DB).

(4) Proviso to Art. 311 (2) becomes applicable only if a person has been convicted on a criminal charge. Conviction here can have only one meaning, namely, that the person must have been convicted finally. AIR 1959 Punj 401 (402) = 60 Punj LR 597.

(5) The words "led to his conviction on a criminal charge" in Proviso (a) to Art. 311 (2) can only mean a criminal charge which has finally resulted in conviction of person proceeded against. AIR 1961 All 336 (337, 338) (DB).

(6) Where the dismissal orders against certain Railway employees were passed when appeals against their convictions under the Penal Code by the trial Court were already pending before the appellate Court which ultimately allowed them, the case of the employees is not covered by Art. 311 (2) Proviso, Clause (a). AIR 1960 All 538 (539).

Articles 310 & 311 — Note 86 (contd.)

(7) Removal from service on ground of conviction on criminal charge — Conviction set aside in appeal — Government not entitled to benefit of sub-clause (a) of proviso — Claim of departmental enquiry under Art. 311 (2) is justified. AIR 1969 All 414 (419) (FB).

(8) Proviso (a) contemplates 'conviction' finally and not by trial Court AIR 1965 Punj 153 (154, 155) = 67 Pun LR 84 **AIR 1961 Mad 486 (492, 493) = (1961) 1 Mad LJ 273.

(9) A charge under Sections 120 and 121, Railways Act, on which a person is convicted falls under the proviso as the offences covered by the aforesaid sections can be regarded to be criminal in the sense in which that expression is used in the proviso. AIR 1959 Punj 169 (169) = ILR (1959) Punj 218. (AIR 1946 Mad 375, Rel. on.)

(10) The words 'criminal charge' in the proviso (a) to Art. 311 (2) connote nothing more nor less than criminal accusation. If this were not so, it will lead to starting results in cases where no charge is framed under the Criminal Procedure Code. A conviction under Section 70 (c), Hyderabad City Police Act is a conviction on a criminal charge within the meaning of the proviso. AIR 1966 Andh Pra 72 (72, 73) = (1965) 2 An WR 423 = 1966 Cri LJ 251 (DB).

(11) Where a Government servant is convicted for contempt of Court, such conviction constitutes conviction on a "criminal charge" for the purpose of proviso (a). AIR 1946 Mad 375 (377).

(12) Conviction for contempt of Court — Dismissal on the ground of contempt and also for forgery — R. 15 of Central Civil Services (Classification, Control and Appeal) Rules, 1957 attracted — Rule 18 (1) which is to the same effect as Art. 311 (2) Proviso (a) not attracted — Opportunity to explain his case not given — Dismissal is illegal. AIR 1966 Punj 447 (449) = 1965 Pun LR (Supp) 453.

(13) Bihar and Orissa Boards Miscellaneous Rules (1928), Rule 176 (c) — Criminal prosecution started against Government servant — Acquittal on ground of benefit of doubt — This does not preclude the Government department from proceeding against said servant and punishing him after following rules of enquiry. AIR 1962 Orissa 125 (127) = (1962) 4 Orissa JD 61 (DB).

(14) Only two exceptions can be treated as valid in dealing with the scope and effect of protection afforded by Art. 311 (2). If a permanent public servant is asked to retire on ground that he has reached age of superannuation which has been reasonably fixed, Art. 311 (2) does not apply because such retirement is neither dismissal nor removal. If he is compulsorily retired under rules which prescribe normal age of superannuation and pro-

vide for a reasonably long period of qualified service after which alone compulsory retirement can be ordered, that again may not amount to dismissal or removal. AIR 1964 SC 1585 (1589, 1590) = 1964 (2) Cri LJ 481 = (1964) 7 SCR 587 (Art. 9.1 of Pepsu Service Regulations as amended by Notification dated 19th January, 1960, held invalid.)

(15) Misconduct by Government servant — Conviction by criminal Court — Government passing order of suspension and of dismissal — Latter order amounts to second punishment for same misconduct and is illegal — Order held not covered by Proviso (a) to Article 311 (2). 1964 (1) Cri LJ 112 (113) = (1963) 2 Mys LJ 28.

Proviso (b).

(16) In all disciplinary proceedings against a Government servant he is entitled to be given a 'reasonable opportunity' at two stages. In respect of both the stages in special circumstances the superior authority may dispense with the service of notice on the delinquent public servant. In the first stage he may proceed with the enquiry ex parte if the person concerned has absconded or were it is for other reasons considered impracticable to communicate with him, but this he can do only "for special and sufficient reasons to be recorded in writing." At the second stage also he may dispense with the issue of notice if he is satisfied that for some reasons to be recorded in writing "it is not reasonably practicable" to give the public servant concerned an opportunity of showing cause against the proposed punishment. AIR 1964 Ori 29 (31, 32, 33) = (1964) 6 Ori JD 91 = (1964) 2 Lab LJ 539 (DB).

Proviso (c).

(17) Under Proviso (c) where the President or Governor, as the case may be, is satisfied that in the interest of the security of the State it is not expedient to give a civil servant an opportunity to show cause, the satisfaction is that of the President or the Governor and so long as he acted in good faith, it is not justiciable in a Court of law. AIR 1958 Andh Pra 619 (621) ** AIR 1958 Andh Pra 288 (291) = ILR (1958) Andh Pra 310 (DB).

(18) Satisfaction contemplated is the subjective satisfaction of the competent authority. AIR 1967 Raj 194 (198, 199) = 1967 Raj LW 164 (DB) ** AIR 1969 All 422 = 1968 All LJ 554.

(19) What Article 311 (2), Proviso (c) requires is satisfaction of the President about the expediency of not giving an opportunity to the employee concerned in the interest of the security of the State. AIR 1958 Bom 283 (289) = 1958 Nag LJ 50 (DB).

(20) It cannot be said that under Clause (c) of the proviso to sub-sec. (2) of Article 311, one of the two enquiries,

Articles 310 & 311 — Note 86 (contd.)
namely, the second enquiry has been dispensed with and that it is still obligatory to hold an enquiry as to whether the charges levelled against the Government servant have been substantiated and to give an opportunity to him to be represented in such enquiry. AIR 1962 Cal 481 (482, 483) = (1963) 2 Lab LJ 161.

(21) Order issued under Article 310 (1) terminating services of employee — Order challenged on ground of it being issued without satisfaction contemplated under Article 311 (2), Proviso (c) — Satisfaction not proved — Order violates Article 311 (2). AIR 1969 All 422 (423).

(22) The applicability of Clause (2) of Article 311 requiring 'reasonable opportunity of showing cause against the action' is excluded by virtue of sub-clause (c) of the Proviso. Sub-clause (c) of the Proviso would be devoid of any meaning and content if it is held that the first or even the second opportunity under Article 311 (2) falls outside the purview of the President's satisfaction. AIR 1962 Punj 400 (401).

(23) Civil Rules will not be applicable to a case where the President or the Governor decides under Proviso (c) to Article 311, Clause (2) that in the interest of the security of the State it is not expedient to give to the Government servant concerned the opportunity to show cause under Article 311, Clause (2). AIR 1958 Andh Pra 288 (291) = ILR (1958) Andh Pra 310 (DB).

(24) Matters dealt with under Article 311 can be disposed of in the manner contemplated by Article 77 of the Constitution which deals with the conduct of "Government business" since this expression means in generic sense the exercise of the executive authority of the Union which certainly comprises the discharge of the executive function of the President under Article 311. AIR 1967 Raj 194 (198) = 1967 Raj LW 164 (DB).

(25) Question of sufficiency of the data on which the satisfaction is based cannot be gone into — It can only be attacked on the ground of mala fides — In the absence of any specific allegation as to who was animated by ill-will or bad faith towards the concerned employee, the plea of bad faith on the part of the authority held could not succeed. AIR 1967 Raj 194 (198, 199) = 1967 Raj LW 164 (DB).

(26) If a party establishes by placing relevant material before the Court that the order was made mala fide or for ulterior purposes, the order may be set aside on the ground that it is a fraud on the Court. AIR 1958 Andh Pra 619 (622) ** AIR 1958 Andh Pra 288 (291) = ILR (1958) Andh Pra 310 (DB).

(27) Opportunity of being heard deprived under Proviso (c) — President need not assign reasons for so depriving. AIR 1962 Punj 400 (401, 402).

(28) Satisfaction contemplated under the proviso is not personal satisfaction of the Governor but of Government. AIR 1962 Cal 481 (484) = (1963) 2 Lab LJ 161.

(29) Order removing Railway servant from service and dispensing with holding of inquiry for security purposes — Matter disposed of by Railway Minister in person — Order issued in the name of President, reciting his satisfaction and authenticated by a Deputy Director of Railway Board — Order cannot be challenged on ground that it is not an order or instrument made by the President — Personal satisfaction of the President is not necessary. AIR 1967 Raj 194 (196) = 1967 Raj LW 164 (DB).

87. Article 311 (3). — (1) The application of Clause (3) of Article 311 does not come in except with reference to sub-clause (b) of the Proviso. AIR 1954 Assam 18 (22) = ILR (1954) 6 Assam 107 = 1954 Cri L Jour 31 (DB).

88. Voluntary resignation or voluntary retirement. — (1) Where a civil servant has attained the age of fifty-five years and for some reason or other himself confesses his inability to continue in service any longer and seeks permission for retirement, it would be a useless formality to ask him to show cause as to why his service should not be terminated, before the order for his retirement is passed. Article 311, Cl. (2) cannot have any possible application in such circumstances. AIR 1954 SC 548 (586) ** AIR 1957 Assam 77 (80) (DB).

(2) Where a civil servant applies for and is granted permission to retire on his completing the age of fifty-five years and he accordingly retires, he cannot subsequently change his mind and ask for the cancellation of the retirement order, though he may be on 'post-retirement leave' and such leave may not have expired at the time. AIR 1954 SC 584 (587).

(3) A civil servant can withdraw his resignation at any time before it is accepted. AIR 1956 All 153 (154).

(4) Where a letter of resignation is expressly made operative only from a future date, it can be withdrawn at any time before such date. AIR 1956 All 70 (71).

(5) Where a person's services are terminated on the ground of his having tendered his resignation while as a matter of fact he has not done so, and he is not given any opportunity of showing why he should not be dismissed or removed from service, the order cannot stand. AIR 1954 Bhopal 25 (30).

Articles 310 & 311 — Note 86 (contd.)

(6) As in the case of a temporary Government servant, a probationary Government servant also may terminate his service by one month's notice. AIR 1963 Cal 359 (364) = (1962) 2 Lab LJ 541.

89. Suspension — See also Note 105.—
(1) Article 311 is not concerned with suspension from service. AIR 1962 SC 630 (632).

(2) Suspension is of two kinds, interim suspension and suspension as a penalty. Suspension pending departmental enquiry or pending criminal proceedings is called interim suspension after departmental enquiry, public servant may be found guilty and penalty by way of suspension may be imposed, in which case it is called suspension as a penalty. AIR 1966 All 552 (554) ** AIR 1964 SC 787 (792, 793).

(3) Suspension is of two kinds, namely suspension as punishment and suspension pending enquiry. Suspension during enquiry may however also be of two kinds, for a distinction must be drawn between suspending an employee from service and suspending him from performing duties of his post or office. If there is contract of service in strict sense, first kind of suspension involves suspension of contract, while second involves only a suspension of employee from performance of his duties on the basis that contract is subsisting. AIR 1961 All 580 (582) = 1961 All LJ 350 (DB).

(4) Suspension order does not put an end to the service under the Government. Real effect of suspension order is that though he continues to be a member of the Government service, he is not permitted to work and further during the period of his suspension he is paid only some allowance generally called "subsistence allowance." AIR 1963 SC 687 (690, 691).

(5) The authority entitled to appoint a public servant would be entitled to suspend him pending a departmental enquiry into his conduct or pending a criminal proceeding, which may eventually result in a departmental enquiry against him. This general principle is illustrated by the provision in Section 16 of the General Clauses Act which is in consonance with the general law of Master and Servant. AIR 1964 SC 787 (792, 793) = (1964) 5 SCR 431.

(6) Even under old Rule 49 of the Civil Services (Classification, Control and Appeal) Rules, 1930, a civil servant could be suspended while an enquiry into his conduct was pending. Though suspension as a punishment could only be the result of an enquiry and an act of judgment on the part of the competent authority, still suspension during the pendency of an enquiry was made. AIR 1963 Punj 87

(89) = 65 Punj LR 40 (DB). (Reversed on another point in AIR 1964 SC 787.)

(7) Interim suspension — Public servant should be paid subsistence allowance in accordance with any statute or rule there may be to govern the matter — If there is no rule he will be entitled to full emoluments during the period of suspension. AIR 1964 SC 787 (793).

(8) An employee can be suspended by way of punishment, but in that case it is the suspension which is the substantive punishment and there is no other punishment. Suspension pending a departmental enquiry of a criminal charge is a different matter altogether and the servant concerned is asked not to associate himself directly with the activities of his employment. In such a case, some interim arrangement is made for a subsistence allowance and it is implied that if the proceedings enure in his favour, he would get full wages.

Rule 7 (v) of the Bengal Subordinate Civil Services Rules speaks about suspension as a substantive punishment. The rules expressly exclude the case of suspension pending the proceedings. But it is the inherent right of Government in respect of its servants to make an order of suspension pending the determination of any criminal proceedings against the servant concerned. The petitioner, a civil servant, was suspended from service on the basis of a First Information Report in respect of certain offences alleged to have been committed by him. The petitioner was, however, discharged at the subsequent trial on the technical ground of want of proper complaint. On the same day a fresh complaint was filed in accordance with law and it was subsequently ordered that the suspension order should stand. Held, that the suspension order had not come to an end by the discharge of the petitioner but continued till the final determination of the criminal proceeding. AIR 1961 Cal 225 (225, 226) = 65 Cal WN 129.

(9) Under Rule 13 of the Punjab Tahsildari Rules, 1952, it is true that the Commissioner alone is competent to pass an order of suspension by way of penalty against a Tahsildar but an order of suspension pending departmental enquiry passed by the Financial Commissioner cannot be challenged on the ground that it was not passed by the competent authority. There is distinction between suspension by way of punishment and suspension pending enquiry. Appendix 'A' relates to suspension by way of punishment and does not purport to deal with suspension pending enquiry.

Rule 12 lists the penalties which can be imposed upon a member of the service and suspension figures as one of such penalties not as an ad interim step taken while the enquiry is proceeding. A public

Articles 310 & 311 — Note 89 (contd.)

servant is liable to be suspended pending departmental enquiry in which case the suspension is ad interim; and if as a result of the enquiry he has been found guilty, the suspension may be imposed as a substantive punishment. Moreover, according to Rule 3, the appointing authority to the post of Tahsildar is the Financial Commissioner. As provided in S. 14 of the Punjab General Clauses Act (1898), power to appoint includes the power to suspend or dismiss any person. This power to suspend has not been taken away by any provision of the Tehsildari Rules. AIR 1968 Punj 406 (412) = 1968 Lab IC 1773 = ILR (1969) 1 Punj 378.

(10) Suspension is one of the punishments which may be imposed on a civil servant under Rule 49 of the Civil Services (Classification, Control and Appeal) Rules. Apart from such suspension of a punitive nature, Government has an inherent power to suspend an officer from performing the duties of his office pending an inquiry into charges against him. AIR 1955 Pat 131 (134) (DB) ** AIR 1952 All 681 (683) = ILR (1952) 2 All 965 (DB).

(11) 'Suspension' is an implied incident of removal, and an employee can be suspended pending final determination of charge. AIR 1960 Madh Pra 273 (277) = 1960 MPLJ 433 (DB).

(12) An order of suspension does not amount to an order of reduction in rank. AIR 1958 Andh Pra 35 (36) (DB) ** AIR 1958 Ker 72 (74) = ILR (1958) Ker 131 (DB) ** AIR 1957 Assam 77 (82) (DB) ** AIR 1957 Mad 46 (46) (DB) ** AIR 1956 Cal 662 (667) ** AIR 1955 Pat 131 (134) (DB).

[But see AIR 1954 Ajmer 22 (25) ** AIR 1952 Pepsu 69 (71, 72) = ILR (1952) Patiala 110 ** AIR 1949 Nag 118 (120) = ILR (1948) Nag 576 (DB).]

(13) The basic idea underlying the root word "suspend" and all its derivatives is that a person in the service of the Government, while holding an office and performing its functions or holding a position or privilege, should be interrupted in doing so and debarred for the time being from further functioning in the office or holding the position or privilege. He is intercepted in the exercise of his functions or his enjoyment of the privilege and put aside as it were, for a time, and excluded, during the period, from his functions or privileges. AIR 1958 Andh Pra 619 (623) ** AIR 1958 Madh Pra 44 (45) (DB) ** AIR 1957 Assam 77 (82) (DB) ** AIR 1957 Punj 130 (131, 132) = ILR (1957) Punj 1059 (FB) ** AIR 1954 Cal 340 (343) = ILR (1955) 2 Cal 399 (DB).

(14) Government's power to suspend its servant from service is inherent and unlimited — Pendency of departmental enquiry not necessary for its exercise.

1968 Serv LR 816 = ILR (1969) 2 Punj 148 (153, 155) (Punj).

(15) An order of suspension with retrospective effect is a contradiction in terms, and invalid. AIR 1958 Andh Pra 619 (623, 624) ** AIR 1958 Cal 239 (241) ** AIR 1958 Madh Pra 44 (45, 46) (DB) ** AIR 1957 Orissa 51 (54) = ILR (1956) Cut 615 (DB) ** AIR 1956 Cal 662 (666) ** AIR 1954 Cal 340 (343) = ILR (1955) 2 Cal 399 (DB) ** AIR 1963 Punj 298 (311, 312) = ILR (1962) 2 Punj 642. (But such an order is not absolutely void but is operative from the date the Government servant is actually relieved of his duties and placed under suspension.) ** (1962) 3 Gui LR 492 = (1962) 2 Lab LJ 507 = AIR 1962 Gui 197 (203) (DB) ** AIR 1960 Bom 274 (275, 276) = 1959 Nag LJ 427 (DB) ** 1960 Raj LW 385 (388, 389, 390) = ILR (1960) 10 Raj 952 ** AIR 1959 Madh Pra 404 (407) = 1960 MPLJ 153 (DB) (Order is effective from the day it is passed for the future, but it is ineffective *ex post facto*).

(16) Order of dismissal with retrospective effect is in substance an order of dismissal as from date of order with super-added direction that order should operate retrospectively as from anterior date — The two parts are severable. Though the court cannot pass new order of dismissal, it can give effect to valid part of order. AIR 1966 SC 951 (953) = (1966) 2 SCR 204. (AIR 1961 Cal 626 and 61 Cal WN 880, Overruled.)

(17) Suspension pending enquiry not provided by bye-law of Co-op. Society — Suspension order with retrospective effect is illegal. AIR 1961 Madh Pra 289 (293) = 1961 MPLJ 1059 (DB).

(18) Government servant suspended by competent authority under Rule 31 of Jammu and Kashmir Civil Services (Classification, Control and Appeal) Rules (1956) — Fact that order was confirmed by Government after some time makes no difference — No question that order was given retrospective effect arises. AIR 1964 J and K 14 (16) = 1963 Kash LJ 125 (DB).

(19) Order of suspension with retrospective effect — Order of suspension cannot be made to operate retrospectively — Court, while declaring retrospective part invalid, may allow prospective part of the same order to stand — But Court will not do so if that amounts to passing of 'new' order. AIR 1965 Cal 13 (15, 16) = (1964) 9 Fac LR 204 ** AIR 1966 Cal 485 (487, 488) = (1966) 2 Lab LJ 71. (On facts held that since petitioner was treated as continuing in service during his absence order dismissing him from date of his absence was meaningless and was invalid to that extent but prospective part could still be given effect to.)

(20) An order of suspension passed before the date of charge-sheet and continued beyond 4 months without obtaining

Articles 310 & 311 — Note 89 (contd.)
 approval of higher authority concerned is not sustainable under Rule 1711 (b) (as it stood on 18-4-57) and is void. Compliance with procedure as laid down in Rule 1711 is essential for validity of order passed for suspension under Railway Establishment Code may it be a punitive suspension or a suspension pending enquiry. AIR 1964 Pat 168 (172, 173).

(21) Courts of law are not bound by departmental interpretation of rules, but have to interpret these rules according to the language and other canons of interpretation. The post-retirement leave can by no stretch of imagination be treated as extension in service. Since his service had ceased, no order of suspension or dismissal could be passed with regard to him, because an order of suspension or dismissal could be passed only with regard to a person who was in actual service on the date when such an order was passed. AIR 1958 J & K 41 (42) (DB). (AIR 1954 SC 584, Foll.)

(22) Where an officer is suspended, there can be no "re-instatement" with retrospective effect. AIR 1958 Cal 239 (241).

(23) Government servant — Order of suspension in contemplation of departmental inquiry — Subsequent order of discharge set aside as illegal — Order of suspension merged in the order of discharge, and was not revived when the order of discharge was set aside — Subsequent order of suspension with retrospective effect — Such order could not be passed and must be set aside. AIR 1956 Cal 447 (448) = 60 Cal WN 628.

(24) The power to suspend an employee lies only with the appointing authority. Where an employee was appointed by executive officer of Municipality, the power to suspend lies only with that Authority and not with his subordinate. U. P. Municipalities Act (1916) being repealed by U. P. Nagar Mahapalika Adhiniyam (2 of 1959), the executive officer succeeded by Mukhya Nagar Adhikari, alone could suspend an employee appointed by him and not the Nagar Swasthya Adhikari. AIR 1966 All 552 (555).

(25) An order of suspension followed by an order of dismissal comes to an end on the order of dismissal being passed. Where the order of dismissal is subsequently set aside or declared invalid, the order of suspension is not thereby revived. AIR 1955 SC 600 (603) = 1955-2 SCR 391 = ILR (1956) 1 All 131. (AIR 1952 Nag 170, Disting.) ** AIR 1958 Madh Pra 44 (46) (DB). (AIR 1955 SC 600, Rel. on.) ** AIR 1957 All 436 (438) = ILR (1957) 1 All 269 ** AIR 1956 All 151 (152) (DB) ** AIR 1956 Cal 682 (686) ** AIR 1963 Raj 203 (206) = 1963 Raj LW 374. (In such a case a fresh order of suspension cannot be passed so

as to have a retrospective effect in the absence of any statutory authority to do so.) ** AIR 1961 Madh Pra 261 (262, 266) = 1961 MPLJ 558 (DB). (Subsequent order of Government continuing suspension retroactively from date of commencement of previous order of suspension to enable Government to hold proper enquiry against him — Order so far as it was retrospective held could not be sustained.) ** AIR 1960 Madh Pra 273 (277, 278) = 1960 MPLJ 433 (DB). (Order of dismissal is effective from date of order.) ** 1960 Raj LW 385 = ILR (1960) 10 Raj 952 ** AIR 1959 Cal 1 (8) = 62 Cal WN 842 (DB).

[But see AIR 1966 Punj 500 (502) = ILR (1966) 2 Punj 907 (DB). (Order of suspension — Its fate is not linked with and is not dependent upon decision as to validity or invalidity of dismissal order. If the order of dismissal is held illegal and set aside the order of suspension is not automatically set aside.)

(26) Government servant on leave preparatory to retirement — Leave revoked by Government — Government servant suspended and departmental enquiry ordered against him — Held, no breach of service rules. AIR 1964 SC 72 (81).

(27) Court must take into account subsequent events — Illegal order of suspension supplanted by another order of suspension — Earlier order will not be quashed. AIR 1959 All 686 (688).

(28) Where an order of suspension is passed against a Civil servant pending a departmental inquiry and thereafter the order of removal is passed for reasons not connected with the departmental enquiry, no departmental enquiry can be held thereafter to punish the employee as the relationship of master and servant ceased. The order of suspension merged into the order of removal, and it could not revive when the latter order was cancelled. AIR 1959 Madh Pra 295 (296) = 1959 MPLJ 1168 (DB). (AIR 1955 SC 600, Rel. on.)

(29) Where a suspension order has been passed in view of criminal proceedings being started against a Government officer, the suspension would automatically come to an end on the termination of the criminal proceedings. AIR 1958 Cal 239 (241) ** AIR 1953 Cal 504 (505).

[But see AIR 1957 All 436 (438) = ILR (1957) 1 All 269.]

(30) Suspension of delinquent in consequence of pending criminal case against him — Criminal case ending in discharge — Initiation or continuance of departmental proceedings on same allegations cannot revive old order of suspension. — Fresh order of suspension necessary unless statutory rules provide for automatic revival of old order of suspension. AIR 1969 Cal 461 (462, 463) = 1969 Lab IC 1299 = (1969) 18 Fac LR 87.

(31) Where pending the criminal trial of a Government servant, departmental

Articles 310 & 311 — Note 89 (contd.)

proceedings are initiated against him on other charges, his suspension on such charges can be continued notwithstanding his acquittal in the criminal case. AIR 1957 All 436 (438) = ILR (1957) 1 All 269.

(32) A Government servant under suspension continues to be a Government servant. AIR 1958 Cal 239 (241). (He is in a state of suspended animation as it were.) ** AIR 1957 Punj 130 (132) = ILR (1957) Punj 1059 (FB) ** AIR 1956 Mad 95 (96) = ILR (1956) Mad 217.

(33) Temporary government servant under suspension — Relationship of employer and employee suspended for the time being, obligations imposed on both sides are suspended — There cannot be any termination of services by notice. AIR 1967 Madh Pra 231 (234) = 1967 MPLJ 39 (DB).

(34) There is no question of suspension of a temporary servant whose services are intended to be terminated. AIR 1960 Manipur 45 (47).

(35) A Government servant may be placed under suspension pending a criminal charge against him although no departmental proceedings are initiated against him at the time. AIR 1957 Orissa 51 (54) = ILR (1956) Cut 615 (DB) ** AIR 1958 Ker 374 (375) = 1958 KLT 320 (DB). (Suspension pending inquiry into conduct, in terms of service Rules valid.)

(36) Suspension pending departmental inquiry is not punishment and is not hit by Article 311. AIR 1959 Madh Pra 295 (297) = 1959 MPLJ 1168 (DB).

(37) Suspension from service — Exoneration of employee by Court — Railway authority intending to hold departmental enquiry — Order of suspension from date of dismissal which was set aside by Court — Order of suspension is valid under Clause (4) of Rule 40 of Railway Protection Force Rules (1959). AIR 1967 Bom 332 (334) = 68 Bom LR 560.

(38) Suspension of an officer pending an enquiry into his conduct is not a penalty under any of the Service Rules. The expressions 'honourably acquitted' and 'acquitted of blame' occurring in Rules 108 (b) (i) and 109 (Jammu and Kashmir Civil Services (Classification, Control and Appeal) Rules (1956)) have been used to describe an acquittal based on the positive innocence of the accused. Provisions of Rules 107 and 108 (b) also show that an officer cannot claim as of right any salary or allowance equal to salary for the period of his suspension. This is not a penalty but one of the conditions of service governing a civil servant. The Government is expressly empowered by Rule 31 (1) to place a Government servant under suspension where an inquiry into his conduct is contemplated and the effect of the suspension is to put an end to his right to ask payment

of salary for the period of suspension. AIR 1962 J and K 68 (70, 72) = 1962 Kash LJ 70.

(39) An order of suspension, though it may be of a punitive nature, is not covered by Article 311. AIR 1954 Madh B 49 (50, 51) = ILR (1954) Madh B 314 (DB) ** AIR 1958 Andh Pra 35 (36) (DB) ** AIR 1956 Punj 102 (104) = ILR (1956) Punj 361.

(40) It cannot be said that there was no power to suspend Government servant without first framing charge against him. AIR 1963 Punj 298 (311) = ILR (1962) 2 Punj 642 (DB).

(41) Not being covered by Article 311, Clause (2), an order of suspension against a civil servant, even if it is passed as a form of punishment against him, would not require for its validity that it should be preceded by a show cause notice under that clause. AIR 1956 Bom 483 (484) (DB) ** AIR 1956 Punj 58 (71) = ILR (1956) Punj 236 (DB) ** AIR 1954 Cal 60 (63) = ILR (1955) 2 Cal 28.

(42) Where a person is suspended pending an enquiry against him which culminates in his dismissal and the validity of the dismissal or the enquiry which results in the dismissal is not questioned, any informality or irregularity with regard to the order of suspension before the enquiry proceedings will not affect the validity of such proceedings or the order of dismissal. AIR 1956 Punj 102 (104) = ILR (1956) Punj 361 ** AIR 1956 Sau 14 (16) (DB).

(43) The suspension referred to in Section 45 (1) of Madras Hindu Religious and Charitable Endowments Act (19 of 1951) is the final order of punishment passed by the Deputy Commissioner after enquiry into the charges was made. The suspension referred to in S. 45 (3) of the Act is during the period when the enquiry into charges is pending as Section 47 (2) refers only to the suspension which is ordered by way of punishment under Section 45 (1) under a final order. ILR (1966) Andh Pra 964 (966).

(44) It is one of the implied stipulations of a contract of service that the employer will not, by any act of commission or omission, add or suffer to be added to the employment new conditions involving obligations, dangers or inconveniences which were not incident to it and were not within the contemplation of the employee when he was engaged. Normally a change of duty may be possible without the consent of the employee if it does not entail any of the above consequences. But where they do, they can only be changed with the concurrence of the employee. Thus, where a municipal committee ordered its primary school teachers to attend certain latrines to count the persons using them and on their refusal to do so, suspended them. Held, that no rule of law had been shown which could be called in aid to

Articles 310 & 311 — Note 89 (contd.)
compel them to perform this additional duty. The order was, therefore an unlawful order which the teachers were not bound to obey. AIR 1955 Nag 206 (207) = 1955 Nag LJ 424 (DB).

(45) Where a Government servant had been exonerated by the Government in respect of certain charges into which an enquiry had already been made previously the commencement of a new enquiry into those dropped charges along with a charge not dropped is in excess of jurisdiction and an order of suspension under Rule 10 (1) of Mysore Civil Services (Classification, Control and Appeal) Rules (1957), passed by the Government must be regarded to have been based on irrelevant considerations, and the order of suspension has to be set aside. AIR 1961 Mys 37 (43, 44) = 38 Mys LJ 828 (DB).

(46) There is inherent power in the Government to suspend a Government servant on a charge of misconduct. AIR 1963 Punj 298 (310, 311) = ILR (1962) 2 Punj 642 (DB).

(47) All India Services (Discipline and Appeal) Rules (1955), Rule 20 — Right to submit memorial to President is similar to right of appeal of a Government servant against order of suspension — There is no curtailment of right guaranteed under Article 314. AIR 1963 Punj 87 (89) = 65 Punj LR 40 (DB). (Reversed on another point in AIR 1964 SC 787.)

(48) The objection that an employee could not be dismissed from date of his suspension was of importance only in relation to payment of salary to him for period of suspension — If dismissal order was validly passed, the order was no doubt effective from the date of making of that order — Effect of order of suspension was to suspend contract of service as a whole and no claim of pay during period of suspension could be made. AIR 1963 Madh Pra 298 (300) = 1963 MPLJ 631 (DB).

(49) Suspension is not dismissal — Until servant is dismissed, he continues in employment — Where the master chooses to continue the servant in his employment there is no right to suspend him or deprive him of any part of his wages. (1956) 60 Cal WN 1023 (1025) = (1957) 1 Lab LJ 223.

(50) Where a servant is placed under suspension pending an enquiry, but the authorities withdraw the enquiry thereby depriving the servant of the opportunity to prove that the charge against him was wrong and that suspension was wholly unjustified, servant cannot be deprived of his full pay and allowances. 1966 MPLJ 655 (657) = 1966 Jab LJ 558.

(51) Where the Government has no power to suspend the employee, the Government remains under an obligation to pay to such employee the full salary for the

period for which it actually, without dismissing him, does not allow him to work professing to have suspended him for that period. AIR 1957 Punj 130 (132) = ILR (1957) Punj 1059 (FB) ** AIR 1954 Punj 298 (301) = ILR (1954) Punj 415 (DB).

(52) Suspension on untenable allegation — Suspension set aside and employee reinstated — Claim for salary is sustainable. AIR 1965 Cal 281 (282) = 68 Cal WN 1028.

(53) Government servant discharged of offence — Suspension during trial — After discharge servant claiming pay for suspension period under Rule 109, J. and K. Civil Service Regulations—Servant is entitled to his pay. AIR 1966 J. and K. 27 (28, 29) = 1966 Kash LJ 126.

(54) In the absence of rules regarding remuneration during period of suspension, employee is entitled to full remuneration. AIR 1966 All 552 (555).

(55) Where the Government in the exercise of a lawful power vested in it to suspend an employee does suspend him, it cannot be said to be under any obligation to pay any salary to the employee unless the terms of service themselves provide for payment of the whole or a part of such salary. AIR 1957 Punj 130 (132) = ILR (1957) Punj 1059 (FB) ** AIR 1954 Punj 298 (301) = ILR (1954) Punj 415 (DB).

(56) Suspension of delinquent in consequence of pending criminal case against him — Discharge of delinquent in criminal case—Delinquent is deemed to have been reinstated and is entitled to recover full salary and allowances. AIR 1969 Cal 461 (462, 463) = 1969 Lab IC 1299 = 18 Fac LR 87.

(57) Under the Railway Establishment Code, the railway administration has power to suspend the railway employees in certain given circumstances only and when a railway employee is duly suspended, he is not entitled to any wages but is entitled to lesser amount which is called compensatory or subsistence allowance. Therefore, a railway employee cannot during his period of suspension claim his full salary. AIR 1957 Punj 130 (132) = ILR (1957) Punj 1059 (FB) ** AIR 1954 Punj 298 (301) = ILR (1954) Punj 415 (DB).

(58) A railway employee cannot go to the Authority under the Payment of Wages Act alleging that his wages have been illegally deducted, because in fact there has been no deduction. AIR 1957 Punj 130 (134) = ILR (1957) Punj 1059 (FB) ** (1956) 58 Bom LR 821 (823, 824) (DB).

[See however AIR 1952 Bom 235 (239) = ILR (1952) Bom 995 (DB).]

(59) Where a person is suspended and then ultimately dismissed, he is not

Articles 310 & 311 — Note 89 (contd.)
entitled even to a month's salary in lieu of notice. AIR 1955 Punj 40 (41).

(60) Where after suspension the services of a temporary civil servant are terminated by one month's notice, he is entitled to salary for the period of suspension. AIR 1954 Madh B 49 (53) = ILR (1954) Madh B 314 (DB).

(61) Where it was stated in the impugned order of suspension that Government considered that in view of the nature of the charges framed against the petitioner, he should be placed under suspension pending the proposed enquiry into those charges: **Held**, that the recital in the impugned order clearly revealed that in the opinion of the Government the suspension of the petitioner was necessary in the public interest and the omission to reproduce the very words of the rule in the impugned order was immaterial. AIR 1961 Mys 37 (40) = 38 Mys LJ 828 (DB).

90. Retirement on superannuation.—

(1) The retirement of a Government servant on superannuation according to the Service Rules is not dismissal or removal from service within Art. 311. AIR 1958 SC 36 (48) ** AIR 1953 Trav-Co 140 (143, 144) = ILR (1952) Trav-Co 756 (DB).

(2) The decision of the Supreme Court in AIR 1964 SC 600 does not lay down an invariable rule that in no case can a person be retired compulsorily before the normal prescribed age of superannuation. Where a public servant is asked to retire on the ground of his having reached the age of superannuation which has been reasonably fixed, Article 311 (2) would very probably not be attracted because an order of this nature is neither a dismissal nor removal. If under the rules, such public servant is compulsorily retired after a period of qualified service, which is reasonably long, then the order would neither amount to dismissal nor to removal within the contemplation of Article 311 (2). Where the petitioner has attained the age of 55 years which is reasonably long, his compulsory retirement cannot be considered to amount to removal. It is an order of compulsory retirement which is within the permissible power of the authority passing the impugned order. AIR 1966 Punj 297 (301) = ILR (1965) 1 Punj 671 (DB).

(3) Where a Government servant is made to retire from service on the ground of superannuation in consequence of a decision of the Government to calculate the age of officers similarly placed according to their college records in preference to the entries in the Civil List, it cannot be said that the retirement of the Government Officer is a punishment, although the calculation of his age in accordance with his college records, instead of in accordance with

the entry in the Civil List, may have operated to his disadvantage. AIR 1954 Trav-Co 32 (33) ** 1968 LIC 1348 (1349, 1351) = 1968 Raj LW 341. (According to date of birth mentioned in application.) ** AIR 1963 Punj 104 (110) = ILR (1962) 2 Punj 597. (Even when it is according to incorrect date of superannuation.)

(4) Where there was superannuation in accordance with the terms of service, it was neither a case of dismissal, discharge nor reduction in rank, and therefore was not governed by Article 311 of the Constitution. AIR 1958 Cal 411 (412, 413).

(5) Bihar Service Code, Rule 74 — Appellant retained in service after superannuation — Extension of service not granted — Appellant ordered to retire under Rule 74 — Order does not offend against Article 311 of the Constitution. AIR 1965 Pat 186 (187) = 1965 BLJR 86 (DB).

(6) Government of India Act (1935), Section 241 (1) (b) — Rules framed in Assam, Rule 56 — Tenure of service — Retirement of Government servant — Order as to extension of service made on date when servant has ceased to be in service — Order is nullity. AIR 1965 SC 473 (475, 476) = ILR (1963) 15 Assam 97.

(7) Bihar Government Instructions, dated 24th August, 1963 — Three months' notice given to Government servant — Power to terminate his service can be exercised any time between 55th and 58th years. AIR 1967 Pat 30 (31) = 1965 BLJR 884 (886) (DB).

(8) Withdrawal of option to retire by civil servant on date of retirement itself — He cannot be retired unless final decision is taken on withdrawal application by competent authority or Government. 1969 Lab IC 61 (65, 66) = 1969 Raj LW 37.

(9) **Held** on facts that (i) Article 311 had no application to the termination of the Government employee's service. The termination of service resulting from change in the age of superannuation did not amount to removal within the meaning of Art. 311. AIR 1964 SC 600, Dist. (ii) that the new rule reducing the age of retirement from 58 years to 55 years could not be said to be retrospective. The proviso to the new rule and the second notification were only methods to tide over the difficult situation which would arise in the public service if the new rule was applied at once and also to meet any financial objection arising out of the enforcement of the new rule. The new rule, therefore, could not be struck down on the ground that it was retrospective in operation. AIR 1965 SC 1567 (1569, 1570) = (1965) 1 SCR 693.

(10) Memorandum D/- 21-3-1963 issued by Government of Assam under F. R. 56 — Compliance with test under memorandum by employee attaining 55 years —

Articles 310 & 311 — Note 90 (contd.)
 Entitled to continue in service upto 58 years—Abridgement of his right under Art. 310 is illegal. AIR 1969 Assam 46 (50) = 1969 Lab IC 534 (DB).

(11) Rules did not compel Government to embark on enquiry into age, though change in recorded age to the prejudice of servant had to be effected by following principles of natural justice. 1968 Lab IC 1348 (1350) = 1968 Raj LW 341.

(12) Merely because a regular departmental proceeding has been initiated against the servant and is still in its preliminary stage when the order compulsorily retiring him is passed, that order will not amount to punishment. AIR 1968 Pat 113 (116) = ILR 46 Pat 462 = 1968 Lab LJ 457 (DB). (The absence of evidence in support of specific charges, made in a departmental proceeding against a public servant, will not by itself suffice to show that, if on a review of the entire official career of the public servant, the superior authority decides that he is an unsuitable employee and should be weeded out on his attaining the age of superannuation, such a decision is either mala fide or involves the element of punishment.)

(13) Compulsory retirement of public servant during pendency of departmental enquiry — Order passed under para. 6 of Government of India Notification O. M. No. 33/18/62 Ests. (A) dated 30-11-1962 on the ground that the servant is unsuitable employee and has attained the age of superannuation — Order is valid. AIR 1968 Pat 113 (115, 116) = ILR 46 Pat 462 = 1968 Lab IC 457 (DB).

(14) Orissa Protection Rules, (Rules for protection of officers of old Bihar and Orissa Services) Rule 8 — Officer in old Bihar and Orissa Secretariat transferred to Orissa on formation of that State — Confirmation as Registrar in Secretariat on 14-10-1958 while Officer (junior to him) in old Bihar and Orissa Secretariat confirmed as Registrar in Bihar on 23-8-1956 — Contravention of protection afforded to transferred officers — Date of confirmation for purpose of pension must be taken as 23-8-1956. AIR 1964 Orissa 65 (68) = 30 Cut LT 49 (DB).

(15) Departmental enquiry pending — Government servant asked to apply for leave preparatory to retirement without waiting for enquiry to conclude—Offer not availed of — Enquiry dropped before Government servant was retired on his attaining age of superannuation — Held there was no inhibition against his retirement — Order refusing leave after retirement held valid. AIR 1961 Madh Pra 293 (295) = 1961 MPLJ 1357 (DB).

(16) Railway employee who had declared himself as Anglo-Indian and had enjoyed privileges for Anglo-Indians was retired after attaining 55 years— Held he could not contend that he was Indian

Christian and as such liable to retirement only after attaining 60 years — Order does not amount to punishment — Employee has no right to hold the post until 60 years. (1962) 2 Lab LJ 584 (586) (Andh Pra).

91. Withholding of increments.— (1) The withholding of increments does not amount to a reduction in rank. ILR (1956) Punj 1213 (1222, 1223).

(2) Reduction in rank is not the same thing as withholding of increment, which is merely an instance of loss of prospects of earning more than what the employee may be earning at the time. If a reasonable notice, to meet the charges levelled against the petitioner, was, in fact, given during the course of the inquiry then, if the proposed action to be taken against him is merely of withholding of increment he would not be entitled to the right conferred by Article 311 (ii) of the Constitution nor would failure to give such second notice violate any rule of natural justice. AIR 1959 Punj 643 (645).

(3) Withholding of increments or reduction to a lower stage in the same time scale do not amount to reduction in rank. 1967 RLW 266 (270) = 1969 Lab IC 330 = (1968) 1 Lab LJ 475.

(4) The petitioner was suspended from services on basis of certain complaints on 29-8-1959. Despite this he was allowed to attend a refresher course from 31-1-1960 to 29-2-1960 and was paid full salary for that period. On 18-11-1960, a charge-sheet was given to him to which he replied on 29-11-1960. Later a show cause notice was given proposing that the period of suspension would be treated as leave without pay, and the petitioner replied to it. Again a second show-cause notice was served on him, stating that he was guilty of misbehaviour and neglect of duties and hence his next increment should be stopped. It was not clear on the record whether the petitioner sent any reply or not. But on 7th July, 1963, an order was passed which stated that since the charges against the petitioner had been proved, the next increment should be stopped and that his period of suspension was not to be treated as period on duty and was to be ignored for all purposes. Held, that the order amounted to removal from service for the period of suspension and since the provisions of Article 311 had not been complied with the order should be quashed. 1967 Cur LJ 419 (421) (Punj).

(5) Rude and improper behaviour by Police Constable in private life — Withholding of increment and reduction to lower stage in time scale in contravention of the provisions of C. P. and Berar Police Regulation 217 (a) — Order held legal. AIR 1960 Bom 285 = 1959 Nag LJ 441 (DB).

(6) Punjab Civil Service Punishment and Appeal Rules 1952, Rule 7 — Depart-

Articles 310 & 311 — Note 91 (contd.)
 mental enquiry — Withholding of future increments — Punishment inflicted not covered by Rule 7 or Article 311 of Constitution — Authority need not give reasons for holding a view different from the enquiring officer. 1967 Cur LJ 156 (164) = ILR (1967) 2 Punj 471.

(7) Rajasthan Civil Services (Classification, Control and Appeal) Rules, 1950 — Stoppage of increments is also covered by Rule 16 — Non-compliance Rule 16 gives cause of action to the public servant. 1967 Raj LW 266 (271) = 1969 Lab IC 330 = (1968) 1 Lab LJ 475.

(8) Withholding of increments is a penalty provided under service rules. Where an order of termination of service was accompanied by a penalty or punishment causing a monetary loss to Government servant, it would be illegal and ineffective if the provisions of Article 311 (2) were not complied with. AIR 1960 Punj 126 (131) = ILR (1959) Punj 2189 (DB).

92. Compulsory retirement.— (1) (Obiter) — If any Rule permits the appropriate Authority to retire compulsorily a civil servant without imposing a limitation in that behalf that such civil servant should have put in a minimum period of service, that Rule would be invalid and the so-called retirement ordered under the said Rule would amount to removal of the civil servant within the meaning of Article 311 (2). AIR 1964 SC 600 (617) = (1964) 5 SCR 683.

(2) Natural justice — Principle not applicable to compulsory retirement in accordance with rules of service. AIR 1965 All 142 (150) = 1964 All LJ 791 (FB).

(3) A person who retires or is made to retire from service no longer remains a member of the service or holds a civil post. Once an order of retirement becomes effective he cannot be demoted removed or dismissed from service and therefore an inquiry cannot be held against him. AIR 1967 Raj 82 (84) (DB).

93. Compulsory retirement on proportionate pension in terms of specific service Rule is not dismissal or removal.—

(1) Compulsory retirement of a Government servant on proportionate pension before the age of superannuation but on completion of service for the prescribed number of years according to the rules or on attainment of the prescribed age according to the rules does not amount to dismissal or removal from service within the meaning of Article 311, although such compulsory retirement necessarily means the termination of service of the Government servant. AIR 1957 SC 892 (895). (AIR 1954 Sau 146, Reversed.) ** AIR 1958 SC 36 (49) ** AIR 1954 SC 369 (374, 375) = 1955 SCR 26 = ILR (1955) 1 All 324 ** AIR 1958 Bom 90 (92) = ILR (1958) Bom 247 (DB) ** AIR 1969 Orissa 37 (42) = 1969 Lab IC 28 =

34 Cut LT 102 (DB). (Retirement under All India Services (Death-cum-Retirement Benefit) Rules (1956).) ** AIR 1960 Madh Pra 117 (118) = 1960 MPLJ 114 (DB). (Notice contemplated by Rule 2 (2), Pension Rules is not a kind of notice required under Article 311 — Notice and order of retirement need not be separate.)

[But see AIR 1958 J and K 11 (12) (FB) ** AIR 1952 Pepsu 152 (159) = ILR (1952) Patiala 392 (DB) ** AIR 1953 Pepsu 24 (24, 25).]

(2) It has been held that in view of the "rule of pleasure" enunciated in Article 310, Clause (1), the Government has always the power to terminate the services of a Government servant by compulsory retirement on proportionate pension even before the age of superannuation, irrespective of any specific Service Rule permitting such a course. AIR 1957 Assam 77 (81) (DB) ** AIR 1956 Madh B 40 (43) (DB) ** AIR 1954 Madh B 54 (56) = ILR (1954) Madh B 301 (DB) ** AIR 1943 Bom 268 (271) = ILR (1943) Bom 411 (DB).

(3-4) Retiring a member from service in public interest after attainment of age 55 and completion of 30 years service entitling him to pension proportionate to period of service standing to his credit is not a form of punishment. AIR 1969 Orissa 37 (42) = 1969 Lab IC 28 = 34 Cut LT 1026 (DB).

(5) An order of retirement before the age of superannuation on proportionate pension pursuant to a policy of retrenchment is retirement in the normal course and not a removal within Article 311, Clause (2). AIR 1956 Madh B 40 (43) (DB) ** AIR 1954 Madh B 177 (180) (DB) ** AIR 1954 Madh B 54 (54, 55, 56) = ILR (1954) Madh B 301 (DB).

(6) Civil Services (Classification Control and Appeal) Rules, Rule 49 — Fundamental Rules (as amended in 1963), R. 56 — Petitioners compulsorily retired at age of 55 and not allowed to continue till age of 58 — Retirement not by way of punishment. AIR 1966 All 560 (562, 563) = 1966 All LJ 153 (DB).

(7) When a civil servant is compulsorily retired in accordance with R. 27 of Bank of Patiala (Staff) Rules (1954) without, however, visiting him with any penal consequences but allowing him to enjoy all the benefits that had already accrued to him by remaining in service till the date of his retirement, Article 311 (2) would not be attracted to his case. AIR 1963 Punj 345 (352, 353) = ILR (1963) 1 Punj 621 (DB).

(8) Compulsory retirement of Government servant who had completed 30 years of service as it was found necessary in public interest — Failure to give opportunity to show cause did not render order unlawful as the employee was not retired by way of punishment —

Articles 310 & 311 — Note 93 (contd.)
Order not infringing any legal right under the service Rules — Application under Article 226 held misconceived. AIR 1960 Madh Pra 252 (253) = 1960 MPLJ 392 (DB).

(9) Hyderabad Civil Service Regulations (1337 F), Reg. 305 — Complaint against member of Hyderabad Judicial Service for exhibition of temper and use of filthy language against practising vakil — Enquiry by Administrative Bench of High Court — Report finding him unfit for discharging judicial responsibilities — Member to retire compulsorily on proportionate pension on recommendation of High Court — Order of retirement not 'removal' and member not entitled to protection of Article 311 (2). AIR 1964 Andh Pra 206 (213, 214, 215, 216) = (1965) 1 Lab LJ 34 (DB).

(10) Compulsory retirement in terms of a specific Service Rule on proportionate pension does not involve the loss of any benefit already accrued. AIR 1957 SC 892 (895) ** AIR 1954 SC 369 (375) = 1955 SCR 26 = ILR (1955) 1 AM 324.

(11) Civil Service Regulations (as adapted in U. P.), Article 465, Note 1 — Compulsory retirement under Article 465, Note 1 is neither illegal nor unconstitutional — Article 13 of Constitution not applicable. AIR 1965 All 142 (150) = 1964 All WR (HC) 467 (FB).

(12) Order of compulsory retirement under Rule 2 (2) of Liberalised Pension Rules (1950) differs from order of dismissal or removal in that it is not a form of punishment prescribed by rules and involves no penal consequences since person retired is entitled to full benefits of pension — Person retired under Rule 2 (2) has no fundamental right to be continued in employment. AIR 1968 Andh Pra 50 (58) = (1967) 2 Andh WR 276 (DB).

(13) Compulsory retirement under Rule 74 of Bihar Service Code — No forfeiture of pay or allowance or pension — Compulsory retirement does not amount to punishment or removal or dismissal — Order is not hit by Art. 311 (2). AIR 1962 Pat 40 (42, 43) = 1961 BLJR 624 (DB).

94. Compulsory retirement when dismissal or removal. — (1) Where the Service Rules themselves provide for compulsory retirement as a mode of punishment, such compulsory retirement would naturally be covered by the expression "removal from service" and would entitle the Government servant to a reasonable opportunity to show cause against the action proposed to be taken. AIR 1957 Andh Pra 794 (804) = ILR (1957) Andh Pra 80 (DB).

(2) 'Removal' to fall within the purview of Article 311, should be by way of punishment or penalty and a compulsory retirement of a Government servant does not per se amount to 'removal' within

the meaning of Article 311 when it is not by way of punishment or penalty. (1962) 64 Punj LR 469 (476) (DB) ** AIR 1962 All 328 (332, 333) = 1962 All LJ 31 (FB).

(3) Retirement of an officer compulsorily prior to the date of his superannuation contrary to the rules amounts to removal within Article 311 (2). AIR 1965 Orissa 81 (84) = (1965) 7 Orissa JD 93 = (1965) 1 Lab LJ 335 (DB).

(4) Tests relevant for finding out whether a given termination is removal or dismissal within the meaning of Art. 311 (2) are firstly, whether the action taken is, by way of punishment. To find this out it is necessary that a charge or imputation against the Officer is made the condition of the exercise of power, or secondly whether by compulsory retirement the Officer is losing the benefit he has already earned, like he does by dismissal or removal and thirdly the compulsory retirement will be considered as removal under Article 311 (2) if the rules do not fix both an age of superannuation and an age for compulsory retirement and the service of a Civil Servant is not terminated between these two points of time. AIR 1966 Mys 61 (65, 66) = (1965) 1 Law Rep 293 (DB). (Rule 293 of the Hyderabad Civil Service Rules (1954) does not infringe any of these tests.) ** AIR 1960 SC 1305 (1308, 1309) = (1961) 1 SCR 88 ** AIR 1969 Orissa 37 (42) = 34 Cut LT 1026 (DB) ** (1964) 66 Pun LR 574 (575).

(5-6) Compulsory retirement will amount to removal or dismissal from service when (1) the order in terms involves a stigma against the officer and (2) secondly when he loses the benefits already earned by his past service. AIR 1966 Pat 97 (108) = ILR 45 Pat 1019 (DB). (Compulsory retirement before superannuation — Note 1 to Reg. 465-A. C. S. R. not complied with — Second opportunity to show cause against proposed action is imperative — In absence of such notice order is invalid and ineffective.) ** AIR 1962 Raj 258 (263) = 1962 Raj LW 506 (DB).

(7) Railway Establishment Code, Rule 2008, Clause (h) — The order of retirement of the railway servant can be sustained if prima facie, order does not contain express words from which a stigma can be inferred. If there are words which throw any stigma, then the order of retirement would amount to removal within the meaning of Art. 311. If, therefore, where the order does not disclose any reason at all, the validity of the order cannot be questioned. (1968) 1 Mad LJ 394 (396) = (1969) 1 Lab LJ 583 ** AIR 1967 SC 1264 (1266) = (1967) 2 SCR 496. (Court cannot look into background to discover whether stigma could be inferred.) ** 1969 Lab IC 1027 (1029) = (1969) 1 Mad LJ 394.

Articles 310 & 311 — Note 94 (contd.)

(8) Compulsory retirement — Order of retirement stating that the employee is retired as he has outlived his utility — Order casts a stigma and amounts to punishment and is "removal"—Enquiry under Article 311 (2) necessary before such order can be passed. **AIR 1967 SC 1260 (1262) = (1967) 2 SCR 333.** (AIR 1965 All 142 (FB), **Overruled**; ILR (1963) 2 All 955, Affirmed.) ** 1963 All LJ 934 (942, 943).

(9) Compulsory retirement in public interest — Casts no stigma on public servant — Involves no punishment — Article 311 of Constitution is not attracted. 1969 Lab IC 336 (337, 338).

(10) Compulsory retirement after reasonably long period of qualifying service before prescribed age of superannuation — Order does not amount to dismissal or removal within the meaning of Article 311 (2). 1968 Cur LJ 56 = 70 Pun LR 577.

(11) Under Punjab Civil Service Rules a Government servant can be made to retire on his attaining the age of 55 without any reason being assigned for it. To such a case Article 311 is not attracted but in case of order of retirement casting aspersion on the character of employee, order amounts to dismissal by way of punishment attracting Art. 311. (1968) 70 Pun LR 581 (585) = 1968 Cur LJ 13 (Punj).

(12) Order passed under Rule 16 (3) of All India Services (Death-cum-retirement Benefit) Rules 1958, requiring a Government servant to retire compulsorily and containing express words from which a stigma can be inferred, may amount to removal within meaning of Art. 311. AIR 1969 Orissa 37 (43) = 34 Cut LT 1026 (DB).

(13) Compulsory retirement of employees ordered on ground of "record of his service" being "found to be unsatisfactory" — Procedure under Article 311 not followed — Such order casts stigma on employee — Order cannot therefore be passed without following procedure under Article 311 — Order hence cannot be sustained. 1969 SLR 221 = (1969) 71 Punj LR 366 (369, 370).

(14) Orissa Service Code, R. 71 (b) — Government servant made to retire on ground of inability to discharge duties efficiently — The reason amounts to a stigma and amounts to punishment — No opportunity given to him to meet such charge — Premature retirement illegal. 1969 Lab IC 369 (370) = 34 Cut LT 1351 (Ori) (DB).

(15) Person who substantively holds permanent post has right to continue in service subject to rule of superannuation and rule of compulsory retirement. If for any other reason that right is invaded and he is asked to leave his office, termination must mean defeat of his right to continue in service and it will be in

nature of penalty and will amount to removal. If he has not attained age of superannuation and there is no minimum age prescribed under rules for compulsorily retiring any Government servant and most of the servants are retired after short period of service, such retirement would amount to removal. AIR 1964 J & K 92 (95, 96, 97) = 1964 Kash LJ 271 (FB) ** (1968) 2 SCWR 773 (776) ** (1969) 2 SCC 120 (124). (Rule not laying down long period of service). **AIR 1961 Assam 74 (76) = (1961) 13 Assam 179 (DB).

(16) Where, a Government servant under his terms and conditions of service or under his contract of service has a right to continue in a post and his service is terminated by an order of compulsory retirement on the basis of a charge of misconduct or inefficiency or incapacity, it would be a case of punishment of removal or dismissal, even though there may be no loss of benefits already earned. 1963 All LJ 934 (942, 943) = (1964) 1 Lab LJ 113 (All).

(17) Misconduct or inefficiency furnish merely a background in the case of retirement and an enquiry, if held, is for the satisfaction of the authorities. But in the case of dismissal or removal they form the very basis of the order which is made. AIR 1960 SC 1305 (1308).

(18) Compulsory retirement of officer under service Rules for "administrative reasons" — After officer's own insistence to be supplied with grounds which led to the decision, certain charges were communicated to him — Officer allowed full pension — Fact that consideration of misconduct or inefficiency weighed with Government in coming to its conclusion, does not amount to any imputation or charge against officer — Order is not by way of punishment. AIR 1960 SC 1305 (1308).

(19) Date of retirement on attainment of age of superannuation — Person can be made to retire on the date on which he factually attains the age of 55 years and not in the year in which he attains the age of 55 years according to the year of his birth given in his Service Book — In case of dispute about the age, the civil servant has to be given an opportunity to show correct date of birth — Retirement without giving such opportunity amounts to 'removal from service'. AIR 1967 Assam 13 (14) = ILR (1966) 18 Assam 34 (DB) ** AIR 1963 Madh Pra 335 (336, 337) = 1963 MPLJ 862 (DB). (Date of birth of Government servant in his service book based merely on surmise of Medical Officer.) ** AIR 1965 Orissa 81 (84) = (1965) 7 Ori JD 93. (AIR 1954 Nag 161 and AIR 1954 Trav-Co 32 held not good law — Earlier compulsory retirement of officer after refixation of date of birth as given in Civil

Articles 310 & 311 — Note 94 (contd.)
 List amounts to removal.) ** 1967 Cur LJ 942 (949) (Punj).

[See also 1967 Cur LJ 70 (72) (Punj). (Civil servant retired from service, filing suit for mere declaration as to his date of birth — Plea that he should sue for being reinstated — Suit for mere declaration of birth-date is maintainable.)]

(20) Under service conditions the Appointing Authority had the power to retire an employee after he attains the age of 55 years on three months' notice without assigning any reason — Retirement without notice is invalid. 66 Punj LR 818 (822).

(21) Petitioner appointed Additional Government Advocate for 3 years — New rule fixing 60 years as superannuation age — Services of Petitioner terminated before his completing three years, under new rule — New rule held not retrospective and did not govern petitioner — Termination held was removal — Removal held illegal for failure to comply with provisions of Article 311 (2). AIR 1959 All 169 (176, 178) = 1959 All LJ 323 (DB).

(22) (Obiter) — If any Rule permits the appropriate authority to retire compulsorily a civil servant without imposing a limitation in that behalf that such civil servant should have put in a minimum period of service, that the Rule would be invalid and the so-called retirement ordered under the said Rule would amount to removal of the civil servant within the meaning of Article 311 (2). AIR 1964 SC 600 (617) = (1964) 5 SCR 683.

95. Except where authorised by specific Rules, compulsory retirement before age of superannuation is dismissal or removal.—(1) Where a person's services are terminated in accordance with the Service Rules, as in the case of retirement on superannuation, or by way of compulsory retirement when the ordering of such compulsory retirement is permissible under the Service Rules, without necessity of basing the order on any misconduct, negligence, inefficiency or other disqualification of the officer, he cannot be said to be deprived of any office to which he has a right and in such cases, therefore, Art. 311, Clause (2) will have no application. AIR 1958 SC 232 (238) ** AIR 1958 SC 36 (49) ** AIR 1957 SC 892 (895) ** AIR 1954 SC 369 (375) = 1955 SCR 26 = ILR (1955) 1 All 324 ** 1961 Raj LW 298 (304) = ILR (1961) 11 Raj 371 (DB) ** AIR 1958 Cal 657 (659) = 62 Cal WN 765 (DB).

(1A) Public servant governed by Saurashtra Covenanted State Services (Superannuation Age) Rules (1955) — His compulsory retirement under Bombay Civil Service Rules (1959) before reaching age of 55 years, after States reorganisation — Not valid — Such retirement tanta-

mounts to removal under Article 311 (2). AIR 1970 SC 143 (145, 146) = (1969) 2 SCC 120.

(2) After the age of 55 there is no right in the servant to be retained, even if he continues to be efficient. AIR 1961 SC 1346 (1347, 1348, 1349) = (1962) 1 SCR 374.

(3) The law in relation to the validity of the rules permitting compulsory premature retirement of Government servants has been well settled and need not be reopened. Whether or not the petitioner's retirement is in the public interest is for the State Government to consider. AIR 1968 Andh Pra 50 (60) = 1967 (2) Andh WR 276 (DB). (Liberalised Pension Rules (1950), Rule 2 (2).)

(4) Rule 244 (2) of Rajasthan Service Rules (1951) providing for compulsory retirement on completion of 25 years of qualifying service is not in contravention of Art. 311 (2). (1965) Raj LW 44 (45) = ILR (1965) 15 Raj 63 ** 1967 Raj LW 473 (474) (DB). (Order of compulsory retirement passed by delegatee of Government not in conformity with Article 166 — Order held not illegal.)

(5) Rule 56 (b) of the Rajasthan Services Rules which imposes a restriction on Government not to retire a Government servant under suspension on a charge of misconduct applies only to cases of Government servant attaining the age of superannuation and it does not apply to cases of compulsory retirement under Rule 244 (2). Though it is desirable not to retire a Government servant under Rule 244 (2) if he is under suspension on a charge of misconduct, yet if an order is passed and is not tainted with malice, it is not hit by Rule 56 (b). AIR 1967 Raj 82 (84) = 1966 Raj LW 619 (DB).

(6) Compulsory retirement — Mysore Civil Services Rules, R. 285, Note 1—Compulsory retirement in public interest — It is not by way of punishment and does not cast any stigma on official retired—Government not under obligation to give opportunity of hearing. AIR 1969 Mys 248 (250) = 1969 Lab IC 986 = (1968) 1 Mys LJ 225.

(7) Under Art. 186 of the Mandi Civil Service Regulations, a permanent public servant of the former Mandi State could be compulsorily retired or his services terminated provided he had completed 25 years qualified service. As Section 240 of the Government of India Act, 1935, did not apply to the former Indian State of Mandi, the public servant who has been compulsorily retired on 18th November, 1948 (that is before the commencement of the Constitution of India) cannot claim, as of right that a show cause notice should have been given to him before he was compulsorily retired. AIR 1959 Him Pra 32 (34).

Articles 310 & 311 — Note 95 (contd.)

(8) Retirement under service rule providing for compulsory retirement at any age whatsoever, irrespective of the length of service cannot necessarily be regarded as dismissal or removal. AIR 1960 SC 1305 (1309).

(9) The liability to retire earlier under Rule 161 of the Bombay Civil Service Rules is a term of service. The effect of the orders requiring a person to retire in pursuance of Rule 161 is not dismissal removal or reduction. The orders are also not passed on the basis of any implied stigma such as inefficiency or incapacity or misconduct. The termination of service resulting from such orders is the termination of service simpliciter flowing from a condition of service and is not either a dismissal, removal or reduction within the meaning of Art. 311. Article 311 (2) is not therefore attracted in such cases. (1963) 4 Guj LR 945 (952) = (1964) 2 Lab LJ 253 (DB).

(10) An order passed in the name of the Governor by an Under Secretary to the Government, under Note 1 to R. 285 of the Mysore Civil Service Rules, directing a Government Servant to retire compulsorily from service, cannot be held to be invalid for failure to give valid notice 'at least three months before date' as required by 'Note 1'. A compulsory retirement neither being a reduction nor removal nor dismissal within the meaning of those expressions found in Article 311 the 'Note' must be considered as containing merely administrative instructions. It cannot have any binding force. The notice mentioned in the 'Note', therefore, cannot be regarded as a condition precedent to a valid compulsory retirement. Even assuming that the 'Note' is valid and binding on the Government, the expressions "shall" and "at least 3 months before that date" by themselves do not show that its requirements are mandatory. They can still be directory. 1962 Mys LJ (Supp) 437 (440, 441).

(11) Age of retirement raised from 55 to 58 in U. P. by amending Rule 56 Fundamental Rules — The appointing authority had power to require the Government servant to retire at any time by three months notice after he attains the age of 55 — Government servant retained in service after fifty five — Notice to retire him before attaining age of fifty eight — Proof of notice is only directive and does not control rule — Age of superannuation remains at 55 with option to continue upto 58 — Termination of service with notice does not attract Article 311 (2) as it is under the rules and not by way of punishment nor can the order be termed as dismissal or removal. (1968) Lab IC 990 (992) = 1968 SLR 656 (All).

(12) Letter from Railway Board, dated 5-12-1962, communicated to all General

Managers and other authorities regarding raising of age of superannuation from 55 years to 58 years — Para 6 of letter vesting power in appointing authority to compulsorily retire railway servant after he attains age of 55 years — Compulsory retirement under Para 6 does not amount to dismissal or removal as contained in Art. 311 — Para 6 is not violative of Articles 309 and 310. 1968 Lab IC 1317 (1321) (Delhi).

(13) Under Rule 56 of Fundamental Rules, age of superannuation raised to 58 — Compulsory retirement under Rule 56 (j) beforehand is not invalid — Rule 56 is not against safeguard given under Article 14 — Compulsory retirement does not amount to removal or dismissal. AIR 1969 Delhi 15 (18, 19) (DB).

(14) Fundamental Rules, Rule 56 (j) — Clarification dated 18-2-1965, issued by Government of India — Pendency of departmental enquiry on charges of misconduct — Order of compulsory retirement under rule 56 (j), not passed as result of any finding in such enquiry — Order cannot be said to have been passed by way of punishment. 1969 Lab IC 338 (340) = 1969 All LJ 261.

(15) Civil Services (Classification, Control and Appeal) Rules, Rule 19 — Fundamental Rules (as amended in 1963), R. 56 — Termination of service by compulsory retirement and termination by order of removal or dismissal by way of punishment — Difference between stated — Petitioners compulsorily retired at age of 55 and not allowed to continue till age of 58 — Retirement held not by way of punishment. AIR 1966 All 560 (563) = 1966 All LJ 153 (DB). (Power to retire held not exercised colourably — Nor could it be said that exercise of power was fraud on statute.)

(16) Retirement on attaining age of superannuation does not amount to compulsory retirement by way of punishment even though extension upto fifty-eight is denied — If a person is ordered to retire before fifty-five then it can be a punishment. 1968 Pat LJR 634 (636) = 1969 BLJR 553 (DB).

[See also AIR 1956 Trav-Co 35 (40). (Retirement on account of policy of State regarding age of superannuation or otherwise).]

(17) Where there is no specific Service Rule, providing for the compulsory retirement of a Government servant before the normal age of superannuation on his attaining a particular age or on his completing a service for a particular number of years, or where there is such a rule but a Government servant is compulsorily retired before attaining the age or completing the period of service indicated therein, the order of compulsory retirement will amount to punishment and

Articles 310 & 311 — Note 95 (contd.)

hence, removal from service within the meaning of Article 311. AIR 1957 SC 892 (895) ** AIR 1957 Andh Pra 794 (804) = ILR (1957) Andh Pra 80 (DB).

[But see AIR 1957 Assam 77 (81) (DB).]

(18) A permanent civil servant has a right to remain in service until he reaches the age of superannuation and if there is no rule made under Article 309 giving to the Government the power to order his compulsory retirement before he reaches the age of superannuation, then the Government servant cannot be so retired. If done, that retirement would amount to dismissal or removal within Article 311 (2). If it is done pursuant to a rule, it cannot be regarded as removal or dismissal. AIR 1964 Madh Pra 248 (251) = 1964 MPLJ 713 (DB).

(19) Compulsory retirement of permanent Government servant — Government servant thereby losing his right to continue in service till age of superannuation — Order passed on the ground that he had out-lived his utility — Order amounts to an order of punishment of removal. 1963 All LJ 934 (943) (DB).

(20) Premature retirement is definitely a form of punishment and comes within the purview of compulsory retirement under Rule 30 of the Kashmir Civil Service Rules. A Government servant cannot therefore be prematurely retired without there being good and sufficient reason as provided in the rules. Under Article 32 of the Kashmir Civil Service Rules which have the force of law, it is provided that no order of dismissal, removal or reduction shall be caused on a member of a service unless he has been informed in writing of the grounds on which it is proposed to take action and has been given adequate opportunity of defending himself. Where nothing of that sort has been done in the case and a mere, executive fiat has been issued and the person has been deprived of what was otherwise due to him, writ of mandamus will issue. AIR 1958 J & K 60 (62).

(21) The services of temporary hands who are governed by temporary service rules contained in Schedule IX to J. and K. Civil Service Regulation can be terminated by competent authority under Rule 5 of Schedule IX. Section 126 (2) of the State Constitution has no application to their cases unless the orders show that their services are terminated by way of punishment. AIR 1964 J & K 92 (98, 99) = 1964 Kash LJ 271 (FB).

(22) It cannot be urged that a compulsory retirement in any case does not amount to dismissal or removal under Article 311 (2), because it entails no forfeiture of the rights and benefits that have already accrued. A compulsory retirement, where a person had a right to continue in office except on ground of

misconduct, negligence, inefficiency or other disqualification, is a punishment. But a compulsory retirement, where a public servant has no right to continue in office, is not a punishment. The test is whether a right to continue in the post except for misconduct, negligence, inefficiency, or other good and sufficient cause is claimed. AIR 1959 Andh Pra 251 (254) = (1959) 1 Andh WR 393 (DB).

(23) A permanent Government servant has a right to continue in service till the age of superannuation under the rules or until such time as his services are terminated by compulsory retirement in terms of a specific Service Rule, unless the post itself is abolished in the meanwhile. AIR 1958 SC 36 (48, 49).

(24) Pepsu Civil Service (Safeguarding of National Security) Rules, 1954 — Compulsory retirement of head constable on the ground of his being associated with other persons in subversive activities — Merely associating with persons who are engaged in subversive activities is not enough — Action taken on wrong interpretation of Rules — Writ issued quashing the order. AIR 1956 Pepsu 19 (26).

(25) No charge-sheet framed against applicant nor enquiry held — Order of retirement under Rule 2 (3) (ii) of M. P. New Pension Rules, 1951, for inefficiency — Applicant not lost any benefit which he had already earned till that date — Order could not be held to be by way of punishment of removal from service — Article 311 not attracted. 1964 MPLJ 378 (380) = 1964 Jab LJ 427 (DB).

(26) Order for compulsory retirement for "good and sufficient reason" a phrase used in Rule 9, Kerala Civil Services (C. C. A.) Rules 1957 — High Court will not enter into question of sufficiency of reason or goodness of it — Order held was passed by competent authority and that there was opportunity given to officer to show cause. AIR 1959 Ker 201 (202) = 1959 KLT 137 (DB).

(27) Though compulsory retirement per se does not attract Article 311 (2) even in cases of compulsory retirement before the age of superannuation, it is open to the Government servant to establish that it is resorted to mala fide or by way of penalty for some alleged misconduct. 1968 Lab IC 731 (733, 734) = 71 Cal WN 205.

(28) Any valid rules relating to premature compulsory retirement must satisfy three conditions— (1) that the rules have fixed both an age of superannuation and an age for compulsory retirement; (2) that the services of a civil servant compulsorily retired under the rules are terminated between these two points of time, and (3) that the minimum period of qualifying service after which alone an order for compulsory retirement can be effected is reasonable. The Office Memorandum of Government of India, Rule 56 (i) of the Fundamental Rules and the Resolution

Articles 310 & 311 — Note 95 (contd.)

of the Orissa Government fulfil all the three conditions and hence they are constitutionally valid and are not hit by Article 311 (2). AIR 1968 Orissa 44 (52) = ILR (1966) Cut 737 = (1969) 1 Lab LJ 408 (DB).

96. Compulsory retirement based on charges of misconduct, negligence, etc., is dismissal or removal.— (1) Where, the order of compulsory retirement was passed against a Sub-Inspector of Police because he had been found guilty of misconduct and that he was not awarded full pension and gratuity to which he was entitled to under the rules, the compulsory retirement order amounted to order of removal within Article 311 and was by way of punishment. (64) 66 Punj LR 574 (575).

(2) Where the order, though calling itself an order of retirement, is professedly based on charges of misconduct, inefficiency and the like, it would amount to a punishment, and hence, removal from service. AIR 1955 Mys 137 (137) (DB).

[See AIR 1958 SC 36 (49).]

(3) Compulsory retirement — Disciplinary Tribunal finding civil servant guilty of charges of corruption — Government accepting findings—Compulsory retirement suggested by Tribunal as punishment — Recommendation also accepted — It is not for High Court in petition under Article 226 to enquire into question as to reasonableness, adequacy or propriety of punishment. AIR 1961 Andh Pra 289 (292, 293) = (1960) 2 Lab LJ 285.

(4) Where the delinquent officer, who had not completed the term of service which would entitle the Government to retire him compulsorily, had been so retired on the proved charges of misconduct purely as a measure of punishment, Article 311 (2) applies to the case. AIR 1963 Mad 14 (15) = (1962) 2 Mad LJ 339 (DB). (A. S. 112 of 1955 (Mad), Affirmed.)

(5) Compulsory retirement of civil servant — Inquiry by Tribunal for Disciplinary Proceedings — Some of the charges of corruption held to have been proved, the remaining leaving suspicion of corrupt practice — Recommendations by Public Service Commission agreeing with the findings of Tribunal and also mentioning that the evidence in the enquiry left suspicion about the Officer being corrupt — Order of compulsory retirement held could not be held to be illegal or passed merely on suspicion. AIR 1966 SC 1827 (1830, 1831, 1832) = (1967) 1 SCJ 855. (W. A. No. 78 of 1961, dated 1-11-1962 (Madras), Reversed.)

(6) Departmental proceedings — Order of compulsory retirement of Police Head Constable — Charge that he entered into contract with Block Development Officer without permission of police authorities

while he was under suspension — Work of charitable nature for benefit of villagers — Government Officers permitted to participate in "Shramadan" drive — Permission under Rule 14 of Madras Police Officers Conduct Rules held was not necessary — Charge also of insubordination — Insubordination cannot be premised on solitary instance in form of an answer to a query during enquiry — Insubordination can be fitting only when servant is insulting or insubordinate to such a degree as to be incompatible with continuation of relation of master and servant — Order quashed. 32 FJR 286 (288, 291) = 15 Fac LR 286 (Mad).

(7) Civil Service (Safeguarding of National Security) Rules, 1949, Rules 3 and 4 — Engaging in subversive activity — Government servant associating with persons engaged in subversive activity — Taking interest in political activities of Communist party when it is not banned — Allegations do not amount to Government servant being engaged in subversive activity — R. 3 not attracted — Compulsory retirement in such circumstances amounts to removal from service by way of penalty — Government servant can maintain a petition under Article 226 of the Constitution. AIR 1963 SC 1160 (1164, 1165). (L. P. A. No. 23-D of 1957, D/- 6-10-1960 (Punj), Reversed.)

(8) In cases of compulsory retirement where the order is not actually founded on any charge of inefficiency, misconduct or the like, the mere fact that the inefficiency, misconduct or the like is the motive of the Government in taking action will not make the order one of punishment so as to attract the provisions of Article 311. AIR 1954 SC 369 (374) = 1955 SCR 26 = ILR (1955) 1 All 324 ** AIR 1957 SC 802 (895) ** AIR 1958 SC 36 (49) ** AIR 1954 Madh B 54 (54, 55, 56) = ILR (1954) Madh B 301 (DB).

97. Compulsory retirement coupled with loss of benefits already earned is dismissal or removal.— (1) Where the action entails forfeiture of the earned benefits it is one of punishment, but where as in the case of compulsory retirement after 30 years of qualifying service, a civil servant earns proportionate pension, the action cannot be one of punishment. AIR 1960 Madh Pra 117 (118) = 1960 MPLJ 114 (DB).

(2) When it is proposed to take action against a servant by way of punishment and that will entail forfeiture of benefits already earned by him, provisions of Article 311 apply. AIR 1969 Orissa 37 (42) = 1969 Lab IC 281 = 34 Cut LT 1026 (DB).

(3) Where the order of compulsory retirement, though provided for by a specific Service Rule, imposes any penalties in the form of the loss of benefits already earned the order would amount to one of punishment and as such would

Articles 310 & 311 — Note 97 (contd.)
come within the scope of Article 311. AIR 1958 SC 36 (49).

98. Compulsory retirement amounting to removal — No right to pension.— (1) Where an order though calling itself an order of compulsory retirement is really one of removal from service, the Government servant will not be entitled to proportionate pension but merely to compassionate allowance. AIR 1955 Mys 137 (137) = ILR (1955) Mys 473 (DB).

99. Alteration of superannuation rule — see Note 20.

100. Right of ministerial servant to continue in service till age of sixty.— (1) A ministerial servant of the Government cannot claim a legal right to continue in service after the age of fifty-five till the age of sixty, though the Service Rules may provide that he may be retired at fifty-five but should ordinarily be retained in service till sixty if he continues to be efficient. It is a matter resting within the discretion of the Government to retain him in service after the age of fifty-five. AIR 1956 Cal 93 (95) ** AIR 1959 Punj 503 (504, 505) = 61 Punj LR 551 (DB). ((58) 60 Punj LR 277, Overruled.) ** AIR 1958 Orissa 202 (204) = 24 Cut LT 237 (DB).

(2) Railway employee who had declared himself as Anglo-Indian and had enjoyed privileges for Anglo-Indians and retired after attaining 55 years contending that he was a Christian and as such liable to retirement only after attaining 60 years — Order of retirement does not amount to punishment — Employee has no right to hold the post until 60 years. (1962) 2 Lab LJ 584 (586) (Andh Pra).

(3) Government servant holding temporary post in State P. W. D. with a privilege of continuing in service till the age of 60 transferred to Electricity Board with all benefits and conditions of service enjoyed in Government service — Board making the post permanent but relieving transferred government servant on his attaining age of 55 — Termination of service in such circumstances amounted to denial of benefits guaranteed to the transferred servant — Termination set aside and Board recommended to reconsider the matter. 1961 Ker LT 1139 (1140) (DB).

(4) Where the right to serve after fifty-five and till sixty (assuming such right to exist) is waived by a ministerial servant himself expressing a desire to retire at fifty-five and applying for leave preparatory to retirement, he cannot complain of want of reasonable opportunity under Article 311, Clause (2) to show cause against his premature retirement. AIR 1954 SC 584 (586).

101. Compulsory retirement with retrospective effect.— (1) There is no illegality

in the order of compulsory retirement of a Government servant from the date he was placed under suspension pending enquiry into his misconduct which came to be proved against him. 1964 Ker LT 180 (188) = (1964) 2 Lab LJ 381 (DB).

102. Reduction of pension as punishment.— (1) Grant of life disability pension to petitioner serving as clerk in Army, on recommendation of medical board — Pension cancelled subsequently after many years as a result of further medical examination — Petitioner has right to relief against cancellation under Art. 226. AIR 1962 Punj 503 (504, 505) = 64 Punj LR 804.

103. Extension of superannuation.— (1) Once the right of a permanent civil servant to hold the post comes to an end on attaining the age of superannuation no fresh right to hold the post is created in him merely because he is permitted to remain in service for a certain period. A right is not conferred upon him under which he can insist to hold the post till the expiry of the extended period of service. The mere fact that the Officers were permitted to remain in service vested the competent authority with an implied power to revoke the permission under which they continued to remain in service after superannuation. Unless the termination of their service is on ground personal to them and carries with it a stigma it cannot attract the provisions of S. 126 (2) of the State Constitution (corresponding to Article 311 (2) of the Indian Constitution). AIR 1964 J & K 92 (98) = 1964 Kash LJ 271 (FB).

[But see AIR 1963 Mys 208 (209) = 1963 Mys LJ (Sup) 412 (DB).

(2) The Government notification, dated 15th August, 1956 on the basis of which extension is claimed contains nothing either express or implied which could persuade the view that the refusal of an extension must be preceded by an opportunity to establish the right to extension or to establish the existence of the condition on the fulfilment of which alone an extension could be granted. AIR 1968 Mys 116 (118-119) = (1967) 1 Mys LJ 354 (DB).

(3) Refusal of an extension cannot be equated with a removal — Extension amounts to retention in service, and the right to such extension must be acquired under Government notification of 15th August, 1956, on the formation of the opinion by the appropriate authority that the conditions on the existence of which alone an extension could be granted exist. AIR 1968 Mys 116 (118) = (1967) 1 Mys LJ 354 (DB).

(4) Petitioner a patwari entitled to continue in service under the service conditions upto the age of 65 if he was not found unfit after the age of 60 — Services of the patwari extended after the age of 60 but further extension was

Articles 310 & 311 — Note 103 (contd.) refused even though he had not attained the age of 65 and even though he was not found unfit for service and was made to retire — **Held** the service conditions did not permit the services of the petitioner being terminated otherwise than in accordance with Article 311 (2). 1968 Cur LJ 523 (525).

(5) Retention of service of civil servant beyond date of superannuation for purpose of holding departmental enquiry cannot be said to be on public grounds — Such action is permissible under Rule 73 (f) Bihar Service Code only if the Civil servant is suspended before his date of compulsory retirement. AIR 1966 Pat 227 (229) = (1965) 1 Lab LJ 99 (DB).

(6) West Bengal Civil Service Rules, Rule 75 (a) — Retention of service for the purpose of conducting a departmental enquiry is not proper and extension of service beyond date of compulsory retirement for this purpose is illegal. AIR 1966 SC 447 (449) = (1965) 2 SCA 884 = (1966) 2 SCWR 169.

104. "Reduction in Rank".— (1) The expression "rank", in Article 311 (2) has reference to a person's classification and not his particular place in the same cadre in the hierarchy of the service to which he belongs. Therefore, losing some places in the seniority list in the same cadre, does not amount to reduction in rank, within the meaning of Article 311 (2). AIR 1962 SC 1704 (1710) = (1963) 1 SCR 437 ** AIR 1968 All 276 (278, 279). (Petition challenging an order which has resulted only in loss of seniority is not maintainable under Article 311.)

(2) The expression 'grade promotion' occurring in Audit Instruction No. 3 under Fundamental Rule 23 does not debar a Government servant from retaining his old pay until he had promotion to a next higher grade. **Held**, on facts, that the petitioner's subsequent fixation on a lower salary by the Registrar was not justified and, that being so, the petitioner must be held to have been reduced in rank. AIR 1960 All 193 (198).

105. Suspension is not reduction.—(1) Suspension does not amount to reduction in rank and Article 311 is not attracted — Government servant is not entitled to opportunity of explanation. AIR 1963 Punj 298 (311) = ILR (1962) 2 Punj 642 (DB) ** (1964) 66 Pun LR 1227 (1229) = 1964 Cur LJ 489 ** AIR 1969 Orissa 224 (225) = 1969 Lab IC 1221 (DB).

(2) The petitioner was not treated on duty while on suspension from service pending departmental enquiry and period of suspension was treated as leave without pay. This was held not to amount to reduction in rank. AIR 1962 Raj 239 (240) (DB).

(3) The consequences of suspension are different from consequences of order of reduction and do not per se attract Arti-

cle 311 (2). (1967) 14 FLR 449 (452) (Cal). (AIR 1962 SC 630, Rel. on.)

(4) An order of suspension is not by way of penalty. All that it does is to make the person affected refrain from discharging his functions in a particular office for a certain period. ILR (1961) 11 Raj 892 (898) (DB).

(5) As the Civil Service Rules make a clear distinction between suspension and reduction in rank, suspension will not be reduction in rank, for the purpose of Article 311, Clause (2), though under Rule 49 of the Civil Service (Classification, Control and Appeal) Rules, suspension is one of the penalties that may be imposed on a Government servant. AIR 1954 Madh B 49 (52) = ILR (1954) Madh B 314 (DB).

(6) The fact that while under suspension a Government servant is not considered for promotion to a higher post or a rank available does not mean that there has been a present reduction in his rank, grade or post. AIR 1954 Madh B 49 (52) = ILR (1954) Madh B 314 (DB).

106. Reduction must be by way of penalty.—(1-2) In order to constitute 'reduction in rank' within meaning of Article 311 (2), two elements must co-exist; (1) there must be a physical degradation in rank (2) such degradation must be ordered by way of penalty. (1967) 14 FLR 449 (451) (Cal).

(3) In order to find out whether an order of reduction or dismissal is penal or not, Court has to apply two tests: (1) If Government servant has right to particular rank, then the very reduction from that rank will operate as a penalty for he will then lose the emoluments and privileges of that rank. (2) (a) If the Government servant has no right to particular rank, his reduction to substantive lower rank will not ordinarily be punishment (b) But the mere fact that the servant has no title to the post or rank, does not mean that an order of reduction of a servant to a lower post or rank can in no circumstances be a punishment. The real test is to find out if the order also visits the servant with any penal consequences. (1967) 14 FLR 449 (452, 455) (Cal). (AIR 1958 SC 36 Foll.) ** AIR 1969 Orissa 215 (217) = 1969 Lab IC 1118 = 35 Cut LT 267 (DB) ** AIR 1964 Cal 265 (268, 269, 270, 271) = (1968) 2 Lab LJ 376 ** AIR 1958 Cal 559 (562, 563) = ILR (1959) 2 Cal 664 (DB).

(4) If a particular Government servant is entitled to hold a substantive post in a category of service his demotion to a lower category entailing evil consequences will prima facie mean a penalty to which the provisions of Article 311 (2) could be attracted. AIR 1969 Andh Pra 118 (123) = (1969) 1 Andh WR 85.

(5) A reduction in rank, which is not by way of punishment does not attract the provisions of Article 311. AIR 1961 All

Articles 310 & 311 — Note 106 (contd.)
 316 (318) ** AIR 1961 Ker 203 (207) = 1960 Ker LT 1179 (DB).

(6) Northern Railway Discipline and Appeal Rules for Non-Gazetted Railway Servants, Chapter IV and Chapter VI, Rr. 51 and 53 — Withholding of increment affecting future increments and seniority is not reduction in rank. AIR 1967 All 112 (114) = (1968) 1 Lab LJ 301.

(7) Reduction to a lower post or on a lower emoluments by way of punishment would amount to reduction in rank. AIR 1962 Raj 239 (240) (DB).

(8) Reduction by way of punishment to lower stage in the same time-scale of pay of a Government servant amounts to reduction in rank within the meaning of Clause (2) of Article 311. AIR 1959 Orissa 167 (168, 169) = ILR (1959) Cut 89 (DB). (AIR 1958 Raj 239, Diss. from.)

(9) The right to hold the post should flow either from the terms of contract of employment or from the rules governing the conditions of service. The service rules provide that when there are two claimants to a post and one of them is confirmed on that post the other may appeal against the confirmation and have it set aside. It follows that under these rules, the confirmation of the former is subject to an administrative appeal and, if it is set aside in appeal as contemplated by the rules there is or can be no question of punishment. Therefore where the main argument in support of the petition is that the petitioner had been confirmed on a post and so he had a right to hold that post and his reversion to a lower post must per se be regarded as punishment the argument is not sound. 1965 MPLJ 990 (991, 992) = 1965 Jab LJ 1087 (DB).

(10) If a particular Government servant is entitled to hold a substantive post in a category of service, his demotion to a lower category entailing evil consequences will prima facie mean a penalty to which provisions of Article 311 (2) could be attracted. AIR 1969 Andh Pra 118 (123) = (1969) 1 Andh WR 85.

(11) Person holding permanent post appointed to higher post by "selection" — Reversion to permanent post by way of punishment — Art. 311 is attracted. AIR 1964 All 528 (529, 530) (DB). (AIR 1958 All 656, Reversed.)

(12) Every demotion involves transfer from a higher to lower post and in its turn entails transfer from one place to another. The transfer of an employee after he is demoted by way of punishment is only consequential and it cannot be regarded as punishment. AIR 1967 Cal 29 (33) = (1969) 1 Lab LJ 300.

(13) Reduction to a lower post being a punishment under Rule 49, Civil Service (Classification, Control and Appeal) Rules, the transfer of a Government officer from a gazetted to a non-gazetted post, though in a different department, would be a

reduction in rank. AIR 1956 Mani 34 (37).

(14) The transfer from a higher post to a lower post or to one carrying lower salary will not amount to "reduction in rank" unless such transfer is made as a penalty or punishment. AIR 1958 Mad 53 (64) = ILR (1958) Mad 158 ** (1957) 61 Cal WN 815 (823) (DB) ** AIR 1956 Madh B 172 (173, 174) (DB).

(15) Transfer to post carrying same scale of pay and rank but not the same status — Posting does not amount to reduction in rank. AIR 1967 SC 1864 (1867) = (1967) 3 SCR 627.

(16) Where after termination of disciplinary proceedings, Government servant was posted to another department on a post carrying a higher scale of pay, but he was given his original scale of pay it was held that the order was one penalising the employee and hence bad under Art. 311. AIR 1968 Manipur 16 (19) = 1968 Lab IC 150.

(17-18) According to Rule 49 C. S. (C. C. A.) Rules, reduction to lower time scale necessarily involves reduction in rank. Hence a Dist. Judge is bound by virtue of Rule 55 of the said Rules read with S. 240(3), Government of India Act (1935) to formulate specific charges and give the Nazir a reasonable opportunity of defending himself not only in respect of charges but also in respect of the proposed punishment. ILR (1954) Cut 684 (704) (DB).

(19) Employee holding post in substantive and permanent capacity — Acceptance by Government of recommendation of Pay Rationalization Committee enhancing pay-scale of that post — Employee is entitled to new scale — Change in designation of post with reduction in pay scale — Amounts to reduction in rank — Compliance with Article 311 (2) is necessary. 1969 Lab IC 1412 (1413) (All).

(20) Reduction resulting from a normal administrative decision to correct a mistake does not involve any penalty — Article 311 (2) not attracted to such case. AIR 1967 Delhi 67 (68).

(21) Officiating Tahsildars in State of Pepsu confirmed as Tahsildars although no posts were available for confirmation — Supernumerary posts of Tahsildars created subsequently by Rajpramukh of Pepsu, to provide liens for confirmed Tahsildars — Merger of Pepsu with Punjab by virtue of operation of States Reorganization Act — Subsequent order of successor (Punjab) Government cancelling previous order of confirmation — Article 311 (2) not attracted. AIR 1964 SC 521 (524, 525, 526, 527) = 1964 Cur LJ (SC) 52.

(22) The transfer of a civil servant from a permanent post in one department or service to another permanent post in another department or service without the consent of the civil servant concerned

Articles 310 & 311 — Note 106 (contd.) does not amount to a reduction in rank when there is no reduction in the scale of pay or in the grade. AIR 1957 Raj 230 (231) (DB).

107. Tests for determining whether reversion amounts to reduction in rank and illustrative cases.— (1) In determining whether a particular order of reversion amounts to the reduction in rank it is not only the form or the wording of the particular order which is to be treated as conclusive but it is the substance of the matter which has to be determined after consideration of the totality of the circumstances. If the real intention is found to be to penalise or punish the official then notwithstanding the form of the order the reversion would be held to amount to reduction in rank. 1966 Cur LJ 318 (339) (Punj) ** AIR 1966 Andh Pra 116 (117, 118) = (1964) 2 Andh WR 477 (DB) ** AIR 1963 Andh Pra 412 (415) = (1963) 1 Andh WR 216 (DB). (Approved probationer under Rule 2 (3) of State Service Rules — Order of reversion without assigning reasons — Inference to be drawn from sequence of events held was that reversion amounted to reduction in rank.) ** AIR 1967 Punj 145 (147) = (1968) 1 Lab LJ 748.

(2) Reversion by itself to the substantive post is not a reduction in rank and it does not involve any punishment. The servant has no right to continue to hold an officiating post, his tenure by its very nature being temporary and at the will of the Government. Unless penalties also are expressly imposed when reversion is ordered the reversion cannot be a reduction in rank. AIR 1959 All 135 (139, 140) (DB). (AIR 1958 SC 36, Rel. on.)

(3) In the case of an officiating employee Government have simultaneously two powers to effect his demotion: (i) under the rules or contract of service and (ii) by way of punishment. In the second case Government must launch a regular formal enquiry under Article 311 (2). ILR (1966) Cut 503 (539) = 8 Ori JD 290 (DB) ** 1969 Lab IC 68 (77) (Tripura) ** AIR 1966 Orissa 173 (179) = ILR (1965) Cut 893 (DB). (Rules of contract of service.) ** AIR 1965 Punj 491 (492, 493). (Officiating Government Servant — Reduction in rank by Controlling authority on the advice of Superior authority — Reduction held was by way of penalty.)

(4) Tests for holding that reduction is punitive are: (1) whether the servant had a right to the post or rank or (2) whether he has been visited with evil consequences. ILR (1966) Cut 503 (526) = 8 Ori JD 290 (DB) ** ILR (1968) Cuttack 394 (397) (DB).

(5) In considering the circumstances of each case the motive of the relevant authorities in reverting the official concerned is wholly irrelevant but the mind or the intention to inflict punishment or

to revert in ordinary course would certainly be relevant. The mere fact that it is found that it was the official's unsatisfactory work which resulted in his reversion, will not vitiate the order. To such a case Article 311 (2) will not apply. 1966 Cur LJ 318 (339) (Punj).

(5-A) A normal order of reversion would be by way of punishment:

- (i) if it is expressed to be so;
- (ii) if evil consequences ensue from the order as direct result thereof;
- (iii) if a stigma is cast on the official by an order of reversion beyond the mere finding of the officer being not suitable to hold the higher post. 1966 Cur LJ 318 (336) (Punj) ** 12 Law Rep. 647 (650) = (1967) 2 Mys LJ 582 (DB). (Order of reversion said that the petitioner was found incompetent, inefficient, grossly deficient and unsuitable for post—Order caused stigma on petitioner.) ** (1966) 68 Punj LR 882 (885). (Reversion of temporary Patwari as 'undesirable' — Order causing stigma to be attached is an order by way of punishment.)

(6) No stigma can be said to be attached to an order of reversion where, subsequent to the order and in reply to the query of employee he is told that the reason was that "his work was found unsatisfactory by competent authority." (1968) 72 Cal WN 817 (821) = (1969) 1 Lab LJ 37.

(7) Where a person holding a substantive appointment in a lower rank is posted to a post in a higher rank in an officiating capacity and is then reverted to his original substantive post, such reversion will not amount to "reduction in rank" within Article 311, Clause (2) unless the order of reversion provides or entails any further consequences of a penal nature such as loss of seniority, stopping of promotion, etc., or is based on charges of misconduct etc., against the Government servant. AIR 1958 SC 36 (49) ** AIR 1958 All 741 (746) (FB) ** AIR 1966 Andh Pra 116 (117, 118, 119) = (1964) 2 Andh WR 477 (DB). (Person officiating on higher post — Office he holds is of transitory character — Appointing authority under no duty to assign reasons for reversion — If reversion does not partake character of punishment, Article 311 (2) is not attracted.) ** (1964) 66 Punj LR 344 (346). (Reversion not on ground of unfitness but on basis of bad reports — Reversion also barring petitioner from promotion.) ** ILR (1966) Cut 503 (545) = 8 Ori JD 290 (DB) ** AIR 1967 Punj 145 (147) = (1968) 1 Lab LJ 748 ** (1968) 72 Cal WN 817 (821) = (1969) 1 Lab LJ 37 ** 1965 Punj LR (Supp) 625 = ILR (1966) 1 Punj 84 (123) (DB). (Punjab Police Rules, 1934, Rule 13 — Respondent's name placed on list E under

Articles 310 & 311 — Note 107 (contd.)
Police Rules — Promotion to officiate on higher post — Reversion and name removed from list — Held, in the circumstances it was by way of punishment.
****AIR 1967 Punj 139 (143) = (1966) Cur LJ 711 (DB).** (Reversion from officiating post to substantive post in the lower cadre is not punishment if the incumbent is found unfit to continue in officiating higher post — Reversion does not amount to a 'reduction' within the meaning of Article 311 (2). C. W. No. 1506 of 1964, dated 9-9-1965 (Punj), **Reversed.**) **** AIR 1964 Cal 265 (269, 270) = (1968) 2 Lab LJ 376 ** ILR (1957) 9 Assam 223 (234) (DB).** (Reversion simultaneous with order of suspension and departmental enquiry — It still remains reversion.) **** AIR 1969 Assam 112 (116) = 1969 Lab IC 1192 (DB).** (Order of reversion resulting in loss to the reverted officer.) **** AIR 1967 Andh Pra 353 (362) = (1966) 1 Andh WR 403 (DB).**

[See AIR 1958 Madh Pra 289 (291, 292) = 1958 MPLJ 49 (DB). (Rule 4 under Para 155-A of C. P. Excise Manual Vol. 1, lays down penalties — Reversion under Rule 4 from officiating post, being not administrative but as measure of penalty will attract Article 311 (2).]

(8) **Indian Police Service — Member reverted from higher officiating post of Superintendent of Police to substantive junior post of Asst. Superintendent of Police for unsatisfactory conduct — Reversion amounted to reduction in rank.** **AIR 1964 SC 428 (429, 431, 433, 434, 435, 436) = (1964) 4 SCR 506.** (AIR 1962 Punj 516, **Reversed.**)

(9) Where a cadre officer in the junior scale of pay was promoted to officiate in a post in the senior scale of pay and was thereafter reverted to his substantive post while other cadre officers junior to him continued to officiate in posts in the senior scale of pay, it would only indicate that the action taken against the cadre officer so reverted was only by way of penalty or punishment. **AIR 1968 SC 754 (759) = (1969) 1 SCJ 217.**

(10) In reverting a person officiating in higher service no reasons need be recorded. All that the Explanation (iv) to R. 13 of the Central Civil Services (Classification, Control and Appeal) Rules, postulates is that even if a person after trial was found unsuitable for such higher service, grade or post, or on administrative grounds unconnected with his conduct, it should not be regarded as a penalty. It does not follow from this that reversions which are not specified within this clause automatically constitute a penalty. This clause does not carry with it the implication that all other cases of reversion from higher service, though made on a temporary basis and until further order would amount to penalty. If the reversion does not partake the charac-

ter of a punishment, then the provisions of Article 311 (2) are not attracted and therefore the procedure indicated therein need not be followed. **AIR 1966 Andh Pra 116 (118) = (1964) 2 Andh WR 477 (DB).**

(11) Although the Government may have a right to transfer a person who holds an appointment to a higher post only on an officiating basis to a lower post at any time purely at its will and pleasure without assigning any reasons for its action, where the Government chooses to order such transfer as a penalty and bases the order on a charge of corruption, misconduct, negligence, inefficiency, etc., against the Government servant, the order will amount to one of punishment and would constitute an order of reduction in rank against the officer within the meaning of Article 311, Clause (2). **AIR 1958 SC 36 (49) ** AIR 1958 Cal 623 (624) ** AIR 1957 All 70 (73) ** AIR 1956 Madh B 172 (173) (DB).**

(12) Where a clerk in the Collectorate holding a permanent post was appointed to a higher post of Panchayat Inspector as a result of 'Selection' and was drawing a salary higher than what he was drawing as a clerk and the nature of duties in the two posts was different, his reversion from the higher post to his permanent post amounts to a reduction in rank. Where in the above case it is clear from the facts of the case that the reduction was by way of punishment, the provisions of Art. 311 are attracted. **AIR 1964 All 528 (529, 530) = 1964 All LJ 331 = 1964 (8) Fac LR 291 (DB).** (AIR 1958 All 656, **Reversed.**)

(13) Where the order of reversion provides for or entails under the Rules any penal consequences in the form of loss of benefit already accrued, over and above the mere reversion to the lower post, the order of reversion will amount to a punishment and will constitute reduction in rank. **AIR 1958 SC 36 (49).**

(14) If the order of reversion entails or provides for the forfeiture of his pay or allowances or the loss of his seniority in his substantive rank or the stoppage or postponement of his future chances of promotion, the order would amount to one of punishment and hence would constitute a reduction in rank. **AIR 1958 SC 36 (49) ** AIR 1956 Madh B 172 (173, 174) (DB) ** AIR 1966 Tripura 8 (11) ** 1966 Cur LJ 318 (339) (Punj).**

(15) The petitioner, railway clerk, was selected to a higher post in an officiating position in Vigilance Department. There his work was considered to be good for which he was given a number of commendation certificates. Later on, on an anonymous complaint challenging his integrity a departmental enquiry was started against him and he was reverted to his parent Department without com-

Articles 310 & 311 — Note 107 (contd.) plying with the provisions of Article 311. The reversion was not due to the fact that the Vigilance Department was going to be wound up and that the real incumbent of the post that he was holding had come back: **Held**, that the order of reversion was hit by Article 311. AIR 1967 Punj 145 (147) = (1968) 1 Lab LJ 748.

(16) Every reversion or reduction in rank by way of reversion, does to a certain extent affect the chances of promotion. After all, a person might be found inefficient to discharge a particular post, but when he is sent back to his substantive post, he may prove his efficiency with regard to the substantive post or by his subsequent display of merit establish his efficiency entitling him to promotion. In other words, the future right of promotion that must be affected is something which must not be indirect or remote but must arise directly out of the order of reversion. AIR 1958 Cal 546 (550) = 62 Cal WN 546.

(17) A civil servant is not entitled as of right to be promoted from a lower rank to the higher rank and once he is reverted to a lower rank, then his promotion is governed by the rules regulating promotions in his service. Promotion to a post is done according to seniority and efficiency. An officer cannot also claim that as he crossed the efficiency bar in the substantive grade and as the Head of the Department gave good reports about him, the Government was bound to promote him. The matter is one in which the discretion and judgment of the officer or authority concerned must prevail. His decision may be open to review by an administrative agency. But it cannot appropriately be a matter for judicial review. AIR 1960 Madh Pra 216 (217) = 1960 MPLJ 365 = (1960) 2 Lab LJ 419 (DB).

(18) Order reverting Officiating Sub-Inspector of Police to his substantive post of Assistant Sub-Inspector — Order though not stating specifically so had the effect of removal of the petitioner's name from the District Approved List of Assistant Sub-Inspectors expected to be suitable for promotion as Sub-Inspectors, maintained under Rule 742 of the Police Regulation— **Held**, the order list had a penal consequence on the petitioner to the effect that it indefinitely postponed his future chances of promotion and the removal of his name from the Approved List was done in an illegal manner. (1964) 8 Fac LR 331 (333) = (1964) 2 Lab LJ 195 (Cal).

(19) Where an Assistant Police Sub-Inspector is appointed as Sub-Inspector and his name also included in the promotion list, his reversion to the lower post after he serves in the higher post for several years, primarily on the ground of his name not being found in the list, is

reduction in rank. When subsequently his name also is removed from the list the reversion is by way of punishment as it results in the penal consequence of his losing chances of promotion. As such, the reversion is hit by Art. 311 (2). 1966 Cur LJ 896 (898) (Punj).

(20) In a case where the Education Department having the material to prove as a fact that the teachers who were promoted to the selection grade were in the knowledge of the condition imposed on their promotion that they would have to refund the difference of salary between the time-scale and the selection grade in a certain contingency, omitted to produce such evidence, then, it could not be held that the teachers had knowledge of such condition. Therefore an order directing refund of the difference in salary was a penal or evil consequence of the reversion and hence the reversion was not maintainable because provisions under Article 311 were not followed. A reversion accompanied by an evil or penal consequence would amount to reduction in rank. Neither the fact that the teachers drew salaries in the higher or selection grade or that large number of copies of the letter in question containing the condition were prepared and sent to various authorities could prove that the teachers concerned knew its contents. 1966 Cur LJ 813 (816) (Punj) = 70 Punj LR 621 (DB). (AIR 1958 SC 36, Foll. AIR 1964 SC 521, Dist.)

(21) Petitioner, State Cadre officer of Indian Administrative Service — Promotion to tenure post under Government of India—Reversion to State Service before expiry of tenure period —Reason for reversion, unsatisfactory performance — **Held**, that reversion could not be sustained as he had been reduced in rank with a stigma upon him without following procedure of Article 311 (2). AIR 1970 SC 77 (Prs 11, 12, 14, 16) = (1969) 2 SCWR 1. (AIR 1969 Cal 180, Reversed.)

(22) Petitioner, Motor Vehicle Inspector promoted as Traffic Manager for period of three months on trial basis — Order of reversion to post of Motor Vehicle Inspector after petitioner had worked as Traffic Manager for seven months — No notice given to petitioner before reversion — Order of reversion passed on ground that Public Service Commission had not accorded approval to appointment of petitioner as Motor Vehicle Inspector in unqualified terms. **Held**, order would undoubtedly mar all future chances of promotion of petitioner and contravened provisions of Art. 311. (1968) Lab IC 1590 (1592, 1593) (Punj) = (1968) Serv LR 574.

(23) Appointment of petitioner as temporary Lower Division Clerk approved by Public Service Commission — Subsequently petitioner promoted as U. D. C.

Articles 310 & 311 — Note 107 (contd.)
and becoming an approved probationer — Order reverting petitioner to L. D. C. on ground of non-consultation with Public Service Commission for appointment as U. D. C. or even confirmation as L. D. C. and on the ground that he did not pass any test. There was no rule compelling petitioner to pass any test — Order not sustainable. (1963) 2 Lab LJ 768 (768, 769) (Andh Pra).

(24) Promotion to higher cadre in Secretariat Department — No departmental examination for promotion is prescribed by rules — Person promoted to higher cadre cannot therefore be reverted to lower post for not passing departmental examination. (1966) 8 Law Rep. 522 (534) (DB).

(25) Confirmation of approved probationer in substantive post — Subsequent reduction to lower rank on interpretation of relevant Rules — Probationer not qualified to hold substantive post under relevant rules — The question still was whether action based upon interpretation of Service Rules had resulted in a penal consequence — Though the order did not expressly purport to be reduction in rank in truth and reality it was so. AIR 1963 Andh Pra 450 (452) = (1963) 1 Andh WR 161.

(26) Petitioner charge-sheeted for making representation direct to higher authorities against his immediate superior — Explanation offered by petitioner — Matter not pursued — Reversion to lower post — Order of reversion assigning no reasons — Held, dominant motive was to punish petitioner — Order of reversion held was vindictive and mala fide — Non-compliance with provisions of Article 311 (2) held rendered order of reversion illegal. AIR 1964 Punj 528 (529, 530) = 1964 Cur LJ 320.

(27) A substantive pro tempore appointment under the Hyderabad Civil Services Regulations is not a temporary appointment. Hence a substantive pro tempore appointment confers on the officer concerned a right to the post subject only to the superior lien of another officer in whose place he may have been appointed. Reversion of an officer appointed on a substantive pro tempore basis without complying with the provisions of Art. 311 will therefore be invalid. AIR 1964 Andh Pra 491 (494, 495, 496) = ILR (1966) Andh Pra 153 = (1966) 2 Lab LJ 350 (DB).

(28) Where a Government servant, with lien on his permanent post, is promoted temporarily and on probation to a higher post, lien on which is retained by another employee, reversion of such Government servant without making an enquiry as contemplated by Article 311 (2) is not invalid. The promotion being temporary and on probation and since the reversion does not entail evil consequ-

ences or any stigma, the case does not fall under Article 311 (2). Since no employee can claim as of right a promotion, unless he can do so under a statutory provision or an enforceable condition of service and ordinarily it is for the State or the promoting authority to determine the suitability of employee for promotion, the reverted Government servant cannot challenge the reversion on the ground of his junior being given promotion. Thus the order of his reversion to the permanent post is one of reversion simpliciter and is not attracted by the provisions of Article 311 (2). 1969 Lab IC 68 (76, 77) (Tripura). (AIR 1964 Andh Pra 491, Distinguished.)

(29) Where an officer appointed on probation is allowed to continue in the same post even after the expiry of the period of probation, without extension of such period, he may well be deemed to have been confirmed and he acquires a lien to that post and his subsequent appointment to a post carrying a lesser scale of pay would amount to reduction in rank offending Article 311. AIR 1962 Him Pra 41 (42, 43).

(30) When the order reverting an employee shows that he is not qualified, although this is not a fact then the basis of the order itself being incorrect the order cannot be sustained. Even if the employee was a temporary servant, he was eligible to all the protection given by the article. 1965 Kash LJ 179 (189).

(31) Termination of service according to terms of contract or conditions of service — Appointment of Government servant to another department not on deputation — Termination of services requiring one month's notice — Reversion to original department — Notice essential — Non-compliance — Order of reversion illegal. AIR 1963 Him Pra 54 (56).

(32) The petitioner was placed under grade I by order dated 24-10-1949. His probation was declared to have been completed satisfactorily on 27-2-1953 and he was also given certain increments. The effect of what was alleged to be refixation of seniority was undoubtedly demotion of the petitioner from grade I to grade II which carried lesser pay resulting in loss in his salary. Held that the demotion of the petitioner operated as reduction in rank. (1960) 2 Lab LJ 387 (389) (Andh Pra).

108. Instances where reversion does not amount to reduction in rank. — (1) Sub-Treasury Officer officiating in post of Superintendent of Surveys — Suspension followed by dismissal of officer — Suspension and dismissal set aside by Judicial Commissioner — Reinstatement to post of Superintendent of Surveys — Reversion to the post of Sub-Treasury Officer with retrospective effect by same order of reinstatement because the post of Superintendent was filled by another

Articles 310 & 311 — Note 108 (contd.)
 officer approved by U. P. S. C. — Reversion did not entail penal consequences — Order not illegal. AIR 1970 SC 364 (365, 366) = 1969 Serv LR 839 ** (1968) 72 Cal WN 817 (821) = (1969) 1 Lab LJ 37.

(2) Person officiating in higher post reverted to original post on being found unsuitable for officiating post — Reversion is not punishment and is not a reduction in rank. AIR 1962 SC 794 (796, 797) = 64 Bom LR 575 = (1963) 6 Fac LR 148 = (1963) 2 Lab LJ 422 = 1962 Supp (1) SCR 92 = (1962) 2 SCJ 168 = (1962) 1 Andh WR 39 (2).

(3) Reversion of an officiating incumbent to his substantive post does not amount to reduction in rank. AIR 1964 All 356 (358). (AIR 1958 All 741 (FB), Rel on. AIR 1964 SC 423, Disting. AIR 1962 SC 1704, Rel. on.)

(4) Article 311 (2) does not deal with the question of pension at all. The reduction in pension is not equivalent to reduction in rank. Reduction in rank applies to a case of a public servant who is expected to serve after the reduction. AIR 1960 SC 247 (251) = (1960) 1 Ker LR 59 = 38 Mys LJ 1 = 1960 SCJ 516 = (1960) 1 Lab LJ 798 = (1960) 1 SCR 981.

(5) Reduction in rank must be a reduction in rank in praesenti and not any loss of prospects of future advantage. Withholding of increment or of promotion or stoppage at the efficiency bar or reduction to a lower stage in time scale are all instances of loss of prospects of earning more than what the employee may be earning at the time. The reduction to a lower post or on a lower emolument by way of punishment would amount to reduction in rank as contemplated in Article 311 of the Constitution. AIR 1958 Raj 239 (240) = 1958 Raj LW 235 (DB).

(6) There is no forfeiture of any right where a person is reverted from a higher post on which he was officiating. The reversion cannot be described as reduction in rank by way of punishment and provisions of Article 311 (2) will not be attracted. The fact that the servant stands to suffer loss of higher salary is not the test for seeing whether the order of reversion is one passed by way of penalty. If the Government, after considering the suitability of a particular incumbent who had not by then acquired the right to hold the post, reverts him to his substantive rank or terminates his services, in case he is temporary, in accordance with the service rules, then that action cannot attract the provisions of Article 311. The crux of the matter is whether it can be inferred, that the Government really intended to take disciplinary action against the Government servant concerned. Whether a particular

termination or reversion would amount to punishment within the meaning of Article 311 (2) would depend upon the facts of each case and such determination will ultimately depend upon the action taken by the Government which finally leads to the order of termination or in a case of officiating appointment to an order of reversion. 1966 Raj LW 262 (269) = ILR (1965) 15 Raj 664 ** AIR 1963 All 358 (360, 361) = ILR (1961) 1 All 940.

(7) The words "reduction in rank" mean degradation in rank or status of an officer, in physical sense and by way of penalty — A appointed as teacher-in-charge — Subsequently B appointed as senior teacher-in-charge without interfering with A's rank — A not reduced in rank. (1963) 1 Lab LJ 719 = 1963 (6) Fac LR 42 (44) (Cal).

(8) Where a person holds no permanent appointment in Government service at all but holds only a post on an officiating basis and is then transferred to a lower post, there is clearly no reduction in rank. AIR 1957 Raj 81 (84) (DB).

(9) Inasmuch as a person holding a higher post in an officiating capacity has no right to that post, it is immaterial for what reason he is reverted, as he cannot be said to be "reduced" in rank when he has no right to the higher post at all. 1958 Jab LJ 187 (199) ** AIR 1957 Raj 81 (82) (DB).

(10) 'Reduction in rank' in Article 311 (2) means reducing to a lower rank due to some personal default of the Officer. A fortiori the same word in other statutory provisions should be similarly construed. If the initial appointment to the post be not valid, no question of reduction in rank would arise, nor would a notice be required in such a case. The order in question was not one of reduction but of setting aside something which was not according to the rule, and for this, the relevant part of the rule does not require notice. The words 'the authority or person concerned' in the Proviso to Section 36 (1) of the Madras District Municipalities Act (V of 1920), should not be construed as entitling both to be heard, the word 'or' in the Proviso is obviously meant to be alternative but not cumulative. Notice would not be required when the reason for the order is not the conduct of the person claiming the notice. Also loss to him would not require notice if he be deprived of what he is not legally entitled to. (1959) 2 Andh WR 482 (483, 484) = (1959) 2 Lab LJ 562 (Andh Pra). (AIR 1956 All 460, Not followed.)

(11) Order of reversion — On face of it not containing stigma — Confidential report cannot be gone into to find if stigma was there. AIR 1969 Madh Pra 216 (218) = (1969) MPLJ 399 = 1969 Lab IC 1211 (DB).

Articles 310 & 311 — Note 108 (contd.)

(12) Government servant officiating in higher post — Reversion to lower post for administrative reasons or unsuitability — Not a reduction in rank by way of punishment — Article 311 (2) not attracted. AIR 1969 Cal 180 (193) = 1969 Lab IC 409 (DB) ** (1969) 1 SCWR 922 (925) = 1969 Cur LJ 461. (Reversion on the ground of unsuitability.) ** 1968 Lab IC 854 (856, 857) (Punj). (Order not affecting employees' chances for promotion — Reduction is not punishment.) ** AIR 1966 Raj 8 (11) = 1965 Raj LW 272 (DB) ** ILR (1966) 1 Punj 84 (122) = 1965 Punj LR (Supp) 625 ** AIR 1962 Punj 476 (477) = 64 Punj LR 723 ** (1957) 2 Mad LJ 515 (516).

(13) Service Rule requiring that Member of State Forest Service cannot hold in substantive capacity post of Conservator of Forests or that superior to it — Person holding substantive post of Dy. Conservator of Forests occupying post of Conservator of Forests in officiating capacity — Person not allowed to continue as Conservator of Forests — No reduction in rank. AIR 1969 All 370 (374) (DB).

(14) Transfer of petitioner from officiating post to post of substantive grade with all other emoluments — Transfer neither by way of punishment nor leaving any stigma on his future career — Transfer could neither violate provisions of S. 577 (e), nor could it amount to reduction in rank or demotion. 1964 All LJ 965 (968).

(15) Appointment by mistake to higher post — Order modified by State Government on representation and another person appointed — Not a punishment and not a reduction in rank of the person promoted by mistake. AIR 1963 All 316 (318).

(16) If a person holds a particular post and is temporarily taken to a higher post, he cannot be said to hold the higher post. The reversion, therefore, from a higher post to a lower post, whatever may be the reason, does not afford the safeguard which is provided under Article 311. AIR 1958 Raj 245 (246, 247) = 1957 Raj LW 645 (DB).

(17) Where the petitioner, officiating as Head Draftsman, was reverted to his substantive post as an administrative measure in pursuance of a regulated policy of the Government controlling the promotion of draftsmen and was inspired by the test of seniority-cum-merit and not as a penalty or punishment, the High Court in its discretion under Article 226 should not interfere with such an order. AIR 1960 Punj 65 (66).

(18) Member of Indian Police Service in junior scale of pay officiating in higher post in senior scale — He can be reverted after trial in the higher post or for administrative reasons — Such rever-

sion is not reduction in rank. AIR 1964 SC 423 (429).

(19) Reduction in rank — Reduction resulting from normal administrative decision to correct a mistake — No penalty involved — Article 311 (2) not attracted. AIR 1963 Cal 563 (565) (DB) ** (1966) 1 Lab LJ 265 (270) (Mys) (DB).

(20) The transfer of a person, appointed substantively or on an officiating basis to a temporary post, from such post to a lower post will not per se amount to a reduction in rank within the meaning of Article 311. AIR 1958 SC 36 (48) ** AIR 1957 SC 886 (887) ** AIR 1958 All 741 (746) (FB) ** AIR 1957 Andh Pra 794 (807) = ILR (1957) Andh Pra 80 (DB).

(21) Reversion from a post temporarily held by a Government servant does not per se amount to reduction in rank when the appointment held by him is not a substantive appointment. But this is a rule of presumption and open to rebuttal and can be rebutted by the surrounding circumstances on the record. AIR 1966 Orissa 173 (179, 180) = ILR (1965) Cut 893 (DB) ** AIR 1958 Raj 245 (247) = 1957 Raj LW 645 (DB).

(22) Where an order of reversion from a higher post to which employee was promoted temporarily sometime back did not deprive him of future chances of promotion, from the mere fact that he was subsequently superseded by other persons, it could not be said that he was reduced in rank, and no relief could be given to him against his alleged supersession. (1966) 12 Fac LR 264 (271) (Cal).

(23) Government servant holding higher rank on temporary basis — Reversion to substantive post — Juniors allowed to continue in the higher post — Order reverting casting no stigma — Order, held, could not be quashed. AIR 1969 Orissa 215 (218, 219) = 1969 Lab IC 1118 = 35 Cut LT 267 (DB).

(24) Reversion of a Government servant from an officiating post to his substantive post notwithstanding that his juniors are retained in the higher posts does not by itself amount to a reduction in rank. ILR (1966) Cut 503 (546) = 8 Ori JD 290 (DB).

(25) Even a substantive appointment to a temporary post does not create a lien in favour of the person appointed in regard to such a post, and he can be transferred to a lower post at the mere will of the Government. AIR 1958 SC 36 (42) ** AIR 1955 Punj 229 (230, 231) = ILR (1957) Punj 1435 (DB).

[But see AIR 1954 Ajmer 22 (23).]

(26) Appointment of non-cadre officer to cadre post — Appointment on ground that no cadre officer was available — Reversion of non-cadre officer when such cadre officer became available — Reversion cannot attract Article 311. AIR 1965 Ker 84 (88) = 1964 Ker LT 704 (FB).

Articles 310 & 311 — Note 108 (contd.)

(27) Conditional promotion — Subsequent reversion held not reduction in rank. AIR 1965 Ker 233 (236) = 1965 Ker LT 370. (AIR 1964 SC 600, Disting.)

(28) Reversion of promoted civil servants — Servants can continue to remain by promotion only so long as posts are available — After disappearance of vacancies, order putting promotees to their original posts is innocuous and justified — (Obiter). AIR 1968 All 279 (281) = 1968 Lab IC 1030.

(29) Reversion of promoted civil servant — When a servant is not entitled to a rank to which he is promoted and in fact was appointed by mistake if that mistake is corrected on representation of adversely affected servant, right of promoted servant cannot be said to be taken away from him. AIR 1968 All 279 (281, 282) = 1968 Lab IC 1030.

(30) Persons provisionally promoted under Rule 31 of Kerala State and Subordinate Services Rules, 1958 reverted after duly selected candidates became available — Article not applicable since reversion was not by way of penalty. AIR 1966 Ker 262 (264).

(31) Temporary appointment in higher grade — Transfer to substantive lower grade — Transfer held did not amount to reduction in rank. AIR 1962 All 413 (419, 420, 421) = 1962 All LJ 446 (DB).

(32) Servant confirmed on a post — Confirmation set aside in appeal as contemplated by rules — There is no question of punishment — There is no reversion attracting Article 311. AIR 1967 Madh Pra 79 (80) = 1965 MPLJ 990 (DB).

(33) Where a person is reverted from his higher officiating post to his substantive post in order to be dismissed from service, the reversion to the substantive post will not amount to reduction in rank as it is only of a preliminary or intermediate character, and does not constitute in itself the punishment intended to be inflicted. (1957) 61 Cal WN 815 (826) (DB).

(34) Reversion on account of promotion of some senior officer to the post is no reduction in rank. AIR 1963 Orissa 164 (165, 166) = (1964) 6 OJD 70 (DB). (AIR 1958 SC 36, Disting.)

(35) Government servant promoted on deputation for stipulated period — Reversion to his substantive post prior to expiry of period — It will not constitute dismissal, removal or reduction in rank within Article 311 (2) even if motive behind such action is to punish the servant for misconduct, negligence or inefficiency. 1969 Lab IC 721 (723) = 73 Cal WN 939.

(36) Reversion from post on which no lien held — Resultant loss of pay — Not in the nature of penalty — Show cause

notice not necessary — Article 311 not violated. AIR 1963 Him Pra 54 (55).

(37) Reduction in rank' — Government servant losing two places in seniority and also losing two steps in his time-scale by forfeiture of two years of his pay permanently — Not a case of 'reduction in rank' under Article 311 (2). AIR 1968 Punj 7 (10) = ILR (1967) 1 Punj 640 = 1968 Lab IC 44 (FB). (ILR (1954) Cut 684 & AIR 1959 Ori 167, Not Foll.)

(38) Applicability — Order passed under service rules reinstating Government servant and regularising period of his suspension and dismissal — Order resulting in denial of part of emoluments and grade increments which he would have drawn had he not been suspended or dismissed — Held, Article 311 (2) was not attracted, as the order could not be regarded as reduction in rank within Article 311 (2). 1968 Cur LJ 247 (255) = (1968) Serv LR 399 (Punj).

(39) Reduction in rank due to fixing Government servant's proper place in service in accordance with service rules — Reduction not being by way of penalty — Article 311 not attracted. AIR 1968 Ker 234 (237) = 1969 Ker LT 1031 (FB).

(40) Central Government equating the posts of senior Assistant Conservators of Forests allotted from the former Mysore State with that of the Deputy Conservators of Forests allotted from the former States of Bombay and Hyderabad and the posts of the Assistant Conservators of Forests and Sub-Assistant Conservators of Forests allotted from the former State of Mysore and that of the Assistant Conservators of Forests allotted from the former State of Madras with the posts of Assistant Conservators of Forests allotted from the former States of Bombay and Hyderabad. Held, it could not be said that the decision of the Government resulted in reduction of the rank of the petitioners from the Mysore State. (1965) 2 Law Rep 385 (391) (DB) (Mys).

(41) Even assuming that the servants of the Devaswom Board are Government servants, when their reversion is not made as measure of punishment for any misconduct on their part and the same has been brought otherwise than by way of punishment, they cannot claim protection under Article 311. AIR 1959 Ker 21 (23) (DB).

(42) Petitioner holding substantive post of sub-Inspector temporarily promoted as Circle Inspector — Selection for promotion to Circle Inspector's posts from Cadre of Sub-Inspectors made by Departmental Promotion Committee and petitioner reverted to substantive post as result of selection — Held, that rules did not enjoin Promotion Committee to record reasons for its decision and in absence of any whimsical, arbitrary or mala

Articles 310 & 311 — Note 108 (contd.)
 fide exercise of power in matter of selection Court had no right to interfere — Held further, even though, as contended, action might have affected petitioner in matter of seniority in his substantive rank and his future chance of promotion, there was no imposition of punishment so as to attract Article 311. 1966 Ker LT 1163 (1166, 1167, 1168) = (1966) 1 Lab LJ 630.

(43) Temporary Moharir appointed and promoted as temporary Revenue Clerk — He can be reverted to his original post. (1966) 12 Fac LR 264 (269) (Cal).

(44) Where a constable officiating as assistant sub-inspector, claiming to have been appointed as a literate constable, who had not passed examination for assistant sub-inspectors, was reverted to his substantive post of constable, reversion was held to be not unjust. 1969 Lab IC 496 (498) (Pat).

(45) Probationer officiating in higher post and continuing therein after expiry of period of probation — Reversion to original post for unsatisfactory work is permissible under Service Rules. Art. 311 (2) does not apply to such cases of reversion. AIR 1962 SC 1711 (1715).

(46) Article 311 has no application when an order of reversion from superior post is passed, not by way of punishment but for other reasons which are not personal to and which have nothing to do with the work of the servant. AIR 1963 Orissa 164 (165) = (1964) 6 Orissa JD 70 (DB).

(47) Where the Government servant had no right as such to hold the post in Class I service and his promotion to officiate in Class I service was only to test his suitability or otherwise for being retained in Class I service and the promotion committee on a review or consideration of his work came to the conclusion that he was not suitable for being continued in Class I service and reverted him to his substantive post in Class II retaining his seniority or rank with no penal consequences as his emoluments and other benefits in Class II were not touched his reduction to Class II was not a punishment and therefore the provisions of Article 311 were not attracted. AIR 1968 Andh Pra 283 (288) = 1968 Lab IC 1186.

(48) Punjab Service of Engineers, Class I P. W. D. (Irrigation Branch) Service Rules (1966), Rules 5 (7) (b), 8 — Non-constitution of screening Committee within prescribed period by Government — Government cannot take the plea of automatic reversion of officer after expiry of three months from date of enforcement of rule. 1969 Lab IC 795 (800) = 1969 Cur LJ 30 = 1969 Serv LR 887 (DB).

109. Mala fide order of reduction. — (1) Mala fide does not necessarily involve a

malicious intention. It is enough if the aggrieved party establishes that the authority making the impugned order does not apply its mind to the matter in question or that the impugned order is made for a purpose or upon a ground other than what is mentioned on the face of the order. 1968 Lab IC 735 (739) = 1968 Serv LR 625 (Cal). (Where an allegation of mala fides is made by a delinquent officer in a departmental enquiry, the Enquiry Officer should allow the officer to adduce evidence in support of his contention. Especially where such allegations are supported by documentary evidence, it is necessary that such allegation should be controverted or denied by means of affidavits to be filed by persons against whom the allegations have been made. It is not correct on the part of the Enquiry Officer to disallow the delinquent officer to adduce evidence in support of those charges.) ** AIR 1964 Cal 265 (272).

(2) Probationer — Officiating in higher post for more than probationary period — Reversion to original post by way of punishment — Order mala fide — Non-compliance with Article 311 (2) — Reversion is illegal. AIR 1962 SC 1711 (1715, 1716) = (1963) 1 SCR 416. (AIR 1957 Punj 191, Reversed.)

(3) Termination order — Penal character or mala fide nature of order should be proved strictly. Mere suspicion, even if strong is not sufficient. (1965) 11 FLR 127 (130) = (1966) 2 Lab LJ 542 (Cal).

(4) Before charging a person with disobedience, a disciplinary authority must be sure of a prima facie case against such person. To charge a person with disobedience, without being so sure, reveals a fault finding mind and a mala fide disposition. Further in a case where the person charged had not shown cause but had asked for being relieved from showing cause, it is of utmost necessity that disciplinary authority examine case with greater care, before he makes up his mind about guilt of the person. An order which does not show any such care, was one not made in good faith and offends against principles of natural justice. (1962) 1 Lab LJ 317 (323) = (1961) 3 Fac LR 285 (Cal). (Prayer for extension of time for reporting at a particular office, with sickness as cause — Time extended — Before its expiry, issue of show cause notice and order of dismissal quashed.)

(5) When an authority is vested with a power but he is required to consult an advisory body before taking its decision, the responsibility for the decision or the final action that emerges is that of the authority who is entrusted with the power. If the authority concerned fails to apply its mind and to exercise its discretion, the order will be vitiated by mala fides. Where the Government mechanically acted upon the advice given

Articles 310 & 311 — Note 109 (contd.)
by the Public Service Commission and reverted the petitioner from his officiating higher post to his substantive lower post without applying its mind to the credentials and the exceptional record of the petitioner upon which they had acted for a long time and to the question whether there were any changed circumstances furnishing a consideration for a contrary decision.

Held, that the impugned order of reversion was invalid owing to mala fides. AIR 1964 Cal 265 (272, 273, 274) = (1968) 2 Lab LJ 376.

(6) Merely to say that an order or action taken by the authority is mala fide has no meaning. When mala fide is alleged, the particulars and details of facts on which it is based or the reasons upon the basis of which it is urged have to be stated in the petition so as to enable the authority concerned to have an opportunity to give a proper reply to any such allegation. Mere allegations without giving opportunity to meet them would go against the principles of natural justice. Question whether Government authority applied its own mind or mechanically followed advice of Advisory body depends on facts and circumstances of each case. AIR 1968 Punj 324 (327) = 69 Pun LR 510 (DB). (Where at no stage the petitioner ever averred that the order made by the State Government in his case was not a decision of it on consideration of the relevant aspects of the case but that it was a mere acceptance of the advice of the Punjab Public Service Commission, and nothing more, and the State Government had no adequate opportunity to give a reply to any such matter at the proper stage it was not just and appropriate to accept the contention raised for the first time in Letters Patent appeal.)

(7) According to Article 320 (3) (b) a State Service Commission has to be consulted in making appointments and on the suitability of candidates promoted. It is a constitutional duty which a Public Service Commission performs. Even if it is considered as a provision not enforceable in a Court, yet the advice given under it is entitled to due respect and it is an eminently relevant consideration for the State Government in promoting or continuing the promotion of an officer. If after considering the advice and the other relevant materials the State Government takes a decision, it cannot be said that the decision is mala fide. AIR 1968 Punj 324 (328) = 69 Pun LR 510 = 1968 Lab IC 980 (DB).

(8) If any party wants to invoke the jurisdiction of the High Court on the allegation that the State or its Officers were actuated in superseding his claim on the ground of mala fides, then that

party should put forward his case in the clearest possible terms. He must mention in his affidavit not merely accusations but reasons in support of those accusations. He must also substantiate those grounds by necessary evidence. (1963) 2 Mys LJ 248 (249) (DB).

(9) Malice would vitiate the exercise of any statutory power. But it has to be established by sufficient materials. When an officer is promoted to a higher rank in an officiating capacity, he is on trial in that higher capacity and it is for the competent authorities to assess his performance and not for the Court in writ proceedings. (1968) 72 Cal WN 817 (822) = (1969) 1 Lab LJ 37.

(10) An enquiry against an employee is not tainted with bad faith at its inception just because the employee is asked in the charge sheet itself to show cause why he should not be punished or because the enquiring officer had been required to hold the enquiry on receipt of the employees' written statement. The charge sheet merely suggests that in view of the charges made against the employee, he is to show cause why he cannot be awarded any of the three modes of punishment contemplated by Art. 311 and if at the enquiry the enquiring officer is satisfied that the charges are baseless there is no question of punishment. As such, it cannot be said that the enquiry was started with the sole object of punishing the employee. The enquiry is not therefore tainted with bad faith at its inception. The enquiring officer must hold the enquiry to submit a report even when the written statement of the employee is so convincing that the charges automatically fall to the ground. Hence if the enquiring officer is asked to hold the enquiry after receiving the written statement, it does not show that the enquiry is tainted with bad faith at its inception. AIR 1967 Cal 29 (30) = (1969) 1 Lab LJ 300.

(11) Reversion — Mala fides — Plea of — Particulars of grounds should be given — Plea raised for first time in Letters Patent appeal not acceptable — (Letters Patent (Lah) Cl. 10). AIR 1968 Punj 324 (327) = 69 Pun LR 510.

110. Reversion from officiating post on ground of incompetency or unfitness. —
(1) In cases of reversion from officiating higher post to a substantive lower post on the ground of incompetency to hold the higher charge, reversion is only a matter of ordinary administrative course and not a punishment, so as to amount to a "reduction in rank." AIR 1958 Cal 623 (624) ** (1957) 61 Cal WN 849 (855) ** AIR 1956 Cal 662 (667) ** AIR 1956 Madh B 172 (173, 174) ** AIR 1956 Nag 113 (115) = ILR (1955) Nag 893 (DB) ** (1955) 59 Cal WN 859 (866, 867) (DB) ** AIR 1954 Cal 383 (385). (Reversion for inefficiency is in normal course

Articles 310 & 311 — Note 110 (contd.) and not punishment.) ** AIR 1969 Punj 131 (133) = 1969 Lab IC 573 ** AIR 1968 Punj 324 (326) = 1968 Lab IC 980 = 69 Pun LR 510 (DB). (Removal from the 'May be tried list' for promotion could not be said to be by way of penalty, as it had no effect at all.) ** 1968 All LJ 737 (740).

(2) State cadre officer of Indian Administrative Service — Promotion to tenure post under Government of India — Reversion to State Service before expiry of tenure period — Reason for reversion, unsatisfactory performance — Reversion amounts to reduction in rank involving stigma — Non-compliance with Article 311 (2) — Order not sustainable. AIR 1970 SC 77 (Prs 13, 16) = (1969) 2 SCWR 1.

(3) Person officiating reverted for unsatisfactory work — Reversion does not amount to reduction in rank — Government has a right to consider suitability of person to hold position to which he had been appointed to officiate and it is entitled for that purpose to make enquiries about his suitability — Losing some places in seniority list is not tantamount to reduction in rank. AIR 1966 SC 1529 (1532, 1534, 1535). (W. P. No. 531 of 1961, D/- 12-12-1962, Reversed.) ** AIR 1970 Orissa 12 (15) = 1970 Lab IC 50 = 35 Cut LT 1144 (DB). (Such an order of reversion was not satisfactory, did not involve any stigma and did not attract Article 311 (2).) ** 1965 All LJ 819 (822, 823) = (1965) 10 Fac LR 189 (All).

(4) Where a person is reverted from an officiating post to his substantive post on the ground of unsuitability, he cannot be said to be reduced in rank. (1955) 59 Cal WN 859 (867) (DB) ** AIR 1960 Punj 244 (247). (Reversion on being found not upto the mark after trial.)

(5) Cadre officer in junior scale promoted to officiate in senior scale reverted to substantive post on the ground of unsuitability and non-cadre officer appointed in his place — Not a penalty. AIR 1968 SC 754 (759) = (1969) 1 SCJ 217.

(6) Rule 49 of the Civil Services (Classification, Control and Appeal) Rules enumerates different forms of punishment. Reversion to the substantive rank is not one of the prescribed punishments. This may take place under the rules in the ordinary course. An employee may in a given case be reduced for proved unfitness or incapacity. ILR (1957) 9 Assam 223.

(7) Where the petitioner who was Office Superintendent in the office of the District Magistrate was reverted to the post of a clerk on the ground that he was not up to the mark but just before four or five days before the reversion

order was passed he was regarded by the District Magistrate as very efficient.

Held, that it must be inferred that the reversion order was by way of penalty on the ground that he was held not up to the mark. AIR 1959 Tripura 2 (4).

(8) All the relevant factors have got to be considered, for finding out as to whether even in the case of a Government servant who is holding an officiating post, an order of reversion to his lower substantive post does or does not amount to reduction in rank. If the order of reversion entails the postponement of the Government servant's future chance of promotion, then, such reversion must be only after compliance with the provisions of Article 311. AIR 1965 Mys 164 (166, 167) = (1964) 2 Lab LJ 421 (DB). (Government servant reverted from higher officiating post to his substantive lower post without giving any reason for reversion — Subsequently he was informed that reversion was on account of confidential report unfavourable to him — Reversion resulted in postponement of his further promotion for one year and his juniors became his seniors — **Held**, that reversion amounted to reduction in rank for purposes of article and order of reversion without giving reasonable opportunity to show cause against such reduction in rank was illegal.)

(9) Even in the case of a civil servant who is officiating in a higher post, reversion to a substantive post which involves a stigma and a penal consequence amounts to reduction in rank within the meaning of the article. A reversion which imperilled future chances of promotion entails penal consequences. Where in reverting an officiating Aval Karkun to his substantive post of a clerk an imputation is made against him that his work was unsatisfactory and his record was not good, it is a clear stigma on his work as an Aval Karkun and entails penal consequences, as his future chances of promotion would undoubtedly stand imperilled.

If the person was not yet found eligible for confirmation, it might have been possible for the confirming authority to desist from making the confirmation, and the postponement of confirmation in that way would not have amounted to a reduction in rank. But when the confirming authority did not stop with the postponement of the confirmation, but reverted him to his substantive post on the ground that he had not given a good account of himself as an Aval Karkun and that his record in that post was not good, the reversion is a punishment, and so a reduction in rank. And since it was not made after affording a reasonable opportunity the impugned order cannot be sustained. 1968 Lab IC 838 (840) = (1967) 2 Mys LJ 140 (DB).

(10) Indian Police Service — Member reverted from higher officiating post of

Articles 310 & 311 — Note 110 (contd.)
 Superintendent of Police to substantive junior post of Assistant Superintendent of Police for unsatisfactory conduct — Order entailing loss of pay as well as loss of seniority and affecting future chances of promotion — Amounts to 'reduction in rank' within Article 311 (2). AIR 1964 SC 423 (428, 429, 430, 431, 433, 434, 435, 436) = 1964 Cur LJ (SC) (10). (AIR 1962 Punj 516, Reversed.)

(11) Engine driver found medically unfit for the post being absorbed in another post carrying less emoluments does not amount to reduction in rank within meaning of Article 311 (2). AIR 1966 Pat 184 (186) = 1966 BLJR 115 (DB).

(12) P working as Assistant Station Master — Selection of P as Section Controller — Subsequent confirmation of P in that post — On finding P physically unable to carry out duties of Section Controller, appointment of P as Asst. Station Master in same pay scale — Subsequent promotion of P as Station Master — Held, even though alternative equivalent appointment as Asst. Station Master was made available to P by reason of his physical condition, his rank in higher position, earned by selection, could not be subordinate to rank of his erstwhile seniors in parent post. (1969) 1 Mys LJ 175 (177) (DB).

(13) Punjab Educational Service (Provincialised Cadre) Class III, Rules (1961), Rule 6 — Proviso to Rule 6 (3) prohibits extension of period of probation beyond three years — Probationer officiating in permanent post — Allowed to continue in that post after expiry of three years — No express order of confirmation passed — He must be deemed to have been confirmed in that post — Subsequent removal from service without following procedure in Punjab Civil Services (Punishment and Appeal) Rules, 1952 or conforming to constitutional requirements of Article 311 is invalid. AIR 1968 SC 1210 (1212, 1213) = (1968) 3 SCR 1.

(14) Appointment on probation to Punjab Civil Service — Requisite probationary period over — No formal order extending the probationary period — Enquiry consisting only of charge-sheet and explanation of Civil Servant — No further proceedings undertaken — Reversion to substantive post — Order of reversion, held, did not amount to punishment — Civil Servant could not, by virtue of the probationary period being over, claim to have a substantive appointment — Reversion by itself did not amount to punishment. AIR 1968 SC 1089 (1095) = (1968) 9 SCA 414. (L. P. A. No. 157 of 1959, D/- 7-1-1963 (Punj), Reversed.)

(15) Appeal by petitioner against order dated 4-9-62 promoting two of his colleagues as Head Assistants, on recommendation of Departmental Promotion

Committee, in preference to petitioner who was seniormost Assistant in Department — Appeal allowed by Lieutenant Governor on 2-2-66 inter alia on ground that promotion committee had adopted procedure of selection on basis of merit-cum-seniority instead of seniority-cum-merit — Order of Secretary dated 1-4-66 appointing petitioner as Head Assistant with immediate effect in pursuance of appellate order — Lieutenant Governor's successor reviewing his predecessor's order on 17-6-66 and holding that correct way to carry out that order was to refer matter afresh to Selection Committee — In pursuance of order petitioner reverted as Assistant on 2-7-66 — Held, on construction of order dated 2-2-66, that petitioner was entitled to be appointed as Head Assistant with effect from 4-9-62 and order of Successor Lieutenant Governor was liable to be quashed — Held, further, assuming petitioner was appointed Head Assistant in officiating capacity by order dated 1-4-66, the reversion from officiating rank in pursuance of illegal order dated 17-6-66 amounted to reduction in rank within meaning of Article 311 (2) and provisions thereof not having been complied with, order of reversion was unconstitutional and void. AIR 1967 Him Pra 34 (37, 38).

111. Demotion on ground of financial stringency. — (1) Petitioner confirmed in the post of Headmaster of Primary School — Reversion to post of Asst. Master with lower salary on account of financial stringency — The order of demotion deprived the petitioner of a higher salary, as such it amounted to punishment even though the reduction is not on account of misconduct on his part but due to financial stringency — Petitioner entitled to protection granted under rule at page 193 of District Board Manual. AIR 1956 All 460 (461, 462) = 1956 All LJ 361.

112. Extension of probationary period — See also Note 7. — (1) An order of the Government imposing a penalty upon a person who is no longer in its service is a nullity. An order, however, passed by the Government with respect to the service term of its servant merely extending his probation does not amount to imposition of penalty within the meaning of the Civil Services (Classification, Control and Appeal) Rules. ILR (1963) Andh Pra 1130 (1135).

(2) It is permissible for an appointing authority to extend the period of probation for the purpose of enabling it (the appointing authority) to decide whether the person appointed to a service, class or category, is fit for the full membership. An order extending the period of probation does not amount to imposing a penalty on the Government servant. In such a circumstance it is not, correct to say that either Article 311 (2) of the Constitution or Rule 17 (b) of the Civil Services

Articles 310 & 311 — Note 112 (contd.)
(Classification, Control and Appeal) Rules has been violated as no charges were framed and no opportunity given to the said servant to defend himself. ILR (1963) Andh Pra 1130 (1137, 1139, 1140)

(3) Where the extension of the probation is not one made before the expiry of the first period of probation, Rule 26 of General Rules for State and Subordinate Services does not apply. Hence there can be no question of giving a notice to the employee before passing an order of extension. ILR (1963) Andh Pra 1130 (1137).

(4) An order passed against an employee in Government service to the effect that until he has been declared to have satisfactorily completed his probation, he does not become a full member of the service, and to continue him as a probationer till the date of his retirement cannot be urged to be in the nature of reduction in rank. Such an order is neither a case of dismissal nor removal. The order does not constitute a punishment within the meaning of Art. 311 (2). Equally inapplicable is R. 17 (b) of Civil Services (Classification, Control and Appeal) Rules. ILR (1963) Andh Pra 1130 (1139).

(5) Held, on facts that from Rr. 26 and 27 of the Madras State Subordinate Service Rules it cannot be inferred that the appointing authority can, without reference to probation or the tests of qualifications acquired during the probation, declare the suitability of the probationer for the full membership of the service and thereafter by implication arising out of any deeming clause to have made the probationer occupy the substantive post. Any order of an appointing authority declaring the probationer to have satisfactorily completed the probation when he has not passed the tests, is invalid and also inoperative and has no legal force to enable the probationer to have his promotion of binding nature on the Government so as to render the Government in any way bound by that order of declaration. When, as a qualification for the suitability of a probationer for full membership, the process prescribed under Rule 26 has become imperative the appointing authority cannot ignore a part of the rules and make use of another part. It is impossible to hold that the petitioner had been legally holding the substantive post and that by reason of the impugned order he was reduced in rank, or has been punished in any manner. AIR 1963 Andh Pra 357 (359, 360, 361, 362) = (1962) 2 Andh WR 455 (DB).

(6) Probationer — There is no automatic confirmation after expiry of probationary period. AIR 1961 All 450 (455, 456) (FB). (AIR 1959 All 536 and ILR (1959) 1 All 226, Overruled.)

(7) The stopping of increments of a probationer whose period of probation is extended under Rule 28 of the General

Rules for State and Subordinate Services cannot be called in question as it is expressly stated in the rule that such a stoppage cannot be treated as a penalty. ILR (1963) Andh Pra 1130 (1140).

(8) Reversion long after completion of probation period without compliance with Article 311 (2) needs to be quashed. It violates R. 6 of Punjab Consolidation of Holdings State Service Class III (Executive Service) Rules 1962. AIR 1969 Punj 324 (327, 330) = 1969 Lab IC 1236.

(9) Held on facts that though the appointment to a permanent service on probation can be terminated at any time during the period of probation, after the expiry of the period of one year, the petitioner did not continue as a probationer but became a permanent servant and therefore was entitled to all the protection guaranteed by the Constitution; the orders extending the period of probation and discharging the petitioner were illegal and should be quashed. There was no provision of the Mysore Civil Service Rules (1958), which form the conditions of service of the petitioner, empowering the Government to extend the period of probation; nor did the order of appointment by virtue of which the petitioner held his office enable the Government to extend the period of probation. AIR 1960 Mys 65 (67, 70, 71) = 37 Mys LJ 725 (DB).

113. Officiating appointments and temporary posts.— (1) Even in the case of a temporary post, where the termination of service or transfer to a lower post is actually resorted to as a measure of punishment, for some misconduct, negligence, inefficiency, etc., the action of the Government would amount to a dismissal or removal from service in the one case and to reduction in rank in the other, so as to attract the application of Article 311. AIR 1958 SC 36 (49) ** AIR 1957 SC 886 (887) ** AIR 1958 All 741 (746) (FB).

(2) So far as the precariousness of the appointment is concerned, there is no difference between a substantive appointment to a temporary post and one on an officiating basis to such post. In both cases, the service is terminable at the mere will of the Government. The only difference is that in the case of a substantive appointment there used to be certain advantages with regard to pay and leave. AIR 1958 SC 36 (42).

(3) The expression 'reduction in rank' is not restricted in its application to cases of persons who are reduced from permanent posts. Officiating employees also may not be punished by reduction in rank without having any opportunity of being heard. ILR (1957) 9 Assam 223 (234) (DB).

(4) Where a petitioner is appointed to a higher post on an officiating basis, then under the general law the implied term of such appointment is that it is termin-

Articles 310 & 311 — Note 113 (contd.)
 able at any time on reasonable notice by the Government and, therefore, his reduction does not operate as a forfeiture of any right and cannot be described as reduction in rank by way of punishment. AIR 1963 All 415 (421). (AIR 1958 SC 36, Foll.; AIR 1962 SC 8, Disting.)

(5) Where the order of reversion simply says that the petitioner is reverted to his substantive post, there is no stigma attached to the order, and an order of reversion from an officiating appointment does not constitute reduction in rank to attract Article 311 (2), without more, because by an officiating appointment the Government servant acquires no title to the higher appointment. But it may attract Article 311 (2) if it entails penal consequences, in addition to the reversion e.g., stopping his future chances of promotion, loss of seniority in his substantive rank or forfeiture of pay which he has already earned. If the order does not entail any such consequences it would not attract Article 311 (2) even if the motive for reversion is some misconduct or inefficiency or unsatisfactory work of the employee. (1968) 72 CWN 817 (820, 821) = (1969) 1 Lab LJ 37.

(6) Where a person, temporarily appointed for a fixed period to officiate in a post, is reverted to a lower rank before the expiry of such period and nothing in the appointment order permits such premature termination, the reversion is illegal. Such employee had acquired a right to hold the post till the expiry of that period and his service cannot be prematurely terminated unless he is guilty of misconduct, negligence, inefficiency or other disqualifications and proceedings under the rules read with Article 311 (2) are taken. AIR 1969 Orissa 61 (63) = 1969 Lab IC 293 = 34 Cul LT 1052 (DB).

(7) Temporary appointment is not different from officiating appointment — Government servant appointed in higher post 'to act until further orders' — Appointment is a temporary one. AIR 1964 Cal 265 (274, 275, 276) = (1968) 2 Lab LJ 376. (AIR 1958 SC 36 = 1958 SCJ 217, Rel. on.)

(8) Mere reversion from a temporary post does not per se amount to reduction in rank. ILR (1966) Cut 503 (525) = 8 Ori JD 290 (DB).

(9) Temporary posts — Reasonable opportunity to show cause against proposed action must be given even to temporary civil servant. 1967 Cur LJ 342 = 69 Punj LR 482 (483).

(10) There is nothing in the wording of Article 311 (2) that the protection guaranteed thereunder was to be extended only in case the proposed reduction in rank was permanent. The clause is unqualified, and will apply even when the reduc-

tion in rank is temporary. AIR 1963 Mys 193 (196, 197) = 1963 Mys LJ (Sup) 87.

(11) Officiating at higher rank — Reversion to substantive post — Such reversion is not demotion or reduction in rank or penalty — Notion of a person officiating implies with it the term that he has no legal right to that post — Not penal. AIR 1966 Cal 402 (408) = (1968) 1 Lab LJ 633 (DB). (A. F. O. O. No. 369 of 1958, D/- 4-5-1965 (Cal), Reversed; AIR 1954 Nag 229 Held overruled by AIR 1962 SC 794; AIR 1958 SC 36, Explained; AIR 1960 SC 689, Disting.)

(12) The appointment, whether substantive or on an officiating basis, to a temporary post will not create any right to the post and the Services of a Government servant so appointed can be terminated at any time at the mere will and pleasure of the Government without alleging or proving any charge against the Government servant. AIR 1958 SC 36 (42, 49).

(13) Even in the case of a temporary post where the service has ripened into what is called under the Civil Service Rules, quasi-permanent service, the Government servant cannot be removed arbitrarily from service without being given an opportunity to show cause against such removal. AIR 1958 SC 36 (42).

114. Reversion from officiating post to permanent post Not reduction where incapacity is only background or motive and not basis of reversion — (1) Where the order for reversion is not based on any charges of misconduct, inefficiency, etc., but has only been promoted as a matter of fact by reasons connected with such misconduct, inefficiency, etc., the misconduct, inefficiency, etc., would only constitute the motive behind the Government's order and not its basis and it is only in cases where the misconduct, inefficiency, etc., constitute the basis of the Government's order, it would amount to punishment. AIR 1958 SC 36 (49) ** AIR 1957 SC 892 (894) ** AIR 1954 SC 369 (375) = ILR (1955) 1 All 324 = 1955 SCR 26.

[But see AIR 1955 Trav-Co 12 (13, 14) ** AIR 1952 Orissa 285 (289) = ILR (1952) Cut 326 (DB).]

(2) The reversion from a temporary post held by a person does not per se amount to reduction in rank and so far as the temporary servants, probationers and servants holding posts in officiating capacities are concerned, they stand on a different footing. In case of an appointment to a permanent post in a Government Service on probation or on an officiating basis, the servant so appointed does not acquire any substantive right to the post and consequently cannot complain, any more than a private servant employed on probation or on an officiating basis can do, if his service is terminated at any time. Mere deprivation

Articles 310 & 311 — Note 114 (contd.) of higher emoluments as a consequence of reversion cannot amount to the "evil consequences" referred to in the second test in Dhingra's case; they must mean something more than mere deprivation of higher emoluments. That being so, they include for example, "forfeiture of substantive pay, loss of seniority, etc." Reversion from a temporary post held by a person does not per se amount to reduction in rank because the temporary post held by him is not his substantive rank. (1964) 1 Mys LJ 422 (429, 438) (DB).

(3) Government servant sent on deputation for stipulated period — He has no right to hold that post for all times — Reversion to his substantive post in parent department from higher officiating post before expiry of stipulated period — It is not case of punishment even though the servant lost benefit of appointment to higher rank and necessary loss of some higher pay or allowances or even of promotion. 1969 Lab IC 721 (724) = 73 Cal WN 939.

(4) Held, on facts of the case that the impugned order of reversion was not passed by way of punishment and did not amount to reduction in rank so as to attract the provisions of Article 311 (2). AIR 1967 Punj 139 (143) = 1966 Cur LJ 711 (DB). (C. W. No. 1506 of 1964, dated 9th September, 1965 (Punj), Reversed.)

(5) Where a Government servant holding a substantive appointment in a lower rank is appointed in an officiating capacity to a higher post and then reverted to his lower substantive post in the ordinary course of administration, such reversion will not amount to a punishment and will, therefore, not amount to a reduction in rank within the meaning of Article 311, Clause (2). AIR 1958 SC 36 (42) ** 1958 Jab LJ 187 (199) (DB) ** AIR 1957 All 70 (72, 73) ** AIR 1957 Andh Pra 254 (255) (DB) ** AIR 1957 Assam 143 (144, 145) (DB) ** (1957) 61 Cal WN 849 (854, 855) ** (1957) 2 Mad LJ 515 (516) ** (1966) 1 Lab LJ 879 (882) (Punj). (Reversion without assigning reason — Notify way of punishment.) ** (1964) 1 Mys LJ 422 (433) (DB). (Reversion from temporarily officiating gazetted post to non-gazetted original permanent post.)

[But see AIR 1952 Orissa 285 (289) = ILR (1952) Cut 326 (DB).]

(6) U. P. Police Regulations, Paragraphs 406 (a), 534 and 537 — Head Constable not entitled to post of Sub-Inspector according to seniority as of right — Head Constable promoted as Sub-Inspector on probation — Probationer found unsuitable and reverted to substantive post of Head constable — Reversion alleged to be result of ex parte enquiry by which entry of misconduct was made in probationer's training sheet and integrity certificate was withheld — Held subsequent

reversion though impelled by prior ex parte enquiry could not amount to reduction in rank as prior enquiry was not conducted to impose any of the three punishments mentioned in Article 311 — Use of word 'unsuitable' could not also render order of reversion as one by way of punishment. (1965) 10 Fac LR 278 = (1966) 2 Lab LJ 75 (80) (All).

(7) When a Government servant has a right to a particular rank, the very reduction from that rank operates as a penalty to attract Article 311 (2), as he then loses the emoluments and privileges of that rank. When he is appointed to a post on officiating basis, he does not acquire any substantive right to that post so that he cannot complain if his service is terminated at any time. Article 311 (2) would not apply where a Government servant had been promoted to a higher post on officiating basis and thereafter reverted to his substantive lower post. The motive or ground behind reversion is immaterial in such cases. Though his future chances of promotion would be indirectly affected by such reversion on account of inefficiency or unsuitability, it is not sufficient to attract Article 311 (2). If however there is anything in the order of reversion which would stand in the way of his earning future promotion by subsequent display of merit, it is undoubtedly a penal consequence. AIR 1966 Tripura 8 (11).

(8) Where a Government servant's service record in his officiating rank has been found to be throughout indifferent and unsatisfactory, his reversion to his substantive post is not as a measure of punishment but only on administrative grounds. Article 311 of the Constitution is not attracted. When a person is given an officiating post to test his suitability to be made permanent in it later, it is an implied term of the officiating appointment that if he is found unsuitable, he will have to go back. In the instant case, the action taken by the authority in reverting him to substantive post is in accordance with such terms. It is in no way a punishment within the meaning of Article 311. The fact that persons junior to him have been promoted to higher ranks while he remained in the same post is not a criterion because it is but a natural consequence of his reversion. 1963 Lab IC 854 (856, 857) (Punj). (AIR 1962 SC 794, Foll.; AIR 1958 SC 36, Ref. AIR 1965 Punj 491, Disting.) ** (1967) 2 Mad LJ 297 (299) = 80 Mad LW 572. (Reversion on ground of unsuitability — Does not amount to penalty.)

(9) Post held on provisional basis — Reversion to substantive post — No reduction in rank — Article not attracted — Confidential report regarding suitability to higher post — Notice of, need not be given — Order of reversion casting no aspersion, could not be attached — (Civil Services). 1969 Cur LJ 58 (65) (Punj).

Articles 310 & 311 — Note 114 (contd.)

(10) Kerala State and Subordinate Service Rules (1958), Rule 10 (b) (ii) — Petitioner provisionally appointed as Panchayat Executive Officer — Reversion to original post on ground that on verification character and antecedents of Petitioner were found not to be acceptable to Government — Article 311 would not apply as there was no dismissal or reduction in rank within the meaning of Article. AIR 1965 Ker 149 (150, 151) = 1964 Ker LT 1066.

(11) Where an impugned order merely states that the Government servant is reverted from his officiating appointment to substantive appointment, it contains no stigma. An order of reversion from an officiating appointment does not constitute reduction in rank to attract Article 311 (2), without more, because by an "officiating appointment", the Government servant acquires no title to higher appointment. (1968) 72 Cal WN 817 (820) = (1969) 1 Lab LJ 37 ** (1967) ILR 46 Pat 1288 (1290) (DB). (Reversion even though based on confidential report will not amount to punishment for purposes of Article 311 (2).)

(12) Probationer in the post of Tahsildar submitting false travelling allowance bills and not passing departmental examinations — Order reverting him to substantive post after an enquiry — Order not punitive in character, enquiry being merely to ascertain if conditions for determining the probation exist — Enquiry cannot be treated to be one under R. 55 (3) of Civil Services (Classification, Control and Appeal) Rules, which prescribes procedure for enquiry under R. 14 of Subordinate Revenue Executive Service (Tahsildar) Rules — Article 311 not infringed. AIR 1966 SC 1842 (1845, 1846, 1847) = (1966) 3 SCR 821. (AIR 1963 All 377, Reversed.)

(13) Where the State Government has in the case of a doubtful record of service of a Government servant provisionally or temporarily promoted him to a higher post, it is not precluded from reverting the officer to his substantive post after it has before it, the advice of Public Service commission in that respect which it considers along with record of service of officer. AIR 1968 Punj 324 (328) = 1968 Lab IC 980 = 69 Pun LR 510 (DB). (Removal of name from 'may be tried list' for promotion has no effect at all and such an action could not be said to amount to reversion accompanied with penalty.)

(14) Reversion from officiating to substantive post — Petitioner cannot complain — On facts held, there was no violation of Fundamental Rule 113 also. AIR 1969 Cal 525 (529, 530, 531) = 1969 Lab IC 1334 = 73 Cal WN 249 (DB). (1968 Lab IC 320 (Cal), Reversed.)

(15) The petitioner who was a lecturer, was appointed by the State Government as acting junior professor on 19th September, 1957. On 23rd August, 1958, she was reverted to her former post as a lecturer: Held (i) that the petitioner's appointment was only on a provisional or temporary basis and that it must be deemed to have been made subject to the general order of 27th November 1956, (ii) that the order applied also to appointment by promotion from subordinate service; (iii) that the order applied to appointment made by the State Government and that the petitioner was appointed by the State Government under the Kerala University Act; (iv) that the appointment by selection did not by itself import permanency in the tenure of the service of the candidate chosen; (v) that the appointment having been made provisionally and therefore on officiating basis, the rule in Dhingra's case, AIR 1958 SC 36, Applied; (vi) that the reversion of the petitioner not being by way of punishment, Article 311 (2) was not attracted; (vii) that the petitioner could not complain that she was being discriminated against. AIR 1960 Ker 260 (261, 262) = 1960 Ker LT 257.

(16) It cannot be said that where an appointment to a higher post is only on an officiating basis, the transfer to a lower post can never be a reduction in rank. There can be a "reduction in rank," even in such cases in certain circumstances. (1955) 59 Cal WN 859 (866) (DB).

(17) Even where an employee had no substantive right to post or rank from which he has been reverted, Article 311 (2) may be attracted if besides physical degradation or reversion to lower post, order for reduction also visits the Government with penal consequences. AIR 1966 Tripura 8 (11).

(18) If a Government servant was holding a particular post in his parent department and was sent to another department on deputation, on his reversion from that department to his parent department, he becomes entitled according to Bombay Government Circular dated, 31-10-1950, not only to all increments which he would have secured in his parent department but also to the restoration to him of every one of the higher posts which he would have in normal course of events occupied in his parent department had he remained in it, without having been deputed to another. An order placing him on lower position contrary to the circular, was quashed. AIR 1962 Mys 146 (149, 152) = 40 Mys LJ 76 (DB).

(19) Transfer from a specified statutory post to other post cannot be made — Petitioner who was permanently appointed as Registrar of Rent Controller's office under West Bengal Act XII of 1956 by

Articles 310 & 311 — Note 114 (contd.) way of promotion cannot be transferred as a Certificate Officer under Bengal Act VIII of 1918 a post with lesser pay — Payment of difference in pay was only to get over the condition presented by R. 24 (1) of W. B. Service Rules. AIR 1967 Cal 285 (287, 289, 290) = (1968) 2 Lab LJ 30 (DB).

115. Retrospective reversion.— (1) In the process of fixing seniority, the petitioners who were senior clerks were promoted to the posts of Assistants but were subsequently reverted to the position of senior clerks. The order of reversion was made to operate retrospectively. As a result of the impugned order, they became liable to refund the difference between the emoluments drawn by them as Assistants and the emoluments to which they would be entitled as senior clerks: Held, that the reversion order entailed penal consequence and amounted to a punishment. The order would not have amounted to penalty if it were to have operated prospectively. If no opportunity, much less a reasonable opportunity was afforded to the petitioners to show cause against the order of reversion that portion of it, which gave effect to it retrospectively, was in conflict with the provisions of Clause (2) of Article 311 of the Constitution of India. AIR 1960 Him Pra 24 (26, 27, 28).

(2) Reduction in rank — May amount to punishment or may be an innocuous thing — Police Sub-Inspector promoted to selection grade — Misconduct in investigation — Reversion with retrospective effect during period of probation — Order amounts to punishment only so far as it was retrospective — Order quashed only to that extent — Punjab Police Rules (1934) (as applied to Himachal Pradesh), Rules 13, 18, 16, 4. AIR 1962 Him Pra 35 (37, 38, 39, 40) = (1962) (1) Cri LJ 721.

(3) Surveyor and Draftsman-cum surveyor treated at par in matters of pay scale — No proof that they belong to same class of service and perform exactly same duties — Guarantee of equable treatment under Articles 14 and 16 held not available on ground of being differently treated — Reduction in pay of scale of post of surveyor — But petitioner, a surveyor allowed provisionally to draw pay in higher scale — Subsequent reduction on lower pay with retrospective effect and order for return of overpayment — Order resulted in evil consequences — Art. 311 (2) attracted—He could not be reduced in rank otherwise than in compliance with Article 311 (2). 1969 Cur LJ 4 (17).

(4) Provisional promotion of teachers — Subsequent reduction on lower pay with retrospective effect and order for return of overpayment — Held, Art. 311 (2) was attracted as the order for

return for overpayment was not included in terms of conditions of service it amounted to punishment. AIR 1966 Punj 46 (48, 49) = 1965 Cur LJ 402. (AIR 1963 Cal 563; AIR 1964 SC 521 and AIR 1958 Mad 53, Disting.)

116. Abolition of post and reversion to lower rank.— (1) Where the post held by a Government servant is abolished and on such abolition he is appointed to another post of a lower grade or carrying a lower salary or scale of pay, there is no question of his being reduced in rank. AIR 1957 Pat 555 (559) (DB).

(2) Affording of opportunity against order of reversion — Not necessary when reversion is due to abolition of temporary post. 1969 Lab IC 1435 (1438) = 1969 Ser LR 504 (Punj).

117. Integration of services upon abolition of former Indian States and on reorganisation of States.— (1) Petitioner, the District Welfare Officer in former Vindhya Pradesh, allowed to continue in the same post in M. P. after reorganisation — In integration list District Welfare Officer, post in V. P. equated with post of Circle Officer in M. P. — Petitioner's posting as Circle Officer in M. P., held did not amount to reduction in rank so as to attract Article 311 (2) and it was also not by way of punishment. AIR 1966 Madh Pra 134 (135) = 1965 MPLJ 825 (DB).

(2) When one State is absorbed in another whether by accession, conquest, merger or integration, all contracts of service between the prior Government and its servants automatically terminate. Thereafter those who elect to serve in the new State, and are taken on by it, serve on such terms and conditions as the new State may choose. This is nothing more than an application of the principle that underlies the law of master and servant, when there is a change of masters. So, on the merger of Manipur State, with the Union territory of India, the service conditions of the employee of the erstwhile State of Manipur prior to the merger came to an end. AIR 1968 Manipur 58 (61) = 1968 Lab IC 1065. (It is also doubtful whether such an employee can take advantage of Article VIII of the Manipur Merger Agreement as he was not a party to the agreement and as the agreement was only between the two high contracting parties, viz., the erstwhile Sovereign of Manipur and the new Sovereign State of India. AIR 1965 SC 1196, Rel. on. Held, however, the Article VIII does not apply to the petitioner as he was not a permanent employee of the erstwhile State of Manipur.)

(3) Officiating Tahsildars in Pepsu confirmed and provided lien in supernumerary post — Merger of Pepsu State with Punjab — Successor State has power in view of Section 116 (2), States Reorganization Act to deprive them of per-

Articles 310 & 311 — Note 117 (contd.)
 manent status — Article 311 (2) not attracted. AIR 1964 SC 521 (524, 525, 526). (L. P. A. Nos. 358 to 361 of 1959 D/- 23-11-1959 (Punj), Reversed.)

(4) The right of the new State to absorb or not to absorb any servant of the previous State cannot be questioned in a municipal Court. Even as a permanent employee of the State he has no rights which he can claim against the new State in a Municipal Court because all such engagements lapse with former sovereignty and it is in the discretion of the new State whether to recognize them or not. If the servant was a permanent employee of the erstwhile State, either he had to be absorbed in the permanent post or not at all. It is illegal to convert his claim into one for a temporary post and compel him to qualify for a permanent post by appearing before Union Public Service Commission. Where such a permanent servant continued to be treated as a permanent servant and take his pay as such servant in the new State for several years after integration, he must be taken to have enjoyed the benefits of Article 311. He could not be removed from service except under its terms. If he is to be removed from service, he is entitled to the benefit of Art. 311. AIR 1959 Madh Pra 136 (139, 140, 141) = 1959 MPLJ 257 = (1959) 1 Lab LJ 512 (DB).

(5) An appointment to a post on an officiating basis for no fixed period, can give to the servant so appointed no right to that post, and his service in that post can be terminated, unless it has ripened into a quasi-permanent service under the service rules. A reduction in rank by way of punishment only, can attract the operation of Article 311 (2). If a Government servant is appointed to a post on probation, or on officiating basis, the service in that post being liable to be terminated, such termination of service does not per se amount to punishment. The real test is to find out whether the order for reduction in rank visits the Government servant with any penal consequence. A mere loss of seniority would not amount to a reduction in rank within Article 311 (2). Where the petitioner had before his promotion to the higher post on officiating basis, held a higher rank in his substantive post and others had been assigned higher ranks over him on integration of services, as a result of reorganisation of States, it would be too unrealistic to say, that the reduction in his rank in the substantive post itself, is the direct consequence of his termination of service in the post in which he was officiating. AIR 1960 Ker 231 (232, 233, 234) = 1960 Ker LT 55.

(6) Reduction of a servant of a State from a post on which he was previously confirmed is only a test for ascertaining

whether he was or was not reduced in rank as a measure of punishment. It is not of universal application. It has to be considered with due regard to facts and circumstances of each case whether reduction in rank was by way of punishment. 1961 Jab LJ 454 = 1961 MPLJ 579 (585, 586) (DB). (Petitioner erstwhile Gwalior State employee, was fixed as Head clerk in the office of Director of Education of Madhya Bharat during integration in Education Department — On his representation M. B. Government ordered him to be made office Superintendent — Government reviewed its order and cancelled its previous order and appointed S (whose claim was said to have been overlooked) to the post of office Superintendent without giving petitioner an opportunity to be heard — Held that the petitioner could claim to serve only on such terms and conditions as the new State of Madhya Bharat chose to give him, (as Head clerk by the final order) and that Article 311 (2) was not attracted as there was no reduction in rank by way of punishment.)

(7) Ad hoc promotion of Sub-Inspectors of Police as Circle Inspectors, when they were transferred from Hyderabad State to the new State of Mysore, as result of States Reorganisation Act — Reversion, on permanent incumbents coming back — Reversion, whether reduction in rank — As promotion on officiating basis is generally according to seniority, subject to fitness for promotion juniormost person reverted is usually person promoted last. AIR 1966 SC 175 (178, 179, 180, 181) = (1964) 6 SCR 279.

(8) An officer appointed to a higher post on an officiating basis has no right to continue in that post and can be reverted to his substantive post for administrative reasons. AIR 1964 SC 1361 (1365) = (1964) 2 SCR 982. (ILR (1961) 11 Raj 260, Reversed.)

(9) Person holding certain substantive post in former Indian State — Merger of such State in Orissa — Person must prove that his former substantive post was recognised expressly or impliedly by the new State — Entries in service book were merely a mechanical reproduction of entries prior to merger without sanction of competent authority. AIR 1962 Orissa 189 (190) = (1962) 4 Ori JD 136.

(10) Article 16 of Covenant creating United State of Madhya Bharat—Absorption in the service of the new State — Mere continuation in service from before formation of new State does not amount to such absorption. AIR 1954 Madh B 54 (57) = ILR (1954) Madh B 301 (DB).

(11) Officer from old regime appointed on temporary basis — His previous service must be deemed as having been terminated and he must be regarded as re-employed. AIR 1956 All 10 (11).

Articles 310 & 311 — Note 117 (contd.)

(12) On the formation of Union of M. B., some officers of the Covenanted States were retrenched and compulsorily retired without being absorbed in the service of the new State in pursuance of the administrative policy — It was held that the provisions of Arts. 14 and 16 were not violated. AIR 1954 Madh B 177 (181) (DB).

(13-14) Petitioner in permanent service of integrating State declared surplus to requirement by new Government — Subsequent absorption of petitioner in permanent service on condition that period of discontinuance could be treated as of leave — Petitioner accepting offer — After retirement petitioner claiming salary for period of discontinuance of service — Held that Clause (16) of the Covenant of the Covenanted States of Madhya Bharat did not create any legal right amongst the Civil Servants of merged States to claim to be in service in the new State — The order stood as a whole and it could not be dissected so as to enable the petitioner to claim benefit under one part and be relieved from the obligation under the other part. If the order that enabled him to be absorbed in service was subject to certain terms the right claimed could not be claimed independent of those terms. AIR 1957 Madh B 100 (103) (DB).

(15) A, Assistant Master in High School, appointed to post of Special Officer for Hindi by process of selection — Review of promotions made irregularly on basis of provisional Inter-State Seniority List as superseded by final Inter-State Seniority List — Reversion of A from Class II to Class III post — Reversion is illegal and must be quashed as the new appointment was made on the basis of eligibility and qualifications prescribed by State Government when it created that special post and not upon the rank which A held in antecedent post. (1969) 1 Mys LJ 169 (172) = 16 Law Rep 450 (DB).

118. Cancellation of promotion. — (1) Where a Government servant holding a lower post is promoted to a higher post but thereafter, such promotion is cancelled for some reason by order of the higher authorities whereupon the Government servant is reverted to his original post, there is no question of reduction in rank. AIR 1957 All 152 (153) (DB) ** AIR 1955 All 528 (530, 531) = ILR (1956) 1 All 537 ** AIR 1955 Cal 385 (391) (DB).

(2) Reduction in rank — Government has power to reduce a civil servant who was previously promoted to higher rank. AIR 1960 Him Pra 24 (27) ** AIR 1963 Mys 109 (110, 111) = (1963) 1 Mys LJ 127 (DB). (Revocation of the order of promotion on the ground that it was

passed through mistake does not amount to reduction in rank so as to attract the provisions of Art. 311.)

(3) It is no point of law that because the Railway Administration made an error in promoting the petitioner, the Administrator must always be anchored to their error and must not be permitted to correct the same. The erroneous promotion does not invest the petitioner with a right to continue in the promoted post. His reversion, therefore, to his substantive rank does not amount to a reduction in rank as contemplated in Article 311 (2) of the Constitution. (1966) 12 Fac LR 53 (54) (Cal).

(4) Where another person's promotion need be set aside before making an order for promotion, rules of natural justice require that the authority must hear the person before making an order adverse to him, particularly when done on the theory that he was unworthily promoted. (1966) 12 Fac LR 264 (271) (Cal).

(5) Government servant promoted to permanent post on substantive basis — Reversion without following procedure in Section 126 of J. and K. Constitution, illegal. AIR 1966 J and K 24 (26) = 1966 Kash LJ 116 (DB).

(6) Constitution of India (1950) Article 311 (2) where a Government servant is given a chance to officiate on a post on a trial basis it is implicit in the promotion awarded to him that he would be reverted on account of unsatisfactory performance. Since he has no right to the post, he cannot complain on reversion to substantive post that he has been deprived of a position to which he was legally entitled — The order of reversion was not by way of punishment and it did not amount to reduction in rank. ILR (1967) 2 All 240 (242, 245) (DB).

(7) Promoted officer cannot be reverted on the ground that he did not pass the departmental examination, when no departmental examination was specifically prescribed under Service Rules. (1966) 2 Mys LJ 129 (130, 131) (DB).

(8) Reduction in rank — A, Assistant Master in High School, appointed to post of Special Officer for Hindi by process of selection — Review of promotions made irregularly on basis of provisional Inter-State Seniority List as superseded by final Inter-State Seniority List — Reversion of A from Class II to Class III post — Reversion is illegal and must be quashed. AIR 1969 Mys 306 (308) = (1969) 1 Mys LJ 169 = 1969 Lab IC 1219 (DB).

(9) Cadre officer in junior scale of pay promoted to officiate in senior scale — Subsequent reversion to substantive post — Juniors allowed to continue to officiate in senior scale — Action taken

Articles 310 & 311 — Note 118 (contd.) is by way of penalty because it not only amounts to reduction in rank but also to a withholding of promotion to which he is entitled under the Rules depending on availability of posts and seniority. AIR 1968 SC 754 (759) = (1969) 1 SCJ 217.

(10) Petitioner Police Inspector of former Coorg State and promoted as Deputy Superintendent of Police by new Mysore State Government subsequently reverted as Police Inspector — Petitioner being over 52 years of age stated as ground for reversion — Police Service Rule imposing age restriction of 52 years for promotion as Deputy Superintendent of Police relied upon — Prior approval of Central Government before promulgation of Rule, not obtained — Proviso to sub-section (7) of Section 115, States Reorganisation Act (1956) held attracted — Rule held invalid for want of prior approval of Central Government — Order reverting petitioner as Police Inspector set aside. AIR 1965 Mys 19 (25) = (1964) 1 Mys LJ 217.

119. Refusal to promote. — (1) Promotion — Cannot be claimed as of right — Decision not to promote does not amount to imposing penalty. AIR 1969 All 213 (214) = 1969 Lab IC 518 ** 1970 Lab IC 160 (163) (Orissa) (DB).

(2) Among the well-known attributes of public service, one that is least subject to exception is that no employee can claim as of right a promotion from one position to another unless he could do so under a statutory provision or an enforceable condition of service; a variety of considerations govern the promotion of an employee, none of which alone can render an employee suitable for promotion; ordinarily, it is for the State or the promoting authority to determine such suitability after an assessment of all relevant considerations, such as seniority, competence, rectitude, and antecedent official records, none of which is less important than the other, for the preservation of purity and efficiency in public service; the basic or governing consideration in all promotions is what may be shortly described as merit or suitability; seniority is in substance one of the elements in the assessment of merit. (1963) 2 Mys LJ 248 (249) (DB) ** (1964) 1 Mys LJ 226 (228, 229).

(3) Refusal to select a person for a particular post though resulting in loss of some place in seniority is not reduction in rank. AIR 1964 All 356 (358).

(4) Promotion is in the discretion of the competent authority, and no Government servant can say that he has a legal right to be promoted. Hence no legal action would lie to enforce an alleged right that he is entitled to be promoted. The remedy of the Government servant aggrieved in such a case lies only by way of appeal to the superior authorities. AIR 1958 Manipur 35 (37). (Promotion from

one grade to a higher grade is not to be made only on the basis of seniority but is to be made primarily on the basis of merit and efficiency, although seniority is also a factor to be taken into consideration.) ** AIR 1961 All 315 (316) = 1960 All LJ 50 (DB).

(5) In a selection post a person cannot claim to be promoted merely on the ground of seniority. It is only when definitely a finding is arrived at by the authority that the work of the senior is not efficient and another person is found more suitable, that a junior would be entitled to be appointed in preference to the senior. That is a matter which would not be justiciable in a writ petition. AIR 1961 All 316 (319, 320).

(6) Right of promotion in a cadre — Creation of separate cadre is essential. AIR 1970 Pat 25 (Pr 32) = 1970 Lab IC 53 = 1969 BLJR 405 (DB)

(7) Refusal to promote on ground of inefficiency — Does not amount to discrimination. AIR 1958 J and K 43 (45).

(8) A mere non-promotion of a Government servant after consideration of his case for promotion does not amount to punishment. (1964) 1 Mys LJ 226 (230) (DB).

(9) Non-selection to post in selection grade is not removal or reduction in rank. AIR 1970 Delhi 1 (5) = 1970 Lab IC 31.

(10) It is the fundamental right of every public servant to seek higher promotion if he is eligible therefor and to obstruct his path of promotion amounts to infringement of his fundamental right under Article 16. Promotion of employee by order of Chief Minister with instructions that his work be observed for six months — His reversion before expiry of that period is illegal — Amounts to deprivation of his right to promotion. 71 Pun LR 439 (446) = 1969 Cur LJ 146.

(11) Promotions in Government service — Seniority by itself does not confer an absolute right to promotion — Decision of the Government as to suitability for promotion is final — Superseding senior member without more does not amount to 'reduction in rank' — No discrimination is practised by promoting a member lower in seniority order over his superior — Idea of selection not ruled out in considering equality of opportunity — Superseding a senior member of the services is not 'reduction in rank' of the senior member. (1963) 2 Mys LJ 248 (250) (DB).

(12) Promotion given by process of selection — Review of promotion made irregularly and promotee reverted — Reversion must be quashed. AIR 1969 Mys 306 (308) = (1969) 1 Mys LJ 169 (DB).

(13) Non-promotion of petitioner on the ground of unsuitability and promoting another who is junior cannot be viewed

Articles 310 & 311 — Note 110 (contd.)
as reduction in rank of the petitioner or as a punishment imposed on him. (1964) 1 Mys LJ 226 (229) (DB).

(14) Petitioner refused promotion on two occasions — Authorities passing an order that he should not be offered any promotion for two years — Held the refusal of promotion if he was allowed the option to refuse it could not justify proscription for future promotion. If by reason of seniority he became entitled to promotion he could not be set aside on the ground of earlier refusal. (1966) 2 Mys LJ 187 (188) = (1966) 7 Law Rep 616 (DB).

(15) The authorities while considering the question of suitability for promotion and taking a decision thereon were not acting judicially and an opportunity to put forward explanation by concerned employees need not be given. (1964) 1 Mys LJ 226 (229) (DB).

(16) When the withholding of the promotion was not by way of punishment Article 311 is not attracted. Even assuming that the doctrine of pleasure of the Governor reiterated in Article 310 relates only to tenure of office and not to the other conditions of service and there may be a justiciable right independent of Article 311 where there is a contravention of a statutory rule dealing not with the tenure of office but with the other conditions of service, it cannot be held that there was any contravention of any rule relating to conditions of service, in not promoting a government servant, where the very conditions of service under which he was holding his post clearly laid down that promotion can be made only on the basis of merit and not on the ground of seniority alone and he was fully aware of it. ILR (1962) Cut 243 (245, 246) (DB).

(17) Promotion of teacher of private school receiving grant-in-aid from Government is within power and discretion of superior authority and is not justiciable unless it is decided in contravention of provisions of some specific rules — Where there are no rules, promotion cannot automatically go by seniority — Merit, general suitability etc. are some of the matters which have to be taken into account — Promoting authority only is the judge of it. AIR 1959 Manipur 1 (7).

(18) Reduction means demotion, that is, putting an employee in a Lower Grade, or post or on a lower scale of pay. It may even include a case where an employee is reduced to a lower stage of pay in the same scale, but by no stretch of imagination it is possible to conceive that when a man has not been allowed to go up by way of promotion as he was not found fit for the higher post there was a reduction in his rank. AIR 1958 Manipur 35 (37).

(19) Deputy Magistrate working as S. D. O. — Punishment by stoppage of promotions and censure in character roll — Period of suspension directed not to be treated as on duty — There is no reduction in rank — No further opportunity to show cause against punishment necessary. AIR 1966 Pat 97 (101) = ILR 45 Pat 1019 (DB).

(20) Supersession in the matter of promotion — Appeal Court holding it to be unjust — Government servant entitled to all ancillary benefits flowing from such redressal — Government Notification cannot deprive him of the right. (1969) 17 Law Rep 650 = (1969) 1 Mys LJ 197 (198) (DB).

120. Reversion and departmental enquiry for same cause. — (1) Where the petitioner, who was a permanent Government servant, and who was promoted to a higher post purely on a temporary basis and until further orders, is found unsuitable for the post on account of misconduct, two courses are open to the Government. The first was to revert him to his former post without any notice and without assigning any cause, and the second, by taking disciplinary action. But both the courses are not open to the Government simultaneously, and the methods are only alternative. Where therefore it is found that the authorities have reverted the petitioner to his former post, it is not open to the authorities to start proceedings for disciplinary action either themselves or through another authority. AIR 1958 SC 36, Rel. on. AIR 1958 Tripura 45 (47).

121. Retrospective orders under the Articles. — (1) The notice of termination of services which adversely affects the employee will take effect from the date on which it is actually or constructively communicated to him. The words, 'commencing with immediate effect' in the notice would only mean commencing from the date on which the notice was served and not from the date of issue. AIR 1965 Him Pra 55 (57, 58).

(2) Order of dismissal cannot have effect from any date prior to that on which it is communicated to delinquent Government servant. AIR 1969 Cal 397 (399) = 1969 Lab IC 1094 = 73 Cal WN 803 ** AIR 1963 Manipur 28 (35) ** AIR 1958 Cal 470 (471) = 62 Cal WN 690 ** (1956) 60 Cal WN 1023 (1026) = (1957) 1 Lab LJ 223.

(3) Order of dismissal with retrospective effect is in substance an order of dismissal as from date of order with superadded direction that it should operate retrospectively as from an anterior date. The two parts are clearly severable — Court has power to give effect to valid and severable part of order but it cannot pass new order of dismissal. AIR 1966 SC 951 (953) = (1966) 2 SCR 204. ((1957)

Articles 310 & 311 — Note 121 (contd.)
61 Cal WN 880 and AIR 1961 Cal 626, **Overruled.**

(4) There can be no suspension of a person with retrospective effect. (1963) 2 Lab LJ 177 = (1963) 6 Fac LR 225 (227) (Cal).

122. Censure. — (1) Government servant cannot legitimately complain that the penalties of censure and suspension were imposed upon him without affording him an opportunity to show cause against the imposition of such penalty. AIR 1969 Orissa 224 (226) = 1969 Lab IC 1221 (DB).

(2) An enquiry as contemplated in cases falling under Article 311 (2) would not be necessary for punishments other than dismissal, removal or reduction in rank, that is, in cases of lesser punishments including censure. AIR 1958 Manipur 35 (37).

(3) The constitutional protection afforded by Article 311 does not extend to a Government servant with regard to whom a censure entry in his character roll is ordered to be made. AIR 1957 Raj 230 (231) ** AIR 1954 Ajmer 22 (25).

123. Determining order of seniority. — (1) Rules of natural justice — Application of, while determining seniority — Exclusion of name of certain employee from final seniority list though included in provisional seniority list — Opportunity of making representation must be afforded before such exclusion. 1969 Lab IC 893 (895) = (1969) 1 Mys LJ 325.

(2) The right of the Government to regulate or determine inter se seniority of its employees is implicit in the theory that the civil servants of a State hold office at the pleasure of the President or Governor and that so long as any statutory inhibition is not shown to be contravened, the employee cannot complain before a Court or claim any relief on the basis of the failure or refusal of the Government to assign to him his proper position in the seniority list. AIR 1958 Mad 243 (247) = ILR (1958) Mad 295 ** AIR 1958 Mad 53 (64, 65) = ILR (1958) Mad 158 ** AIR 1956 Pepsu 26 (29) = ILR (1955) Patiala 703.

(3) Persons already declared to have completed their probation — Subsequent Order of Government to prepare integrated seniority list to receive their promotions with retrospective effect — Illegal. AIR 1969 Andh Pra 118 (123) = (1969) 1 Andh WR 85.

(4) Article is attracted when reduction is as a punishment; it does not apply to the case of a public servant whose rank is reduced in the fixation of seniority list. AIR 1961 Ker 203 (207) = 1960 KLT (1200) ** AIR 1962 SC 1704 (1710).

(5) Whenever the Government wanted to change the rules as to seniority or to refix the seniority with reference to a particular service the persons in service

likely to be affected need not be given an opportunity of being heard and no principle of natural justice can be said to have been violated if such opportunity was not given.

A person who had obtained a benefit in the way of seniority by relaxation of rules and who has been deprived of that benefit by a subsequent cancellation of such relaxation cannot claim as of right any particular rank in his substantive cadre and least of all can he seek to enforce such a right. AIR 1959 Mad 1 (4, 5, 6, 7) = (1958) 2 Mad LJ 379 (DB).

(6) Fixation of seniority — Service Rules vesting discretion in authorities — No arbitrary exercise of discretion — Courts will not interfere with the order — Posts and Telegraphs Manual, Vol. IV, Chapter II, Rule 38. AIR 1962 Orissa 20 (21) = ILR (1961) Cut 303 (DB).

(7) The expression 'rank' in Article 311 (2) has reference to a person's classification and not his particular place in the same cadre in the hierarchy of service to which he belongs. AIR 1966 SC 1197 (1200) ** AIR 1962 SC 1704 (1710).

(8) Losing some places in seniority list is not tantamount to reduction in rank within Article 311 (2). AIR 1966 SC 1197 (1199, 1200) = (1966) 3 SCR 61. (AIR 1960 Cal 209, held overruled in AIR 1962 SC 1704.) ** AIR 1966 SC 1529 (1533, 1534) = (1966) 3 SCR 106. (W. P. No. 531 of 1961, dated 12-12-1962 (Mys), **Reversed.**) ** AIR 1962 SC 1704 (1710) ** AIR 1968 All 276 (278, 279) = 1968 Lab IC 1027. (Petition challenging an order which has resulted only in the loss of seniority is not maintainable under Art. 311.) ** (1966) 2 Lab LJ 374 (389) = (1964) 8 Fac LR 375 (All). (Seniority of Munsif reduced in same cadre — Art. 311 (2) held not applicable since order did not amount to reduction in rank.)

(9) Government servant — Fixation of his seniority in cadre — No law as to — It depends upon discretion of Government — No writ of mandamus can be issued. AIR 1963 All 358 (360).

(10) Refusal to select person for particular post — Losing place in seniority list in same cadre — Not reduction in rank. AIR 1964 All 356 (358).

(11) Reduction in rank — What constitutes — Reversion of Government servant from officiating post to his substantive post resulting in loss of seniority in that post — Reversion must be held to be by way of punishment — Appeal No. 138 of 1956, dated 26-7-1956 (Bom), **Reversed** — Government of India Act (1935), Section 240 (3). AIR 1962 SC 8 (10, 11) = (1962) 1 SCR 886.

(12) Railway servant — Reduction in rank by way of seniority — Order held not justiciable. AIR 1959 Mad 68 (71) = 71 Mad LW 750 (DB).

Articles 310 & 311 — Note 123 (contd.)

(13) Orissa Administrative, Finance and Police Service (Direct Recruitment) Rules (1950), Rules 2, 7 (2) (b), 7 (2) (a) (i) and Appendix I — Combined competitive examination in accordance with Rule 2 — While drawing up the results, separate ranking of candidates only for police service in separate column is invalid — Unilateral decision of State Government to demote a police officer to lower place in list of seniority affects his future chance of promotion to higher rank — Non-compliance with provisions of Article 311 and principles of natural justice — Decision is invalid. 1969 Lab IC 738 (741, 742) (Orissa) (DB).

(14) Unaccepted officiating Patwaris — Such Patwaris are not included in R. 16 Punjab Revenue Patwaris Class III Service Rules — Names of such persons are not maintained in the register kept in specified form for other Patwaris — Unaccepted Patwaris terminated as a result of their participating in strike — Subsequent re-instatement — Past service ordered to be counted only for the purpose of pension under Rule 4.20 (a) of Punjab Civil Service Rules — Government order fixing seniority — Candidates continuing to work during strike given seniority over candidates participating in strike — Order is only administrative — No discrimination violating Arts. 14 and 16 of the Constitution — Order fixing seniority does not amount to dismissal, removal or reduction in rank within the meaning of Art. 311—Art. 311 not attracted. (1967) 69 Punj LR 1036 (1041).

(15) An alleged breach of service rules does not give to an employee of the Government any cause of action. Hence, to a suit to get an order fixing the seniority of the plaintiff, an Assistant Surgeon in the Punjab Civil Medical Service, in contravention of Government Service Rules declared illegal and ultra vires, the provision of Article 310 of the Constitution is attracted and the matter is not justiciable. 64 Punj LR 774 (780) = (1962) 2 Lab LJ 725.

(16) Integration of services on reorganization of State — List prepared by considering all relevant factors — Revised list and refixing particular servant's seniority — Representation of all affected servants not considered — Revision is whimsical and arbitrary and violative of Article 14 — Mysore Government Order No. G. A. D. 20 I. G. S. 62 dated 20-7-63 held ultra vires and illegal. AIR 1966 Mys 31 (35) = (1965) 1 Mys LJ 392 (DB).

(17) Whenever the Government proceed to modify or amend the rules relating to seniority and refix the seniority of the Government servants with reference to such rules, the affected servant cannot contend that his reduction in rank is by way of punishment. The loss of seniority

of the petitioner which resulted from the refixing of the seniority inter se between the petitioner and another would not amount to a reduction in rank of a penal nature so as to attract the application of Article 311 (2). AIR 1960 Mys 255 (257, 258) = 38 Mys LJ 522 (DB) ** AIR 1958 Mad 53 (68) = ILR (1958) Mad 158. (Re-adjustment of the order of seniority will not amount to a reduction in rank.)

(18) Promotion of assistant teacher as headmaster in Railway High School — Provisional panel made by General Manager in accordance with Railway Board's letter No. E. (N. G.) 57 P. M. 1-24, dated 8th October, 1958, according to which fresh panel to be made after existing one is exhausted — Final panel rearranging seniority affecting the petitioner — Held, this was not a rectification of clerical mistake and General Manager could not invoke even his inherent power. 1969 Lab IC 483 (484) = 16 Fac LR 440 (Cal).

(19) In respect of selection grade posts a selection has to be made from amongst the officers in that cadre, and only that officer who in the opinion of the authority making the selection is considered fit is selected for the post. Hence no Government servant in a particular cadre can claim a post in the selection grade in that cadre as of right on the ground of his seniority. His suitability for that post must obviously depend on the subjective satisfaction of his superior officers. ILR (1962) Cut 243 (245) (DB).

(20) I. P. S. (Regulation of Seniority) Rules (1954), Rr. 2 (g) and 3 (3) (b) — 'Senior Post' — State Government has been given power to declare any post as 'Senior I. P. S. Post' and no form has been prescribed for such declaration — For purpose of applying Rule 3 (3) (b), definition in R. 2 (g) is sole guide and whether person acting in an equivalent post was on deputation from Army or was promoted to State Police ranks is immaterial — If definition in R. 2 (g) included only officiation subsequent to appointment to I. P. S. cadre after termination of deputation from parent Department, second part of definition would become unnecessary and meaningless and it would involve an interregnum which cannot be reasonably imputed to Service Rules. (1967) 14 Fac LR 72 (81, 82) = (1967) 2 Lab LJ 289 (Cal).

(21) Government taking over management of private trust fund and treating its employees as Government servants from 20-11-55 — Held on facts that B who became a second grade clerk in 1951 was clearly entitled to a higher rank than A, a Government servant, who became a second grade clerk only on 4-12-1953 — Services rendered by B in private trust fund are to be treated as part of services rendered under Government. AIR 1969 Mys 346 (347, 348) = (1969) 1 Mys LJ 415 (DB).

Articles 310 and 311 (contd.)

124. Grounds of dismissal or removal. —

(1) A Government servant may be dismissed or removed for any good and sufficient reason. Where the Government Servants' Conduct Rules prohibit the doing of certain thing, a breach of the rule will be a good and sufficient reason for dismissal. AIR 1956 Raj 28 (29)=ILR (1955) 5 Raj 887 (DB).

(2) So long as it is not complained that there has been an infringement of Arts. 310 and 311, High Court would not be justified in setting aside an order of removal (for disobedience of transfer order) of Governor whose pleasure with regard to termination of services of Government Servant serving in a State is final. 1958 All LJ 218 (221).

(3) Where a Government servant is dismissed or removed from service on certain charges, it is open to the Court to go into the question of the sufficiency of the reasons on which the order of dismissal or removal is based in order to satisfy itself whether the reason given can at all be a "good and sufficient reason" for the dismissal or removal. ILR (1958) 8 Raj 432 (434) (DB).

(4) The Court can consider not only whether the reason given for dismissal or removal can at all be a reason for such action but also whether the finding of the dismissing authority that a certain ground has been made out is a bona fide one. AIR 1956 Mad 220 (225) ** AIR 1956 Pepsu 19 (26).

(5) Dismissal of public servant based on two charges — Subsequent finding of guilt on one charge only — Order of dismissal cannot be maintained. AIR 1963 Punj 336 (338)=65 Pun LR 571 (DB).

(6) Order of dismissal based on charges, findings on some of which are vitiated — Order of dismissal is to be set aside and cannot be justified on the basis of remaining charges. AIR 1962 Orissa 78 (81, 82)=27 Cut LT 265 (DB). (Findings on charges vitiated.)

(7) If a person has been guilty of indiscipline and has been punished on previous occasions those factors are usually taken into consideration in awarding punishment though they should not be taken into consideration in finding the applicant guilty of that particular charge. AIR 1959 All 624 (625)= ILR (1957) 2 All 246.

(8) Where the guilt of taking bribe is proved against the public servant, it is sufficient to entail dismissal from service and the fact that the enquiry officer exceeded the scope of enquiry on other counts is immaterial and the dismissal cannot be challenged on this ground. AIR 1960 All 618 (619)= ILR (1960) 1 All 214= 1960 Cr LJ 1290 (DB).

(9) Where a Government servant was dismissed merely on the ground that he had received some money from one person for being paid over to another which he accordingly did, it was held that this was no reason at all for punishing him. ILR (1958) 8 Raj 432 (435) (DB).

(10) It is not necessary that the ground on which a public servant is dismissed must amount to or be akin to a criminal charge. AIR 1951 Mad 882 (882) (DB).

(11) Dismissal or removal of a Government servant may be justified on grounds of inefficiency, insubordination and general reputation of corrupt conduct. AIR 1951 Mad 882 (882, 883) (DB).

(12) The guarantee provided in Art. 311 did not refer only to the procedural aspect — Matters wholly unconnected with conditions of employment could not be taken into consideration in imposing punishment. (1963) 1 Lab LJ 512 (516, 517) (Mad).

(13) In order to enable a master to take disciplinary action against his servant it is not a condition precedent that misconduct on the part of the servant must arise within his employment and not outside his employment. There is no reason why this principle should not apply to public servants. AIR 1960 Bom 285 (286, 287)= 61 Bom LR 1537= 1959 Nag LJ 441 (DB).

(14) Disrespectful statements made against a superior in an appeal to the higher authorities will amount to indiscipline and misconduct for which Government servant may be dismissed. AIR 1956 Orissa 99 (101)= ILR (1956) Cut 29 (DB) ** AIR 1954 Him Pra 1 (4).

(15) The High Court will not normally question the correctness of the decision of punishing authority where the Government servant has been given a reasonable opportunity as contemplated by Article 311, Clause (2). AIR 1956 Bom 483 (487) ** AIR 1956 Bom 455 (458)= ILR (1956) Bom 767 (DB) ** AIR 1956 Raj 28 (29)= ILR (1955) 5 Raj 887 (DB).

(16) Enquiry into integrity of public servant — Defence that assets were increased on account of gifts from father or mother — Onus to prove on delinquent. AIR 1964 Cal 415 (417)= (1966) 1 Lab LJ 111.

(17) Order of removal on ground of acceptance of private service by Government servant — Inaccurate references in order to Rule 13, Government Servants Conduct Rules instead of Rule 15 and also to a particular Government Order which was not applicable — Held did not affect validity of the order. AIR 1959 SC 536 (542)= 1959 Supp (1) SCR 892.

(18) Mere passing of resolution of strike — No breach of Disciplinary Rules. AIR 1959 All 614 (616).

Article 310 and 311 (contd.)

125. Grounds of dismissal — Subversive activities — See also Note 41. — (1) Reference in charge sheet only to political leaning but not to any objectionable activity having relation to politics amounting to misconduct — Dismissal on basis of charge sheet — Dismissal amounts to fundamental error on basis of record. AIR 1967 Mad 392 (394, 395) = 1965 Mad WN 26 (DB). (W. P. No. 113 of 1960 (Mad), Reversed.)

(2) A rule providing for the discharge or compulsory retirement of a Government servant for being involved in subversive activities prejudicial to national security is not open to impeachment on the ground of its being too vague and indefinite and as such as being violative of Article 14. AIR 1958 SC 232 (237) ** AIR 1958 Andh Pra 288 (292, 293) = ILR (1958) Andh Pra 310 (DB).

(3) The rules governing the conduct and discipline of Government servants may provide for the dismissal or compulsory retirement of persons involved in such subversive activities and in such cases a special short procedure may be provided and the provisions of such special procedure would not be an infringement of Article 14 of the Constitution. AIR 1958 SC 232 (237, 238) ** AIR 1956 Mad 220 (223) ** AIR 1956 Pepsu 19 (23, 24).

(4) The subversive activity for which a Government servant can be dismissed or compulsorily retired must be an unlawful activity. Being a member of the Communist Party or of a Labour Union, which is not declared to be unlawful, will not amount to "subversive activity". AIR 1958 Mad 220 (224).

(5) Government servant cannot be held to be guilty of misconduct by being member of an association formed by Government servants, which has not been recognised by Government. AIR 1960 All 353 (356, 357, 358) = ILR (1959) 1 All 787 (DB).

(6) Public servant's freedom to vote for any political party does not mean 'active membership' and open participation in subversive organisation. Concealment of the fact of 'active membership of a subversive organisation' would certainly be a concealment within the meaning of R. 1706 of Railway Est. Code relating to dismissal. AIR 1958 Cal 654 (656) = 62 Cal WN 352.

(7) Mere association with persons who are engaged in subversive activities is not enough to justify dismissal or compulsory retirement of Government servant unless he is associated with the others in the subversive activities in which they are engaged. AIR 1956 Mad 220 (224) ** AIR 1956 Pepsu 19 (25).

(8) Where the authorities have the power under the relevant Service Rules to terminate the services of an employee simply by giving notice and also have power under a different rule to terminate his services

on the ground of his engaging in subversive activities prejudicial to national security, and the authorities profess to follow the latter course, the procedure prescribed by the Rules in this connection must be followed. AIR 1958 SC 232 (236).

(9) The termination of service of a Government servant on the ground of his being a Communist or Trade Unionist does not infringe his Fundamental Right under Article 19 (1) (c). AIR 1958 SC 232 (238).

(10) The termination of the services of a railway servant by notice under Rule 3 of the Railway Services (Safeguarding of National Security) Rules, 1949, does not constitute a punishment so as to amount to dismissal or removal within the meaning of Article 311. AIR 1958 SC 232 (238).

(11) The Railway Services (Safeguarding of National Security) Rules, 1949, are prospective in their operation and action can only be taken under them in regard to subversive activities being presently indulged in or likely to be indulged in. AIR 1958 SC 232 (239).

(12) West Bengal Government Servants Conduct Rules (1959), Rule 4 — Association of public servant with girls taking intoxicating drinks alleged to be unbecoming conduct — Held case not covered by Rule 4 — Rule 4 not retrospective. AIR 1964 Cal 503 (514, 515) = 68 Cal WN 215.

(13) Even in the absence of a specific rule in the Government Servants' Conduct Rules prohibiting strikes a Government servant in an administrative department going on strike will be guilty of serious indiscipline. AIR 1956 Raj 28 (29) = ILR (1955) 5 Raj 887 (DB).

126. Criminal proceedings against officer. — (1) The fact that the officer has committed an act for which he may be criminally prosecuted is no bar to his being departmentally proceeded against and dismissed if he is found guilty in such departmental enquiry. AIR 1956 Mad 460 (461) = 1956 Cri L Jour 1081 ** AIR 1955 Pepsu 97 (98) = ILR (1955) Patiala 416 ** AIR 1951 Cal 179 (181).

[But see AIR 1954 Assam 18 (21) = ILR (1954) 6 Assam 107 = 1954 Cri L Jour 31 (DB).]

(2) Even where a civil servant has been acquitted of charges in the criminal proceedings in a Court departmental proceedings under Article 311, Clause (2) in respect of identical charges would not be without jurisdiction. AIR 1955 Pepsu 97 (98) = ILR (1955) Patiala 416 ** AIR 1953 Cal 316 (319) = ILR (1952) 2 Cal 254 ** AIR 1967 Mad 315 (316, 317) = 78 Mad LW 692 (DB).

[See AIR 1957 Orissa 51 (54) = ILR (1956) Cut 615 (DB).]

[See however AIR 1965 Mad 502 (505) = (1965) 2 Mad LJ 90.]

[But see AIR 1959 Madh Pra 46 (48) ** AIR 1956 Punj 106 (108) = ILR (1956)

Articles 310 and 311 — Note 126 (contd.)
Punj 77 (DB) ** 1951 Nag L Jour 593 (595) (DB).]

(3) It cannot be said that in the case of an acquittal by a criminal Court the departmental proceedings cannot be initiated on the same facts. Even in the case of acquittal the departmental proceedings may follow when the acquittal is 'other than colourable'. 1968 Lab IC 63 (65) = 79 Mad LW 635 ** (1966) 13 Fac LR 405 = (1967) 1 Mad LJ 146 (147).

(4) Government servant prosecuted on criminal charge and honourably acquitted — Departmental proceedings in respect of same matter — Not open to authorities. AIR 1959 Madh Pra 46 (48, 49) = 1958 MPLJ 681.

(5) Where a criminal case on same allegations was pending the enquiring officer ought to have stayed the departmental enquiry pending conclusion of Criminal case. AIR 1966 J and K 73 (75) = 1966 Kash LJ 142.

(6) As mere prosecution is not conviction and the pendency of a criminal prosecution is no proof of the guilt of an accused, to call upon a man to show cause why he should not be dismissed from Government service because of the pendency of a criminal prosecution against him is only to make a nonsense of a charge of misconduct. AIR 1961 Cal 626 (629) = 65 Cal WN 607 (DB). (Overruled on another point in AIR 1966 SC 951.)

(7) It is not the true position of law to state that wherever it is possible to prosecute a Government servant in a Court of law the authorities would be precluded from proceeding against him departmentally under any conceivable circumstances. Whether the concerned Railway Code provides for disciplinary proceedings after acquittal by a criminal Court or not, the right to exercise the disciplinary jurisdiction is always, there when a charge of sufficient gravity is alleged against an employee. (1966) 1 Mad LJ 306 (307) = 78 Mad LW 692 ** AIR 1967 Mad 315 (316, 317).

(8) In an enquiry against a Government servant once a properly constituted authority has arrived at a decision, then its successor in office cannot enter upon a reconsideration of the matter so as to arrive at another and totally different decision. AIR 1958 Madh Pra 413 (414, 415) = 1959 MPLJ 465 = 1958 Cr LJ 1485.

(9) The Government servant, who has been dismissed from service by way of departmental action for corruption, can be later on prosecuted and punished in a Court of law. See AIR 1954 SC 375 (378) = 1954 SCR 1150 = 1954 Cri L Jour 993.

(10) Although Government employee may have been acquitted by a criminal Court on a charge of Criminal misappropriation, he may still be held responsible for the loss

and may be removed from service. AIR 1956 All 43 (45).

(11) Criminal charge against public servant — Acquittal on basis of benefit of doubt — Departmental inquiry in respect of same charge is not against natural justice — Standard of proof in criminal case and departmental inquiry not same — Orissa Service Code, Vol. II Rule 5 (c). AIR 1963 Orissa 73 (78, 79) = ILR (1962) Cut 125 ** AIR 1956 Pat 228 (230) (DB).

(12) Suspicion of theft without actual proof of theft at a departmental inquiry is a sufficient reason for the removal of a turner in a railway machine shop. AIR 1957 Hyd 13 (13) = ILR (1956) Hyd 644 (DB).

127. Suit for declaration. — (1) In a suit for declaration that the plaintiff's dismissal from service was wrongful and for arrears of pay it is not necessary for the plaintiff to refer to Article 311 (2). 1963 MPLJ 28 = 1963 Jab LJ 94 (DB).

(2) Government officer — Dismissal of — Suit filed by officer to challenge validity of order of dismissal is maintainable. AIR 1966 SC 1313 = (1966) 2 SCJ 777.

(3) A plaintiff, who is compulsorily retirable but is discharged from service, is not entitled to a declaratory decree that the discharge is not valid and that he must still be regarded as being in service. AIR 1956 Punj 42 (43) = ILR (1955) Punj 1279.

(4) A declaration cannot be granted where at the time of the decree the circumstances have changed and on account of the highly advanced age of the plaintiff and other circumstances, he cannot be properly restored to his office. AIR 1953 Cal 188 (193) = ILR (1953) 2 Cal 249 (DB).

(5) Where a Civil servant, whose dismissal from service was found ultra vires and illegal, had prayed for a declaration that the dismissal was ultra vires and illegal — Held that the plaintiff was entitled to a declaratory decree prayed for, taking into account the circumstances of the case. AIR 1960 Pat 366 (370, 371) = 1960 BLJR 312 (DB).

(6) Suit by Government servant for declaration that order of his dismissal was void and he still continued in service — Plaintiff reaching age of superannuation pending decision of appeal against the decision in suit — Held it would not be proper for the appellate Court to grant plaintiff-appellant declaration that he continued in service up to the date of decision of appeal. AIR 1963 Raj 57 (62) = 1963 Raj LW 128.

(7) Person appointed as additional Government Advocate which at the time was tenure post — Subsequent alteration of Rules providing for superannuation at the age of sixty — Termination of services of appointee under new rules before the expiry of period of tenure for which he had been appointed — Proper remedy is civil suit. AIR 1959 All 169 (176, 178, 179) (DB).

Articles 310 and 311 — Note 127 (contd.)

(8) Suit for declaration that the charge-sheet issued to the plaintiff in a departmental enquiry is illegal on the ground that there is no evidence to support it, is in law maintainable. AIR 1964 Pat 168 (174).

(9) Where a suit was brought challenging an order of dismissal of a public servant, on the ground that the order was passed by an officer subordinate to the officer by whom the dismissed public servant had been appointed, and pending the suit an order of dismissal is passed by the proper authority, the Court will not pass a declaratory decree to the effect that the dismissal of the plaintiff is void and that he is still in service. AIR 1950 All 212 (223) = ILR (1950) All 1222 (DB).

(10) Where in a suit for a declaration that the order dismissing the plaintiff from service was illegal, null and void and for consequential reliefs and to recover arrears of salary, etc., it is proved that the show cause notice against the proposed punishment was vitiated, the plaintiff would be entitled to the declaration that the plaintiff was in the service of the Government on the date of the suit and to arrears of salary only upto the date of the suit. AIR 1963 Guj 244 (250).

(11) Dismissal of clerk of Andhra University for alleged misconduct — Suit for declaration that dismissal was unjust and illegal — Onus is on the University to satisfy the Court about propriety of its dismissal — Suit for bare declaration without further claim for damages or restoration to office is maintainable. AIR 1951 Mad 870 (871, 872, 873) = (1951) 1 Mad LJ 518.

(12) In a suit for declaration that the plaintiff's dismissal was wrongful on the ground that no opportunity was given to him as required by Article 311 (2) the failure to give an opportunity is a part of cause of action and must be taken to have accrued at the place where the order of dismissal was passed so that the Court at that place has jurisdiction to entertain the suit. AIR 1956 Sau 75 (76).

(13) No suit to declare invalidity of the decision of a statutory tribunal is maintainable for a mere error of fact or of law. AIR 1966 Cal 42 (44) = (1968) 2 Lab LJ 617 (DB).

(14) In a suit for declaration that a Government servant continued in service till filing of plaint, based on a finding that the order of dismissal was void and has to be regarded as non-existent or ineffective, civil Court is not sitting in appeal over the decision of departmental authorities. (1957) 70 Mad LW 965 (969) = (1957) 2 Lab LJ 668.

(15) Removal of Government servant — Suit for declaration that removal was unconstitutional and illegal — Questions that can be decided in such suit — Findings of Tribunal conducting departmental enquiry

not to be considered. AIR 1963 Tripura 20 (25).

(16) Duty of Court — The Court is not to re-consider on facts the decision in the departmental enquiry — The Court is not entitled to go into the facts to find out as to whether the finding is correct or not. AIR 1960 Bom 225 (229) = 61 Bom LR 1625.

(17) Dismissal of police constable after enquiry — Finding by Deputy-Inspector General of Police that constable was so hot-headed that he might prove source of danger to others at any provocation or no provocation — Held, Court would not lightly interfere with decision in absence of some jurisdictional or other similarly serious legal infirmity justifying judicial interference. (1966) 68 Pun LR 874 (878).

(18) Suit for declaration that order for removal from Government service was unconstitutional — Nature of decree that can be passed — Future salary until reinstatement cannot be awarded. AIR 1963 Tripura 20 (31).

(19) It is the choice of the Government servant who challenges the order of his dismissal from service as illegal, either to sue for a declaration or to claim the actual arrears of salary, that might be due up to the date of the suit. AIR 1959 Madh Pra 46 (49) = 1958 MPLJ 681 = (1959) Lab LJ 47.

(20-21) Disciplinary action against railway servant — Order of suspension as punishment under Rule 1702 of Railway Establishment Code — Substantial non-compliance with procedure laid down in Rule 1711 and Article 311 — Civil Court has jurisdiction, even before second stage under Article 311 has arrived, to declare suspension order void. AIR 1964 Pat 168 (171, 172).

(22) In case of wrongful dismissal, declaration entitling petitioner to recover salary for 12 years without discharging any duty and without proof of damages would not be proper. AIR 1962 Raj 244 (247) = 1962 Raj LW 296.

(23) Suit filed in 1958 against State of Bombay — Suit pending in trial Court in 1960 — Liability of defendant in suit — Effect of Sections 60 and 61 of Bombay Reorganisation Act on suit — Liability held to be that of State of Maharashtra whether suit was on contract or on actionable wrong — Held, that State of Maharashtra was necessary party. AIR 1965 Guj 173 (179) = ILR (1964) Guj 1116 (DB).

(24) Railway servant — Dismissal in contravention of Article 311 (1) — Civil suit — Decree declaring dismissal as illegal — Reinstatement and second order of dismissal by same officer after fresh inquiry — Application under Article 226 — Principle of res judicata applies. AIR 1959 Punj 37 (38) = ILR (1957) Punj 1833.

(25) Setting aside order of dismissal from service should be treated as passed on

Articles 310 and 311 — Note 127 (contd.) merits irrespective of grounds on which it is passed. ILR (1960) 10 Raj 952 = 1960 Raj LW 385 (386, 387).

(26) Civil servant retired from service, filing suit for mere declaration as to his date of birth — Plea that he should sue for being reinstated — Suit for mere declaration of birth date is maintainable. 1967 Cur LJ 70 (72) (Punj).

128. Suit for salary.— (1) A civil servant is entitled to sue for arrears of his salary. AIR 1954 SC 245 (249) = 1954 SCR 786 *° AIR 1955 Assam 17 (20) = ILR (1954) 6 Assam 383 (DB) *° 1965 All LJ 292 (294) *° AIR 1961 Cal 626 (635) = 65 Cal WN 607 (DB). (Overruled on another point in AIR 1966 SC 951.)

(2) A civil servant, who has been dismissed or removed from service and whose dismissal or removal from service is illegal and ultra vires, can sue the Government for arrears of his salary. AIR 1958 SC 36 (41) *° AIR 1955 SC 600 (601) = 1955-2 SCR 391 = ILR (1956) 1 All 131. (AIR 1951 All 205, Reversed.) *° AIR 1954 SC 245 (249, 251) = 1954 SCR 786 *° AIR 1947 FC 23 (26) = 1947 FCR 89 = ILR (1947) Kar (FC) 52.

(3) The principle that a civil servant holds office during the pleasure of the head of the State refers to the tenure of office of the civil servant and does not imply that his service is ex gratia or that his salary is in the nature of a bounty. AIR 1954 SC 245 (250) = 1954 SCR 786.

(4) Claim for arrears of salary — Suspension on untenable allegation — Suspension set aside and employee reinstated — Claim is maintainable. AIR 1965 Cal 281 (282) = 68 Cal WN 1028.

(5) Railway servant dismissed on basis of conviction for offence unconnected with his duty — Conviction set aside in appeal — Order of dismissal also set aside — Servant is entitled to his pay for period between dismissal and reinstatement. AIR 1965 Cal 75 (76, 77, 79) *° AIR 1961 Mad 486 (490 to 593) = (1961) 1 Mad LJ 273 (DB).

(6) Dismissal of Railway servant — Dismissal declared void and reinstatement ordered — Claim to salary for a period prior to three years of institution of suit for recovery of arrears will be barred by Article 102, Limitation Act, 1908. AIR 1968 Madh Pra 204 (206, 207) = 1968 MPLJ 328 (DB).

(7) Though a Government servant is entitled to recover arrears of salary for period of service already rendered at his usual rate of pay, unless he has statutory right to the same. AIR 1965 Cal 484 (488) = 1965 (2) Cri LJ 471 = (1965) 1 Lab LJ 816.

(8) Government servant — Right to salary — M. B. Civil Service (Classification, Control and Appeal) Rules, 1956 — Withholding of pay by way of punishment is ultra vires the Rules of 1956 — Such punishment is against the spirit of Article 23 of the

Constitution. AIR 1960 Madh Pra 303 (304) = 1960 MPLJ 836 (DB).

(9) Dismissal of Civil servant in contravention of Section 240 (2) of Government of India Act (1935) — Suit by servant for recovery of arrears of pay, is maintainable — Relief need not be limited to declaration only. AIR 1954 Mad 1155 (1158, 1159) = (1954) 2 MPLJ 254 (DB). (Reversed on another point in AIR 1955 SC 817.)

(10) Government servant — Servant discharged of offence — Suspension during trial — After discharge, servant claiming pay for suspension period — Servant is entitled to his pay. AIR 1966 J. & K. 27 (28, 29) = 1966 Kash LJ 126.

(11) Suit for arrears of salary by dismissed Government servant without seeking declaration for quashing order of dismissal — Decree for arrears of salary can be granted. AIR 1959 Madh Pra 46 (48) = 1958 MPLJ 681.

(12) Suit for declaration that dismissal order was void or illegal relief founded on allegation of breach of provisions of Article — Plaintiff bound to ask for salary for period between dismissal and filing of the suit — If plaintiff omits to sue for arrears of salary to date of suit a second suit for arrears prior to that date would not be competent in view of Order 2, Rule 2, Civil P. C. AIR 1968 Bom 304 (307) = 69 Bom LR 710 (DB).

(13) Government servant — Supersession or Reduction in rank — Remedy — Question as to how much more amount Government servant was entitled to — Separate suit and not writ petition would be proper remedy. AIR 1961 All 316 (317, 318).

(14) Civil P. C. (1908), Section 9 — Suit by government servant to recover money on the ground that his promotion was withheld illegally does not lie. ILR (1962) Cut 243 (244, 246) (DB).

(15) Suit by railway servant against Union of India for arrears of salary — Plaintiff claiming that he was entitled to draw salary on basis of old scales — Amount claimed representing difference between old scale and new scale — Suit is maintainable. AIR 1961 Punj 329 (331).

129. Suit for pension.— (1) Suit for pension — Not maintainable — Pension is an ex gratia payment made out of discretion of the Government — Suit for, not maintainable. AIR 1963 Mad 49 (49, 50) *° AIR 1937 PC 27 (29, 30) = 64 Ind App 40 = ILR (1937) Mad 517.

(2) Suit for pension in cases not covered by Pensions Act is competent. AIR 1962 Punj 8 (16) = ILR (1961) 2 Punj 179 (DB).

(3) Gratuity is a matter in the discretion of the Government and a suit by a retired railway servant for recovery of gratuity is incompetent. AIR 1961 Punj 3 (4, 5) = 63 Punj LR 23.

Articles 310 and 311 — Note 129 (contd.)

(4) Where grant of pension or gratuity was not a matter of discretion but was governed by rules detailing conditions when pension was due a claim for pension is actionable. AIR 1961 Punj 443 (446).

130. Suit for damages.— (1) A servant wrongfully dismissed is entitled to such damages as will compensate him for the wrong he has sustained. AIR 1966 Mad 203 (215, 216, 217) = (1965) 2 Mad LJ 421 (DB).

(2) Civil servant — Wrongful dismissal from service — Suit for damages against Government — Maintainable — Measure of damages is loss suffered by reason of such dismissal. AIR 1962 Cal 349 (359).

(3) Even though the provisions of Article 311 may have been contravened in dismissing or removing from service a Government servant, a suit for damages by the Government servant against the Government will not lie and he will only be entitled to a declaration that the order for dismissal or removal is void and inoperative. AIR 1955 SC 600 (602) = 1955-2 SCR 391 = ILR (1956) 1 All 131 ** AIR 1948 PC 121 (127) = 75 Ind App 225 = 1948 FCR 44 ** AIR 1942 FC 3 (7) = 1941 FCR 37 = ILR (1941) Kar (FC) 165 = ILR (1942) Lah 692 ** AIR 1957 Madh Bha 108 (111).

[But see AIR 1948 Mad 379 (382) (DB) ** AIR 1946 Mad 366 (368) = ILR (1947) Mad 36 (DB).]

(4) A suit against the Union of India instituted by an officer of the Indian Army for a declaration that his dismissal from service was wrongful and for damages is not maintainable. AIR 1956 Bom 601 (605).

(5) Wrongful dismissal of public servant — Writ to earn damages is not competent. AIR 1958 Cal 654 (655) = 62 Cal WN 352.

(6) Government servant has no justiciable right to claim promotion to a selection post and hence his suit for recovery of money from the Government on the ground that his promotion was withheld illegally is misconceived. ILR (1962) Cut 243 (244) (DB).

(7) In the case of wrongful dismissal of a temporary servant damages are generally an adequate remedy. AIR 1962 Raj 244 (246, 247) = 1962 Raj LW 296.

131. Suit for mandatory injunction. — (1) A suit for mandatory injunction against the Government by a dismissed Government servant to re-instate him in service will not lie. AIR 1951 All 205 (219) = ILR (1952) 2 All 467 (DB).

132. Claim for dearness allowance.— (1) A Government resolution fixing the scale of dearness allowance under Rule 44 is "law" within Article 13 (3) (a) and can be declared void if it infringes Article 14. AIR 1954 SC 493 (495) = 1955 SCR 599.

(2) A claim against the Government that dearness allowance must be granted at a

particular rate is not justiciable. AIR 1954 SC 493 (495) = 1955 SCR 599.

(3) Guarantee of equal opportunity in public employment — Guarantee does not extend beyond initial stage of employment. AIR 1960 All 484 (499).

133. Writ proceedings — See also Articles 226 and 32.— (1) Maintainability of petition under Article 226 not dependent on applicability of Article 311 — Employee not governed by Article 311 can challenge termination of his service under Article 226. 1966 Cur LJ 930 (931) (Punj).

(2) Where there is a contravention of constitutional provisions in any case in which the Government servant is removed from service or reduced in rank, he is entitled to apply to the High Court for a proper writ under Article 226. AIR 1957 Nag 18 (19) ** AIR 1956 Tripura 33 (34) ** AIR 1955 Hyd 48 (51) = ILR (1955) Hyd 152 (DB) ** AIR 1954 Bhopal 25 (27) ** AIR 1954 Nag 258 (259) (DB) ** ILR (1954) Cut 684 (704).

(3) So long as it is not complained that there has been an infringement of Articles 310 or 311 of the Constitution, the High Court would not be justified under Article 226 in setting aside the order of the Governor whose pleasure with regard to the termination of the services of a Government servant serving in a State is final. (1958) 2 Lab LJ 673 = 1958 All LJ 218 (221) = 1958 All WR (HC) 284.

(4) The High Court should interfere only when the order of dismissal was passed on no evidence at all, or when the enquiry was held by an authority not competent to hold it, or when the rules of natural justice were violated or the enquiry was held in violation of statutory rules prescribed for the mode of enquiry or where the conclusion is wholly arbitrary and capricious or where no reasonable opportunity was given or for similar grounds. 1968 Lab IC 1145 (1148, 1149) (Manipur).

(5) Certiorari — Writ against Government — Order of dismissal of public servant — High Court can enquire whether the order is based on no evidence. AIR 1964 SC 364 (369).

(6) High Court's powers in writ petition to review findings of Inquiry Officer are restricted but they can consider and hold unlawful and set aside any agency action, findings and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law etc. 1965 Punj LR (Supp) 66 (75) (DB) ** AIR 1970 Punj 81 (85) = ILR (1968) 1 Punj 368.

(7) The essential factors which a civil Court will examine are: (i) whether the plaintiff has been dismissed by an authority which appointed him; (ii) whether before he was dismissed from service he has been given a reasonable opportunity of showing cause against the action proposed to be

Articles 310 and 311 — Note 133 (contd.) taken; (iii) whether the procedure adopted in the departmental enquiry has so prejudiced the plaintiff that it has resulted in the denial of a reasonable opportunity; and (iv) whether on the whole, principles of natural justice have not been violated. (1956) 2 Lab LJ 347 (352) (DB) (Mad).

(8) Disciplinary proceedings against Government servant — Writ petition to quash such proceedings — Court cannot usurp functions of disciplinary jurisdiction of Government over its employees, but it cannot be deterred from enforcing provisions of Article 311, though it might have indirect consequence of interfering with sanctioning which was within exclusive competence of Government. AIR 1964 Mad 166 (168, 169) = (1964) 2 Mad LJ 353 (DB).

(9) Scope — Order expressed to be by order of Governor — Even so it cannot be held to be beyond challenge. (1963) 67 Cal WN 859 (869) (DB).

(10) Whenever it was urged before the High Court that, as a result of an order passed in a departmental enquiry, a civil servant had been deprived of a reasonable opportunity, the High Court must examine the matter and decide whether the requirements of Article 311 (2) had been satisfied or not. AIR 1966 Madh Pra 58 (60) = 1965 MPLJ 699 (DB).

(11) So far as the jurisdiction of the High Court under Article 226 is concerned it is not confined to cases where there has been a violation of the provisions of the Constitution and such jurisdiction extends also to cases in which there has been a violation of other legal provisions. 1957 MPLJ 115 (119) (DB) (Nag) ** AIR 1956 Andhra 203 (207, 208) ** AIR 1955 Nag 160 (163) = ILR (1955) Nag 93 = 1955 Cri L Jour 974 (DB).

(12) It is only the violation of Article 311 that would enable aggrieved officer to invoke jurisdiction of High Court under Article 226. (1961) 2 Andh WR 4 (9) (DB) ** ILR (1956) Punj 1213 (1224).

(13) In a proceeding under Article 226 High Court does not act as a Court of appeal over the decision of the authorities holding a departmental enquiry. AIR 1963 SC 1723 (1727) ** 1969 Lab IC 896 (898) = 35 Cut LT 391 (DB) (Orissa) ** 1963 6 FLR 26 (28) = (1963) 1 Lab LJ 708 (Cal) ** AIR 1963 Orissa 73 (76, 77) = ILR (1962) Cut 125 (DB).

(14) Even if the rule of Criminal trial that an offence should be proved beyond reasonable doubt is not applied in departmental enquiry, High Court in a petition under Article 226, is not competent to declare the order of authorities holding a departmental enquiry invalid, as the High Court is not a court of appeal over departmental decision. AIR 1963 SC 1723 (1726, 1727).

(15) Government servant dismissed from service for misbehaviour, gross indiscipline and insubordination — Validity of dismissal challenged — Duty of Court — Civil Courts in such cases do not sit in appeal from orders passed by Government in accordance with statutory provisions and the Constitution. 1966 Cur LJ 968 (980) (DB) (Punj).

(16) Jurisdiction of High Court, acting under Article 226, does not enable it to convert itself into Court of appeal and examine for itself correctness of decisions impugned. AIR 1961 Madh Pra 261 (263) = 1961 MPLJ 558 (DB).

(17) In a proceeding under Article 226 High Court is concerned only with the questions whether the enquiry was held by an authority competent in that behalf and according to the prescribed procedure and whether the principles of natural justice have not been violated. AIR 1963 SC 1723 (1727). (Writ Petn. No. 922 of 1956, D/-18-11-1959 (A. P.), Reversed.)

(18) High Court can consider under Article 226 propriety or validity of decision of enquiry officer. AIR 1961 SC 1623 (1629).

(19) In writ petition, High Court cannot substitute its own opinion for that of appointing authority as regards merits and suitability of a candidate. AIR 1958 J and K 40 (41) (DB).

(20) Departmental enquiry — Appreciation of evidence — Jurisdiction of High Court as to. AIR 1969 Manipur 36 (40) = 1969 Lab IC 561 ** AIR 1965 Mys 283 (284) = (1965) 1 Mys LJ 422 (DB) ** (1965) 1 Mys LJ 323 (328) = (1965) 2 Lab LJ 588 ** AIR 1962 Punj 289 (291) = 1962 Cur LJ 120 ** AIR 1961 All 284 (285).

(21) It is not within the scope of an inquiry under Article 226 to canvass the findings of fact of the disciplinary tribunal in a case against a public servant. AIR 1960 Andh Pra 15 (16) = (1969) 1 Lab LJ 560.

(22) The Court has no jurisdiction if the findings of the Enquiry officer or tribunal prima facie make out a case of misdemeanour to direct the authority to reconsider that order. AIR 1963 SC 779 (786). (AIR 1960 Orissa 68, Reversed.)

(23) It is not for High Court in petition under Article 226 to enquire into question as to reasonableness, adequacy or propriety of punishment. AIR 1961 Andh Pra 289 (292, 293) = (1960) 2 Lab LJ 285.

(24) If order of disciplinary authority is based on no evidence, certiorari will lie, without further proof of mala fides — But if based on any evidence, jurisdiction of High Court cannot be invoked to question its adequacy. AIR 1967 Orissa 49 (51, 52) = 7 O. J. D. 136 (DB).

[But see AIR 1960 Assam 141 (147) (DB).]

(25) Petition under Article 226 alleging order of suspension is mala fide — Petition alleging mala fide on the part of minister in charge — Counter affidavit filed not by minister but by departmental secretary hav-

Articles 310 and 311 — Note 133 (contd.) ing no personal knowledge regarding the allegations against the minister — Order set aside holding mala fides has been established. AIR 1964 SC 72 (81, 85). (AIR 1963 Punj 298, Reversed).

(26) It is not the function of the High Court in exercise of its jurisdiction under Article 226 to examine whether in a departmental enquiry the materials on record would be taken as sufficient by another authority to hold the Government servant guilty of the charges and whether the punishment was too severe in view of the fact that the charges dealt only with negligence in the discharge of duties and did not involve any element of corruption. These are matters to be considered by the superior officers of Government. AIR 1960 Orissa 26 (28, 29) = (1959) 1 OJD 550 (DB).

(27) Supreme Court is not a regular Court of appeal against orders of tribunals — Where there is no error of law or anything contrary to practice obtaining in industrial adjudication, Supreme Court would refuse to interfere with the scheme framed by Tribunal. AIR 1967 SC 948 (953, 962) = (1967) 1 SCR 652.

(28) Government servant challenging validity of a service rule — Proper remedy available is writ petition to High Court under Article 226 — Writ petition directly to Supreme Court under Article 32 not competent. AIR 1964 SC 1585 (1589) = 1964 (2) Cri LJ 481.

(29) Held on facts that High Court in the writ petition was not sitting as a Court of Appeal and could not go into correctness or otherwise of the grounds for refusal on the part of the Enquiry Officer. AIR 1962 Punj 355 (358) = 64 Pun LR 431.

(30) A public servant can file a suit in enforcement of his rights: (a) where there is a violation of constitutional rights, (b) where there is a violation of statutory provisions, (c) where there is a violation of rules of natural justice, but he cannot complain where constitutional and statutory provisions are complied with or in cases of termination of service, according to the terms of the contract even if an allegation of misconduct is specifically stated, provided the termination is on the terms and services of the contract — In these matters, the civil Court is not sitting in appeal over the decision of the departmental authorities. (1957) 2 Lab LJ 668 = 70 Mad LW 965 (969).

(31) In a writ petition it could not be urged that the Court was not entitled to look beyond the order of termination and find out what was its real substance and effect. The Court was entitled to examine whether the nature and incidents of the action resulting in the dismissal or removal from service were to be found in the

action of compulsory retirement. 1964-2 Mad LJ 78 = AIR 1964 Mad 243 (244 to 246) (DB).

(32) The Court, in exercise of its writ jurisdiction, cannot interfere with jurisdiction vested by statute in administrative agency — It is not proper for High Court to put itself in shoes of agency and consider whether particular decision is reasonable — But it is always entitled to look at surrounding circumstances, to consider whether decision in dispute is reasonable and will be prepared to revise it, if it is palpably unreasonable, that no reasonable authority could come to that decision. (1967) 2 Mad LJ 297 (301) = 80 Mad LW 572 (Mad).

(33) The content of an enquiry contemplated to be made under Section 33 of the Industrial Disputes Act before granting permission to terminate employment of a workman cannot be assimilated into the enquiry to be made by the Civil Court, when the public servant claims that he is denied the protection under Article 311 or that his employment has been terminated in violation of rules framed under Article 309. AIR 1963 SC 601 (604, 605) = (1963) Supp 1 SCR 266 = 1963 (1) Cri LJ 491.

(34) Where the order of dismissal of the Government servant is based in part at least on erroneous assumption of facts the High Court should exercise its jurisdiction under Article 226 to quash the order of the Government. AIR 1960 Mad 393 (394) = (1961) 1 Mad LJ 46 (DB).

(35) Disciplinary proceedings — Findings of enquiry authority — High Court has jurisdiction to question whether there is no evidence in support of findings. AIR 1966 Him Pra 13 (16).

(36) Where the entire proceeding is bad because the petitioner did not have an adequate opportunity of calling evidence or meeting evidence called, at original enquiry, the proper order to pass will be to set aside the findings and orders of enquiring officer as well as of Appellate Authority. (1956) 60 Cal WN 692 (702).

(37) It is not open to High Court to delve into motive of the action of authorities in terminating services of an employee, when such step by it, was justified under the relevant rules. AIR 1959 Assam 120 (123).

(38) Departmental enquiry against Sub-Inspector of Police resulting in termination of his probation — Proceedings not vitiated by any error of procedure — Order terminating probation not interfered with. AIR 1969 Mad 275 (280) = (1969) 1 Mad LJ 32 = 1969 Lab IC 826.

(39) High Court cannot go into factual merits of executive order or substitute it by its own. AIR 1965 Ker 108 (109) = 1964 Ker LJ 832 (DB).

(40) High Court has no power to interfere with administrative discretion of the Executive. AIR 1958 Madh Pra 135 (139, 140) (DB).

Articles 310 and 311 — Note 133 (contd.)

(41) Where conditions of service depend not upon statutory rules or contractual conditions but upon departmental instructions which are variable, such executive instructions are not statutory rules and writ of mandamus cannot be issued. AIR 1965 Cal 298 (301) = (1964) 9 Fac LR 71.

(42) Government servant who had appeared in test examination appointed to officiate in higher post — Test examination confers no right on him under any law or Rule — Order subsequently reverting him only an administrative order — No writ by way of certiorari or mandamus can be issued. ILR (1957) 1 All 278 (285).

(43) Railway employee ordered to retire according to earlier date of birth in his service register — Order is administrative — Mandamus and not certiorari is appropriate relief. AIR 1959 Mad 88 (88) = (1958) 2 Mad LJ 517 (DB).

(44) Where a Government servant is dismissed without giving him a reasonable opportunity to show cause against the action proposed, the order of dismissal being an administrative order, no writ of certiorari can be issued. The appropriate writ to issue would be that of mandamus. AIR 1961 All 122 (125) = 1960 All LJ 762.

(45) Where the Medical Board had not applied the standard prescribed by revised instructions for examination of direct recruits, mandamus was issued directing the Government to appoint a Medical Board for examination of the candidate. AIR 1958 Raj 242 (245) = ILR (1958) 8 Raj 37 (DB).

(46) Termination of service of Government servant — Petition for writ of mandamus — No demand for justice made — Petition held not maintainable. AIR 1958 Cal 654 (655) = 62 Cal WN 352.

(47) Grievance of petitioners that they were discriminated against when concession was shown to junior officers in the matter of promotion by the Government — Mandamus cannot be issued commanding authority to show indulgence as concession cannot be claimed as of right. AIR 1967 SC 993 (996) = (1967) 2 SCR 70.

(48) Mandamus, writ of — Person selected for one post transferred to another post — Other post lacking chances for promotion — Rights of such person are affected and writ can be issued in his favour. 1968 Lab IC 1377 (1381) = (1968) 1 Mad LJ 348.

(49) If an order of reversion to a substantive rank being a penalty or punishment amounts to reduction in rank in the circumstances of a particular case, non-compliance with Section 240 (3) Govt. of India Act (1935), or Article 311 (2) will justify the grant of mandamus. ILR (1957) 9 Assam 223 (234) (DB).

(49-A) Non-consideration for promotion of an employee otherwise qualified for consideration — Writ of mandamus can issue.

AIR 1970 Orissa 19 (21, 22) = 35 Cut LT 1209 (DB).

(50) Contention that compulsory retirement amounted to removal and opportunity to show cause was essential — Held that in view of definite pronouncement of Supreme Court that compulsory retirement is not dismissal or removal and that it does not attract Article 311, no question of interpretation of Constitution or any substantial question of law arose. 1955 Madh Bha LJ 1115 (1117).

(51) Where order removing a person from service is quashed by certiorari, it is not necessary to pass a further order directing his restoration to his former position. AIR 1956 Pat 257 (268) = 35 Pat 312 (DB).

(52) The petitioner asked for a declaration that he was entitled to subsistence allowance as promised in the suspension order — The fact that a suit for money would mean delay is no ground for granting a decree for money or a declaratory decree as above, in writ proceedings. AIR 1956 All 43 (45, 46).

(53) If Article 311 had been infringed in removing petitioner from service, High Court would direct Government to pass legal order after complying with the provisions of the Constitution. AIR 1954 Mad 1043 (1044).

(54) Although dismissal of a Government servant is only the exercise of administrative power, that does not preclude the applicability of Article 226 to such cases. AIR 1956 SC 285 (291) = 1955-2 SCR 1331 ** AIR 1957 Punj 42 (44, 45) = ILR (1957) Punj 198 (DB).

(55) The dismissal of a civil servant is an administrative matter — Order dismissing the petitioner's appeal, which is administrative in character, cannot be assailed on the ground that it does not disclose in detail the reasons for making it. AIR 1964 Madh Pra 114 (116) = (1964) MPLJ 86 = (1964) 8 Fac LR 210 (DB).

(56) Proceedings by way of departmental enquiry and punishment of a Government servant are in the nature of quasi-judicial proceedings. AIR 1955 Pat 372 (373) = 34 Pat 179 (DB) ** AIR 1954 Bhopal 25 (27) ** AIR 1954 Bom 361 (363) = ILR (1954) Bom 1271 ** AIR 1953 Cal 316 (318) = ILR (1952) 2 Cal 254 ** AIR 1953 Hyd 201 (202, 203) = ILR (1953) Hyd 155 (DB).

(57-58) The departmental enquiry by Tribunal constituted under Sec. 7 of Police Act, according to rules prescribed by U. P. State Govt. is of quasi-judicial nature, in respect of which writ of certiorari can issue. AIR 1958 All 607 (608) = 1958 All LJ 205 (DB).

(59) Departmental enquiry — Executive instructions regarding it are not mandatory but are regulatory — Breach of, does not become justiciable. AIR 1968 Punj 406 (412) = 1968 Lab IC 1173 = ILR (1969) 1 Punj 378.

Articles 310 and 311 — Note 133 (contd.)

(60) A writ application can be made even in respect of an order of suspension passed against a Government servant as a disciplinary measure where there appear to be no legal grounds for taking disciplinary action against him. AIR 1956 Mad 220 (222).

(61) Suspension of Government employee — Allegations found untenable — Reinstatement — Proceedings under Article 226 by employee for direction to pay arrears of salary — Writ allowed — Employee entitled to costs. AIR 1965 Cal 281 (282) = 68 Cal WN 1028.

(61-A) The question of sufficiency or otherwise of the evidence on the basis of which the order of suspension was passed is beyond the scope of writ petition under Article 226. AIR 1958 Ker 72 (74) = ILR (1958) Ker 131 (DB).

(62) Suspension — Madhya Bharat Civil Services (Punishment and Appeal) Rules, 1950 — Breach of — Is not by itself ground for interference with order of suspension — Rules are administrative orders. AIR 1959 Madh Pra 295 (297) = 1959 MPLJ 1168 (DB).

(63) Power to interfere — Interim order of suspension — Suspension order providing subsistence allowance — Order cannot be challenged in writ proceedings. 56 Pun LR 1227 (1229, 1230) = 1954 Cur LJ 489.

(64) High Court cannot go into question whether order of suspension was based on proper materials — Suspension does not amount to dismissal, discharge or reduction in rank — S. 126, Constitution of Jammu and Kashmir (1957) not attracted. AIR 1964 J. and K. 14 (16) = 1963 Kash LJ 125 (DB).

(65) Suspension order passed by person having no authority to do so — High Court would quash the order even though pending the writ petition an order by the proper authority is passed. AIR 1954 Pepsu 98 (Pr 27) = ILR (1954) Patiala 105.

(66) High Court can interfere with an order of suspension if it is malicious. ILR (1981) 11 Raj 892 (898) (DB).

(67) Suspension of Government servant — Not paid salary nor reinstated after quashing of order of suspension by High Court — Direction for payment of salaries due to him can be issued. AIR 1967 Pat 318 (319) = 1967 BLJR 552 (DB).

(68) Order of removal void as contravening Article 311 (2) — Though Government cannot be ordered to re-instate petitioner, it can be ordered to pass a legal order after complying with the provisions of the Constitution. AIR 1952 Sau 40 (43) (DB).

(69) A wrongful dismissal does not mean that Court will have to reinstate wrongfully dismissed person — Wrongfully dismissed person has to adopt the procedure laid down by statute (West Bengal Secondary Education Act) and ask for reinstatement from

statutory body which the statute has created and which the statute has expressly clothed with power of reinstatement — It is not for Civil Court to be the substitute for statutory body. (1966) 70 Cal WN 571 (577).

(70) A mere possibility of a threat of reversion in service may not normally justify the intervention of the High Court in a petition filed under Article 226 — But if the impugned order carries with it a real and substantial threat to the rights accrued to the petitioners, it is permissible for the Courts to interdict the trespass on such right. AIR 1969 Andh Pra 118 (120) = (1969) 1 Andh WR 85.

(71-72) In a writ petition against disciplinary action non-observance of service Rules is not a sufficient ground unless prejudice has been proved on account of that non-observance. AIR 1963 Manipur 28 (31).

(73) It cannot be said that the Bihar Government Servants' Conduct Rules are given retrospective effect nor is there any illegality in applying the rules against the public servant. AIR 1967 Pat 43 (48) = (1967) 2 Lab LJ 540 (DB).

(74) An order for the compulsory retirement of a police officer based on a wrong interpretation of the relevant rules can be quashed in proceedings under Article 226. AIR 1956 Pepsu 19 (26).

(75) In a petition under Article 226, against the reversion of the petitioner from his post, the Court is concerned only with the question whether there are irregularities in the enquiry which would vitiate it under Article 311 (2). AIR 1962 Tripura 15 (16).

(76) A mere irregularity which has not prejudiced the petitioner will not be a ground for interference by the High Court with an order terminating the services of the petitioner. AIR 1958 Andh Pra 240 (249) (DB) ** AIR 1956 All 476 (477) (DB) ** AIR 1956 Him Pra 71 (72).

(77) Irregularity in observance of rules in the matter of promotion — Aggrieved servant cannot have recourse to Court of Law. AIR 1962 Mad 485 (486) = (1962) 2 Mad LJ 140.

(78) Where the case involves disputed questions of fact which cannot be decided in summary proceedings, the petitioner will not be granted relief under Article 226. AIR 1957 J & K 1 (3) ** AIR 1954 Pepsu 98 (103) = ILR (1954) Patiala 105 ** AIR 1952 Cal 610 (614) ** AIR 1959 J. and K 136 (137).

(79) Where the petitioner is guilty of suppressing material facts, he will not be entitled to relief in a writ application. AIR 1956 Tripura 33 (35) ** AIR 1954 Pepsu 98 (102) = ILR (1954) Patiala 105.

(80) The mere fact that the aggrieved Government servant has another remedy open to him, as for instance, by a regular suit or by recourse to higher authorities departmentally, is no bar to the entertain-

Articles 310 and 311 — Note 133 (contd.)
 ment of his application under Article 226.
 AIR 1958 J & K 11 (13) (FB) ** AIR
 1956 Andhra 203 (208) ** AIR 1956 Cal
 662 (668) ** AIR 1956 Trav-Co 35 (41,
 42) ** AIR 1955 Hyd 48 (54) = ILR (1955)
 Hyd 152 (DB).

(81) Order compulsorily retiring Govern-
 ment servant — No violation of Article 311
 (2) — Other remedies open to Govt. servant
 to vindicate his rights if he was aggrieved
 by order — Not proper case for exercise of
 jurisdiction under Article 226. (1960) 2
 Lab LJ 464 (467) (Andh Pra) (DB).

(82) Wrongful dismissal — Action by way
 of suit not pursued — Writ petition may
 be refused. AIR 1960 All 647 (648, 650).

(83) Petition for writ against order of dis-
 missal — Though Court should take into
 consideration the fact that the petitioner
 could have instituted a suit it should not
 throw out a petition where it has been pend-
 ing for a long time on the ground that
 remedy by way of a suit was open to him.
 AIR 1958 All 584 (587) (DB).

(84) In a writ application against an order
 of dismissal, removal or reduction in rank,
 the High Court is not concerned with the
 merits of the order. AIR 1957 Orissa 21
 (23) (DB) ** AIR 1956 Orissa 99 (102) =
 ILR (1956) Cut 29 (DB) ** AIR 1955 Hyd
 48 (51) = ILR (1955) Hyd 152 (DB) **
 AIR 1955 Punj 3 (4) ** AIR 1954 All 487
 (489) (DB) ** AIR 1952 Bom 37 (42, 43) =
 ILR (1952) Bom 269 (DB).

(85) Misreading of administrative instruc-
 tions — Causing prejudice — Writ petition
 maintainable. AIR 1969 Punj 257 (269) =
 1969 Lab IC 958 = ILR (1969) 1 Punj 103.

(86) Departmental proceeding against
 public servant — Mere suspicion should not
 take place of proof. 1969 Lab IC 896 (898)
 (Orissa) = 35 Cut LT 391.

(87) Any statutory rule relating to ser-
 vices which is otherwise enforceable can be
 enforced in a Court of law, including a
 proceeding under Article 226. 1968 Lab
 IC 731 (733, 734) = 71 Cal WN 205.

(88) The question of violation of any rules
 or statute enacted under Article 309 regulat-
 ing the conditions of service of such ser-
 vants of the State as are not protected by
 Article 311 would be a justiciable matter.
 ILR (1966) 2 Punj 305 (310) (FB).

(89-90) Reversion of Government servant,
 deputed to other department, to parent de-
 partment — Service Rule relating to fixation
 of pay on reversion — Claim under such
 rule is justiciable right in respect of which
 relief is obtainable under Article 226. AIR
 1961 Mys 88 (98) = 39 Mys LJ 1 (FB).
 (R. A. No. 128 of 1957 (Mys), (Overruled.)

(91) Doctrine of President's pleasure —
 Departmental inquiry against person hold-
 ing civil post connected with defence —
 Non-compliance with service rules under
 Article 309 — Non-compliance would be
 justiciable — Writ petition can lie. AIR

1968 Punj 312 (319) = 1968 Lab IC 967 =
 ILR (1957) 1 Punj 649 (FB). (AIR 1937 PC
 27 and AIR 1937 PC 31 held no longer
 good law, AIR 1953 Punj 137, AIR 1955
 Punj 166, AIR 1956 Punj 42 and (1957)
 59 Punj LR 472 and S. A. No. 43-D of 1956,
 D/- 23-5-1961 (Punj), Overruled in view of
 AIR 1961 SC 751.)

(92) Departmental enquiry — Departmen-
 tal authority is not bound by conclusions
 reached by enquiry Committee — Conclu-
 sion of disciplinary authority supported by
 evidence and one which could have been
 reached by reasonable man — High Court
 in certiorari jurisdiction would not interfere
 with that conclusion. AIR 1969 SC 966
 (968) = 1969 Lab IC 1368 = (1969) 2 SCJ
 513. (AIR 1963 Punj 336, Reversed.)

(93) Service agreement — Employee gov-
 erned by State Bank of India (Sub-account-
 ants and Head Cashiers) Service Rules,
 1959 — Termination of service under
 rules — Writ petition — Alternative re-
 medy by way of suit is no bar. AIR 1964
 Mad 335 (345, 346) = (1963) 2 Lab LJ
 304.

(94) Dismissal of Government servant not
 for "substantial misdemeanours" but for
 minor irregularities — Court will interfere.
 AIR 1965 Mad 502 (505, 506) = (1965) 2
 Mad LJ 90.

(95) Temporary employee complaining of
 wrongful dismissal must approach under
 Article 226 without delay. AIR 1963 Cal
 421 (423) = (1963) 2 Lab LJ 569.

(96) Inquiry held was vitiated be-
 cause Government servant was found
 guilty of charge different from what
 he was originally charged with — Inquiry
 Report and order of removal from service
 quashed without prejudice to fresh inquiry
 being held. (1966) 12 Fac LR 120 (122)
 (Cal).

(97) The guarantee provided in Art. 311
 does not refer only to procedural aspect of
 matter. In a case where the Government
 have no cause of complaint against peti-
 tioner in so far as discharge of his duties
 is concerned, Government cannot take note
 of matters unconnected with such official
 duties in imposing any punishment in rela-
 tion thereto. 1963 (1) Lab LJ 512 (515)
 (Mad).

(98) Reversion only not indicating whe-
 ther it was in usual course or by way of
 punishment — Court can examine substance
 and real nature of order. AIR 1966 Pat
 364 (366, 367) = 1966 BLJR 480 (DB).

(99) Any notice issued to a Government
 servant concerned to show cause why the
 confirmation order should not be cancelled
 is invalid and without jurisdiction and
 calls for interference under Article 226.
 AIR 1968 Assam 18 (19) = 1968 Lab IC
 919 (DB).

(100) Formal enquiry against officiating
 Government servant — Reversion of such
 officer without enabling him to defend him-
 self — It leaves a stigma against his service

Articles 310 and 311 — Note 133 (contd.)
— Order of reversion must be quashed under Article 226. ILR (1969) 1 Punj 499 (504, 505, 506) = 1969 Serv LR 732 (DB).

(101) Complaints as to service conditions — Not amenable to judicial review under Article 226. AIR 1960 Ker 82 (83) = 1959 Ker LT 492.

(102) Whether disciplinary authority is correct or not in appreciating evidence is not open to question in writ proceedings. (1966) 79 Mad LW 428 (434) = ILR (1965) Mad 508.

(103) Where the case of petitioner is not that, there was no evidence or that the order was mala fide, jurisdiction of High Court under Article 226 would not be attracted by his raising the question of sufficiency of evidence. AIR 1959 Ker 201 (202) = 1959 Ker LT 137 (DB).

(104) Petition under Article 226 by dismissed civil servant for quashing order of dismissal on ground of irregularities and for injunction — Proper remedy held was by way of suit. AIR 1956 Bom 351 (352).

(105) Public servant has no right to promotion or to claim seniority in his grade or cadre — Article 311 (2) has no application to such a case — Writ does not lie for enforcing such right or claim. AIR 1968 Cal 35 (37, 38) = (1969) 1 Lab LJ 45 ** 1969 Lab IC 56 (57, 58) = 70 Pun LR 684.

(106) Satisfaction of President — Is not justiciable. (1967) 2 Lab LJ 767 (771) = 1967 All LJ 645.

(107) Selection Post — Promotion on ground of seniority — Matter not justiciable in writ petition. AIR 1961 All 316 (319).

(108) Seniority is a matter of administrative nature depending on rules which have been framed by government under Art. 309 — Question of seniority is a matter which is not justiciable in court of law, much less in writ petition. AIR 1961 All 316 (318).

(109) Railway servant — Reduction in rank by way of seniority — Such order was not as and by way of punishment — Order held not justiciable. AIR 1959 Mad 68 (71) = 71 Mad LW 750 (DB).

(110) Order of dismissal of police constable passed after enquiry — Mere fact that he was exonerated by Deputy Inspector-General of Police of three charges and found guilty on fourth charge alone, held, not sufficient to set aside order. (1966) 68 Pun LR 874.

(111) Departmental proceedings — Order of discharge — Revision against the order — Revising Authority passing a cryptic order is no ground to set it aside in writ proceedings. AIR 1967 Pat 133 (135, 137) = (1968) 1 Lab LJ 703 (DB).

(112) Issue of second show cause notice under Article 311 (2) by competent authority — No absence of or usurpation or excess of jurisdiction — Writ of prohibition will

not issue on ground that findings in preliminary enquiry were not supported by evidence. (1965) 2 Lab LJ 645 (648, 654) = (1966) 7 Guj LR 56.

(113) Where the grievance is that the services of a Government servant have been terminated contrary to the terms of a contract of service, the proper remedy will not be by a writ application under Article 226, but by means of a suit. AIR 1956 Cal 532 (537) ** AIR 1954 Cal 561 (563) ** (1966) 2 Lab LJ 814 (820, 821) = 1967 Mah LJ 192.

(114) Orissa Welfare Officers (Recruitment and Conditions of Service) Rules, 1951, Rule 6 — Dismissal of Welfare Officer on ground of disobedience of superior authority — Order supported by materials on record — Held, no error apparent on face of record — Order cannot be interfered with under Article 226. AIR 1967 Orissa 26 (28, 29) = (1965) 1 Lab LJ 349 (DB).

(115) The posting of an officer is a matter entirely within the discretion of the Government and is not justiciable. AIR 1953 Nag 138 (140) = ILR (1953) Nag 522 (DB).

(116) The authority to decide whether a ministerial officer continues to be efficient is the appointing authority. It will not be proper for the High Court in exercise of its extraordinary jurisdiction under Art. 226 to sit in judgment over the opinion of the appointing authority. AIR 1958 Orissa 202 (203) = 24 Cut LT 237 (DB).

(117) Ground of misdemeanour entailing dismissal made out — Court will not enquire whether there was violation of rule of natural justice, in respect of other finding. AIR 1967 Orissa 26 (28, 29) = (1965) 1 Lab LJ 349.

(118) Removal of Travelling Ticket Examiner for neglect of duty and for deliberately undercharging marriage party — Second charge not proved — Held, it could not be said that competent authority would have inflicted punishment of removal for first charge and therefore order of removal could not be quashed. 1968 Raj LW 272 (286) = (1969) 1 Lab LJ 382.

(119) High Court will not upset findings of Enquiry Officers in departmental inquiry if it finds that the Enquiry Officer has acted within his jurisdiction and given reasonable opportunity to petitioners to defend himself. AIR 1960 Punj 646 (652) (DB).

(120) Transfer of School teacher controlled by Municipality — Reduction in rank not established — Writ will not be issued — Courts are not meant for issuing writs only at the choice and whims of parties 1969 Lab IC 900 (903) (Pat) (DB).

(121) Rajasthan Medical Service (Collegiate Branch), Rules (1956), Rule 30 (4) (as amended on 22nd August, 1966) — Recruitment under — No provision for reference to Public Service Commission for conti-

Articles 310 and 311 — Note 133 (contd.)
 nuation of appointment for more than six months — Relief under Articles 226 or 32 is not available. 1968 Lab IC 1605 (1622) = 1969 Raj LW 47.

(122) Dismissal of railway servant — Order of appellate Tribunal cryptic but the appellate authority showing in proceedings under Article 226 that it had considered all material in support of original order and this position is not controverted, the cryptic order by itself is not sufficient ground for interference. AIR 1966 Pat 205 (209) = 1966 BLJR 188 (FB).

(123) Transfer of non-gazetted railway servant from one department to another by Chief Commercial Superintendent — Question about transfer of official is primarily for authorities concerned and it is not for High Court in petition under Article 226 to adjudicate about advisability or propriety of transfer — High Court can interfere only if transfer is violative of any legal provision or is otherwise mala fide. AIR 1967 Punj 76 (79) = (1969) 2 Lab LJ 247.

(124) Transfer of Government servant challenged on grounds of mala fides — Mala fides not proved — High Court refused to exercise powers under Article 226 and quash the order of transfer. AIR 1965 Punj 455 (456, 457).

(125) Where punishment or dismissal is not contrary to rules High Court cannot interfere with the same merely because it appears to be too severe. (1968) 2 Mad LJ 226 (229) = (1968) 2 Lab LJ 804 ** 1967 BLJR 344 = AIR 1967 Pat 347 (350) (DB).

(126) Final order of dismissal not passed — Writ cannot be issued at the stage of enquiry. AIR 1962 All 166 (174).

(127) Municipal employee — Dismissal on account of mala fide conduct — Charge sheet issued and explanation called for — Enquiry held in his presence — High Court refused to exercise jurisdiction under Article 226. AIR 1958 Bom 260 (262) = 1958 Nag LJ 589 (DB).

(128) Petition for issue of writ of mandamus directing Electricity Board not to fill posts of Accountants by direct recruitment and to promote employees who are deputed from State Government for working in Board — Petitioners having no vested legal rights on date of filing petition for being appointed as Accountants — Held writ could not be issued. AIR 1969 Andh Pra 328 (334) = 1969 Lab IC 1080 = (1969) 1 Andh WR 551 (DB).

(129) Reversion of employee consequent to abolition of post held by him on purely temporary basis — Reversion neither was by way of punishment nor entailing penalty — Employee having no right to post, held had no cause of action to file writ petition. 1969 Lab IC 1435 (1437) = 1969 Serv. LR 504 (Punj).

(130) Not applicable to enforce contract of service with Government which is still

subsisting — Whatever the grievance of the employee he must seek his remedy under general law and not under Article 226 in the absence of any statutory right or liability even where the contract is with the Government. AIR 1969 Cal 95 (104) = 1969 Lab IC 142 = 17 Fac LR 50.

(131) Managing Committee of school granting compulsory leave to teacher and debarring him from coming to school pending decision of committee — Committee superseded by ad hoc committee — Order of termination of service passed by ad hoc committee as per contract of service — No inference held could be drawn that ad hoc committee was actuated by malice — Not a case for interference under Art. 226 AIR 1959 Tripura 27 (32).

(132) Wrongful dismissal or termination of service — Proper writ is writ of certiorari — Certiorari is limited to the quashing of the impugned order — Writ cannot be issued to compel reinstatement to post indicated. AIR 1959 Tripura 27 (29).

(133) Two courses open to appointing authority in respect of Government servant appointed in temporary service — Appointing authority deciding to terminate service — Court will not interfere. AIR 1963 Tripura 38 (42).

(134) Tribunal suggesting compulsory retirement as punishment — Recommendation accepted — It is not for High Court in petition under Article 226 to enquire into question as to reasonableness, adequacy or propriety of punishment. AIR 1961 Andh Pra 289 (292, 293) = (1960) 2 Lab LJ 285.

(135) Termination of contract of service — Proper inquiry held observing rules of natural justice — Interference with order not possible unless the plea that the authority concerned acted maliciously or for a collateral purpose is made out. AIR 1968 SC 292 (300) = (1968) 1 SCR 434.

(136) Railway servant — Appointment subject to character and antecedents being verified by civil authorities — Service terminated on receipt of unsatisfactory report — High Court will not interfere. AIR 1958 Cal 654 (656) = 62 Cal WN 352.

(137) Where the Government officer has only been asked to take leave preparatory to retirement which he has accordingly done, there is no order dispensing with the services of the officer. To such a case Article 311 does not apply and there is no basis for an application under Article 226. AIR 1952 Trav-Co 409 (411) (DB).

(138) In considering whether a public Officer is guilty of misconduct charged against him, rule followed in criminal trials that an offence is not established beyond reasonable doubt to the satisfaction of Court does not apply and even if that rule is not applied, High Court in a petition under Article 226, is not competent to declare the order of the authorities hold-

Articles 310 & 311 — Note 133 (contd.)
ing departmental enquiry invalid. AIR 1968 SC 1723 (1727).

(139) Where an employee of a co-operative society is dismissed by the Secretary, no writ can issue against the Registrar, Co-operative Societies, or the State Government. AIR 1956 All 43 (46).

(140) Remarks by superior officer in service book of subordinate officer — Writ for their expungement will not be issued. AIR 1961 Cal 164 (165) = 64 Cal WN 857.

(141) A company registered under the Companies Act cannot be said to be either a public body or a 'public authority' merely because the Central Government exercises quite an extensive control over the affairs of the company. Hence an employee of such a company cannot be called a 'civil servant' governed by Article 311. The employee of the company, on being dismissed is not entitled to get relief under Art. 226. (1964) 72 Cal WN 398 = 38 Com Cas 500.

(142) Domestic tribunal functioning within letter and spirit of law — No interference with its decision. AIR 1959 Tripura 27 (32).

(143) Domestic enquiry against an employee — Court not to appraise the evidence and substitute its findings for that of inquiring officer. AIR 1968 Delhi 269 (271) = 1968 Lab IC 402.

(144) Objection to jurisdiction of Anti-Corruption Commission can be raised for first time in writ petition which can be filed before the Commission passed its final order. AIR 1967 J and K 98 (102) = 1967 Kash LJ 368 (FB).

(145) Dismissal of servant by master, after due notice — Dismissal is not justiciable — No writ lies. AIR 1968 Kerala 72 (73, 74) = 1968 Lab IC 349 = 1969 Kerala LR 308.

(146) Central Civil Services (Temporary Service) Rules, 1949, Rule 3 — In view of Rule 3 the Judicial Commissioner's Court cannot take the place of the appointing authority and, in a writ petition under Article 226 go into the question of the suitability of the servant in regard to age, qualifications, work and character. AIR 1963 Tripura 38 (41).

(147) Findings of Enquiring Officer or Tribunal making out a prima facie case against the delinquent — High Court has no jurisdiction to direct that authority to reconsider its order on the ground that in respect of some of its findings, but not all, there appeared to be violation of rules of natural justice. AIR 1964 Orissa 241 (246) = (1965) 7 Ori JD 147 (DB).

(148) Order of reversion of civil servant from officiating post to substantive post — Petition challenging validity of order filed nearly after seven years — Refusal to entertain held justifiable. AIR 1970 SC 364 (365) = 1969 Serv LR 839 ** AIR 1958 Punj 16 (17) ** AIR 1956 Pat 23 (26) **

AIR 1956 Pepsu 19 (21) ** AIR 1960 Madh Pra 299 (300, 301) = 1960 MPLJ 892 (DB).

(149) Where the delay has been explained by the fact that the applicant was pursuing his remedies by way of appeals, petitions, etc., to departmental authorities and executive heads, the application cannot be thrown out on the ground of delay. AIR 1958 J and K 11 (13) (FB) ** AIR 1954 Bhopal 25 (27) ** AIR 1961 All 338 (340) (DB). (Employee proceeding against order departmentally and filing writ petition within 3 months of last order — Petition is not belated and is within time. Writ Petn. D/-5-3-1958 (All), Reversed.)

(150) Court will attach importance to the question whether the objection on the ground of delay has been taken by the State in its return to the application, or whether the State has been prejudiced by such delay. AIR 1956 Sau 14 (16) (DB) ** AIR 1956 Trav-Co 35 (41).

(151) Dismissal of Civil Servant — Charges serious — Legal position difficult, legal advice necessary — Delay in filing writ was excusable. AIR 1969 Cal 164 (166) = 1969 Lab IC 406.

(152) Writ petition — Filing of — Delay — Transfer of petitioner's services from Government to University — Petitioner filing writ petition after making representation to Government — No laches on his part. 1969 Lab IC 730 (738) = (1968) 2 Mys LJ 479 (DB).

(153) A writ can issue even though the officer who passed the dismissal order has left the office and some other officer has been appointed to the post. AIR 1956 Pat 257 (268) = 35 Pat 312.

(154) Where an order of dismissal passed by an inferior authority is confirmed on revision or in appeal, by a superior authority resident outside the jurisdiction of the High Court, the High Court will have jurisdiction to interfere. 1954 Raj LW 520 (521) (DB).

(155) Certiorari — Territorial jurisdiction — Executive orders — Dismissal of Government servant confirmed in appeal — Doctrine of merger not applicable — Punishing authority amenable to territorial jurisdiction of High Court while appellate authority functioning and residing outside the jurisdiction — Original order of dismissal can be examined. (1961) 3 Fac LR 25 (29) (All).

(156) Suspension of District Judge on charges of corruption — Order of suspension issued by Chief Justice — Not necessary to make High Court party to writ proceedings initiated by aggrieved party. AIR 1967 J. K. 98 (102) = 1967 Kash LJ 368 (FB).

(157) Territorial jurisdiction — Petitioner, an employee of Durgapur Steel Project under Hindustan Steel Limited, dismissed without assigning any cause — Petition under Article 226 for violation of Article 311 and Rules of natural justice — Union of

Articles 310 & 311 — Note 133 (contd.)
India represented by Secretary, Ministry of Iron and Steel, New Delhi, Secretary Hindustan Steel Limited of Ranchi and General Manager, Durgapur Steel Project made respondents — First two respondents being outside jurisdiction of Calcutta High Court, petition is not maintainable in Calcutta High Court — Fact that third respondent is within jurisdiction does not help the petitioner. AIR 1963 Cal 421 (423) = (1963) 2 Lab LJ 569.

(158) Petition to quash reversion order — Legal representatives of petitioner brought on record after his death — Reversion order being void as offending Article 311 — Legal representatives held entitled to prayer sought. AIR 1968 Guj 202 (208, 209, 210) = 8 Guj LR 793 (DB).

(159) Bombay Reorganisation Act (1960), Sections 61, 81, 82 — Civil servant serving in Bombay State at Rajkot illegally dismissed in violation of Article 311 (2) — Writ petition against dismissal — Petition does not lie in Gujarat High Court. AIR 1964 Guj 1 (4, 5, 6, 7, 8, 9) = (1963) 4 Guj LR 571 (FB).

(160) Decision in writ petition — Operates as res judicata in subsequent suit. AIR 1965 Punj 342 (346) = 1965 Cur LJ 104 (DB).

(161) Dismissal of Writ petition against order of dismissal — Subsequent suit challenging dismissal — Decision on points raised in writ will act as res judicata — Suit can be based on new points. AIR 1969 All 466 (468).

(162) Application under Article 226, dismissed on ground of availability of remedy by way of suit — Observations that provisions of Article 311 were observed — Remarks that merits of case not entered into — Decision is not res judicata in subsequent suit. AIR 1958 Madh Pra 326 (328) = 1959 MPLJ 128.

(163) Suit by employee of Cantonment Board that his dismissal is inoperative and void because he was not given adequate opportunity to defend himself against the charge, is maintainable. AIR 1961 Punj 460 (462) = 63 Punj LR 407.

(164) Writ petition challenging order of reversion on ground of discrimination — Persons likely to be affected by order of Court not made parties to petition — Petition is incompetent. 1969 Lab IC 1435 (1436) = 1969 Serv LR 504 (Punj).

(165) Where a suspension order is made by the Financial Adviser and the Chief Accounts Officer, Northern Railways, the question whether he was justified in making that order cannot be gone into by the Allahabad High Court in a proceeding under Article 226 if the Financial Adviser and Chief Accounts Officer was not made a party to the proceeding. AIR 1957 All 671 (676) (DB).

(166) Termination of service of temporary Government servant — Finding that termi-

nation amounts to dismissal from service so as to attract Article 311 (2) arrived at following test laid down in Supreme Court decision — Case held involved no substantial question of law relating to interpretation of Article 311 (2) — Case involved at best further interpretation of Supreme Court decision for which no certificate under Article 132 (1) could be granted. AIR 1961 Tripura 27 (29).

(167) Government of India Act (1935), Section 240 — Contravention of Sec. 240 — Person aggrieved is entitled to suitable remedy at hands of Court. ILR (1954) Cut 684 (DB).

(168) In case of contravention of provisions of Sections 240, 241 of the Govt. of India Act 1935, the person aggrieved is entitled to suitable remedy at the hands of Court. ILR (1954) Cut 684 (703, 704) (DB).

(169) Functions of an Enquiry Committee appointed to conduct departmental enquiry into the misconduct of railway servants are not quasi-judicial but administrative. Unless final orders are passed on the basis of the report of the Enquiry Committee, application for certiorari to quash proceedings is premature. AIR 1963 Pat 38 (44, 45) (DB).

(170) If, in an application under Article 226, it is found that some of the charges against a public servant are untenable either due to failure to comply with rules of natural justice or for some other reason, nevertheless, the High Court has no jurisdiction to remand the case for reconsideration by the competent authority. (1964) 6 Orissa JD 107 (114, 115) (DB).

(171) Writ petition by Government servant challenging order of dismissal from service based on report of enquiry officer — Personal allegations against enquiry officer made in petition — No specific denial of allegation in counter affidavit nor any affidavit denying allegations filed by enquiry officer — Held allegations must be accepted as true though enquiry officer was not specifically made party to petition. 1968 Lab IC 1268 (1273) (Tripura).

(172) Civil servant — Punishment given according to civil service rules but not having statutory and constitutional protection cannot form basis of action in Civil Court. ILR (1956) Punj 1213 (1223).

(173) Assam Education Department Rules and Orders are administrative Rules — No scope for issue of any writ in regard to these Rules. ILR (1966) 18 Assam 98 (104) (DB).

(174) Parliament and State Legislatures can make a law laying down and regulating scope and extent of the doctrine of 'reasonable opportunity' embodied in Article 311 but said law would be subject to judicial review. AIR 1961 SC 751 (761) = 1961 (1) Cri LJ 773 = (1961) 2 SCR 679.

Articles 310 & 311 (contd.)

134. Equality clauses in the Constitution. — (1) Although the State Government has power to make a law altering unilaterally the conditions of service of a Government servant such law should not be repugnant to Art. 311 or Art. 14 or Art. 16 of the Constitution. 1969 Lab IC 730 (737) = (1968) 2 Mys LJ 479 = 16 Law Rep 563 (DB).

(2) A rule prescribing a language qualification for entry into State Service does not offend Article 15 or 16 and is not invalid on that account. AIR 1955 Orissa 113 (115) = ILR (1955) Cut 510 (DB).

(3) The selection of persons for retrenchment is principally a subjective matter and does not violate Article 16. AIR 1955 Nag 289 (290) = ILR (1955) Nag 800 (DB) ** AIR 1952 Trav-Co 7 (10).

[See however AIR 1957 Pat 617 (622, 629) = 35 Pat 1.]

(4) Equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State is confined not only to the initial appointments but includes also the terms and conditions of service as well as promotion to selection posts. AIR 1968 Punj 436 (439) = 70 Pun LR 590 ** 69 Pun LR 194 (202) ** AIR 1961 Ker 203 (206) = 1960 KLT 1179 (DB).

(5) The guarantee under Article 16 extends to every employment whether permanent or temporary. All along during the continuance of employment every citizen is assured of that equality of opportunity and the same principle must govern the case when the appointment or employment is sought to be terminated. AIR 1959 Bom 134 (139) = 60 Bom LR 342 (DB). (Reversed in AIR 1962 SC 630 on another point.) ** AIR 1959 All 134.

(6) There is nothing in the rules for the Recruitment of Ministerial Staff which would take away the discretion of Government to appoint to a selection post any member of the Staff when it considers fit to hold that post. An employee having accepted an officiating chance, cannot, complain on his being reverted to substantive post that his rights have been infringed. ILR (1966) 2 All 42 (47, 49) (DB).

(7) All employees in the same time scale performing the same or similar duties are certainly entitled to the protection guaranteed by Article 16 and some of them cannot at the sweet will of the Government be discriminated against inter se, in the matters of their service, without their consent. 69 Pun LR 194 (204) = 1967 Cur LJ 89.

(8) Government servants — Proposal to raise scales of pay — Imposition of test for qualifying servants to higher scale in one section while exempting servants in other section of same department — Working in section subject to test more difficult but offering better chances than working in other section — Action of Government held

not discriminatory. AIR 1960 All 484 (499, 500).

(9) Article 16 clause (1) does not apply to compulsory retirement, as such retirement is not "employment" or "appointment" to any office. AIR 1954 All 343 (347) (DB).

(10) Rule 285 of Mysore Civil Services Rules 1958 under which Government is entitled in public interest to retire Government servant prematurely is not open to challenge under Article 14 or 16 (1) — AIR 1965 SC 280 (282) = (1967) 2 Lab LJ 246 = 15 Fac LR 224.

(11) Termination of services of one of temporary Government employees — Article 16 is not violated — There is no denial of equal opportunity of employment merely because he was selected for termination of services. (1961) 2 Guj LR 268 (270).

(12) Termination of services of temporary employee while retaining his juniors in service — The termination would be hit by Article 16 if it is necessitated by exigencies of services. 1968 All LJ 735 (737) = 1968 All WR (HC) 834.

(13) There is no violation of Article 14 in the termination of the service of a Government servant after notice in accordance with the contract of service. AIR 1953 SC 250 (252) = 1953 SCR 655 ** AIR 1955 All 496 (499) = ILR (1956) 2 All 627.

(14) Discrimination in the matter of confirmation of servants similarly situated is violative of Art. 14 and Article 311 is attracted. AIR 1968 Manipur 58 (62, 63) = 1968 Lab IC 1065.

(15) A provision, empowering Government in its absolute discretion to compulsorily retire any person who has put in twenty-five years of service, is not ultra vires under Article 14, as that article does not control Article 310, Clause (1). AIR 1954 All 343 (348) (DB).

(16) Compulsory retirement — Memorandum issued by Govt. as general order raising retirement age to 58 years — Provision prescribing compulsory retirement after the Government servant has completed 55 years of age but without assigning any reason — Provision offends Article 14 but not Article 311 (2). AIR 1970 Assam 1 (5, 10) = 1970 Lab IC 11 = (1969) Assam LR 99 (FB).

(17) The selection of a person for promotion to a higher appointment, which under the rules has to be made on the basis of merit and ability, and not merely of seniority, cannot involve any infringement of the provisions of Article 14. AIR 1957 J and K 29 (30) (FB).

(18) Submission of names of some appointees only to the Public Service Commission for regularisation of appointments — Others reverted on the ground of their appointments not having been regularised — Order is discriminatory and must be quashed — Case is governed by Article 14 and Articles 310 and 311 have no applica-

Articles 310 & 311 — Note 134 (contd.)
tion. AIR 1962 Ker 29 (30) = 1960 K. LT 929.

(19) The general principle that all employment under the Union or State is *durante bene placito* does not in the least militate against constitutional prohibition in Art. 16 that there shall be no arbitrary discrimination between one citizen and another in matters of service. AIR 1959 Bom 134 (138) = 60 Bom LR 342 (DB). (Reversed in AIR 1962 SC 630 on another point.)

(20) The provisions of Articles 310 and 311 are not immune from the equality clauses of the Constitution and the termination of service even of a temporary employee by arbitrarily picking him out for such termination would be void under Article 16. AIR 1959 Bom 134 (137, 138) = ILR (1958) Bom 1266 (DB).

(21) The applicability of Article 14 cannot be excluded on the ground that Article 310 is a special provision dealing with special or particular matter and Article 14 is a general provision. AIR 1960 All 484 (489, 499) = ILR (1959) 2 All 33.

(22) Executive order of Government — Refusal to pay arrears according to re-fixation of salary of Government servant — Government servant can invoke Article 14 and challenge order under Article 226 on ground of discrimination. AIR 1959 Ker 338 (339, 340) = 1958 Ker LT 1122.

(23) Merely because the enquiry is held not under the Public Servants (Inquiries) Act, 1850, which only applies to officers who are not removable without the sanction of the Government but under the rules of the particular State, does not mean that there is any violation of the equality clause. AIR 1955 Punj 1 (3).

(24) There is no infringement of Article 14 involved in the fact that the Public Servants (Inquiries) Act, 1850, which is a Central Act, is applicable only to servants who cannot be dismissed without the sanction of the Government, while there is another set of rules applicable to subordinate services. AIR 1955 Punj 3 (4).

(25) Enquiry against dismissed Officer — Pepsu Public Servants (Inquiries) Ordinance (2006 B. K.) — Applicability — Ordinance applies only when Government holds public inquiry against dismissed Officer and not to departmental inquiry — Government has option to hold either of the inquiries — Departmental inquiry is governed by Pepsu Services Regulations — Latter provisions do not contravene provisions of Article 14. AIR 1960 Punj 646 (652) (DB).

(26) Scope — Judicial Officer, in service of State — Proceedings started against officer under Travancore Public Servants (Inquiries) Act, 1122 — Proceedings not started against him under Kerala Civil Services (Classification, Control and Appeal) Rules 1957, though these rules were in existence — Though procedures in such proceedings

slightly differ, still guarantee given under Art. 311 (2) is not discriminatory. AIR 1963 Ker 92 (97, 98.)

(27) Police services — Enquiry against police officer commenced before the Constitution but completed after the Constitution — Order of dismissal is not invalid under Article 14 where the substance of the special procedure followed after the Constitution is the same as in a trial by normal procedure. AIR 1961 SC 1245 (1253, 1254) = (1962) 1 SCR 151.

(28) Madras Police Subordinate Service (Discipline and Appeal) Rules 1950, Rules 3 (b), 2 and 5 — Madras Civil Services (Disciplinary Proceedings Tribunal) Rules 1948, Rule 8 — Enquiry against Police Officer — Procedure to be followed under Police Rules as well as under Tribunal Rules is substantially same and satisfies requirements of natural justice — No discriminatory treatment. AIR 1965 SC 1103 (1107) = (1965) 2 SCJ 662.

(29) With repeal of Sec. 243 of Government of India Act, provisions of Article 311 of Constitution which is a substitute for S. 240 of Government of India Act, 1935 are made applicable to members of Subordinate Police force — Rules under U. P. Regulations are not discriminatory. AIR 1959 All 569 (571) = 1959 All LJ 96.

(30) U. P. Disciplinary Proceedings (Administrative Tribunal) Rules (1947), R. 8 — Procedure for trial under — Not more onerous or less favourable than that under Civil Service Rules. AIR 1960 All 754 (759).

(31) Proceeding started in 1947 against Sub-Inspector of Police for enquiry into alleged misdemeanour — Procedure, either under U. P. Disciplinary Proceedings (Administrative Tribunal) Rules, 1947 or under U. P. Police Regulations open to authorities, at a time when Article 14 was not in force — Writ petition by Sub-Inspector after Constitution — He cannot challenge validity of enquiry on the plea of equal protection of the laws. AIR 1961 SC 1245 (1251).

(32) Enquiry for misdemeanour — Two sets of rules under which enquiry could be ordered — Disciplinary Proceedings (Administrative Tribunal) Rules (1951) and Bihar and Orissa Subordinate Services Discipline and Appeal Rules (1935) — Enquiry held under Disciplinary Proceedings (Administrative Tribunal) Rules (1951) — Those rules more drastic than Bihar and Orissa Subordinate Services Discipline and Appeal Rules (1935) — Case of discrimination arises. AIR 1961 SC 1715 (1717).

(33) Life Insurance Corporation — Field Officer — Who is — Includes inter alia Superintendent of Agencies — Discrimination — Definition not ultra vires of Life Insurance Corporation Act (1956), or illegal under Article 14 of Indian Constitution (1950). AIR 1964 Cal 388 (390, 391).

Articles 310 & 311 — Note 134 (contd.)

(34) Reorganisation of States — Integration of services of former Mysore State into new State of Mysore — Cadres of men, teachers and women teachers equated — Preparation of inter-State Seniority list by Central Government — Application of different standards in allocating seniority to men teachers and women teachers, held, discriminatory — Seniority list held, invalid. 1969 Lab IC 1032 (1034) = 17 Law Rep 814 (Mys).

(35) Andhra Civil Services (Disciplinary Proceedings Tribunal) Rules 1953, Rules 4 (2) and 5 (b) — Validity — Rule 4 (2) not violative of Article 14. AIR 1962 Andh Pra 303 (307) = (1961) 2 Lab LJ 536 (DB).

(36) No objection can be taken under Article 14 to the power of the Government to appoint any person it likes to conduct the inquiry against a public servant. AIR 1955 Punj 3 (4) * AIR 1968 Punj 312 (319) = ILR (1967) 1 Punj 649 = 1968 Lab IC 967 (FB).

135. Lien.— (1) As soon as a Government servant is substantively appointed to a permanent post, he gets a right to that post which is known as "lien". AIR 1958 SC 36 (43) * AIR 1952 Orissa 285 (289) = ILR (1952) Cut 326 (DB).

(2) Unless both the elements, namely, permanency of the post and substantive-ness of the appointment, co-exist, no lien will be created. AIR 1957 Raj 81 (84) (DB).

(3) Mysore Civil Service Rules, Rule 162 — Government servant refused leave and asked to report on duty — On failure his lien on post cancelled under Rule 162 — This amounted to removal from service without necessary enquiry — Rule 162 so far as is repugnant to Article 311 is void — Order cancelling his lien was held bad. 1968 Lab IC 1384 (1385) = (1968) 1 Mys LJ 519.

(4) Government servant confirmed on permanent post of lower division clerk in Forest Department — Transferred to Jail Department but not substantively — Voluntary declaration by servant that he would not claim any lien on his permanent post — Later on, his services in jail Dept. terminated and placed at disposal of Forest Department which refused to reappoint him — Held: refusal to replace him on his permanent post contravened Rules 14 and 14-A of Fundamental Rules which continued to be operative and effective as laws in force and are statutory provisions. AIR 1969 Madh Pra 60 (61, 62) = 1968 MPLJ 757 (DB).

(5) Lien on transfer is not lien on particular post when none is held before transfer. AIR 1964 Cal 388 (390, 391).

(6) It has been held that not being allowed an opportunity to avail oneself of a lien on a substantive appointment while being discharged from a temporary appointment does not give a Central Gov-

ernment servant a cause of action as the service is during the pleasure of the President. AIR 1956 Punj 42 (44) = ILR (1955) Punj 1279.

(7) Incumbent of permanent post — Loss of lien due to conversion of post — Government creating a supernumerary post in the State Cadre and providing him with lien on that post from the date he lost lien on any permanent post — Post so created was permanent and not a temporary one — Incumbent was fully qualified for pension under Rule 361 of Madras Pension Rules — Complaint of prejudice by him was without force. AIR 1967 SC 1864 (1868) = (1967) 3 SCR 627.

136. Public Service Commission, consultation with — See also Article 320.— (1) Article 320 (3) (c) does not confer any rights on a public servant so that the absence of consultation or any irregularity in consultation with the Public Service Commission would not afford him a cause of action in a Court of law, or entitle him to relief under the special powers of a High Court under Article 226 of the Constitution. AIR 1962 Guj 197 (202) = (1962) 3 Guj LR 492 = (1962) 2 Lab LJ 507 (DB).

(2) Order appointing employee to post communicated by Deputy Secretary by and in name of Governor — Order published in Government Gazette and communicated to employee — Order amounts to contract of employment — Order is not invalid because sanction of Public Service Commission was not obtained. AIR 1963 Bom 13 (16) = 1962 Nag LJ 569.

(3) Question whether Government Authority applied its own mind or mechanically followed advice of Public Service Commission depends on facts and circumstances of each particular case. AIR 1968 Punj 324 (327) = 69 Pun LR 510.

(4) Article 320 (3) (c) is not mandatory and it does not confer any rights on the public servant and the absence of consultation with the Public Service Commission or any irregularity in consultation does not afford him a cause of action in a Court of law. Article 311 is not controlled by Article 320. AIR 1962 SC 1344 (1346) = (1961-62) 21 FJR 478.

137. Public Servants (Inquiries) Act, 37 of 1850.— (1) The Public Servants (Inquiries) Act, 1850, provides for inquiries into the conduct of public servants not removable from service without the sanction of the Government. The Act merely provides for inquiries and not for the punishment of such public servants. AIR 1956 Punj 58 (70) = ILR (1956) Punj 236 (DB).

(2) An inquiry under the Public Servants (Inquiries) Act is not a compulsory preliminary before a Government servant to whom the Act applies is dismissed or removed from service. AIR 1954 SC 375 (378) = 1954 SCR 1150 = 1954 Cri L Jour 993.

Articles 310 & 311 — Note 137 (contd.)

(3) An inquiry under the Act may precede the inquiry under Article 311, Cl. (2). AIR 1954 SC 375 (378) = 1954 SCR 150 = 1954 Cri L Jour 993.

(4) The object of the inquiry under the Public Servants (Inquiries) Act, 1850 is to enable the Government to make up its mind as to the action to be taken before the notice to show cause is issued under Article 311, clause (2). The inquiry is purely for the Government's own benefit. AIR 1954 SC 375 (378) = 1954 SCR 1150 = 1954 Cri L Jour 993 *° AIR 1957 Assam 77 (82) (DB).

(5) An inquiry under the Act of 1850 is not a prosecution for an offence within the meaning of Article 20, clause (2). AIR 1955 SC 160 (165) = 1955 SCR 1011 °° AIR 1954 SC 375 (378) = 1954 SCR 1150 = 1954 Cri L Jour 993.

(6) There is no power given to the Inquiry Officer under Public Servants (Inquiries) Act to compel an officer against whom an enquiry is being held to produce any document or evidence which may incriminate him. 1961-63 Pun LR 780 (787) (DB).

(7) An inquiry under the Act will not be bad merely on the ground of misjoinder of charges as the provisions of the Criminal Procedure Code relating to joinder of charges do not apply to such an inquiry. AIR 1956 Punj 58 (71) = ILR (1956) Punj 236 (DB).

(8) The Act of 1850 is not bad as contravening Article 14. AIR 1956 Punj 58 (70) = ILR (1956) Punj 236 (DB).

(9) The fact that the State Government had no power to order an inquiry under the Public Servants (Inquiries) Act, will not affect the validity of the proceedings based upon the inquiry and report of the Commission. AIR 1956 Punj 58 (62) = ILR (1956) Punj 236 (DB).

(10) Public Servants (Inquiries) Act 1850, Section 2 — Disciplinary proceedings against members of I. C. S. — Enquiry — Act applies — No obligation to hold enquiry under Rule 55, Civil Services (Classification, Control and Appeal) Rules — Holding of enquiry under Act does not violate Article 14. AIR 1960 SC 493 (497, 499, 500).

(11) If bias is proved against a tribunal holding inquiry under the Public Servants (Inquiries) Act, the proceedings may be quashed. AIR 1955 Pat 131 (132, 133) (DB).

(12) An inquiry under the Travancore Public Servants (Inquiries) Act, 1122, may be ordered by the Council of Ministers and it is not necessary that the Governor himself must order such inquiry. AIR 1955 SC 160 (165) = 1955 SCR 1011.

138. High Court's power of superintendence under Article 227.— (1) Neither the Government nor the Disciplinary Proceedings Tribunal would fall within Article 227

and come within the superintendence of the High Court. AIR 1951 Mad 882 (883) (DB).

(2) There is no discrimination if an enquiry is held under the Public Servants (Inquiries) Act and not under All India Services (Disciplinary and Appeal) Rules, 1955. (1961) 63 Punj LR 780 (789) (DB).

(3) The inquiry under Public Servants (Inquiries) Act, 1850, may be held by a Judge of the High Court and the fact that he has not been permitted by the President to hold the inquiry will only affect the question of his salary and not the validity of his inquiry. AIR 1956 Punj 58 (70) = ILR (1956) Punj 236 (DB).

(4) Where on grounds of convenience the Commissioner under the Public Servants (Inquiries) Act, is asked to inquire into the conduct of an officer to whom the Act does not apply the mere non-compliance with the provisions of the Act in the conduct of the inquiry will not invalidate an order of dismissal based on the result of the inquiry. AIR 1956 Trav-Co 158 (159).

(5) Enquiry under Public Servants (Inquiries) Act — Charges framed make out ingredients of an offence under Indian Penal Code — It does not per se affect the jurisdiction of the Superior Officer to enquire into the truth of the charges in a departmental enquiry. (1961) 63 Punj LR 780 (790) (DB).

(6) The Act of 1850 is applicable to members of the Indian Civil Service and also it is open to a State Government to order an inquiry under the Act against a member of an I. C. S. AIR 1956 Punj 58 (64) = ILR (1956) Punj 236 (DB).

139. Practice.— (1) In a suit for a declaration that the dismissal of the plaintiff was illegal and void, a plea of automatic termination of services, abandoned in the High Court by the Government, may be reopened in the Supreme Court on appeal where the plea is purely one of law. AIR 1955 SC 817 (819) = 1955-2 SCR 541.

(2) In a suit for declaration that an order of compulsory retirement against the plaintiff was illegal and void, an application for amendment of the plaint at the appellate stage by including a claim for arrears of salary was refused on the ground of laches. AIR 1956 All 439 (442) = ILR (1956) 1 All 24 (DB).

(3) Writ appeal — New plea — Question of bias of enquiring officer cannot be allowed to be raised for the first time. ILR (1965) 1 Mad 487 (496) (DB).

(4) Substantial question of law as to interpretation of Constitution — Question whether Proviso (a) to Article 311 (2) would also apply in respect of a conviction before entry of public servant in service is substantial question of law involving interpretation of Constitution. AIR 1961 Tripura 27 (28).

(5) Failure to supply report of enquiry to delinquent — Difficulty in defending case

312. All-India services.—(1) Notwithstanding anything in Part XI, if the Council of States has declared by resolution supported by not less than two-thirds of the members present and voting that it is necessary or expedient in the national interest so to do, Parliament may by law provide for the creation of one or more All-India services common to the Union and the States, and, subject to the other provisions of this Chapter, regulate the recruitment,^a and the conditions of service of persons appointed, to any such service.

(2) The services known at the commencement of this Constitution as the Indian Administrative Service and the Indian Police Service shall be deemed to be services created by Parliament under this article.

[a] See the All-India Services Act, 1951 (61 of 1951) (29-10-1951: The following such services have been constituted under the Act:

- (1) Indian Administrative Service.
- (2) Indian Police Service.
- (3) Indian Service of Engineers (Irrigation, Power, Buildings and Roads).
- (4) Indian Forest Service.
- (5) Indian Medical and Health Service.

JAMMU AND KASHMIR

In its application to the State of Jammu and Kashmir, in Art. 312, after the words 'the States' the brackets and words '(including the State of Jammu and Kashmir)' shall be inserted — Constitution (Application to J. and K.) Order, 1954, Para. 2, sub-para. (9) (as substituted by C. O. 56).

313. Transitional provisions.—Until other provision is made in this behalf under this Constitution, all the laws in force immediately before the commencement of this Constitution and applicable to any public service or any post which con-

Articles 310 & 311 — Note 139 (contd.)
not complained of while contesting show cause notice or filing appeal and memorial — Plea raised for first time in writ application held not maintainable. (1962) 1 Lab LJ 468 = (1961) 3 Fac LR 442 (444) (Cal).

(6) Disciplinary proceedings against Government servant for misconduct — Departmental enquiry or public trial available — Former course followed — Proceedings whether violate Art. 14 — (Quaere). AIR 1961 Cal 1 (11) = 65 Cal WN 361 (DB).

(7) Removal of Sub-Inspector of Police from service—Order passed by D. I. G. of Police — Contention of breach of Article 311 (1) on ground that he was appointed by I. G. Police — District Judge held that he had been appointed by D. I. G. of Police — That being finding of fact is binding on Supreme Court in special appeal against the decision of the High Court. AIR 1969 SC 1020 (1023) = 1969 Lab IC 1402 = (1969) 2 SCJ 541.

(8) Where there is a complaint about failure of natural justice, party complaining need not also establish prejudice. ILR (1965) 1 Mad 487 (497) (DB).

ARTICLE 312

1. Officer of All India Service — Who is. — (1) Where an officer belonging to a State service is appointed to officiate as an officer of an All-India service, he cannot be deemed to be an officer of the All-India service. AIR 1949 FC 50 (54) = ILR (1949) All 520 = 1949 FCR 9.

2. The All India Services Act, 1951. —

(1) This Act was passed for regulating the conditions of service of persons appointed to All-India services and under this Act, rules have been made for the purpose. AIR 1957 Pat 515 (526) = 36 Pat 557 (DB).

(2) Section 3, All India Services Act, 1951 is not invalid and the All India Services (Discipline and Appeal) Rules 1955, promulgated under it cannot be attacked on this ground. AIR 1959 SC 512 (517) = (1959) Supp (1) SCR 792.

(3) All India Services Act, 1951 is not unconstitutional though passed by provisional Parliament without requisite majority. AIR 1959 SC 512 (516) = 1959 Supp 1 SCR 792.

(4) Under Sec. 3 of All India Services Act, 1951 persons who had been appointed to the Secretary of State's Service, Indian Police, were to be included in the Indian Police Service, and were governed by the provisions of the Act and the Indian Police Service (Recruitment) Rules (1954). AIR 1968 SC 1372 (1375) = (1968) 3 SCR 224.

Article 313 — Note 1

Cases regarding Service Rules and Regulations may also be found under Articles 309 and 311 of the Constitution. —

(1) This Article gives constitutional sanctity to all laws in force immediately before commencement of the Constitution and applicable to any public service, till appropriate laws are made by the Parlia-

tinues to exist after the commencement of this Constitution, as an All-India service or as service or post under the Union or a State shall continue in force so far as consistent with the provisions of this Constitution.

[Government of India Act (1935), S. 276.]

Article 313 — Note 1 (contd.)

ment or the State Legislature. AIR 1961 Andh Pra 206 (210) = (1965) 1 Lab LJ 34 (DB).

(2) The provision in the article seems really to be included in Art. 372 which is general in its terms, while this article refers only to laws relating to public services under the State, both at the Centre and in the States. AIR 1955 Cal 451 (455) (DB) ** AIR 1954 Cal 383 (386) ** AIR 1953 Cal 316 (318) = ILR (1952) 2 Cal 254 ** AIR 1961 SC 1245 (1250) = (1962) 1 SCR 151 ** AIR 1961 SC 751 (758) = 1961 (1) Cri LJ 773 = (1961) 2 SCR 679.

(3) Article 310 has to be read subject to Article 313. AIR 1967 All 197 (200) = (1968) 2 Lab LJ 6.

(4) Person appointed in connection with affairs of a province in accordance with Section 241 of Government of India Act, 1935, continuing in service after the Constitution — His service must be held to continue in connection with the affairs of the State concerned. AIR 1963 Punj 298 (306) = ILR (1962) 2 Punj 642 (DB). (Reversed in AIR 1964 SC 72 on another point.)

(5) The Governor also has the power of making other provision within the scope of Article 313 and thus can change the rules — Rules of 1941 could only continue till Punjab Civil Services Rules (1959) were made. AIR 1963 Punj 298 (306, 307) = ILR (1962) 2 Punj 642 (DB). (Reversed in AIR 1964 SC 72 on another point.)

(6) The words "so far as consistent with the provisions of the Constitution" are significant and hence, a rule providing for an appeal to the Governor exercising his individual judgment would not be applicable after the Constitution. AIR 1957 Andh Pra 794 (806) = ILR (1957) Andh Pra 80.

(7) The expression "laws in force" in this article will include rules and regulations. AIR 1956 SC 285 (291) = (1955) 2 SCR 1331 ** (1955) 59 Cal WN 450 (459) ** AIR 1955 Mad 182 (187) ** AIR 1953 Nag 69 (70) = ILR (1952) Nag 955 (DB) ** AIR 1965 SC 868 (870) = (1964) 7 SCR 471 ** AIR 1969 Madh Pra 60 (61) = 1968 MPLJ 757 (DB) ** AIR 1964 Guj 145 (153) = (1964) 5 Guj LR 386 (DB) ** AIR 1964 Punj 242 (245) = (1964) 1 Lab LJ 671 (DB) ** AIR 1961 Mys 247 (252) = 38 Mys LJ 212 (DB) ** AIR 1960 Bom 14 (15) = 60 Bom LR 1032 ** AIR 1956 Bom 483 (486).

(8) The expression 'laws in force' includes Government Notifications under

statutory power. AIR 1957 Pat 676 (678) (DB).

(9) Army instructions cannot be called a law. AIR 1955 Cal 543 (547) (DB).

(10) Civil Service Regulations, which were in force when the Government of India Act, 1919, was passed, acquired statutory force by virtue of Section 96B (4) of that Act. AIR 1954 SC 369 (371, 372) = 1955 SCR 26 = ILR (1955) 1 All 324.

(11) The pre-existing fundamental Rules framed under S. 96-B of the Government of India Act, 1915 are not "laws in force", as "other provisions" have been made by the West Bengal Service Rules under Section 241 of the Government of India Act, 1935. AIR 1961 Cal 1 (9) = 65 Cal WN 361 (SB).

(12) Draft rules prepared by Federal Public Service Commission for regulating the promotion of officers of the State Police Service to the Indian Police Service were continued in force after the Constitution. (1967) 9 Orissa JD 139 (178, 179) = ILR (1967) Cut 735.

(13) President could during President's Rule supersede Patiala State Regulations and other State Rules and order by issuing Bank of Patiala Management and Regulation Order, 1954 and could authorise Board of Directors of the Bank to frame rules viz., Bank of Patiala (Staff) Rules 1954 under that Order. AIR 1963 Punj 345 (350) = ILR (1963) 1 Punj 621 (DB).

(14) Punjab Tahsildari Rules 1932, framed under Sections 9 and 29 of Punjab Land Revenue Act (17 of 1887) continued to remain in force even after the Act was amended by the Adaptation of Indian Laws Order, 1937. AIR 1962 SC 219 (223) = (1962) 3 SCR 515.

(15) Only statutory rules applicable to any public service and not executive instructions of the Government are continued under this Article. AIR 1962 Assam 28 (30).

(16) Pre-existing Rules and Regulations cannot be classed as being the "express provision" in the Constitution simply by their continuance. AIR 1958 Bom 283 (286) = 60 Bom LR 241 (DB).

(17) Railway Services (Revision of Pay) Rules (1947), framed under Section 241 (2), Government of India Act (1935) — Article 313 preserved those rules — Benefit accrued to employees under Rule 6 could not be taken away so long as rules were consistent and were not superseded by other rules made under Article 309. 1969 Lab IC 1265 (1268) (DB) (Delhi).

314. Provision for protection of existing officers of certain services.—Except as otherwise expressly provided by this Constitution, every person who having been appointed by the Secretary of State or Secretary of State in Council to a civil service of the Crown in India continues on and after the commencement of this Constitution to serve under the Government of India or of a State shall be entitled to receive from the Government of India and the Government of the State, which he is from time to time serving, the same conditions of service as respects remuneration, leave and pension, and the same rights as respects disciplinary matters or rights as similar thereto as changed circumstances may permit as that person was entitled to immediately before such commencement.

[Government of India Act (1935), Ss. 247 to 249.]

CHAPTER II

PUBLIC SERVICE COMMISSIONS

315. Public Service Commissions for the Union and for the States.—(1) Subject to the provisions of this article, there shall be a Public Service Commission for the Union and a Public Service Commission for each State.

(2) Two or more States may agree that there shall be one Public Service Commission for that group of States, and if a resolution to that effect is passed by the

Article 314 — Note 1

(1) The benefit of the provision did not apply to officers whom the Government had decided not to continue. AIR 1955 SC 817 (827, 828) = (1955) 2 SCR 541.

(2) The provisions of Section 240 (2) and (3) of the Government of India Act, 1935, corresponding to Article 311 (1) and (2), were not applicable to I. C. S. officers whose services came to an automatic end on the attainment of Independence and who were informed that their services would not be required. AIR 1955 SC 817 (830) = (1955) 2 SCR 541. (AIR 1954 Mad 1155 (1162), Reversed.)

(3) The expression 'remuneration' in Article 314 is not used in any limited sense as merely salary. If a person was in receipt of a payment, or in receipt of a percentage, or any kind of payment which would not be actual money payment, the amount he would receive annually, in respect of this would be remuneration. AIR 1962 SC 505 (509, 510) = 1962 Supp (1) SCR 505.

(4) The words 'disciplinary matters' must be given their widest meaning consistent with what disciplinary matters may reasonably include. Suspension must be comprised within the words 'disciplinary matters'. AIR 1964 SC 787 (791, 792) = (1964) 5 SCR 431 ** AIR 1957 Pat 515 (523) = 36 Pat 557 (DB).

(5) The words 'changed circumstances' in Article 314 mean the change in circumstances due to transfer of power in August 1947 and the coming into force of the Constitution in January, 1950. and no more. AIR 1964 SC 787 (791) = (1964) 5 SCR 431.

(6) Rule 7 of All India Services (Discipline and Appeal) Rules, 1955 in so far as it applies to members of Indian Administrative Service who are members

thereof by virtue of Rule 3 (a) and (b) of the Indian Administrative (Recruitment) Rules, 1954 was held invalid to the extent to which it permitted an authority other than the Government of India to suspend as an interim measure such members of the services. AIR 1964 SC 787 (798, 799) = (1964) 5 SCR 431. (AIR 1963 Punj 87, Reversed.)

(7) Under both set of Rules, viz., R. 55 of the Civil Services (Classification, Control and Appeal) Rules, 1930 and All India Services (Discipline and Appeal) Rules 1955, the enquiry could be ordered by the authority under whom the civil servant happened to be serving. AIR 1968 SC 1372 (1378) = (1968) 3 SCR 224.

(8) A member of the Indian Civil Service before disciplinary action is taken against him is entitled by force of guarantees enshrined in the Constitution to an inquiry under the Public Servants (Inquiries) Act or under Rule 55 of Civil Services (CCA) Rules. The exercise of authority under one of the two alternatives is not invalid. AIR 1960 SC 493 (499) = (1960) 2 SCR 569 ** (1961) 63 Punj LR 780 (786) ** AIR 1956 Punj 58 (69) = ILR (1956) Punj 236 (DB)

Article 315 — Note 1

(1) The Public Service Commission has a distinct status under the Constitution, apart from the Government of the Union or of the State and cannot be identified with such Government. See AIR 1955 Madh B 56 (60) = ILR (1954) Madh B 256 (DB).

(2) Governor General's approval to Governor's reference to Federal Public Service Commission need not be separate for every case under Section 264 (3) of the Government of India Act, 1935 but general approval to Governor's references to the Commission is sufficient. AIR 1959 All 393 (399).

House or, where there are two Houses,^a by each House of the Legislature of each of those States, Parliament may by law provide for the appointment of a Joint State Public Service Commission (referred to in this Chapter as Joint Commission) to serve the needs of those States.

(3) Any such law as aforesaid may contain such incidental and consequential provisions as may be necessary or desirable for giving effect to the purposes of the law.

(4) The Public Service Commission for the Union, if requested so to do by the Governor ^b[° ° °] of a State, may, with the approval of the President, agree to serve all or any of the needs of the State.

(5) References in this Constitution to the Union Public Service Commission or a State Public Service Commission shall, unless the context otherwise requires, be construed as references to the Commission serving the needs of the Union or, as the case may be, the State as respects the particular matter in question.

[Government of India Act, 1935, S. 264.]

[a] For States having two Houses of Legislature, see Art. 168 (1) (a).

[b] The words 'or Rajpramukh' were omitted by the Constitution (Seventh Amendment) Act, 1956, S. 29 and Sch. (1-11-1956).

316. Appointment and term of office of members.—(1) The Chairman and other members of a Public Service Commission shall be appointed, in the case of the Union Commission or a joint Commission, by the President, and in the case of a State Commission, by the Governor ^a[° ° °] of the State :

Provided that as nearly as may be one-half of the members of every Public Service Commission shall be persons who at the dates of their respective appointments have held office for at least ten years either under the Government of India or under the Government of a State, and in computing the said period of ten years any period before the commencement of this Constitution during which a person has held office under the Crown in India or under the Government of an Indian State shall be included.

^b[(1A) If the office of the Chairman of the Commission becomes vacant or if any such Chairman is by reason of absence or for any other reason unable to perform the duties of his office, those duties shall, until some person appointed under clause (1) to the vacant office has entered on the duties thereof or, as the case may be, until the Chairman has resumed his duties, be performed by such one of the other members of the Commission as the President, in the case of the Union Commission or a Joint Commission, and the Governor of the State in the case of a State Commission, may appoint for the purpose.]

(2) A member of a Public Service Commission shall hold office for a term of six years from the date on which he enters upon his office or until he attains, in

Article 316 — Note 1

(1) The proviso to Article 316 (1) only means that as far as possible at least one-half of the members of the Public Service Commission should be persons who have held office under the Government for a period of ten or more years. The Proviso does not mean that not more than half the members must be such persons. AIR 1955 Orissa 113 (116) = ILR (1955) Cut 510 (DB).

(2) The expression "as nearly as may be one-half" in the Proviso indicates only approximation. The expression cannot be read as equivalent to not more than half. AIR 1955 Orissa 113 (116) = ILR (1955) Cut 510 (DB).

(3) Clause (1) of this Article refers to the chairman and other members, for the

purpose that the President or Governor will have the right to appoint a Chairman. AIR 1966 Cal 290 (301) = (1967) 1 Lab LJ 288 (FB).

(4) The Chairman of P. S. C. is also a member of it and if the member is subsequently appointed as Chairman his tenure expires after six years from his appointment as member. He does not get fresh period of six years from his appointment as Chairman. AIR 1966 Cal 290 (293) = (1967) 1 Lab LJ 288 (FB).

(5) Public Service Commission holding competitive examinations for recruitment to services of the State is an independent body distinct from the State. AIR 1955 Madh B 56 (60) = Madh BLJ (1954) HCR 1660 (DB).

the case of the Union Commission, the age of sixty-five years, and in the case of a State^o Commission or a Joint Commission, the age of sixty years, whichever is earlier :

Provided that—

- (a) a member of a Public Service Commission may, by writing under his hand addressed, in the case of the Union Commission or a Joint Commission, to the President, and in the case of a State Commission, to the Governor ^a[° ° °] of the State, resign his office;
- (b) a member of a Public Service Commission may be removed from his office in the manner provided in clause (1) or clause (3) of Art. 317.
- (3) A person who holds office as a member of a Public Service Commission shall, on the expiration of his term of office, be ineligible for re-appointment to that office.

[Cf: Government of India Act (1935), S. 265 (1).]

[a] The words 'or Rajpramukh' were omitted by the Constitution (Seventh Amendment) Act, 1956, S. 29 and Sch. (1-11-1956).

[b] Inserted by the Constitution (Fifteenth Amendment) Act, 1963, S. 11 (5-10-1963).

[c] For the meaning of 'State', see Art. 308, supra.

317. Removal and suspension of a member of a Public Service Commission.—

(1) Subject to the provisions of cl. (3), the Chairman or any other member of a Public Service Commission shall only be removed from his office by order of the President on the ground of misbehaviour after the Supreme Court, on reference being made to it by the President, has, on inquiry held in accordance with the procedure prescribed^b in that behalf under Article 145, reported that the Chairman or such other member, as the case may be, ought on any such ground to be removed.

(2) The President, in the case of the Union Commission or a Joint Commission, and the Governor, ^a[° °] in the case of a State Commission, may suspend from office the Chairman or any other member of the Commission in respect of whom a reference has been made to the Supreme Court under clause (1) until the President has passed orders on receipt of the report of the Supreme Court on such reference

(3) Notwithstanding anything in clause (1), the President may by order remove from office the Chairman or any other member of a Public Service Commission if the Chairman or such other member, as the case may be—

- (a) is adjudged an insolvent; or
- (b) engages during his term of office in any paid employment outside the duties of his office; or
- (c) is, in the opinion of the President, unfit to continue in office by reason of infirmity of mind or body.

(4) If the Chairman or any other member of a Public Service Commission is or becomes in any way concerned or interested in any contract or agreement made by or on behalf of the Government of India or the Government of a State or participates in any way in the profit thereof or in any benefit or emolument arising therefrom otherwise than as a member and in common with the other members of an incorporated company, he shall, for the purposes of clause (1), be deemed to be guilty of misbehaviour.

Article 317 — Note 1

(1) The provisions under this Article and Article 319 are merely consequential to the provision of Article 316 (1). AIR 1966 Cal 290. (301) = (1967) 1 Lab LJ 288 (FB).

(2) The word "misbehaviour" when employed in respect of holders of high offices has a well understood and well defined meaning according to the tradition and standard maintained by the members of a particular service or office. (1961) 63 Punj LR 780 (784).

[a] The words 'or Rajpramukh' were omitted by Constitution (Seventh Amendment) Act, 1956, S. 29 and Sch. (1-11-1956).

[b] For Rules made by the Supreme Court as to reference under this Article, see Order XXXVIII of the Supreme Court Rules, 1966 published in Gaz. of Ind., 15-1-1966, Pt. II, S. 3 (i), Ext., pp. 13 to 84 (1-3-1966).

318. Power to make regulations as to conditions of service of members and staff of the Commission.—In the case of the Union Commission or a Joint Commission, the President and, in the case of a State Commission, the Governor ^{a[* °]} of the State may by regulations—

(a) determine the number of members of the Commission and their conditions of service; and

(b) make provision with respect to the number of members of the staff of the Commission and their conditions of service :

Provided that the conditions of service of a member of a Public Service Commission shall not be varied to his disadvantage after his appointment.

[Government of India Act (1935), S. 265 (2).]

[a] The words 'or Rajpramukh' were omitted by the Constitution (Seventh Amendment) Act, 1956, S. 29 and Sch. (1-11-1956).

319. Prohibition as to the holding of offices by members of Commission on ceasing to be such members.—On ceasing to hold office—

(a) the Chairman of the Union Public Service Commission shall be ineligible for further employment either under the Government of India or under the Government of a State;

(b) the Chairman of a State Public Service Commission shall be eligible for appointment as the Chairman or any other member of the Union Public Service Commission or as the Chairman of any other State Public Service Commission, but not for any other employment either under the Government of India or under the Government of a State;

(c) a member other than the Chairman of the Union Public Service Commission shall be eligible for appointment as the Chairman of the Union Public Service Commission or as the Chairman of a State Public Service Commission, but not for any other employment either under the Government of India or under the Government of a State.

(d) a member other than the Chairman of a State Public Service Commission shall be eligible for appointment as the Chairman or any other member of the Union Public Service Commission or as the Chairman of that or any other State Public Service Commission, but not for any other employment either under the Government of India or under the Government of a State.

[Government of India Act, 1935, Section 265 (3).]

Article 318 — Note 1

(1) This Article refers to the members of the Public Service Commission and the word member includes the chairman. AIR 1966 Cal 290 (301) = (1967) 1 Lab LJ 288 (FB).

(2) This Article and Article 317 are merely consequential to the provision of Article 316 (1). AIR 1966 Cal 290 (301) = (1967) 1 Lab LJ 288 (FB).

(3) W. B. Public Service Commission (Conditions of Service and Miscellaneous Provisions) Regulations (1953) Regs. 4 and 5 — Express order relaxing operation of

Regulations is necessary. AIR 1966 Cal 356 (358) = 71 Cal WN 622 (DB).

(4) Rule 5 of Punjab Public Service Commission (Conditions of Service) Regulations, 1958 is a statutory one and it cannot be affected by executive instructions even of the Government of India. 1969 Lab IC 1037 (1039, 1040) = 1968 Cur LJ 757 (Punj).

Article 319 — Note 1

(1) This Article relates to prohibition on "ceasing to hold office". AIR 1966 Cal 290 (301) = (1967) 1 Lab LJ 288.

320. Functions of Public Service Commissions. — (1) It shall be the duty of the Union and the State Public Service Commissions to conduct examinations for appointments to the services of the Union and the services of the State respectively.

(2) It shall also be the duty of the Union Public Service Commission, if requested by any two or more States so to do, to assist those States in framing and operating schemes of joint recruitment for any services for which candidates possessing special qualifications are required.

(3) The Union Public Service Commission or the State Public Service Commission, as the case may be, shall be consulted—

(a) on all matters relating to methods of recruitment to civil services and for civil posts;

ARTICLE 320 — SYNOPSIS

1. Government of India Act, 1935.
2. Clause (1) — Examination conducted by Public Service Commission.
3. Clause (3) — General.
4. Clause (3) (a).
5. Clause (3) (c) — Scope and object of.
6. Stage at which the Public Service Commission is to be consulted.
7. "All disciplinary matters."
8. Persons to whom Clause (3) (c) is applicable.
9. "Including memorials or petitions relating to such matters."
10. Clause (3) (d).
11. Clause (3), Proviso.
12. Clause (4).
13. Clause (5).
14. Position of the Public Service Commission vis-a-vis Government.

1. **Government of India Act, 1935.**— (1) The corresponding section in the Government of India Act, 1935, was Section 266. Under sub-section (4) of that section, consultation with the Public Service Commission was not necessary in matters connected with subordinate ranks of Police Services. AIR 1952 Nag 172 (175) = ILR (1952) Nag 118 = 1952 Cri LJ 870 (DB).

2. **Clause (1) — Examination conducted by Public Service Commission.**— (1) The examination conducted by the Public Service Commission under Clause (1) for the purpose of appointment to services under the Government, need not be competitive but may be merely selective. AIR 1956 Mys 20 (22) = ILR (1955) Mys 597 (DB).

(2) The power of Public Service Commission to conduct examinations conferred under Article 320 (1) implies a power to hold enquiries into the malpractices or misconduct of the examinees or to punish such delinquents. AIR 1961 Andh Pra 378 (381, 382) = (1961) 1 Andh WR 256 (DB).

(3) Rules made by Madras State Public Service Commission for Regulating Conduct of Examinations, Rr. 14 and 15 — Rule 14 confers power on commission to cancel results and to debar a candidate

while Rule 15 confers power to hold re-examination. AIR 1961 Andh Pra 378 (382, 383) = (1961) 1 Andh WR 256 (DB).

3. **Clause (3) — General.** — (1) Clause (3) is only directory and not mandatory in the sense that non-compliance with it will invalidate the action taken by the Government. AIR 1957 SC 912 (918) ** AIR 1957 Punj 191 (196) = ILR (1957) Punj 1222 (DB) ** AIR 1957 Punj 97 (99) ** AIR 1955 Cal 451 (457, 458, 459) (DB) ** AIR 1954 Cal 60 (63) = ILR (1955) 2 Cal 28 (DB) ** AIR 1970 SC 158 (160) = (1969) 1 SCWR 1115 ** AIR 1962 SC 1344 (1346) = (1962) 1 Lab LJ 656 ** AIR 1968 Ker 244 (249) = 1968 Lab IC 1159 = 1968 Ker LT 268 ** AIR 1966 Mys 220 (227) = (1965) 2 Mys LJ 490 (FB) ** (1963) 2 Lab LJ 766 (768, 769) (Andh Pra) ** AIR 1963 Bom 13 (16) = 64 Bom LR 446 ** AIR 1962 Guj 197 (202) = (1962) 3 Guj LR 492 (DB) ** AIR 1960 Orissa 62 (64) = ILR (1959) Cut 496 ** (1959) 2 Lab LJ 261 (264) (Andh Pra). ((1958) 2 LLJ 273, Foll.) ** AIR 1958 Manipur 35 (37).

The following decisions are not good law in view of AIR 1957 SC 912:— AIR 1958 Bom 167 (175) = ILR (1957) Bom 120 (DB) ** AIR 1958 Madh Pra 135 (142) (DB) ** ILR (1957) Andh Pra 715 (725) (DB) ** AIR 1955 Pepsu 106 (109) = ILR (1955) Patiala 202 ** AIR 1954 Raj 12 (15) (DB) ** (1953) 57 Cal WN 157 (161).

(2) Although, the provision is not mandatory and although the advice of the Public Service Commission is not binding on the Government, it is highly improper to ignore the provision altogether as a matter of regular practice. AIR 1957 SC 912 (916) ** AIR 1957 Punj 97 (99) ** AIR 1955 Cal 451 (458, 459) (DB).

(3) Normally the Government servants, to whom the article applies, are entitled to the constitutional protection provided in the clause. AIR 1956 SC 285 (292) = (1955) 2 SCR 1331.

(4) Rule 8 of the Rules framed by Punjab Government under the Proviso to Article 309 is not ultra vires of Art. 320 — Government by its own rules binding itself to accept Commission's selections

- (b) on the principles to be followed in making appointments to civil services and posts and in making promotions and transfers from one service to another and on the suitability of candidates for such appointments, promotions or transfers;
- (c) on all disciplinary matters affecting a person serving under the Government of India or the Government of a State in a civil capacity, including memorials or petitions relating to such matters;
- (d) on any claim by or in respect of a person who is serving or has served under the Government of India or the Government of a State or under the Crown in India or under the Government of an Indian State, in a civil capacity, that any costs incurred by him in defending legal proceedings instituted against him in respect of acts done or purporting to be done in the execution of his duty should be paid out of the Consolidated Fund of India, or, as the case may be, out of the Consolidated Fund of the State;
- (e) on any claim for the award of a pension in respect of injuries sustained by a person while serving under the Government of India or the Government of a State or under the Crown in India or under the Government of an Indian State, in a civil capacity, and any question as to the amount of any such award,

Article 320 — Note 3 (contd.)

for promotion — Act of Government in refusing to accept Commission's selection is invalid. AIR 1964 Punj 302 (304) = 1964 Cur LJ 103 (DB). (C. W. No. 410 of 1961, dated 4-5-1962 (Punj), **Reversed.**)

(5) Under Section 56 (1) of the Patna Municipal Corporation Act (1952) for making temporary appointment, prior consultation with Public Service Commission is not at all necessary. 1966 BLJR 697 (700, 701) (DB).

(6) Indian Administrative Service (Regulation of Seniority) Rules (1954), R. 3 (3) second proviso — Provision of retaining power in Government of India in consultation with commission to approve or not to approve period for purposes of seniority is not violative of Art. 14. 1968 Lab IC 1426 (1429) = ILR 47 Pat 533.

4. Clause (3) (a). — (1) The civil services and civil posts mentioned in Cl. 3 (a) are used in contradistinction with military services and military posts. AIR 1956 Raj 104 (106) = ILR (1956) 6 Raj 74 (DB).

5. Clause (3) (c). — **Scope and object of.** — (1) The advice of the Public Service Commission is not binding on the Government. AIR 1957 SC 912 (916) ** (1953) 57 Cal WN 157 (161) ** AIR 1962 SC 1130 (1133) = 1962 Supp 1 SCR 968 ** AIR 1966 Mys 220 (225) = (1965) 2 Mys LJ 490 (DB).

[See AIR 1956 Mys 20 (27) = ILR (1955) Mys 597 (DB).]

(2) The object of Clause (3) (c) is to give an assurance to the services that an independent body has considered the action proposed to be taken against a particular person and also to afford the Government unbiased advice on matters affecting morale of the public services. AIR 1957 SC 912 (916).

[See (1959) 2 Lab LJ 261 (264) (Andh

Pra). (Consultation with Public Service Commission before dismissal is not mandatory.) ** AIR 1955 Punj 1 (3).]

(3) The report received by the Council of Ministers from the Public Service Commission under Article 320 (3) (c) is privileged document as its disclosure would lead to injury to public interest. AIR 1961 SC 493 (512) = (1961) 2 SCR 371. (AIR 1921 Cal 282 and AIR 1944 Lah 434, **Overruled**; AIR 1960 Punj 407, **Reversed.**)

(4) Though the Union Public Service Commission has to be consulted in all disciplinary matters, it is not an appellate authority over the Enquiry Officer. AIR 1962 SC 1130 (1132, 1133) = 1962 Supp (1) SCR 968.

(5) The power to revert a gazetted Government servant vests exclusively in the Government and not in the Public Service Commission, though the latter has to aid and advice Government by their opinion. AIR 1966 Orissa 173 (183) = (1966) 8 Orissa JD 211 ** AIR 1964 Cal 265 (270) = (1968) 2 Lab LJ 376.

6. Stage at which the Public Service Commission is to be consulted. — (1) It is enough if the Public Service Commission is consulted at some stage before the final order imposing the penalty is passed. AIR 1957 Andh Pra 794 (804) = ILR (1957) Andh Pra 80 (DB).

[See AIR 1957 SC 882 (883).]

(2) Where the Public Service Commission is consulted before the show cause notice under Article 311 (2) is given to the Officer and he does not show any cause in reply to the notice, it is not necessary to consult the Public Service Commission again before the final order is passed against the officer. AIR 1955 SC 160 (166) = 1955 SCR 1011.

(3) A Government servant cannot claim that notice issued to him to show cause

and it shall be the duty of a Public Service Commission to advise on any matter so referred to them and on any other matter which the President, or, as the case may be, the Governor "[° °]" of the State, may refer to them.

Provided that the President as respects the all-India services and also as respects other services and posts in connection with the affairs of the Union, and the Governor "[° ° ° ° °]" as respects other services and posts in connection with the affairs of a State, may make regulations specifying the matters in which either generally, or in any particular class of case or in any particular circumstances, it shall not be necessary for a Public Service Commission to be consulted.

(4) Nothing in clause (3) shall require a Public Service Commission to be consulted as respects the manner in which any provision referred to in clause (4) of Article 16^c may be made or as respects the manner in which effect may be given to the provisions of Article 335^c.

Article 320 — Note 6 (contd.)

against the action proposed to be taken against him should have been issued to him after the expression of opinion by the Public Service Commission. AIR 1960 Mad 393 (393) = (1961) 1 Mad LJ 46 ** (1956) 2 Mad LJ 145 (147).

(4) Once the Governor has passed an order imposing the penalty no question of consultation with the Public Service Commission arises. ILR (1956) Punj 1213 (1230).

7. "All disciplinary matters." — (1) Clause (3) (c) applies to every kind of disciplinary action proposed to be taken in respect of a particular person. AIR 1956 SC 285 (292) = (1955) 2 SCR 1331.

(2) Suspension proceedings partake of the nature of the disciplinary matter within the meaning of Clause (3) (c). AIR 1958 Ker 72 (74) = ILR (1958) Ker 131 (DB) ** AIR 1954 Cal 60 (63) = ILR (1955) 2 Cal 28 (DB).

(3) The termination of service of a person in accordance with the terms of contract of service, is not a disciplinary matter requiring consultation. AIR 1953 Pat 92 (95) (DB).

(4) If a person is appointed to a temporary post, his period of appointment will expire when the post itself is abolished. In such a case there is no question of any disciplinary action so as to make the consultation with the Public Service Commission necessary. AIR 1955 Pat 353 (357) (DB).

(5) Reduction in rank being a disciplinary matter requires consultation with the Public Service Commission. AIR 1952 Pepsu 152 (155) = ILR (1952) Patiala 392 (DB).

(6) Where the reversion of a Government servant from the higher officiating post to his original substantive post is by way of penalty, the Public Service Commission must be consulted in the matter. AIR 1955 Pepsu 106 (109) = ILR (1955) Patiala 202 ** AIR 1954 Pepsu 98 (104) = ILR (1954) Patiala 105 ** AIR 1952 Nag 288 (289) = ILR (1952) Nag

105 (DB) ** AIR 1952 Pepsu 152 (155) = ILR (1952) Patiala 392 (DB).

(7) Where the order reverting to a lower post does not amount under the Fundamental Rules to a penalty, there is no need to consult the Public Service Commission. AIR 1957 Punj 191 (196) = ILR (1957) Punj 1222 (DB) ** AIR 1954 Pepsu 98 (104) = ILR (1954) Patiala 105.

(8) Clause (3) (c) is inapplicable where a Government servant is made to retire compulsorily on account of Government Policy and not as a matter of disciplinary action. AIR 1953 Trav-Co 140 (144) = ILR (1952) Trav-Co 756 (DB).

[See also AIR 1954 Pat 187 (190) = ILR 32 Pat 708 (DB).]

(9) Where there is no question of punishment or disciplinary action, consultation with the Public Service Commission is not necessary. AIR 1954 Trav-Co 32 (33) = ILR (1953) Trav-Co 954 (DB) ** AIR 1953 Trav-Co 140 (144) = ILR (1952) Trav-Co 756 (DB).

(10) Where a Government servant applies for leave preparatory to retirement and is retired thereafter, there is no need to consult the Public Service Commission. AIR 1952 Trav-Co 409 (411).

(11) High Court exercising power by promoting some members to higher posts in supersession of plaintiff's claim according to seniority list — Consultation with State Public Service Commission not necessary. AIR 1962 SC 1704 (1710) = (1963) 1 SCR 437.

(12) Kerala Public Service Commission (Consultation) Regulation (1957), Rule 9 — There is no obligation on State Government to consult commission in matters relating to judicial officers — Public Service Commission still consulted before terminating services of judicial officer — There is no irregularity or illegality. AIR 1963 Ker 92 (100).

(13) Decision to take disciplinary action against a public servant and to set up the actual disciplinary Tribunal and its personnel should form subject matter

(5) All regulations made under the proviso to clause (3) by the President or the Governor ^{a[° °]} of a State shall be laid for not less than fourteen days before each House of Parliament or the House or each House of the Legislature of the State, as the case may be, as soon as possible after they are made, and shall be subject to such modifications whether by way of repeal or amendment, as both Houses of Parliament or the House or both Houses of the Legislature of the State may make during the session in which they are so laid.

[Government of India Act (1935) S. 266.]

[a] The words 'or Rajpramukh' were omitted by Constitution (Seventh Amendment) Act, 1956, S. 29 and Schedule [1-11-1956].

[b] The words "or Rajpramukh, as the case may be", were omitted, *ibid*.

[c] Art. 16(4) deals with making of any provision for the reservation of appointments or posts in favour of any backward class of citizen: Art. 335 deals with the claims of Scheduled Castes and Scheduled Tribes to services and posts.

Article 320 — Note 7 (contd.)

of consultation. AIR 1961 Cal 1 (6) = 65 Cal WN 361 (SB).

8. Persons to whom clause (3) (c) is applicable. — (1) The clause does not apply to servants of Sindri Fertilizers and Chemicals Ltd., as they are not servants of Union or State Government. AIR 1957 Pat 10 (14) (DB).

(2) The phrase "persons serving under the Government of India or the Government of a State" seems to have reference to such persons in respect of whom the administrative control is vested in the respective executive Governments. AIR 1956 SC 285 (294) = (1955) 2 SCR 1331.

(3) The clause does not apply to members of the staff of High Court. AIR 1956 SC 285 (294) = (1955) 2 SCR 1331.

(4) Clause (3) (c) applies only to those persons to whom clause (1) of Art. 320 applies, that is, to those who are recruited through examination held by the Public Service Commission. AIR 1954 Cal 60 (63) = ILR (1955) 2 Cal 28 (DB) ** AIR 1955 Cal 183 (186).

(5) A Notification issued under the Proviso to Clause (3) may have the effect of removing from the operation of Clause (3) (c) a particular class of persons. AIR 1955 Mad 468 (469).

(6) Employees of the State Bank of India are servants of a statutory corporation and are not civil servants of the Union Government within the meaning of Article 320 (3) (c). AIR 1958 Pat 418 (419) = ILR 37 Pat 431 (DB).

9. "Including memorials or petitions relating to such matters." — (1) A petition of appeal presented by a dismissed Government servant comes under the words "memorials or petitions" and it cannot, therefore, be rejected without first consulting the Public Service Commission. ILR (1951) 1 Raj 134 (150) (DB) ** 1952 Raj LW 118 = ILR (1951) 1 Raj 134 (150, 151).

(2) An application for review would be covered by the words "memorials and petitions." AIR 1957 SC 912 (916).

[See however AIR 1955 SC 160 (166) = 1955 SCR 1011.]

10. Clause (3) (d). — (1) Where a Government servant is prosecuted for the offence of cheating by submitting false travel bills and taking money on them and is acquitted, his claim to reimbursement of expenses incurred by him in defending himself should be dealt with under Clause (3) of this article. AIR 1957 Assam 143 (145) (DB).

11. Clause (3), Proviso. — (1) The proviso governs all the clauses of sub-article (3) of Article 320. AIR 1958 Andh Pra 35 (37) (DB).

(2) The proviso enables the President or the Governor to make regulations specifying the matters in regard to which consultation with the Public Service Commission is not necessary. AIR 1957 Manipur 7 (9).

(3) It is within the powers of the Governor to limit the functions of the Public Service Commission and if any appointment is taken out of the purview of the Public Service Commission, it is well covered by the provisions of the Constitution. If such appointments have been taken out from the purview of the Public Service Commission by enacting a valid rule, the Government is fully empowered to make appointment for any length of period against any post without consulting the Public Service Commission. 1968 Lab IC 1605 (1622) = 1969 Raj LW 47.

(4) Consultation with the Public Service Commission may be dispensed with in regard to disciplinary matters in cases mentioned in the Regulation. AIR 1958 Andh Pra 35 (37) (DB) ** AIR 1958 Ker 72 (74) = ILR (1958) Ker 131 (DB) ** ILR (1957) Andh Pra 715 (725) (DB) ** AIR 1957 Pat 676 (678) (DB) ** AIR 1956 Mad 220 (222) ** (1960) 2 Lab LJ 165 (168) (Andh Pra) (DB) ** (1957) 2 Andh WR 425 (430) ** ILR (1957) 9 Assam 223.

[See AIR 1958 Andh Pra 240 (251) (DB).]

(5) Where a notification dispensing with the need to consult the Public Service Commission with reference to appointment to certain office is issued after

Articles 320 — Note 11 (contd.)

the appointment is made, such appointment without consulting the Public Service Commission will be valid where it is to take effect after the notification. AIR 1957 Mad 17 (19) = ILR (1957) Mad 158 (DB).

(6) Though the Public Service (Commission) Consultation Regulations under the proviso dispensing with consultation with the Public Service Commission came into force only after the inquiry against a public servant had started, they will apply if they are in force at the time when Government was satisfied that action was necessary. AIR 1956 Trav-Co 158 (159).

[But see AIR 1958 Bom 167 (169) = ILR (1967) Bom 120 (DB).]

(7) The expression "other services and posts in connection with the affairs of a State" means services and posts other than all-India Services and other services and posts in connection with the affairs of the Union. AIR 1956 Trav-Co 158 (159).

(8) Regulations and notifications made under the corresponding Section 266 (3) of the Government of India Act, 1935, making it unnecessary to consult the Public Service Commission in any matter, continue in force even after the Constitution, under Article 313. AIR 1957 All 436 (438) = ILR (1957) 1 All 269 ** AIR 1957 Pat 676 (678) (DB) ** AIR 1958 Pat 228 (232) (DB) ** AIR 1955 Nag 163 (165) = ILR (1955) Nag 187 (DB) ** AIR 1954 All 813 (814, 815) = ILR (1955) 2 All 800 (DB).

(9) Under the Hyderabad Rules the Government is not prohibited from consulting the commission nor does it act illegally if it consults the commission. AIR 1968 Andh Pra 364 (370) = 1968 Lab IC 1499 = (1969) 1 Andh WR 17.

(10) Under the Jammu and Kashmir Public Service Commission (Limitation of Functions) Regulation, 1957 the Public Service Commission has to be consulted in all appointments like that of a Principal. If appointment to the post of a Principal is made without consulting the Commission and in spite of its protest the appointment is not in accordance with law and the Constitution. AIR 1968 J and K 26 (31, 32) = 1968 Lab IC 132 = 1968 Kash LJ 53.

(11) Where the President proposes to make an order of dismissal removal or reduction in rank after being satisfied that such action is necessary in the interest of the security of the State it shall not be necessary for the President to consult the Commission. AIR 1958 Bom 283 (290) = 60 Bom LR 241 (DB).

12. Clause (4). — (1) The Public Service Commission need not be consulted by the State Government with respect to the making of provisions for reservation of appointments in favour of backward classes of citizens. AIR 1956 Mys 20 (25) = ILR (1955) Mys 597 (DB).

13. Clause (5). — (1) The provision in Clause (5) as to laying of the Regulations before the Legislature has been held to be only directory and not mandatory. AIR 1955 Cal 451 (459) (DB) ** AIR 1955 Pepsu 97 (102) = ILR (1955) Patiala 416.

[But see AIR 1957 Manipur 7 (9).]

(2) Clause (5) of this article also applies only to Regulations made under the proviso to Clause (3) and cannot be considered as requiring that the Regulations made under the Government of India Act, 1935, should be laid before the Legislature. AIR 1954 All 813 (815) = ILR (1955) 2 All 800 (DB) ** (1953) 57 Cal WN 157 (161).

[See also AIR 1956 Sau 14 (20) (DB).]

(3) Where there is nothing on the record to show whether or not the old Regulations framed under Section 266 (3) of the Government of India Act, 1935 were laid before the Parliament after their adaptation by the Adaptation of Laws Order, 1950, it must be deemed that the provisions of Cl. (5) of Art. 320 were complied with. AIR 1958 Manipur 35 (36, 37).

14. Position of the Public Service Commission vis a vis Government. — (1) The Public Service Commission is an independent body and is not an authority subordinate to the Government. See AIR 1955 Madh B 56 (60) = ILR (1954) Madh B 256 (DB).

(2) The Public Service Commission is not an authority exercising any power under the Constitution. AIR 1956 Mys 20 (25) = ILR (1955) Mys 597 (DB).

(3) The function of the Public Service Commission is purely advisory and its advice is not binding on the Government. AIR 1958 Madh Pra 135 (142) (DB) ** AIR 1956 Manipur 34 (40) ** AIR 1958 Tripura 28 (31).

(4) It is not open to the Public Service Commission to refuse any information wanted by the Government. AIR 1956 Mys 20 (27) = ILR (1955) Mys 597 (DB).

(5) The Public Service Commission is a constitutional body charged with certain constitutional rights, duties and obligations. Article 321 does recognise the possibility of extending the functions of the Public Service Commission. But it can only be done by an Act of the State Legislature under Article 321. AIR 1958 Cal 345 (348, 349, 350) = 62 Cal WN 429.

(6) Public Service Commission, cannot identify itself with Government Authorities — Commission cannot change its decisions to suit the views of Government Authorities. 1968 Lab IC 1377 (1380) = (1968) 1 Mad LJ 348.

321. Power to extend functions of Public Service Commissions.—An Act made by Parliament or, as the case may be, the Legislature of a State may provide for the exercise of additional functions by the Union Public Service Commission or the State Public Service Commission as respects the services of the Union or the State and also as respects the services of any local authority or other body corporate constituted by law or of any public institution.

[Government of India Act (1935) S. 267.]

322. Expenses of Public Service Commissions.—The expenses of the Union or a State Public Service Commission, including any salaries, allowances and pensions payable to or in respect of the members or staff of the Commission, shall be charged on the Consolidated Fund of India or, as the case may be, the Consolidated Fund of the State.

[Government of India Act (1935) S. 268.]

323. Reports of Public Service Commissions.—(1) It shall be the duty of the Union Commission to present annually to the President a report as to the work done by the Commission and on receipt of such report the President shall cause a copy thereof together with a memorandum explaining, as respects the cases, if any, where the advice of the Commission was not accepted, the reasons for such non-acceptance to be laid before each House of Parliament.

(2) It shall be the duty of a State Commission to present annually to the Governor ^a[* *] of the State a report as to the work done by the Commission. and it shall be the duty of a Joint Commission to present annually to the Governor ^a[* *] of each of the States the needs of which are served by the Joint Commission a report as to the work done by the Commission in relation to that State, and in either case the Governor ^b[* * *] shall, on receipt of such report, cause a copy thereof together with a memorandum explaining as respects the cases, if any, where the advice of the Commission was not accepted, the reasons for such non-acceptance to be laid before the Legislature of the State.

[a] The words "or Rajpramukh" were omitted by the Constitution (Seventh Amendment) Act, 1956, S. 29 and Schedule [1-11-1956].

[b] The words "or Rajpramukh, as the case may be," were omitted, *ibid*.

PART XV ELECTIONS

324. Superintendence, direction and control of elections to be vested in an Election Commission^{aa}. — (1) The superintendence, direction and control of the

Article 321 — Note 1

(1) Constitution does not recognise in Article 321 the possibility of extending the functions of the Public Service Commission. Under this provision only additional function can be entrusted to the State Public Service Commission. But it can only be done by an Act of the State legislature. It cannot be done by any private or departmental arrangement between the Commission and the Government. AIR 1958 Cal 345 (350) = 62 Cal WN 429.

Article 323 — Note 1

(1) As under the Government of India Act, 1935, the status of the Public Service Commission is advisory under the Constitution. But there is a provision under Article 323 which was not to be found in the Act of 1935, viz., that annually the President or the Governor or Rajpramukh shall have to explain to the Legislature

the reasons why in the particular cases the advice of the Commission could not be accepted. AIR 1956 Manipur 34 (40).

(2) Functions of Public Service Commission are only advisory — Government is not bound to follow the advice or recommendation tendered by the Commission. AIR 1958 Tripura 28 (31).

(3) Public Service Commission cannot withhold any information wanted by Government. AIR 1956 Mys 20 (26) = ILR (1955) Mys 597 (DB).

(4) Section 137 of the Constitution of J. and K. (1956) which corresponds to Article 323 is directory and not mandatory. AIR 1968 J and K 26 (31) = 1968 Kash LJ 53.

ARTICLE 324 — SYNOPSIS

1. Scheme of Part 15.
2. Executive authority of Election Commission.
3. Election Tribunal.

preparation of the electoral rolls for, and the conduct of, all elections to Parliament and to the Legislature of every State and of elections to the offices of President and Vice-President held under this Constitution * [* * *] shall be vested in a Commission (referred to in this Constitution as the Election Commission).

(2) The Election Commission shall consist of the Chief Election Commissioner and such number of other Election Commissioners, if any, as the President may from time to time fix and the appointment of the Chief Election Commissioner and other Election Commissioners shall, subject to the provisions of any law made in that behalf by Parliament, be made by the President.

(3) When any other Election Commissioner is so appointed the Chief Election Commissioner shall act as the Chairman of the Election Commission.

(4) Before each general election to the House of the People and to the Legislative Assembly of each State, and before the first general election and thereafter before each biennial election to the Legislative Council of each State having such Council, the President may also appoint after consultation with the Election Commission such Regional Commissioners as he may consider necessary to assist the Election Commission in the performance of the functions conferred on the Commission by clause (1).

(5) Subject to the provisions of any law made by Parliament, the conditions of service and tenure of office of the Election Commissioners and the Regional Commissioners shall be such as the President may by rule determine :

Article 324 (contd.)

1. Scheme of Part 15.— (1) Part XV of the Constitution is really a Code in itself providing the entire ground work for enacting appropriate laws and setting up suitable machinery for the conduct of elections. AIR 1962 SC 64 (66, 69) = 1962 SCR 218.

[See AIR 1964 Raj 126 (130) = ILR (1964) 14 Raj 26 (DB).]

(2) The purpose behind part XV of the Constitution is that the conduct of elections should be left unhindered in the hands of the Election Commission and the working of the election machinery should up to the stage of declaration of the election results be not arrested by judicial or as far as may be by any other process. AIR 1962 All 511 (512, 513) (DB).

(3) Upon the resignation of a member in the Legislature the seat becomes vacant under Article 190 (3) (b) of the Constitution. Section 150 of the Representation of the People Act cannot whittle down its force and effect. (1967) 1 Andh LT 253 = (1967) 2 Andh WR 53 (DB).

(4) The word "election" in Part XV connotes the entire procedure to be gone through to return a candidate to the legislature. AIR 1968 Manipur 84 (93).

2. Executive authority of Election Commission.— (1) The executive authority of the Election Commission under this article cannot be limited by any law passed by Parliament under the provisions of Article 327. There is also no provision in any article of the Constitution as to the manner in which the Election Commission would exercise its authority under Article 324. It is a matter of internal arrangement over which the Election Tri-

bunal has full competence and control. AIR 1963 Pat 293 (294) (DB).

(2) It is not open to the Election Commission to prescribe a form of oath for a presidential candidate. Such power cannot be spelt out of Article 324. AIR 1968 SC 904 (910) = (1968) 2 SCR 133.

(3) (Obiter:— In matters governed by the Representation of the People Act, the Election Commission is bound to follow the provisions of the Act in respect of the express directions contained in the Act passed by the Parliament, in the exercise of its powers under Article 327. Article 327 has been made subject to the provisions of the Constitution and Article 324 (1) is one of such provisions, but the power contained in Article 324 (1) is a general power. AIR 1968 All 794 (799) = ILR (1968) 2 All 332 (DB).

(4) In a case where the Electoral Registration Officer by mistake or by misconception prepared electoral roll for a particular constituency including in it an area which does not belong to the constituency, he must be held to have exceeded the jurisdiction vested in him. In such a case, the Election Commission can in exercise of its executive power under Article 324 of the Constitution and Section 21 (3) of the Representation of the People Act direct a special revision of the electoral roll for the said constituency. AIR 1968 Andh Pra 218 (221) = ILR (1969) Andh Pra 256 (DB).

(5) Articles 324 and 327 show that the conduct of elections is vested in the Election Commission though the law is to be made by Parliament. AIR 1958 Madh Pra 299 (301) = 1958 MPLJ 270 (DB).

(6) The Union and State Governments adopted the arrangement that State Govt. would initially bear all expenses and

Provided that the Chief Election Commissioner shall not be removed from his office except in like manner and on the like grounds as a Judge of the Supreme Court and the conditions of service of the Chief Election Commissioner shall not be varied to his disadvantage after his appointment:

Provided further that any other Election Commissioner or a Regional Commissioner shall not be removed from office except on the recommendation of the Chief Election Commissioner.

(6) The President, or the Governor ^[* *] of a State, shall, when so requested by the Election Commission, make available to the Election Commission or to a Regional Commissioner such staff as may be necessary for the discharge of the functions conferred on the Election Commission by clause (1).

[Government of India Act (1935), Section 29.]

[a] Words "including the appointment of election tribunals for the decision of doubts and disputes arising out of or in connection with elections to Parliament and to the Legislatures of the States", are omitted by the Constitution (Nineteenth Amendment) Act, 1966, S. (11-12-1966). Jurisdiction to decide election petitions is now vested in the High Courts — See the Representation of the People Act, 1951, (43 of 1951), S. 86 (as substituted by Act 47 of 1966, S. 41.)

[aa] This Article came into force on 26-11-1949 — See Art. 394.

[b] The words "or Rajpramukh", were omitted by the Constitution (Seventh Amendment) Act, 1956, S. 29 and Sch. [1-11-1956].

JAMMU AND KASHMIR

In its application to the State of Jammu and Kashmir, in clause (1) of Art. 324, the reference to the Constitution shall, in relation to elections to either House of the Legislature of Jammu and Kashmir, be construed as a reference to the Constitution of Jammu and Kashmir.

—See Constitution (Application to J. and K.) Order, 1954, Para 2, sub-para (10) (a) (as substituted by C. O. 60, w.e.f. 26-1-1960.)

325. No person to be ineligible for inclusion in, or to claim to be included in a special, electoral roll on grounds of religion, race, caste or sex.—There shall be one general electoral roll for every territorial constituency for election to either House of Parliament or to the House or either House of the Legislature of a State and no person shall be ineligible for inclusion in any such roll or claim to be included in any special electoral roll for any such constituency on grounds only of religion, race, caste, sex or any of them.

JAMMU AND KASHMIR

In Article 325, reference to a State shall be construed as not including a reference to the State of Jammu and Kashmir.

—See Constitution (Application to Jammu and Kashmir) Order, 1954, Para 2, Sub-para. (10) (b) (as substituted by C. O. 75.)

Article 324 — Note 2 (contd.)

collect all receipts of sale proceeds and finally liabilities would be divided half and half. By this arrangement, District Election officer, a State servant, can exercise the power to collect sale proceeds of electoral rolls which remain with State Government. AIR 1969 Orissa 263 (264, 265).

the Election Commission nor can the Commission dictate to it as to how it should decide a petition. AIR 1954 Nag 166 182 (183) = ILR (1954) Nag 209 (FB).

(2) This article does not prohibit the appointment of more than one Election Tribunal to function in the same area. AIR 1958 All 137 (140) (DB).

Article 325 — Note 1

3. Election Tribunal.— (1) Although the Election Tribunal owes its constitution to the Election Commission, it is appointed to decide a petition according to its own lights. It is in no sense a servant of

(1) Corrections made under Sections 22 and 23 of Representation of the People Act (1950) — Non-inclusion in electoral roll does not postpone effect. AIR 1959 Pat 356 (361) = 1959 BLJR 179 (DB).

326. Elections to the House of the People and to the Legislative Assemblies of States to be on the basis of adult suffrage.—The elections to the House of the People and to the Legislative Assembly of every State shall be on the basis of adult suffrage; that is to say, every person who is a citizen of India^a and who is not less than twenty-one years^d of age on such date as may be fixed^b in that behalf by or under any law made by the appropriate Legislature and is not otherwise disqualified under this Constitution or any law^c made by the appropriate Legislature on the ground of non-residence, unsoundness of mind, crime or corrupt or illegal practice, shall be entitled to be registered as a voter at any such election.

[a] See Articles 5 to 11 above and Citizenship Act, 1955, Sections 3 to 10.

[b] See Section 19 read with Section 21 of the Representation of the People Act, 1950 (43 of 1950).

[c] See the Representation of the People Act, 1950 (43 of 1950), S. 16 and Representation of the People Act, 1951 (43 of 1951), Ss. 42, 141.

[d] See Section 4 of the Indian Majority Act, 1875, which lays down the principle in regard to computation of age.

JAMMU AND KASHMIR

In Art. 326, reference to a State shall be construed as not including a reference to the State of Jammu and Kashmir.

—See Constitution (Application to Jammu and Kashmir) Order, 1954, Para 2, Subpara. (10) (b) (as substituted by C. O. 75.)

ARTICLE 326

1. Scope.—(1) This article does not apply to elections to elected bodies other than those specified in the article itself. AIR 1958 Raj 96 (100) (DB).

(2) What the article provides is that every adult citizen of India, who is not disqualified in any of the ways mentioned in the article, is entitled to get himself enrolled as a voter in the electoral roll. AIR 1954 Orissa 87 (91) = ILR (1953) Cut 659 (DB).

(3) If a person's name is not entered on the electoral roll and he is consequently deprived of the right of voting, his remedy is to proceed under the provisions of the Representation of the People Act, to get the omission rectified. AIR 1954 Orissa 87 (91) = ILR (1953) Cut 659 (DB).

(4) The adult suffrage as envisaged by the article gives only a right to vote and not also a right to stand for election to a particular body. AIR 1958 Raj 96 (100) (DB).

(5) Where the nomination of the candidate is rejected, it is not open to an elector to come to the Court alleging that his right to vote for any candidate he likes is infringed by the rejection of the nomination. AIR 1954 Orissa 87 (91) = ILR (1953) Cut 659 (DB).

(6) Rule 27-A of the Representation of the People (Preparation of Election Rolls) Rules (1956) cannot be challenged on ground that it curtails right of franchise granted by Article 326. AIR 1961 Cal 289 (295, 296, 297).

(7) Omission of names in electoral rolls — Does not amount to non-compliance with the Article. AIR 1968 Ker 284 (291) = 1968 Ker LT 747.

(8) Residence is not a qualification prescribed under Article 326 — It cannot, therefore, be tried by Court trying election petition under Section 100 (1) (d) (iv) of Representation of the People Act (1951). AIR 1969 Cal 267 (275).

(9) Article 326, while mentioning the qualifications for being entitled to be registered as a voter, does not add that the person so qualified shall have a right to vote. AIR 1968 Punj 1 (6) = 69 Punj LR 618 (FB).

2. Electoral roll — Entry in — Effect of.—(1) The entry of a person's name as a voter in the electoral roll is only prima facie evidence that he is qualified to vote, but it is not finally conclusive. AIR 1955 Andhra 109 (111, 112).

(2) Per Full Bench — In the case of a person whose name appears in the electoral roll and who has exercised his vote the Election Tribunal can go into the question whether or not he had attained the age of twentyone on the qualifying date, and, on the finding that he had not, exclude his vote from the count. AIR 1962 Ker 190 (191, 192, 193, 210) = 1962 Ker LT 275 (FB).

(3) Election challenged on ground of want of qualifying age — Section 36 (7) of 1951 Act no bar for enquiry into — Entries in electoral rolls — No presumption that they must be accepted as conclusive proof of age. AIR 1964 Raj 126 (132) = ILR (1964) 14 Raj 26 (DB).

(4) Inclusion of name of voter who is under 21 years of age, in the electoral roll — Breach of Constitution in preparing electoral roll rendering roll a nullity so far as voter's name is concerned and his name entered in roll must be deemed as non est for purposes of acceptance or reception of his vote. AIR 1967 Mad 244 (246) = (1966) 2 Mad LJ 560 (DB).

327. Power of Parliament to make provision with respect to elections to Legislatures.—Subject to the provisions of this Constitution, Parliament may from time to time by law make provision^a with respect to all matters relating to, or in connection with, elections to either House of Parliament or to the House or either House of the Legislature of a State including the preparation of electoral rolls, the delimitation of constituencies and all other matters necessary for securing the due constitution of such House or Houses.

[Government of India Act (1935), S. 291.]

[a] See the Representation of the People Act, 1950 (43 of 1950); the Representation of the People Act 1951 (43 of 1951); the Representation of the People (Miscellaneous Provisions) Act, 1956 (88 of 1956); the Delimitation Commission Act, 1962 (61 of 1962).

JAMMU AND KASHMIR

In Article 327, the reference to a State shall be construed as not including a reference to the State of Jammu and Kashmir.

—See Constitution (Application to Jammu and Kashmir) Order, 1954, Para 2, Subpara. (10) (b) (as substituted by C. O. 75.)

Article 326 — Note 2 (contd.)

(5) Election Tribunal has no jurisdiction to permit evidence being led for determining the question whether a voter is below age of 21 years and therefore is disentitled to vote. AIR 1969 Guj 334 (335, 336). (AIR 1962 Ker 190 (FB) and AIR 1955 Andhra 109 and AIR 1967 Mad 244, Dissented from.)

(6) Election tribunal can enquire into age qualification of candidate despite fact that his name appears in electoral roll, as a voter. AIR 1970 Andh Pra 56 (67) = (1969) 1 Andh WR 52 (FB).

ARTICLE 327

1. "Subject to the provisions of this Constitution".— (1) The Parliament cannot make, under this article, a law which conflicts with the other provisions of the Constitution. AIR 1954 Nag 166 (186) = ILR (1954) Nag 209 (FB).

(2) The executive authority of the Election Commission under Article 324 cannot be limited by any law passed by Parliament under the provisions of this article. AIR 1953 Pat 293 (294) (DB).

(3) Section 170 of the Representation of the People Act, 1951 is not ultra vires. AIR 1953 Cal 98 (102).

(4) The Representation of the People Act 1951 has been enacted by Parliament under provisions of Article 327. Article 327 is subject to provisions of Article 324. AIR 1958 All 794 (799) = 15 Ele LR 425 (DB).

(5) Combined effect of Articles 324 and 327 is that conduct of elections is vested in the Election Commission, though the law is to be made by Parliament. AIR 1958 Madh Pra 299 (301) = 1958 MPLJ 270 (DB).

(6) The Representation of the People Act 1951 itself has been enacted by Parliament under Article 327. Hence it cannot be contended that the Election Commission need not await the disposal of an Election Petition. (1967) 2 Andh WR 53 = (1967) 1 Andh LT 253 (DB).

(7) Law made by Parliament pursuant to Article 327 has to be read as supplemental to and not in derogation of Article 173. AIR 1968 Mys 18 (28) = 13 Law Rep 153.

2. Scope of legislation by Parliament.—

(1) The words "all matters relating to or in connection with elections" are wide enough to include, all matters arising out of or connected with any stage of the entire election process. AIR 1957 SC 694 (698) ** AIR 1952 All 511 (513) (DB).

(2) Parliament had full competence to legislate with regard to election offences in the manner provided under Sections 131 (1) (b) and 136 (1) of Representation of the People Act which therefore are not ultra vires. AIR 1954 Pat 356 (357) = 1954 Cri LJ 1132.

(3) The Representation of the People Act, 1950, prescribes the mode in which a person can get himself registered as a voter in the electoral roll and if his name is not registered in the electoral roll and he fails to follow the procedure laid down in the Act to get the omission rectified, he cannot subsequently complain that he has been deprived of the right to vote. AIR 1954 Orissa 87 (89) = ILR (1953) Cut 659 (DB).

(4) Provisions of Act of 1950 providing for preparation of electoral rolls are in accordance with Article 327. AIR 1968 Manipur 84 (93).

(5) The manner in which a vote cast by a registered voter is to be challenged is a matter for legislation by Parliament under Article 327. AIR 1968 Punj 1 (5) = 69 Punj LR 618 (FB).

(6) The power of the State legislature to make a law on the subject of election is subordinate to the Parliament's Power. AIR 1954 Madh B 111 (112) = Madh BLJ 1954 HCR 578 (DB).

(7) Parliament has no power to legislate regarding contingencies provided in Articles 101 and 190. AIR 1968 J & K 46 (50, 51) (DB).

328. Power of Legislature of a State to make provision with respect to elections to such Legislature.—Subject to the provisions of this Constitution and in so far as provision in that behalf is not made by Parliament, the Legislature of a State may from time to time by law make provision with respect to all matters relating to, or in connection with, the elections to the House or either House of the Legislature of the State including the preparation of electoral rolls and all other matters necessary for securing the due constitution of such House or Houses.

JAMMU AND KASHMIR

Article 328 shall be omitted — See Constitution (Application to Jammu and Kashmir)

Order, 1954, Para. 2, sub-para. (10) (c) (as substituted by C. O. 75).

329. Bar to interference by courts in electoral matters.—Notwithstanding anything in this Constitution—

- (a) the validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies, made or purporting to be made under Article 327 or Article 328, shall not be called in question in any court;

Article 327 — Note 2 (contd.)

(8) No power in Union Parliament to legislate in respect of matters pertaining to election to Jammu and Kashmir State legislature. AIR 1968 J and K 46 (50) (DB).

(9) Vote cast by duly registered voter though below 21 years of age on qualifying date, is valid. AIR 1968 Punj 1 (4) = 69 Pun LR 618 (FB).

3. Delimitation Commission Act. — (1) Orders under Sections 8 and 9 of the Delimitation Commission Act (1962) and their publication under Section 10 (1) have same effect as if they were law made by Parliament itself under Art. 327 — Such orders are not mere administrative directions. AIR 1967 SC 669 (672, 674, 676) = (1967) 1 SCR 400.

(2) (As it stood after amendment in 1956) — Power of delimitation of constituencies is given not by Article 82 but by Article 327 — Reference to Article 82 in Statement of Objects and Reasons of Delimitation Commission Act, 1962 does not mean that the Act was law made under Article 82. AIR 1967 SC 669 (671, 672) = (1967) 1 SCR 400.

(3) Provisions of the Delimitation Commission Act cannot be challenged in an election petition. AIR 1968 Raj 249 (262, 263) = ILR (1967) 17 Raj 995.

(4) Delimitation Commission Act 1962 was made by Parliament in exercise of its power under Article 327. AIR 1968 Raj 249 (262) = ILR (1967) 17 Raj 995
** AIR 1968 Andh Pra 218 (222) = ILR (1969) Andh Pra 256 (DB).

Article 328 — Note 1

(1) The power of the State Legislature under this article is subject to any law that the Parliament may have made. Hence, it is not correct to say that a Tribunal appointed under the Representation of the People Act, 1951, which is an Act passed by Parliament, is not competent to try the petition calling in question an election to the State Legislature.

AIR 1954 Madh B 111 (112) = ILR (1954) Madh B 440 (DB).

(2) In the absence of any legislation of Parliament the manner in which a vote cast by a registered voter is to be challenged is a matter for legislation by the State under Article 328. AIR 1968 Punj 1 (5) = 69 Punj LR 618 (FB).

(3) Use of words "with respect to all matters relating to or in connection with" in Articles 327 and 328 does not indicate that the word 'election' does not cover every part of the process of the election of representative. AIR 1952 All 511 (513) = (1952) 22 ITR 101 (DB).

(4) Although the Conduct of Election Rules 1961 did not contemplate a discretion to the Election Commission in the matter of selection of symbols, there was some jurisdiction in the Commission to regulate or restrict choice of symbols in particular circumstances. (1967) 71 Cal WN 799.

ARTICLE 329 — SYNOPSIS

1. Election.
2. Election Disputes.
3. Election Disputes — Applications under Article 226 or 227.
4. Elections — Other than for legislative bodies.

1. Election. — (1) The term "election" in this context connotes the whole process by which a candidate is returned to the Legislature and does not refer only to the last stage in such process at which a candidate is declared elected. AIR 1952 SC 64 (68) = 1952 SCR 218 ** AIR 1955 SC 233 (238) = 1955 SCR 1104 ** AIR 1952 Madh B 97 (102) (FB) ** AIR 1968 Manipur 84 (93) ** AIR 1965 Assam 83 (85) (DB) ** (1964) 68 Cal WN 270 ** AIR 1961 Cal 289 (294) ** AIR 1958 Bom 397 (399) = 60 Bom LR 353 (DB).

(2) Election commences with issue of notification that polls would be held. AIR 1968 Manipur 84 (93).

(b) no election to either House of Parliament or to the House or either House of the Legislature of a State^a shall be called in question except by an election petition presented to such authority and in such manner as may be provided^b for by or under any law made by the appropriate Legislature.

(a) For such States, see Art. 168 (1) (a), *supra*.

(b) See Part VI, consisting of Ss. 79 to 122 of the Representation of the People Act, 1951 (43 of 1951).

JAMMU AND KASHMIR

(i) In Art. 329, reference to a State shall be interpreted as not including a reference to the State of Jammu and Kashmir; and

(ii) the words and figures "or Article 328", shall be omitted.

—See Constitution (Application to J. and K.) Order, 1954, Para. sub-paras. (10) (b) and (c) (as substituted by C. O. 75).

Article 329 — Note 1 (contd.)

(2-A) Election commences with issuance of notification for holding election and culminates with return of candidate to Legislature. (1969) 71 Punj LR 708 (711) (DB).

(3) The steps taken for the purpose of obtaining photographs for the identity cards is a part of the proceedings relating to the election. AIR 1961 Cal 289 (295).

(4) The delimitation of constituencies or the preparation revision or amendment of the electoral roll cannot be regarded as a stage in the process of any particular election. AIR 1969 Guj 292 (298) (DB).

(5) Notification by Government effecting territorial division of Municipality and allotment of seats — Matter relates to steps anterior to election — Notification can be challenged under Article 226. (1969) 17 LR 757 (DB).

2. Election Disputes. — (1) Any irregularity or illegality taking place in the course of an election cannot be called in question till the election is over and even then it can be called in question only by an election petition challenging an election. AIR 1952 SC 64 (68) = 1952 SCR 218 ** AIR 1955 All 536 (538) ** AIR 1955 Andh 180 (181) ** AIR 1954 Pepsu 118 (121) = ILR (1954) Patiala 387 (DB) ** AIR 1963 All 363 (364, 365).

(2) The underlying principle of shutting out legal proceedings to agitate election matters when the election is in progress is that election proceedings must not be retarded or protracted and must be concluded as speedily as possible. AIR 1952 SC 64 (68 to 71) = 1952 SCR 218.

(3) A suit to set aside an election is not competent. AIR 1955 SC 233 (238) = 1955 SCR 1104 ** AIR 1968 Manipur 84 (93) ** (1964) 68 Cal WN 270.

(3A) Issuance of notification under Section 147 (1), Representation of the People Act was a part of the election process and can be challenged only by an election petition. Writ petition is not

sustainable. (1969) 71 Pun LR 708 (711) (DB).

(4) The rejection of a nomination paper by a Returning Officer does not amount to calling in question an election and so is not barred by Cl. (b) of this article. AIR 1952 SC 64 (72) = 1952 SCR 218.

(5) Representation of the People Act (1950), Section 30 — Correctness of — Electoral rolls — Cannot be challenged in election petition under Article 329 (b). AIR 1969 Mys 84 (89).

[But see AIR 1968 Manipur 84 (93). (Dispute about the validity of draft electoral rolls arises in the process of election and can be agitated only by way of an Election Petition.)]

(6) Election petition claiming composite relief under Section 84 pending — By-election cannot be called during the pendency of such election petition. (1967) 1 Andh LT 253 = (1967) 2 Andh WR 53 (DB).

(7) Article 329 (b) applies to election to the Legislative Assembly of a Union Territory. AIR 1968 Manipur 84 (93, 94).

(8) An election petition challenging the election of a successful candidate must strictly conform to the requirements of the law. AIR 1963 Raj 219 (220) = 1963 Raj LW 444 (DB).

(9) Rajasthan High Court Rules are not in violation of Art. 329 of the Constitution — Rules are mandatory — Election appeal filed without complying with rules — Appeal should be dismissed. AIR 1965 Raj 58 (64, 65) = 1964 Raj LW 529 (DB).

(10) The tendency to be hyper-technical annihilating the real substance of the law, is also to be deprecated, if there is substantial compliance with the requirements of law. AIR 1963 Raj 219 (220, 221) = 1963 Raj LW 444 (DB) ** AIR 1964 All 523 (525) = 1963 All LJ 789 (DB).

(11) Allotment of reserved seats after compliance with Section 9, Delimitation

Article 329 — Note 2 (contd.)

Commission Act — Decision of Commission cannot be challenged in court of law, unless arbitrary. AIR 1969 Andh Pra 1 (2) = (1967) 2 Andh WR 248 (DB).

(12) Provisions of De-limitation Commission Act cannot be challenged in an election petition. AIR 1968 Raj 249 (262) = ILR (1967) 17 Raj 995.

(13) An order made by the Election Tribunal cannot be challenged in a civil Court, nor can High Court interfere with it. Madh BLJ (1954) HCR 179 (DB).

(14) Objection to delimitation of constituencies can be entertained only before date specified under Section 9 (2) of Delimitation Commission Act and after their publication in Gazette, they can no longer be reargued in court of law. AIR 1967 SC 600 (675) = (1967) 1 SCR 400.

(15) The power of the Parliament, under Article 329 (b), would also extend to providing an appeal and also an authority to decide it. AIR 1959 Madh Pra 141 (142) = 1959 MPLJ 69 (DB) ** AIR 1961 Madh Pra 127 (130, 131) = 1961 MPLJ 1361 (DB).

(16) An order under Section 8 or 9 of the Delimitation Commission Act (1962) and published under Section 10 (1) would not be called in question in any 'Court'. But if by the publication of the order in the Gazette of India it is to be treated as law made under Art. 327, Article 329 would prevent any investigation by any Court of law. AIR 1967 SC 600 (674) = (1967) 1 SCR 400.

(17) Article 329 requires that three conditions must be fulfilled, the first being that there should be an election petition, the second, it should be presented to the appropriate authority and the third that it should be presented in the manner provided by law made by the appropriate legislature. AIR 1963 Raj 219 (220) = 1963 Raj LW 444 (DB).

(18) Section 30 (a) of Representation of the People Act (1950), not protected by Article 329 (a). AIR 1969 Guj 292 (298) (DB).

3. Election Disputes — Applications under Article 226 or 227. (1) The improper rejection or acceptance of a nomination paper by the Returning Officer cannot be made the subject-matter of a writ proceeding under Article 226. AIR 1952 SC 64 (68, 69, 70, 71) = 1952 SCR 218 ** AIR 1952 Madh B 97 (102) (FB) ** AIR 1957 Madh Pra 122 (125) ** AIR 1967 Delhi 68 (69, 70) = 69 Pun LR (D) 291 (DB) ** AIR 1963 All 363 (364, 365).

(2) The opening words of the article "notwithstanding anything in this Constitution" show that the constitutional remedy under Article 226 is limited and made unavailable by another provision of the Constitution itself, irrespective of any legislative provision. AIR 1952 Madh B 97 (100) (FB) ** AIR 1955 Andhra 180 (181) ** AIR 1954 Orissa 87 (92) = ILR

(1953) Cut 659 (DB) ** AIR 1953 Cal 98 (100, 101) ** AIR 1952 All 511 (514) (DB) ** AIR 1952 Bom 277 (281) = ILR (1952) Bom 785 (DB) ** AIR 1957 Madh Pra 142 (144) = 1957 MPLJ 290 (DB).

(3) Although under this article an election can be called in question only by means of an election petition, yet the jurisdiction of the High Court under Articles 226 and 227 and of the Supreme Court under Article 136 to interfere with the decision of the Election Tribunal is not affected by this article. AIR 1955 SC 233 (238) = 1955 SCR 1104 ** AIR 1954 SC 440 (446) = 1955 SCR 250 = ILR (1954) Mys 285 ** AIR 1954 SC 202 (204) = 1954 SCR 913 ** AIR 1954 SC 749 (752) = 1955 SCR 671 ** AIR 1954 SC 520 (522) = 1955 SCR 267 ** AIR 1954 SC 513 (516) = 1955 SCR 500 ** AIR 1954 SC 510 (513) = 1955 SCR 481.

(4) The High Court under Article 226 did not interfere with the decision of an Election Tribunal on merits, when the Tribunal had acted within its jurisdiction. AIR 1953 All 633 (637) = ILR (1954) 2 All 515 (DB) ** AIR 1953 Madh B 267 (269) = ILR (1954) Madh B 128 (DB).

(5) The Supreme Court in appeal under Article 136 will not ordinarily interfere with the findings of fact of the Election Tribunal. AIR 1957 SC 242 (245) = 1957 SCR 179 ** AIR 1954 SC 411 (413) = 1955 SCR 140.

(6) While under Article 226 the High Court can only annul the decision of the Election Tribunal, it can under Art. 227 do that and also issue further directions in the matter. AIR 1955 SC 233 (243) = 1955 SCR 1104.

(7) The High Court of Madras cannot issue any writ under Article 226 to Election Commission having its offices permanently located at New Delhi. AIR 1953 SC 210 (213) = 1953 SCR 1144.

(8) Article 329 (b) does not oust the jurisdiction of High Court under Art. 133. AIR 1960 Orissa 1 (3) = 17 Ele LR 65 (DB).

(9) Before results of election are declared and election petition is filed, High Court has no jurisdiction under Art. 226 or 227 or under Civil P. C. or under the Representation of the People Act, 1951. AIR 1968 Pat 49 (49, 50) = 1967 BLJR 459 (DB).

(10) The provisions of Article 329 (b) apply as a bar to the maintainability of applications challenging the orders for obtaining identity photographs and until and unless the election is completed and until and unless the remedies under the Act and the Rules are exhausted, applications by way of writ petitions cannot be entertained. AIR 1961 Cal 289 (295).

(11) One seat contested by two candidates — Election of elected candidate declared void — Notification issued to elect a person to fill in the vacancy so

PART XVI

SPECIAL PROVISIONS RELATING TO CERTAIN CLASSES

330. Reservation of seats for Scheduled Castes^b and Scheduled Tribes^b in the House of the People. — (1) Seats shall be reserved^c in the House of the People for —

- (a) the Scheduled Castes;
- (b) the Scheduled Tribes ^a[except the Scheduled Tribes in the tribal areas^d of Assam and in Nagaland]; and
- (c) the Scheduled Tribes in the autonomous Districts of Assam.

(2) The number of seats reserved in any State ^a[or Union Territory] for the Scheduled Castes or the Scheduled Tribes under clause (1) shall bear, as nearly as may be, the same proportion to the total number of seats allotted to that State ^a[or Union territory] in the House of the People as the population of the Scheduled Castes in the State ^a[or Union territory] or of the Scheduled Tribes in the State ^a[or Union territory] or part of the State ^a[or Union territory], as the case may be, in respect of which seats are so reserved, bears to the total population of the State ^a[or Union territory].

- (a) Inserted after the word 'State', wherever it occurs in clause (2), by the Constitution (Seventh Amendment) Act, 1956, S. 29 and Schedule [1-11-1956].
- (b) For interpretation of these terms, see Art. 366 (24) and Art. 366 (25) respectively.
- (c) Such reservation shall continue for thirty years — See Art. 334, *infra*.
- (d) Substituted for the words 'except the Scheduled Tribes in the tribal areas of Assam' by the Constitution (Twenty-third Amendment) Act, 1969, S. 2 (23-1-1970).
- (e) A new autonomous State has been formed, consisting of the United Khasi-Jaintia Hills district and the Garo Hills district. It is called Meghalaya.

Article 329 — Note 3 (contd.)

caused — Petition of the other candidate does not lie under Article 226, for a writ to cancel and recall the Notification and to be declared elected, till the said Notification is set aside. (1964) 68 Cal WN 270.

(12) If Article 329 applies the powers of the High Court to issue writ under Article 226 would be excluded. AIR 1969 Guj 292 (294) (DB).

4. Elections — Other than for legislative bodies. — (1) Municipal election — High Court has power to interfere even at pre-election or prepolling stage as there is no restrictive provision like Article 329 (b) under the Bengal Municipal Act. AIR 1962 Cal 53 (57) = 64 Cal WN 1043 (DB) ** AIR 1960 Mys 189 (189, 190) = 37 Mys LJ 637 (DB) ** AIR 1958 Madh Pra 181 (182) = 1958 Jab LJ 158.

(2) Provision takes away jurisdiction of the Courts in matters relating to elections to Parliament and State Legislature. But there is no similar provision barring the jurisdiction of High Courts in matters relating to Municipal Elections. ILR (1960) 10 Raj 540. (Overruled on another point in AIR 1961 Raj 250, (FB).) ** AIR 1969 Manipur 13 (19).

Article 330 — Note 1

(1) A Mahar continues to be a Mahar and a member of a scheduled caste notwithstanding his conversion to the Mahanubhava Panth. AIR 1954 SC 236 (244, 245) = 1954 SCR 817.

(2) Valuable right conferred on persons belonging to scheduled castes and scheduled tribes — To take away that right very

satisfactory evidence establishing facts contemplated by paragraph 3 of Constitution (Scheduled Caste) Order (1950) must be tendered. AIR 1958 Bom 296 (299, 300) = 60 Bom LR 776 (DB).

(3) Constitution (Scheduled Tribes) Order, 1950, Part III, Item 25 — Members embracing Christianity do not cease to be Oraons and are entitled to rights and privileges of tribals — They can contest election to Parliamentary seat meant for Scheduled Tribes. AIR 1964 Pat 201 (206) (DB).

(4) Change from lower to higher caste — Unilateral acts cannot be taken to prove claim to higher status. AIR 1950 SC 1318 (1327) = (1960) 1 SCR 426.

(5) S. 54 (4) of the Representation of the People Act (43 of 1951), is not ultra vires and inconsistent with Arts. 14 and 330. AIR 1950 SC 1318 (1323) = (1960) 1 SCR 426.

(6) Use of word 'seat' or of expression "fill a seat" in Art. 330 of Constitution or sections of Representation of the People Act of 1951 do not mean that election is held by reference to two seats in double-member constituency. AIR 1950 SC 1318 (1326) = (1960) 1 SCR 426.

(7) A member of the scheduled tribe is entitled to contest for the reserved seat and for that purpose he can and must make the prescribed declaration but it does not follow that, he is precluded from contesting the election, if necessary, for the general seat. AIR 1950 SC 1318 (1326, 1326) = (1960) 1 SCR 426.

(8) The reservation of a seat in a double-member constituency for members of the Scheduled tribes cannot affect the

JAMMU AND KASHMIR

Part XVI of the Constitution applies to the State of Jammu and Kashmir, subject to certain exceptions and modifications, which are indicated under the respective articles.

In Article 330, references to the 'Scheduled Tribes' shall be omitted — See Constitution (Application to J. and K.) Order, 1954, Para. 2, sub-para. (11) (a).

331. Representation of the Anglo-Indian community in the House of the People.—Notwithstanding anything in Article 81, the President may, if he is of opinion that the Anglo-Indian^a community is not adequately represented in the House of the People, nominate not more than two members of that community to the House of the People.

[a] For interpretation, see Art. 366 (2), post.

JAMMU AND KASHMIR

Art. 331 shall be omitted—See Constitution (Application to J. and K.) Order, 1954, Para. 2, sub-para. (11) (b).

332. Reservation of seats for Scheduled Castes and Scheduled Tribes in the Legislative Assemblies of the States. — (1) Seats shall be reserved^a for the Scheduled Castes and the Scheduled Tribes, ^b[except the Scheduled Tribes in the tribal areas of Assam and in Nagaland] in the Legislative Assembly of every State ^c[° ° °].

(2) Seats shall be reserved also for the autonomous districts in the Legislative Assembly of the State of Assam.

(3) The number of seats reserved for the Scheduled Castes or the Scheduled Tribes in the Legislative Assembly of any State under clause (1) shall bear, as nearly as may be, the same proportion to the total number of seats in the Assembly as the population of the Scheduled Castes in the State or of the Scheduled Tribes in the State or part of the State, as the case may be, in respect of which seats are so reserved, bears to the total population of the State.

(4) The number of seats reserved for an autonomous district in the Legislative Assembly of the State of Assam shall bear to the total number of seats in that Assembly a proportion not less than the population of the district bears to the total population of the State.

(5) The constituencies for the seats reserved for any autonomous district of Assam shall not comprise any area outside that district except in the case of the constituency comprising the cantonment and Municipality of Shillong.

(6) No person who is not a member of a Scheduled Tribe of any autonomous district of the State of Assam shall be eligible for election to the Legislative

Article 330 — Note 1 (contd.)

main basic position that the constituency is one and for returning representatives to the House of the People it is the same joint electorate that goes to the poll. AIR 1959 SC 1318 (1323).

(9) Candidate for election by birth belonging to Scheduled Caste (Samgar) among Hindus — Candidate accepting and following tenets of Arya Samaj — Held on evidence that he still retained his caste. AIR 1960 Mys 27 (31, 33) = 37 Mys LJ 765 (DB).

(10) The Samgar caste is a scheduled caste under Article 330. AIR 1960 Mys 27 (29) = 37 Mys LJ 765 (DB).

(11) Article 330 only means that the Constitution has made provision for the scheduled caste or scheduled tribe by fixing the number of seats according to

their population. AIR 1958 Andh Pra 724 (731, 732) = (1958) 2 Andh WR 226 (DB).

(12) Section 54 of the Representation of the People Act 1951 is not opposed to Article 330. AIR 1958 Andh Pra 724 (731, 732) = (1958) 2 Andh WR 226 (DB).

Article 332 — Note 1

(1) Election from Constituency reserved for members of scheduled castes — Member of scheduled caste who has become convert to Buddhism is ineligible to be a candidate for such election. AIR 1965 SC 1179 (1184) = (1965) 1 SCR 849 = 67 Bom LR 812.

(2) A person born of English father and Khasi mother, who identifies and lives with his mother's community was held to be a Khasi. AIR 1958 Assam 128 (138) = (1958-59) 14 ELR 480 (DB).

Assembly of the State from any constituency of that district except from the constituency comprising the cantonment and Municipality of Shillong.

[a] For extent of such reservation, see Art. 334, post.

[b] Substituted for the words "except the Scheduled Tribes in the tribe areas of Assam" by the Constitution (Twenty-third Amendment) Act, 1969, S. 3 (23-1-70).

[c] The words "specified in Part A or Part B of the First Schedule" were omitted by the Constitution (Seventh Amendment) Act, 1956, Section 29 and Schedule [1-11-1956].

JAMMU AND KASHMIR

Art. 332 shall be omitted — See Constitution (Application to Jammu and Kashmir) Order, 1954, Para. 2, sub-para. (11) (b).

333. Representation of the Anglo-Indian community in the Legislative Assemblies of the States. — Notwithstanding anything in Art. 170^c, the Governor ^a[° °] of a State may, if he is of opinion that the Anglo-Indian community^b needs representation in the Legislative Assembly of the State and is not adequately represented therein ^d[nominate one member of that community to the Assembly].

[a] The words "or Rajpramukh" were omitted by the Constitution (Seventh Amendment) Act, 1956, Section 29 and Schedule [1-11-1956].

[b] For interpretation, see Article 366(2).

[c] Article 170 deals with composition of the Legislative Assemblies.

[d] Substituted for the words 'nominate such number of members of the Community to the Assembly as he considers appropriate' by the Constitution (Twenty-third Amendment) Act, 1969 S. 4 (23-2-70).

JAMMU AND KASHMIR

Article 333 shall be omitted — See Constitution (Application to Jammu and Kashmir) Order, 1956, Para. 2, sub-para. (11) (b).

334. Reservation of seats and special representation to cease after ^a[thirty years]. — Notwithstanding anything in the foregoing provisions of this Part, the provisions of this Constitution relating to —

(a) the reservation of seats for the Scheduled Castes and the Scheduled Tribes in the House of the People and in the Legislative Assemblies of the States; and

(b) the representation of the Anglo-Indian community in the House of the People and in the Legislative Assemblies of the States by nomination, shall cease to have effect on the expiration of a period of ^a[thirty years] from the commencement of this Constitution^b;

Provided that nothing in this article shall affect any representation in the House of the People or in the Legislative Assembly of a State until the dissolution of the then existing House or Assembly, as the case may be.

[a] Substituted for "twenty years" by the Constitution (Twenty-third Amendment) Act, 1969, Section 5 (23-1-1970).

[b] That is, from 26-1-1950.

JAMMU AND KASHMIR

In its application to the State of Jammu and Kashmir, in Article 334, references to the State or the States shall be construed as not including references to the State of Jammu and Kashmir — See Constitution (Application to J. and K.) Order, 1954, Para. 2, sub-para. (11) (c).

335. Claims of Scheduled Castes and Scheduled Tribes to services and posts. — The claims of the members of the Scheduled Castes and the Scheduled Tribes shall

Article 335 — Note 1

(1) Provisions of Article 16 (4) are to be strictly construed — They are to be interpreted in context and background of Article 335. AIR 1968 SC 507 (512) = (1968) 1 SCR 721 (FB).

(2) In making a provision for reservation of appointments or posts the Govern-

ment has to take into consideration claims of members of backward classes as also the maintenance of efficiency of administration. AIR 1968 SC 507 (512) = (1968) 1 SCR 721 ** AIR 1969 Cal 576 (577) ** AIR 1967 Andh Pra 353 (362) = (1966) 1 Andh WR 403 (DB).

(3) Carry Forward Rule — Constitutionality — Rule is non est by substitution

be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts^a in connection with the affairs of the Union or of a State.

[a] See Art. 320 (4) for the manner in which the effect is to be given to this provision.

JAMMU AND KASHMIR

In its application to the State of Jammu and Kashmir, in Art. 335, reference to the State shall be construed as not including a reference to the State of Jammu and Kashmir, — See Constitution (Application to J. and K.) Order, 1954, Para. 2, sub-para. (11) (c).

336. Special provision for Anglo-Indian community in certain services.—
(1) During the first two years after the commencement of this Constitution, appointments of members of the Anglo-Indian community to posts in the railway, customs, postal and telegraph services of the Union shall be made on the same basis as immediately before the fifteenth day of August, 1947.

During every succeeding period of two years, the number of posts reserved for the members of the said community in the said services shall, as nearly as possible, be less by ten per cent. than the numbers so reserved during the immediately preceding period of two years:

Provided that at the end of ten years from the commencement of this Constitution all such reservations shall cease.

(2) Nothing in clause (1) shall bar the appointment of members of the Anglo-Indian community to posts other than, or in addition to, those reserved for the community under that clause if such members are found qualified for appointment on merit as compared with the members of other communities.

JAMMU AND KASHMIR

Article 336 shall be omitted — See Constitution (Application to J. and K.) Order, 1954, Para. 2, sub-para. 11 (b).

337. Special provision with respect to educational grants for the benefit of Anglo-Indian community.—During the first three financial years after the com-

Article 335 — Note 1 (contd.)
thereof by new carry forward rule of 1955. AIR 1965 SC 1430 (1432, 1433) = (1965) 2 SCR 421.

(4) Reservation to vacancies by Government Resolution for Scheduled Castes and Scheduled Tribes — Provision adopting principle of "carry forward" in second and third years permitting reservation of more than 50 per cent vacancies in the third year — Carry forward rule held unconstitutional and invalid. AIR 1964 SC 179 (187, 189) = (1964) 4 SCR 660.

(5) This article speaks only about 'scheduled castes' and 'scheduled tribes', but what is provided therein must with equal force apply to the other backward classes. AIR 1968 Ker 42 (48) = 1967 Ker LT 266 (FB).

(6) Determination of backward classes — Caste cannot be exclusive consideration. AIR 1967 Andh Pra 353 (360, 361) = (1966) 1 Andh WR 403 (DB).

(7) It is not clear whether Article 335 was intended to confer any right on members of the scheduled castes. 1967 Ker LJ 500.

(8) A Court of law cannot enforce at the instance of a scheduled caste member, the directions issued by the Central Government for preferential treatment for scheduled castes in appointments and promotions, unless it is shown that he is entitled to be appointed or promoted if

these instructions are applied. 1967 Ker LJ 500.

(9) The justiciability of failure to appoint or promote by not following the instructions of the Central Government for preferential treatment for scheduled castes is doubtful since the claiming member will necessarily fail to establish a specific right in him. 1967 Ker LJ 500.

Article 336 — Note 1

(1) Merely, because Constitution in Article 336 has reserved certain posts for a particular community in addition to what it may get under Article 29 (2), it does not follow that the same is true of reservation under Article 15 (4). AIR 1967 Mys 21 (23, 24) = (1966) 1 Mys LJ 119 (DB).

Article 337 — Note 1

(1) In so far as a certain Order issued by a State Government enjoins that no primary, or secondary school shall from the date of the Order, admit to a class, where English is used as the medium of instruction any pupil other than the children of Anglo-Indians or of citizens of non-Asiatic descent, it quite clearly prevents the Anglo-Indian schools from performing their constitutional obligations and exposes them to the liability of losing the special grant. In this view, the Order would be unconstitutional. AIR 1954 SC 561 (569) = 1955 SCR 568. (AIR 1954 Bom 468, Affirmed on appeal.)

mencement of this Constitution, the same grants, if any, shall be made by the Union and by each State a[* * *] for the benefit of the Anglo-Indian community in respect of education as were made in the financial year ending on the thirty-first day of March, 1948.

During every succeeding period of three years the grants may be less by ten per cent. than those for the immediately preceding period of three years:

Provided that at the end of ten years from the commencement of this Constitution such grants, to the extent to which they are a special concession to the Anglo-Indian community, shall cease :

Provided further that no educational institution shall be entitled to receive any grant under this article unless at least forty per cent. of the annual admissions therein are made available to members of communities other than the Anglo-Indian community.

[a] The words 'specified in Part A or Part B of the First Schedule' were omitted by the Constitution (Seventh Amendment) Act, 1956, S. 29 and Sch. [1-11-1956].

JAMMU AND KASHMIR

Article 337 shall be omitted — See Constitution (Application to J. and K.) Order, 1954, Para. 2, sub-para. (11) (b).

338. Special Officer for Scheduled Castes^a, Scheduled Tribes^a, etc.—(1) There shall be a Special Officer for the Scheduled Castes and Scheduled Tribes to be appointed by the President.

(2) It shall be the duty of the Special Officer to investigate all matters relating to the safeguards provided for the Scheduled Castes and Scheduled Tribes under this Constitution and report to the President upon the working of those safeguards at such intervals as the President may direct, and the President shall cause all such reports to be laid before each House of Parliament.

(3) In this article, references to the Scheduled Castes and Scheduled Tribes shall be construed as including references to such other backward classes as the President may, on receipt of the report of a Commission appointed under clause (1) of Article 340, by order specify and also to the Anglo-Indian community.

[a] For interpretation of these terms, see Arts. 366 (24) and 366 (25).

339. Control of the Union over the administration of Scheduled Areas and the welfare of Scheduled Tribes. (1) The President may at any time and shall, at the expiration of ten years from the commencement of this Constitution by order appoint a Commission to report on the administration of the Scheduled Areas and the welfare of the Scheduled Tribes in the States a[* * *].

The order may define the composition, powers and procedure of the Commission and may contain such incidental or ancillary provisions as the President may consider necessary or desirable.

(2) The executive power of the Union shall extend to the giving of directions to b[a State] as to the drawing up and execution of schemes specified in the direction to be essential for the welfare of the Scheduled Tribes in the State.

[a] The words 'specified in Part A and Part B of the First Schedule', were omitted by the Constitution (Seventh Amendment) Act, 1956, S. 29 and Schedule (1-11-1956).

[b] Substituted for the words 'any such State', *ibid*.

JAMMU AND KASHMIR

Article 339 shall be omitted — See Constitution (Application to J. and K.) Order, 1954, Para. 2, sub-para. (11) (b).

340. Appointment of a Commission to investigate the conditions of backward classes.—(1) The President may by order appoint a Commission consisting of such persons as he thinks fit to investigate the conditions of socially and educationally backward classes within the territory of India and the difficulties under which they labour and to make recommendations as to the steps that should be taken by the Union or any State to remove such difficulties and to improve their condition and as to the grants that should be made for the purpose by the Union or any State and the conditions subject to which such grants should be made, and the order appointing such Commission shall define the procedure to be followed by the Commission.

(2) A Commission so appointed shall investigate the matters referred to them and present to the President a report setting out the facts as found by them and making such recommendations as they think proper.

(3) The President shall cause a copy of the report so presented together with a memorandum explaining the action taken thereon to be laid before each House of Parliament.

341. Scheduled Caste.—(1) The President ^a[may with respect to any State ^b[or Union territory], and where it is a State ^c[° ° °], after consultation with the

Article 340 — Note 1

(1) Appointment of Commission and subsequent steps to follow under Article 340 do not constitute condition precedent to action being taken under Article 15 (4). AIR 1963 SC 640 (657, 658) = (1963) Supp 1 SCR 439 ** AIR 1964 Mys 132 (135) = (1963) 2 Mys LJ 302 (DB).

(2) It is the Union or the State that has to take action in pursuance of the recommendations made by the Commission — Not correct to say that only the President can act in the matter. AIR 1963 SC 649 (653) = (1963) Supp 1 SCR 439.

(3) Article 340 nowhere provides that President can issue any instructions to States which will have a binding force — Memorandum on report of Backward Classes Commission is not binding on States. AIR 1967 Andh Pra 353 (362) = (1966) 1 Andh WR 403 (DB).

(4) When Supreme Court has found Schedule class list based on caste as bad, request in memorandum on report of Backward Classes Commission under Article 340 cannot have greater validity than those Supreme Courts decisions in the absence of any constitutional provision in that behalf. AIR 1967 Andh Pra 353 (362) = (1966) 1 Andh WR 403 (DB) ** AIR 1968 Ker 42 (56) = 1967 Ker LT 266 (FB).

(5-6) This article envisages the necessity of an investigation about the conditions of socially and economically backward classes within the territory of India. AIR 1968 Ker 42 (48) = 1967 Ker LT 266 (FB).

(7) State can determine who socially and educationally backward classes are. AIR 1960 Mys 338 (344, 345) = 38 Mys LJ 652 (DB).

ARTICLE 341 — SYNOPSIS

1. Scheduled Castes — Conversion to other religion.

2. Various Scheduled Castes.

3. Scheduled Castes — Unit whether State or smaller area.

1. Scheduled Castes — Conversion to other religion.— (1) The Constitution (Scheduled Castes) Order, 1950, is not ultra vires on the ground that certain enumerated castes, people though belonging to such castes but professing the Sikh religion are excluded. AIR 1952 Punj 143 (144) = ILR (1951) Punj 321 (FB).

(2) The Constitution (Scheduled Castes) Order, 1950, is not ultra vires on the ground that it excludes from the definition persons professing a religion other than Hinduism, for example, Pariah converts to Christianity. AIR 1952 Mad 474 (476) = ILR (1953) Mad 106 (DB).

(3) Conversion to Christianity takes the convert out of the category of Scheduled Castes in terms of the Constitution (Scheduled Castes) Order (1950). ILR (1963) Andh-Pra 500 (DB).

(4) Constitution (Scheduled Castes) Order (1950), Para 3, Sch. I Part IV, Cl. (3), Item 13 — Meaning of 'professes a religion' is to enter publicly into a religious state — For attracting the provisions of this para it has to be established that the person concerned has publicly entered a religion different from the Hindu or Sikh religion. AIR 1958 Bom 296 (297) = 60 Bom LR 776 (DB).

(5) In order to prove that a member of the Muka Dora tribe had ceased to be a member of that tribe, there should be first of all, evidence of intention, the reactions of the old body and that of the new body. AIR 1958 Andh Pra 724 (735) = (1958) 2 Andh WR 226 (DB).

Governor d[* *] thereof,] by public notification specify^e the castes, races or tribes or parts of or groups within castes, races or tribes which shall for the purposes of this Constitution be deemed to be Scheduled Castes in relation to that State ^f[or Union territory, as the case may be].

(2) Parliament may by law include in or exclude from the list of Scheduled Castes specified in a notification issued under clause (1) any caste, race or tribe or part of or group within any caste, race or tribe, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification.

[Government of India Act (1935), Sch. I, Para. 26.]

[a] Substituted for the words 'may after consultation with the Governor or Rajpramukh of a State' by the Constitution (First Amendment) Act, 1951, S. 10 (18-6-1951).

[b] Inserted by the Constitution (Seventh Amendment) Act, 1956, S. 29 and Sch. (1-11-1956).

[c] The words 'specified in Part A or Part B of the First Schedule', omitted, *ibid*.

[d] Words 'or Rajpramukh', omitted, *ibid*.

[e] See the Constitution (Scheduled Castes) Order, 1950, published as C. O. 19, dated 10-8-1950, in Gaz. Ind., 1950, Part II, S. 3, Ext., p. 163 and the Constitution (Scheduled Castes) (Union Territories) Order, 1951, published, as C. O. 32, dated 20-9-1951, in Gaz. Ind., 1951, Pt. II, S. 3, p. 1198; Constitution (Jammu and Kashmir) Scheduled Castes Order, 1956, C. O. 52, dated 22-12-1956, published in Gaz. Ind., 1956, Pt. II, S. 3, Ext., p. 2686A; Constitution (Dadra and Nagar Haveli) Scheduled Castes Order, 1962, C. O. 64, dated 30-6-1962, Gaz. Ind., 1962, Pt. II, S. 3 (i), Ext., p. 389; Constitution (Pondicherry) Scheduled Castes Order, 1964, C. O. 68, Gaz. Ind., 5-3-1964, Pt. II, S. 3 (i), Ext., p. 327; Constitution (Goa, Daman and Diu) Scheduled Castes Order, 1968, C. O. 81, Gaz. Ind., 12-1-1968, Pt. II, S. 3 (i), Ext., p. 7—See also the Scheduled Castes and Scheduled Tribes (Amendment) Act, 1956 (68 of 1956).

[f] Inserted by the Constitution (Seventh Amendment) Act, 1956, S. 29 and Schedule (1-11-1956).

Article 341 (contd.)

2. Various Scheduled Castes.— (1) Schedule Castes — Candidate of Dobar sub-caste held not of chamar caste. AIR 1965 SC 1557 (1560) = (1965) 1 SCWR 840.

(2) 'Bhovi' caste mentioned in order includes 'Voddars' of Mysore State before re-organisation — Evidence to show that caste not mentioned in order is included in a caste mentioned by the order is ordinarily not admissible. AIR 1965 SC 1269 (1272) = (1965) 2 SCJ 153.

(3) Scheduled Caste — The terms Roh-tia, Ramdasi, Ravidasi are not precise, exact and distinctive — Roh-tia and Ram-dasi do not necessarily exclude each other — Constitution (Scheduled Castes) Order, 1950. AIR 1966 Punj 282 (288) (DB).

(4) A person properly described as mochl in Punjab does not fall within the caste of Chamars as included in Constitution (Scheduled Castes) Order 1950 and Constitution (Scheduled Castes) (Union Territories) Order 1951 (as amended in 1966). AIR 1969 SC 597 (598) = (1969) 1 SCJ 916 ** AIR 1966 Punj 334 (335, 336) = 68 Punj LR 97 (DB).

(5) Constitution (Scheduled Castes) Order, 1950, Sch., Part 13, Item 40 — "Sunri excluding Saha" — The word 'Saha' refers

to a caste group within the Sunri caste. AIR 1967 SC 115 (117, 118) = (1966) Supp SCR 387. (AIR 1966 Cal 141, Reversed.)

(6) Question whether particular caste is a Scheduled caste — Notification issued under Article 341 has to be looked at — Enquiry whether particular sub-caste is included in caste mentioned therein not permissible. AIR 1965 SC 1557 (1559) = (1965) 1 SCWR 840. (AIR 1965 SC 1269, Rel. on.) ** AIR 1969 SC 597 (599, 600) = (1969) 1 SCJ 916.

(7) Order No. 6132 (15) K. M. 1160/58, dated 2nd April, 1960 of Board of Revenue, Government of West Bengal, giving preference to bid by a patni a scheduled castes member in public auction of ferries, over bid by highest bidder — Reservation made for scheduled castes member is saved by Article 16 (4) and by Article 341 read with Constitution Order, 1950. (1967) 71 Cal WN 107.

(8) Article 342 is in pari materia with Article 341. AIR 1967 Mys 182 (184) = (1967) 2 Mys LJ 277.

3. Scheduled Castes — Unit whether State or smaller area.— (1) Specification of castes with reference to different districts or sub-areas of the State — Permitted by the Article. AIR 1965 SC 1557 (1560) = (1965) 1 SCWR 840.

342. Scheduled Tribes.—(1) The President ^a[may with respect to any State ^b[or Union territory], and where it is a State ^c[° ° °], after consultation with the Governor ^d[° ° °] thereof], by public notification, specify^e the tribes or tribal communities or parts of or groups within tribes or tribal communities which shall for the purposes of this Constitution be deemed to be Scheduled Tribes in relation to that State ^f[or Union territory, as the case may be.]

(2) Parliament may by law include in or exclude from the list of Scheduled Tribes specified in a notification issued under clause (1) any tribe or tribal community or part of or group within any tribe or tribal community, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification.

[a] Substituted for the words “may, after consultation with the Governor or the Rajpramukh of a State” by the Constitution (First Amendment) Act, 1951, S. 11 (18-6-1951).

[b] Inserted by the Constitution (Seventh Amendment) Act, 1956, S. 29 and Schedule (1-11-1956).

[c] The words ‘specified in Part A or Part B of the First Schedule’, omitted, *ibid*.

[d] The words ‘or Rajpramukh’, omitted, *ibid*.

[e] See the Constitution (Scheduled Tribes) Order, 1950, C. O. 22, dated 6-9-1950, Gaz. Ind., 1950, Pt. II, S. 3, Ext., p. 597, as amended from time to time; Constitution (Scheduled Tribes) (Union Territories) Order, 1951, C. O. 33, dated 20-9-1951, Gaz. Ind., 1951, Pt. II, S. 3, Ext., p. 1198G; Constitution (Andaman and Nicobar Islands) Scheduled Tribes Order, 1959, C. O. 58, dated 31-3-1959, Gaz. Ind., 1959, Pt. II, S. 3 (i), Ext., p. 151; Constitution (Dadra and Nagar Haveli) (Scheduled Tribes) Order, 1962, C. O. 65, dated 30-6-1962, Gaz. Ind., 1962, Pt. II, S. 3 (i), Ext., p. 389; Constitution (Scheduled Tribes) (Uttar Pradesh) Order, 1967, C. O. 78, Gaz. Ind., 24-6-1967, Pt. II, S. 3 (i), Ext., p. 311; Constitution (Goa, Daman and Diu) (Scheduled Tribes) Order, 1968, C. O. 82, Gaz. of Ind., 12-1-1968, Pt. II, S. 3 (i), Ext., p. 8—See also the Scheduled Castes and Scheduled Tribes (Amendment) Act, 1956 (63 of 1956).

[f] Inserted by Constitution (Seventh Amendment) Act, 1956, S. 29 and Schedule 1-11-1956).

JAMMU AND KASHMIR

Art. 342 shall be omitted—See Constitution (Application to J. and K.) Order, 1954, Para 2, sub-para. (11) (b).

Article 341 — Note 3 (contd.)

(2) The Scheduled Castes notified must be “with respect to any state” and “in relation to that state” — Article does not authorise President to declare any caste as Scheduled Caste “with respect to any district”. (1959) 37 Mys LJ 775 (DB).

(3) To get benefit of being a member of a Scheduled Caste or Scheduled Tribe in the matter of public employment, the person claiming should be a member of such caste or tribe in relation to the particular area or State where he is residing and where he seeks employment. AIR 1969 Orissa 220 (221, 222) = 35 Cut LT 55 (DB).

(4) The power under Section 41 of the States Reorganisation Act did not authorise the President to exclude any person from the category of a Scheduled Caste, who enjoyed that status under the original Scheduled Castes Order. AIR 1961 Madh Pra 84 (87) = 1961 MPLJ 927 (DB).

(5) Under Article 341 (2) without any law made by Parliament, the original Scheduled Castes Order, 1950, specifying Chamar as a Scheduled Caste in the entire area of Madhya Pradesh, could not be varied by any subsequent notification. AIR 1961 Madh Pra 84 (86, 87) = 1961 MPLJ 927 (DB).

(6) Constitution (Scheduled Castes) Order 1950, Sch. I — States Reorganisation Act (1956), Section 41 — Scheduled Castes and Tribes List (Modification) Order (1956), Sch. I, Part VI — Chamars of Narsimhapur District in M. P. held members of Scheduled Castes. AIR 1961 Madh Pra 84 (87) = 1961 MPLJ 927 (DB).

ARTICLE 342

1. Scheduled Tribes.— (1) ‘Naikda or Navaka’ does not include ‘Bedar’. AIR 1967 Mys 182 (190) = (1967) 2 Mys LJ 277.

(2) Constitution (Scheduled Tribes) Order 1950, Sch. I, Part I; Assam Autonomous

PART XVII
OFFICIAL LANGUAGE
CHAPTER I
LANGUAGE OF THE UNION

343. Official language of the Union.—(1) The official language^a of the Union shall be Hindi in Devanagari script.

The form of numerals to be used for the official purposes of the Union shall be the international form of Indian numerals.

(2) Notwithstanding anything in clause (1), for a period of fifteen years from the commencement of this Constitution, the English language shall continue to be used for all the official purposes of the Union for which it was being used immediately before such commencement :

Provided that the President may, during the said period, by order authorise the use of the Hindi language in addition to the English language and of the Devanagari form of numerals in addition to the international form of Indian numerals for any of the official purposes of the Union.

Article 342 — Note 1 (contd.)

District — Khasi tribe has been notified as the tribe entitled to reservation of seat under Article 342. AIR 1958 Assam 128 (131) = (1958-59) 14 ELR 480 (DB).

(3) The inhabitants of Laccadive, Minicoy and Amindivi islands who and both of whose parents were born in these islands are classified as Scheduled Tribes. AIR 1957 Mad 433 (435) = (1956) 2 Mad LJ 361 (DB).

(4) Constitution (Scheduled Tribes) Order, 1950, Part III, Item 25 — Members embracing Christianity do not cease to be Oraons and are entitled to rights and privileges of tribals — They can contest election to Parliamentary seat meant for Scheduled Tribes. AIR 1964 Pat 201 (206) (DB).

(5) Gond community is not declared to be a Scheduled Tribe in Gazipur district of U. P. — As per Scheduled Tribes Order it is a Scheduled Tribe only in the Gazipur district of U. P. 1969 Lab IC 1016 (1016) (Cal.)

(6) Benefit, could not be claimed by a person who is not a member of Scheduled Tribe in relation to the State in which he is residing. AIR 1969 Orissa 220 (221, 222) = 35 Cut LT 55 (DB).

(7) The expression 'aboriginal communities' can be generally used to comprise of aboriginal communities whether or not they are formally included in an order under Article 342. 1969 Lab IC 1016 (1017) (Cal.)

(8) The provisions of Article 16 (4) include reservations for the members of Scheduled Castes and Tribes. 1969 Lab IC 1016 (1017) (Cal.)

(9) Constitution (Scheduled Tribes) Order (1950) — Article 342 is in pari materia with Article 341 as regards principles governing scope of enquiry under Article 342. AIR 1967 Mys 182 (184) = (1967) 2 Mys LJ 277.

(10) Constitution (Scheduled Tribes) Order (1950) — 'Girijana' is group of persons belonging to Scheduled Tribes — 'Hasalaru'

tribe is not different from 'Hasalar' tribe and difference in spelling has no materiality. (1969) 17 Law Rep 691 (692) (DB).

(11) After the President has specified the Scheduled Tribes, it is only the Parliament that is competent to include in or exclude from the list of Scheduled Tribes specified in a notification issued under Cl. (1) of Article 342. AIR 1967 Mys 182 (184, 185) = (1967) 2 Mys LJ 277.

(12) A Muka Dora tribesman following manners and customs of the twice born for 20 to 30 years is not sufficient to hold that he had ceased to belong to Muka Dora tribe. AIR 1958 Andh Pra 724 (736) = (1958) 2 Andh WR 226 (DB).

Article 343 — Note 1

(1) Article 343 provides that the official language of the Union shall be Hindi in Devanagari script. In the eighth Schedule Hindi and Urdu are mentioned as separate languages. AIR 1962 All 83 (87, 88) = 1961 All LJ 976 (DB).

(2) Article 343 contemplates use of both forms of numerals viz., International form of Indian numerals and Devnagari form of numerals for any office purposes. AIR 1967 Andh Pra 111 (116) = (1966) 1 Andh WR 393 (DB).

(3) The object of the Official Languages Act 1963 is to provide, with reference to Article 343 (3), for the languages which may be used for official purposes of the Union of India, for transaction of business of Parliament, for Central and State Acts and for certain purposes in High Courts. AIR 1965 Mad 11 (11) = 1965 (1) Cri LJ 49 = (1964) 2 Mad LJ 530 (DB).

(4) Official language of Pondicherry was to be French till decided otherwise by the Legislative Assembly of Pondicherry. Under the Official Languages Act 1965, Tamil and English have been elevated to status of official languages. Till that Act came into force French text of the judgments of the Superior Court of Appeal were prepared as the official text. AIR 1968 Mad 298 (307) = (1967) 2 Mad LJ 85 (DB).

(3) Notwithstanding anything in this article, Parliament may by law^b provide for the use, after the said period of fifteen years, of—

- (a) the English language, or
 - (b) the Devnagari form of numerals,
- for such purposes as may be specified in the law.

[a] For language to be used in Parliament notwithstanding anything in this Part, see Art. 120; For language to be used in the Legislature of a State notwithstanding anything in this Part, see Art. 210; For power of the President to issue directions in accordance with the report of Committee of Parliament notwithstanding this Article, see Art. 344 (6).

[b] See the Official Languages Act, 1963 (19 of 1963), S. 3.

JAMMU AND KASHMIR

The provisions of this part shall apply to Jammu and Kashmir only in so far as they relate to—

- (i) the official language of the Union;
- (ii) the official language for communication between one State and another, or between a State and the Union; and
- (iii) the language of the proceedings in the Supreme Court.

—See Constitution (Application to J. and K.) Order, 1954, Para. 2, sub-para. (12).

344. Commission and Committee of Parliament on official language.—(1) The President shall, at the expiration of five years from the commencement of this Constitution and thereafter at the expiration of ten years from such commencement, by order constitute a Commission which shall consist of a Chairman and such other members representing the different languages specified in the Eighth Schedule as the President may appoint, and the order shall define the procedure to be followed by the Commission.

(2) It shall be the duty of the Commission to make recommendations to the President as to—

- (a) the progressive use of the Hindi language for the official purposes of the Union;
- (b) restrictions on the use of the English language for all or any of the official purposes of the Union;
- (c) the language to be used for all or any of the purposes mentioned in Article 348;^a
- (d) the form of numerals to be used for any one or more specified purposes of the Union;
- (e) any other matter referred to the Commission by the President as regards the official language of the Union and the language for communication between the Union and a State or between one State and another and their use.

(3) In making their recommendations under clause (2), the Commission shall have due regard to the industrial, cultural and scientific advancement of India, and the just claims and the interests of persons belonging to the non-Hindi speaking areas in regard to the public services.

(4) There shall be constituted a Committee consisting of thirty members, of whom twenty shall be members of the House of the People and ten shall be members of the Council of States to be elected respectively by the members of the House of the People and the members of the Council of States in accordance with the system of proportional representation by means of the single transferable vote.

(5) It shall be the duty of the Committee to examine the recommendations of the Commission constituted under clause (1) and to report to the President their opinion thereon.

(6) Notwithstanding anything in Article 343, the President may, after consideration of the report referred to in clause (5), issue directions in accordance with the whole or any part of that report.

[a] Article 348 deals with language to be used in the Supreme Court and in the High Courts and for Acts, Bills etc.

CHAPTER II REGIONAL LANGUAGES

345. Official language or languages of a State.^a—Subject to the provisions of Articles 346 and 347, the Legislature of a State may by law adopt any one or more of the languages in use in the State or Hindi as the language or languages to be used for all or any of the official purposes of that State :

Provided that, until the Legislature of the State otherwise provides by law, the English language shall continue to be used for those official purposes within the State for which it was being used immediately before the commencement of this Constitution.

[a] The following Acts have been passed by the State Legislatures :

- (1) A. P. Official Language Act, 1966 (A. P. Act 9 of 1966) (w. e. f. 29-3-1968).
- (2) Assam Official Language Act, 1960 (Assam Act 33 of 1960).
- (3) Bihar Language of Laws Act, 1955 (Bihar Act 23 of 1955).
- (4) Gujarat Official Languages Act, 1960 (Guj. Act 1 of 1961).
- (5) Kerala State Legislature (Continuance of Use of English Language) Act, 1965 (Presi. Act 1 of 1965).
- (6) Madras State Legislature (Continuance of Use of English Language) Act, 1964 (Madras Act 38 of 1964).
- (7) Madras Official Language Act 1956 (Madras Act 39 of 1956) (w. e. f. 1-1-1967).
- (8) Maharashtra Official Languages Act, 1964 (Maha. Act 5 of 1965) (26-1-1965).
- (9) Orissa Official Language Act, 1954 (Orissa Act 14 of 1954) (w. e. f. 16-5-1966).
- (10) Punjab Official Languages Act, 1967 (Punj. Act 25 of 1967) (w. e. f. 1-1-1968).
- (11) Rajasthan Official Language Act, 1956 (Raj. Act 47 of 1956).
- (12) Pondicherry Official Languages Act, 1963 (Pondi. Act 3 of 1965) (w. e. f. 1-7-1966).
- (13) W. B. Official Language Act, 1961 (W. B. Act, 24 of 1961) (w. e. f. 26-1-1965).
- (14) Mysore Official Language Act 1963 (Mys. Act 26 of 1963) (w. e. f. 1-4-1968).
- (15) U. P. Official Language Act, 1951 (U. P. Act 26 of 1951) (w. e. f. 26-1-1968).
- (16) Kerala Official Language (Legislation) Act, 1969 (Ker. Act 8 of 1969).
- (17) Haryana Official Language Act, 1969 (Haryana Act 17 of 1969).

Article 345 — Note 1

(1) Notwithstanding a State Law adopting Hindi or a regional language for the official purposes of the State, English can be used for the official purposes of the State until there is an express legislative prohibition against such use. AIR 1957 Madh Pra 1 (3) (DB) ** 1969 MPLJ 99 = 1968 Jab LJ 989.

(2) The State Legislature of Madhya Pradesh was entitled to adopt both Hindi and Marathi as the official languages. AIR 1959 Madh Pra 208 (210) = 1959 MPLJ 478 (DB) ** 1969 MPLJ 99 = 1968 Jab LJ 989.

(3) Hindi language finds a place among the regional languages specified in the Eighth Schedule and cannot be deemed to be taken out of the category of regional languages contemplated by Article 345. AIR 1959 Madh Pra 208 (210) = 1959 MPLJ 478 (DB).

(4) Pleadings and applications in English are permissible subject to a translation being supplied to the other side when necessary. AIR 1967 Andh Pra 42 (43) = (1966) 1 Andh WR 175 (DB).

(5) Allahabad General Rules (Civil), R. 15 — Plaint written not in Hindi but in English — Plaint is valid in spite of Rule 15 — Proviso to Article 345 also emphasises that unless the legislature of a State expressly provides by law, English is to continue as the language to be used for official purposes within the State. AIR 1963 All 546 (547) = 1963 All LJ 243 (DB).

(6) Article 345 does not declare that after enactment of a law by a State Legislature adopting Hindi as the language for any of the official purposes of the State any order made by the State and expressed in the English language shall be void. AIR 1961 All 365 (368) = 1961 All LJ 153.

346. Official language for communication between one State and another or between a State and the Union.—The language for the time being authorised for use in the Union for official purposes shall be the official language for communication between one State and another State and between a State and the Union:

Provided that if two or more States agree that the Hindi language should be the official language for communication between such States, that language may be used for such communication.

347. Special provision relating to language spoken by a section of the population of a State.—On a demand being made in that behalf the President may, if he is satisfied that a substantial proportion of the population of a State desire the use of any language spoken by them to be recognised by that State, direct that such language shall also be officially recognised throughout that State or any part thereof for such purpose as he may specify.

CHAPTER III

LANGUAGE OF THE SUPREME COURT, HIGH COURTS, ETC.

348. Language to be used in the Supreme Court and in the High Courts and for Acts, Bills, etc.—(1) Notwithstanding anything in the foregoing provisions of this Part, until Parliament by law otherwise provides—

- (a) all proceedings in the Supreme Court and in every High Court,
- (b) the authoritative texts—

- (i) of all Bills to be introduced or amendments thereto to be moved in either House of Parliament or in the House or either House of the Legislature of a State,

- (ii) of all Acts passed by Parliament or the Legislature of a State and of all Ordinances promulgated by the President or the Governor^a [° ° °] of a State, and

- (iii) of all orders, rules, regulations and bye-laws issued under this Constitution or under any law made by Parliament or the Legislature of a State,

shall be in the English language.

Article 348 — Note 1

(1) Under Clause (3) of this article it is the English version of an Act or rule, regulation, etc., that is to be treated as the authoritative text in case of conflict between the English version and that in Hindi or other language. AIR 1954 All 257 (278) (DB) *° AIR 1962 All 240 (244) = 1961 All LJ 900 (FB) *° AIR 1966 Raj 142 (149) = 1965 Raj LW 358 (DB) *° AIR 1965 All 170 (172) = 1965 (1) Cri LJ 418 = 1964 All WR (HC) 204.

[But see AIR 1959 All 792 (793) = 1959 All LJ 685 *° AIR 1959 All 208 (210) = 1958 All LJ 719 (DB).]

(2) The doctrine that if there be two versions of a statute in two different languages, one version can be used to interpret the other does not apply in India, as Clause (3) of this article clearly provides that where laws are passed in an Indian language and translated into English, the authoritative version shall be the English one. AIR 1958 Madh Pra 16 (19).

(3) Where the English translation of a statute or rule, etc., has not been published as contemplated by this clause, this will not render the Act or Rule null and void. AIR 1957 Madh B 26 (28) (DB).

(4) Under the Official Language Act of the Pondicherry Legislature both Tamil and English have been elevated to the status of the official languages to come into effect upon a date to be notified. Even if the date be not actually notified, yet, until that is done, the procedure that seems to prevail, with regard to the language of the Court, is that there is prepared a French Text of the judgments of the Superior Court of Appeal which will be the official text of the judgment. AIR 1968 Mad 298 (307) = (1967) 2 Mad LJ 85.

(5) The validity of the U. P. Government Servants' Conduct Rules (1946) is not affected because they were published only in English version and not in Hindi version — Both versions are equally authoritative. AIR 1962 All 507 (509) = 1962 (2) Cri LJ 459 = 1962 All LJ 355. (AIR 1962 All 240, Foll.)

(2) Notwithstanding anything in sub-clause (a) of clause (1), the Governor a[* *] of a State may, with the previous consent of the President, authorise the use of the Hindi language, or any other language used for any official purposes of the State, in proceedings in the High Court having its principal seat in that State:

Provided that nothing in this clause shall apply to any judgment, decree or order passed or made by such High Court.

(3) Notwithstanding anything in sub-clause (b) of clause (1), where the Legislature of a State has prescribed any language other than the English language for use in Bills introduced in, or Acts passed by, the Legislature of the State or in Ordinances promulgated by the Governor a[* *] of the State or in any order, rule, regulation or bye-law referred to in paragraph (iii) of that sub-clause, a translation of the same in the English language published under the authority of the Governor a[* *] of the State in the Official Gazette of that State shall be deemed to be the authoritative text thereof in the English language under this article.

[Government of India Act (1935), S. 214 (5); S. 227.]

[a] The words 'or Rajpramukh' were omitted by the Constitution (Seventh Amendment) Act, 1956, S. 29 and Schedule (1-11-1956).

349. Special procedure for enactment of certain laws relating to language.— During the period of fifteen years from the commencement of this Constitution, no Bill or amendment making provision^a for the language to be used for any of the purposes mentioned in clause (1) of Article 348 shall be introduced or moved in either House of Parliament without the previous sanction of the President, and the President shall not give his sanction to the introduction of any such Bill or the moving of any such amendment except after he has taken into consideration the recommendations of the Commission constituted under clause (1) of Article 344 and the report of the Committee constituted under clause (4) of that article.

[a] See the Official Languages Act, 1963 (19 of 1963), S. 3 (26-1-1965).

CHAPTER IV SPECIAL DIRECTIVES

350. Language to be used in representations for redress of grievances.— Every person shall be entitled to submit a representation for the redress of any grievance to any officer or authority of the Union or a State in any of the languages used in the Union or in the State, as the case may be.

^a[350A. Facilities for instruction in mother-tongue at primary stage.—It shall be the endeavour of every State and of every local authority within the State to provide adequate facilities for instruction in the mother-tongue at the primary stage of education to children belonging to linguistic minority groups; and the President may issue such directions to any State as he considers necessary or proper for securing the provision of such facilities.]

[a] Inserted by the Constitution (Seventh Amendment) Act, 1956, S. 21 (1-11-1956).

Article 350 — Note 1

(1) The languages contemplated by Article 350 have reference to those in the Eighth Schedule which does not contain English language. No person can claim to make a representation in English by virtue of Article 350. AIR 1959 Madh Pra 208 (210) = 1959 MPLJ 478 (DB).

(2) The expression "any officer or authority" does not cover Courts of law. Section 3, M. P. Languages Act (1950) is not

repugnant to Article 350. AIR 1959 Madh Pra 208 (211) = 1959 MPLJ 478 (DB).

(3) In considering the applicability of this article to complaints presented before a Court of law, two points have to be considered. Firstly, whether a complaint presented before a Court of law can be said to be a representation for redress of a grievance. Secondly, can a Court of law be properly described as an officer or authority of a State. AIR 1963 All 546 (547) = 1963 All LJ 243 (DB).

OBJECTS AND REASONS

"The new Article 350A proposed in this clause is designed to implement one of the States Reorganisation Commission's important recommendations regarding safeguards for linguistic minorities in the States after reorganisation."—Gaz. Ind., 1956, Pt. II, S. 2, Ext., p. 218.

*[350B. Special Officer for linguistic minorities.—(1) There shall be a Special Officer for linguistic minorities to be appointed by the President.

(2) It shall be the duty of the Special Officer to investigate all matters relating to the safeguards provided for linguistic minorities under this Constitution and report to the President upon those matters at such intervals as the President may direct, and the President shall cause all such reports to be laid before each House of Parliament, and sent to the Governments of the States concerned.]

[a] Inserted by the Constitution (Seventh Amendment) Act, 1956, S. 29 and Sch. (1-11-1956).

351. Directive for development of the Hindi language.—It shall be the duty of the Union to promote the spread of the Hindi language, to develop it so that it may serve as a medium of expression for all the elements of the composite culture of India and to secure its enrichment by assimilating without interfering with its genus, the forms, style and expression, used in Hindustani and in the other languages of India specified in the Eighth Schedule, and by drawing, wherever necessary or desirable, for its vocabulary, primarily on Sanskrit and secondarily on other languages.

PART XVIII

EMERGENCY PROVISIONS

352. Proclamation of Emergency.—(1) If the President is satisfied that a grave emergency exists whereby the security of India or of any part of the territory thereof is threatened, whether by war or external aggression or internal disturbance, he may, by Proclamation, make a declaration to that effect.

(2) A Proclamation issued under clause (1)—

(a) may be revoked by a subsequent Proclamation;

(b) shall be laid before each House of Parliament;

(c) shall cease to operate at the expiration of two months unless before the expiration of that period it has been approved by resolutions of both Houses of Parliament.

ARTICLE 352 — SYNOPSIS

1. "Satisfied".

2. Construction of war-time measures.

3. "Internal disturbance".

4. Revocation of a proclamation.

1. "Satisfied." — (1) Where a Proclamation of Emergency is made under this article, it is not open to the Courts to question the grounds on which the President is satisfied that a grave emergency exists whereby the security of India is threatened by war or external aggression or internal disturbances. AIR 1945 PC 48 (50)= 72 Ind App 57= ILR (1945) Kar (PC) 97= 1945 FCR 161= 46 Cri LJ 589 ** AIR 1981 PC 111 (111, 112)= 58 Ind App 169 = ILR 12 Lah 280= 32 Cri L Jour 727 ** AIR 1943 FC 75 (83)= (1944) 6 FCR 1= ILR (1943) Kar (FC) 103= 45 Cri LJ 841.

(2) A proclamation does not cease to be in compliance with Article 362 (1) because

it does not contain the words "the President is satisfied." (1967) 8 Guj LR 265 (275) *° AIR 1967 SC 243 (245)= 1967 Cri LJ 282= (1966) Supp SCR 209 ** ILR (1967) 1 Punj 517 (522).

2. Construction of war-time measures. —

(1) War-time measures, which often have to be enacted hastily, should be construed more liberally in favour of the State than peace-time legislation. AIR 1952 SC 335 (338)= 1952 SCR 877= 1952 Cri LJ 1406 ** AIR 1943 Nag 36 (53, 64)= ILR (1943) Nag 73= 44 Cri L Jour 237 *° AIR 1965 Punj 74 (79)= 66 Pun LR 724 (DB).

(2) Person charged with offence under Rule 126 (p) (2) of Defence of India (Part XII-A Gold Control) Rules (1962) — Cannot take recourse to Court during period of emergency, even if his rights under Article 21 are infringed. AIR 1970 Andhra Pra 47 (53)= 1970 Cri LJ 199 (DB).

3. "Internal disturbance". — (1) "Internal disturbance" means a rebellion or insurrec-

Provided that if any such Proclamation is issued at a time when the House of the People has been dissolved or the dissolution of the House of the People takes place during the period of two months referred to in sub-clause (c), and if a resolution approving the Proclamation has been passed by the Council of States, but no resolution with respect to such Proclamation has been passed by the House of the People before the expiration of that period, the Proclamation shall cease to operate at the expiration of thirty days from the date on which the House of the People first sits after its reconstitution unless before the expiration of the said period of thirty days a resolution approving the Proclamation has been also passed by the House of the People.

(3) A Proclamation of Emergency declaring that the security of India or of any part of the territory thereof is threatened by war or by external aggression or by internal disturbance may be made before the actual occurrence of war or of any such aggression or disturbance if the President is satisfied that there is imminent danger thereof.

[Government of India Act (1935), S. 102 (1), (3), (5).]

JAMMU AND KASHMIR

Part XVIII of the Constitution applies to the State of Jammu and Kashmir, subject to certain exceptions and modifications. These exceptions and modifications are indicated in the respective Articles.

In its application to the State of Jammu and Kashmir, to Art. 352, the following new clause shall be added, namely:—

“(4) No Proclamation of Emergency made on grounds only of internal disturbance or imminent danger thereof shall have effect in relation to the State of Jammu and Kashmir (except as respects Art. 354) unless it is made at the request or with the concurrence of the Government of that State.”—See Constitution (Application to Jammu and Kashmir) Order, 1954, Para. 2, sub-para. (13) (a).

353. Effect of Proclamation of Emergency.—While a Proclamation of Emergency is in operation, then—

- (a) notwithstanding anything in this Constitution, the executive power of the Union shall extend to the giving of directions to any State as to the manner in which the executive power thereof is to be exercised;
- (b) the power of Parliament to make laws with respect to any matter shall include power to make laws conferring powers and imposing duties, or authorising the conferring of powers and the imposition of duties, upon the Union or officers and authorities of the Union as respects that matter, notwithstanding that it is one which is not enumerated in the Union List.

Article 352 — Note 3 (contd.)
tion and not an ordinary breach of public peace. AIR 1959 All 101 (111)= 1959 Cri LJ 128= 1958 All LJ 793 (FB). (Reversed in AIR 1962 SC 955 on another point.)

4. Revocation of a proclamation.— (1) A proclamation issued can be revoked only by an event mentioned in Cl. (2) and not otherwise. AIR 1967 SC 243 (245)= 1967 Cri LJ 282= (1966) Supp SCR 209.

(2) The question whether the proclamation should continue to be in force is left exclusively to the President and the Parliament. AIR 1966 Raj 247 (250)= 1966 Cri LJ 1338= 1966 Raj LW 371 (DB).

Article 353 — Note 1

(1) Where emergency by external aggression has been proclaimed, it cannot be

argued that detention, during such emergency, could be made in respect of only those activities which relate to the external aggression and not in respect of internal disturbances. AIR 1968 Mad 54 (57)= 1968 Cri LJ 177= (1966) 2 Mad LJ 283 (DB).

(2) By the combined operation of Articles 352, 353 and 250 (1), Parliament has the right to make laws with respect to all the three lists in the Seventh Schedule to the Constitution during a period of emergency. This power of Parliament is not confined to the making of laws alone but includes the power to confer jurisdiction and impose duties both upon the Union of India and its authorities as respects any law made during the operation of proclamation of emergency. AIR 1964 Cal 279 (280, 281)= 1964 (1) Cri LJ 662 (DB).

354. Application of provisions relating to distribution of revenues while a Proclamation of Emergency is in operation.—(1) The President may, while a Proclamation of Emergency is in operation, by order direct that all or any of the provisions of Articles 268 to 279 shall for such period, not extending in any case beyond the expiration of the financial year in which such Proclamation ceases to operate, as may be specified in the order, have effect subject to such exceptions or modifications as he thinks fit.

(2) Every order made under clause (1) shall, as soon as may be after it is made, be laid before each House of Parliament.

355. Duty of the Union to protect States against external aggression and internal disturbance.—It shall be the duty of the Union to protect every State against external aggression and internal disturbance and to ensure that the Government of every State is carried on in accordance with the provisions of this Constitution.

356. Provisions in case of failure of constitutional machinery in States.—(1) If the President on receipt of a report from the Governor ^a[° ° °] of a State or otherwise, is satisfied that a situation has arisen^o in which the Government of the State cannot be carried on in accordance with the provisions of this Constitution, the President may by Proclamation—

- (a) assume to himself all or any of the functions of the Government of the State and all or any of the powers vested in or exercisable by the Governor, ^b[° ° °] or any body or authority in the State other than the Legislature of the State;
- (b) declare that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament;
- (c) make such incidental and consequential provisions as appear to the President to be necessary or desirable for giving effect to the objects of the Proclamation, including provisions for suspending in whole or in part the operation of any provisions of this Constitution relating to any body or authority in the State:

Article 353 — Note 1 (contd.)

(3) Central Government competent to issue directions to State Government calling upon them to withdraw or cancel orders of detention passed under the Defence of India Rules by the various authorities under their (State Governments') Control. AIR 1967 Bom 109 (122) (DB).

Article 356 — Note 1

(1) When "the Government of the State cannot be carried on in accordance with the provisions of the Constitution" this Article empowers the President to assume to himself the executive powers of the State Government, and to declare that the powers of the State Legislature shall be exercisable by the Parliament. AIR 1954 Pepsu 136 (148)= ILR (1954) Patiala 183 (DB).

(2) The word 'Proclamation' means a public announcement. 1946 Rang LR 64 (68).

(3) The President will not be disqualified from issuing a Proclamation by the fact that at the time he is out of India. 1946 Rang LR 64 (69, 70).

(4) Where a Proclamation has been issued under this Article declaring that the powers of the State Legislature shall be exercisable by Parliament, a provision in a

State enactment that the State Government cannot make a certain rule unless it has published a draft of the rule at least thirty days before the State Legislative Assembly meets cannot be complied with and therefore such a rule made during the operation of the Proclamation is invalid. (1955) 57 Pun LR 69 (72)= ILR (1955) Punj 810 (818) (DB).

(5) A provision delegating the President's power to the State Governor would come under this clause (c). See AIR 1954 Pepsu 136 (148)= ILR (1954) Patiala 183 (DB).

(6) The legality or propriety of a proclamation is not open to consideration by the Court. AIR 1968 Punj 441 (450)= ILR (1969) 1 Punj 176 (DB).

(7) The power to issue a proclamation is a constitutional power of the President and not the executive power of the Union. AIR 1968 Punj 441 (447)= ILR (1969) 1 Punj 176 (DB).

(8) The validity of a proclamation under this Article cannot be challenged in the Court. AIR 1965 Ker 229 (232)= 1965 Ker LT 460

(9) Proclamation under Article 356 can be issued, even though there is no sitting Legislative Assembly. AIR 1965 Ker 229 (230, 231)= 1965 Ker LT 460.

Provided that nothing in this clause shall authorise the President to assume to himself any of the powers vested in or exercisable by a High Court, or to suspend in whole or in part the operation of any provision of this Constitution relating to High Courts.

(2) Any such Proclamation may be revoked or varied by a subsequent Proclamation.

(3) Every Proclamation under this article shall be laid before each House of Parliament and shall, except where it is a Proclamation revoking a previous Proclamation, cease to operate at the expiration of two months unless before the expiration of that period it has been approved by resolutions of both Houses of Parliament :

Provided that if any such Proclamation (not being a Proclamation revoking a previous Proclamation) is issued at a time when the House of the People is dissolved or the dissolution of the House of the People takes place during the period of two months referred to in this clause, and if a resolution approving the Proclamation has been passed by the Council of States, but no resolution with respect to such Proclamation has been passed by the House of the People before the expiration of that period, the Proclamation shall cease to operate at the expiration of thirty days from the date on which the House of the People first sits after its reconstitution unless before the expiration of the said period of thirty days a resolution approving the Proclamation has been also passed by the House of the People.

(4) A Proclamation so approved shall, unless revoked, cease to operate on the expiration of a period of six months from the date of the passing of the second of the resolutions approving the Proclamation under clause (3):

Provided that if and so often as a resolution approving the continuance in force of such a Proclamation is passed by both Houses of Parliament, the Proclamation shall, unless revoked, continue in force for a further period of six months from the date on which under this clause it would otherwise have ceased to operate, but no such Proclamation shall in any case remain in force for more than three years :

Provided further that if the dissolution of the House of the People takes place during any such period of six months and a resolution approving the continuance in force of such Proclamation has been passed by the Council of States, but no resolution with respect to the continuance in force of such Proclamation has been passed by the House of the People during the said period, the Proclamation shall cease to operate at the expiration of thirty days from the date on which the House of the People first sits after its reconstitution unless before the expiration of the said period of thirty days a resolution approving the continuance in force of the Proclamation has been also passed by the House of the People.

[Government of India Act (1935), S. 45; S. 93.]

[a] The words "or Rajpramukh" were omitted by the Constitution (Seventh Amendment) Act, 1956, S. 29 and Schedule (1-11-1956).

[b] The words "or Rajpramukh, as the case may be," were omitted *ibid*.

[c] See Art. 365 post.

Article 356 — Note 1 (contd.)

(10) No resort need be had by the President to the provisions of Article 356 (1) (a) read with Article 172 or Article 174 to dissolve the State Legislative Assembly. The power is implicit in Clause (1) (b) of Article 356 itself. AIR 1965 Ker 229 (230, 231)= 1965 Ker LT 460.

(11) Where the President's rule has been imposed on a State and the President's powers have been delegated, an order passed in the name of the President is an order of the State Government in exercise of its functions as a delegate and is valid.

AIR 1968 Punj 363 (366)= ILR (1967) 2 Punj 790.

(12) Where there is an order by the President, who has assumed the administration of the State, making his powers exercisable by the Government, a sanction for prosecution by the Governor is valid. The sanction of the President is not necessary. 1962 Ker LT 690 (696) (DB).

(13) Where during the President's Rule, the Governor passes an order, the President can cancel it. AIR 1966 SC 816 (819)= 1966 Cri LJ 602= 1965 Ker LT 1229.

(14) After the assumption of the Governor's powers by the President, there is no imped-

JAMMU AND KASHMIR

In its application to the State of Jammu and Kashmir, in clause (1) of Art. 356, references to the provision or provisions of the Constitution shall be construed as including references to provisions or provision of the Constitution of Jammu and Kashmir — See Constitution (Application to J. and K.) Order, 1954, Para. 2, sub-para. (13) (b) (as substituted by C. O. 71 of 1964.)

357. Exercise of legislative powers under Proclamation issued under Article 356.—(1) Where by a Proclamation issued under clause (1) of Article 356, it has been declared that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament, it shall be competent—

- (a) for Parliament to confer on the President the power of the Legislature of the State to make laws, and to authorise the President to delegate, subject to such conditions as he may think fit to impose, the power so conferred to any other authority to be specified by him in that behalf;
- (b) for Parliament, or for the President or other authority in whom such power to make laws is vested under sub-clause (a), to make laws conferring powers and imposing duties, or authorising the conferring of powers and the imposition of duties, upon the Union or officers and authorities thereof;
- (c) for the President to authorise when the House of the People is not in session expenditure from the Consolidated Fund of the State pending the sanction of such expenditure by Parliament.

(2) Any law made in exercise of the power of the Legislature of the State by Parliament or the President or other authority referred to in sub-clause (a) of clause (1) which Parliament or the President or such other authority would not, but for the issue of a Proclamation under Article 356, have been competent to make shall, to the extent of the incompetency, cease to have effect on the expiration of a period of one year after the Proclamation has ceased to operate except as respects things done or omitted to be done before the expiration of the said period, unless the provisions which shall so cease to have effect are sooner repealed or re-enacted with or without modification by Act of the appropriate Legislature.

358. Suspension of provisions of Article 19^a during emergencies.—While a Proclamation of Emergency is in operation, nothing in Article 19 shall restrict the power of the State as defined in Part III^a to make any law or to take any executive action which the State would but for the provisions contained in that Part be competent to make or to take, but any law so made shall, to the extent of the incompetency, cease to have effect as soon as the Proclamation ceases to operate, except as respects things done or omitted to be done before the law so ceases to have effect.

[a] Part III of the Constitution deals with Fundamental Rights: Art. 19 deals with protection of certain rights regarding freedom of speech and expression, freedom of assembly, etc. etc.

Article 356 — Note 1 (contd.)

ment to the Governor attempting to ascertain the possibility of a constitutional Government in the State before sending his report under this Article. His deliberation with party leaders is not illegal. AIR 1965 Ker 229 (231)= 1965 Ker LT 460.

(15) On the assumption of the administration by the President, there being no Ministers, Article 166, Clause (3) is necessarily suspended and rules made under it are not in force. 1962 Ker LT 690 (697) (DB).

Article 357 — Note 1

(1) The expression “except as respects things done” in Article 357 (2) must receive

liberal and extensive construction. Provisions of Bank of Patiala Regulation and Management Order (1954), including that of Clause 4 (1) (iii) and Rules made thereunder relate to matter of day-to-day affairs and administration of Bank and come within purview of saving clause in Art. 357 (2). AIR 1966 SC 1607 (1611, 1612)= (1966) 3 SCR 486.

Article 358 — Note 1

(1) As soon as a Proclamation of Emergency is issued by the President under Article 358 the provisions of Article 19 are automatically suspended. AIR 1967

Article 358 — Note 1 (contd.)

SC 483 (485)= 1967 Cri LJ 520= 1966 Supp SCR 464 ** AIR 1966 SC 1078 (1080) = 1966 Cri LJ 812= (1966) 2 SCR 573 ** AIR 1966 SC 657 (660)= 1966 Cri LJ 586 = (1966) 2 SCR 406 ** AIR 1968 Ker 143 (146)= 1968 Lab IC 647= 1967 Ker LT 735 ** AIR 1967 Pat 114 (117)= 1966 BLJR 929 (DB) ** AIR 1967 Him. Pra. 21 (24) ** AIR 1967 Goa 142 (144) ** AIR 1966 Raj 247 (250)= 1966 Cri LJ 1338= 1966 Raj LW 371 ** AIR 1965 Punj 74 (76)= 66 Pun LR 724.

(2) The suspension of Art. 19 as soon as a proclamation of emergency has been issued removes during the period of the emergency the fetters created on the legislative and executive powers by Article 19. (1966) 68 Pun LR 390 ** AIR 1967 Madh Pra 268 (275)= 1967 MPLJ 47 (DB)

(3) Article 358 permits the State to make a law or take executive action heedless of Article 19 only while a proclamation of emergency is in operation. 1969 Lab IC 30 (33) (Ker) (DB).

(4) Article 358 not only protects a law violative of Article 19 during period of emergency but it protects any executive action violative of Article 19. AIR 1968 Guj 124 (149) (DB).

(5) Article 358 does not invest the State with arbitrary authority to take action to the prejudice of citizens and others. AIR 1967 SC 1170 (1173)= (1967) 2 SCR 454.

(6) Article 358 does not validate a law which was invalid because of the constitutional inhibition before the proclamation of emergency. AIR 1967 SC 1170 (1173)= (1967) 2 SCR 454 ** AIR 1963 Assam 94 (97) (FB). (Reversed on another point in AIR 1964 SC 600.) ** (1966) 1 Mad LJ 313 ** AIR 1964 Madh Pra 175 (182)= 1964 (2) Cri LJ 160= 1964 MPLJ 209 (DB).

(7) Where anything has been done under a pre-emergency statute like the Essential Commodities Act, including any rule or order made thereunder a plea under Article 19 is available, notwithstanding the emergency proclaimed. 1969 Lab IC 30 (32) (Ker) (DB).

(8) Article 358 which suspends the provisions of Article 19 during an emergency declared by the President under Article 352 is in terms prospective. AIR 1967 SC 1170 (1173)= (1967) 2 SCR 454.

(9) Act passed after enforcement of emergency — Challenge to under Art. 19 (1) (f) and (g) cannot be made as the article has no application. AIR 1969 All 317 (325, 326)= 1967 All LJ 999 (FB) ** AIR 1967 SC 483 (485)= 1967 Cri LJ 520= (1966) Supp SCR 464 ** AIR 1966 SC 1078 (1080) 1966 Cri LJ 812= (1966) 2 SCR 573 ** AIR 1968 Bom 75 (84)= 69 Bom LR 93 (DB) ** AIR 1968 Guj 124 (149) (DB) ** AIR 1967 Madh Pra 268 (275) (DB) ** AIR 1967 Goa 142 (144) ** AIR 1965 Bom 224 (238)= 67 Bom LR 101 (DB). (Overruled

on another point in AIR 1968 SC 870.) ** AIR 1965 Punj 74 (76)= 66 Pun LR 724 (DB) ** AIR 1964 Punj 307 (309) (DB).

(10) In view of the provisions of Article 358 the suspension of Article 19 during the period of emergency is complete and legislative and executive action taken cannot be questioned on the ground that it contravenes Article 19 even after the emergency is over. AIR 1964 SC 381 (393)= (1964) 1 Cri LJ 269= (1964) 4 SCR 797. (1963 All WR (HC) 559, Overruled on another point.)

(11) No Court could pronounce a legislation, subsequent to the emergency as in violation of Article 19 and therefore void. AIR 1965 Mad 225 (229)= 1965 (1) Cri LJ 714 = (1965) 1 Mad LJ 486 (DB) ** AIR 1967 Him Pra 21 (26).

(12) Proclamation of emergency — Court can take judicial notice of and disallow complaints of violations of Article 19. AIR 1965 All 86 (91)= (1964) 15 STC 505 (DB).

(13) Scheme or modification of scheme under Chapter 4A of Motor Vehicles Act is 'law' within Articles 19 and 358. AIR 1967 Him Pra 21 (23).

(14) Wide definition of "Law" in Art. 13 will include order made under Defence of India Rules, Rule 125. AIR 1967 Pat 114 (117)= 1966 BLJR 929 (DB).

(15) It is for the authority in whom the power to declare the emergency is vested to declare by any subsequent declaration that the Emergency has ceased. AIR 1969 J and K 5 (6)= 1969 Cri LJ 67.

(16) An ordinance, Rule or order made under Art. 359 (1) can be challenged on a ground other than those covered by Art. 358 and by the Presidential Order issued under Article 359 (1). AIR 1966 SC 657 (660)= 1966 Cri LJ 586= (1966) 2 SCR 406 ** AIR 1967 SC 483 (485)= 1967 Cri LJ 520 = (1966) Supp SCR 464 ** AIR 1966 SC 1078 (1080)= 1966 Cri LJ 812= (1966) 2 SCR 573.

(17) While Article 358 suspends the rights guaranteed under Article 19 during the period of emergency Article 359 does not purport expressly to suspend any of the fundamental rights. AIR 1964 SC 381 (393)= (1964) 1 Cri LJ 269= (1964) 4 SCR 797. (1963 All WR (HC) 559, Overruled on another point.)

(18) The suspension of Article 19 provided under Article 358 continues so long as the Proclamation of Emergency is in operation. AIR 1964 SC 381 (393)= (1964) 1 Cri LJ 269= (1964) 4 SCR 797. (1963 All WR (HC) 559, Overruled on another point.)

(19) The suspension of Article 19 under Article 358 applies to the whole of the country, and so, covers all legislatures and also States. But the order issued under Article 359 (1) may extend to the whole of India or may be confined to any part of the territory of India. AIR 1964 SC 381 (394)= (1964) 1 Cri LJ 269= (1964) 4 SCR

359. Suspension of the enforcement of the rights conferred by Part III^a during emergencies.—(1) Where a Proclamation of Emergency is in operation, the President may by order declare that the right to move any Court for the enforcement of such of the rights conferred by Part III as may be mentioned in the order and all proceedings pending in any Court for the enforcement of the rights so mentioned shall remain suspended for the period during which the Proclamation is in force or for such shorter period as may be specified in the order.

(2) An order made as aforesaid may extend to the whole or any part of the territory of India.

(3) Every order made under clause (1) shall, as soon as may be after it is made, be laid before each House of Parliament.

[a] Part III deals with Fundamental Rights: Article 359 does not authorise abrogation of fundamental rights during the operation of the Proclamation; it only suspends their enforcement during emergency. Except during martial law, (Art. 34), all contraventions of Part III during emergency could be challenged after the same is over.

Article 358 — Note 1 (contd.)

797. (1963 All WR (HC) 559, Overruled on another point.)

(20) The saving provided in Article 358 has been reproduced in Rule 132-A, framed under the Defence of India Act. The expression "things done or omitted to be done" is wide enough to continue a prosecution not completed under a temporary Act or prosecutions about to be commenced. 1969 Cri LJ 1582 (1591, 1594) (Mad).

ARTICLE 359 — SYNOPSIS

1. Presidential Order — General.
2. Order affecting a class of persons.
3. Right to bring action to enforce specified fundamental rights suspended.
4. Legislative or executive acts can be challenged on other grounds.
5. Fundamental rights themselves are not affected by order.

1. Presidential Order — General. (1) During the period of emergency Article 19 only is suspended temporarily under Article 358 and all other rights except those specifically suspended by the President under Article 359 remain untouched. AIR 1967 SC 1643 (1656) = (1967) 2 SCR 762.

(2) The power confided to the President under Article 359 for making a selection of the fundamental rights to suspend their enforcement is absolute. (1965) 1 Mys LJ 176 (DB).

(3) President can suspend enforcement of any of the fundamental rights. AIR 1968 SC 765 (768) = 1968 Cri LJ 972 = (1968) 2 SCR 227.

(4) How long the proclamation of emergency should continue and what restrictions should be imposed on the fundamental rights of citizens during the pendency of emergency are matters which must be left to the executive. AIR 1964 SC 381 (408) = (1964) 1 Cri LJ 269 = (1964) 4 SCR 797.

(5) The fact that emergency may last for a long period and as a consequence citizens may be precluded from enforcing fundamental rights under Articles 14, 21 and 22 during the period of the order has no bearing on the validity of detention under Defence of India Act. AIR 1964 SC 381 (403) = 1964 (1) Cri LJ 269 = (1964) 4 SCR 797.

(6) The fact that during the operation of the Presidential order the executive may abuse the powers and the citizens would have no remedy is essentially a political question and its impact on the constitutional question is at best indirect. AIR 1964 SC 381 (403) = 1964 (1) Cri LJ 269 = (1964) 4 SCR 797.

(7) President's order under Article 359 providing that enforcement of fundamental rights under Articles 14, 21, 22 would be suspended if any person is deprived of such right under Defence of India Ordinance (later replaced by the Act) or the rules or orders made thereunder — Held. it was not necessary to make any express provision in Defence of India Act or the rules for the suspension of the enforcement of fundamental rights under Articles 14, 21 and 22. AIR 1968 SC 765 (770) = 1968 Cri LJ 972 = (1968) 2 SCR 227.

(8) Presidential order suspending enforcement of rights under Articles 14, 21 and 22 during period of emergency — By indirectly validating Laws in infringement of Articles 14, 21, and 22 the Order does not become a fraud on powers under Article 359. AIR 1964 SC 381 (415) = (1964) 1 Cri LJ 269 = (1964) 4 SCR 797.

(9) In construing the Presidential Order issued under Article 359 (1) it is necessary to remember the general rule of construction that an order purporting to suspend the fundamental rights must be strictly construed in favour of the citizen's fundamental rights. AIR 1966 SC 657 (660) = 1966 Cri LJ 586 = (1966) 2 SCR 406 ** AIR 1967 Guj 229 (247) = 7 Guj LR 597.

(10) Order of President under, D/- 8-11-1962 — Reference to Defence of India

Article 359 — Note 1 (contd.)

Ordinance of 1962 — Must be construed as reference to Defence of India Act, 1962. AIR 1966 SC 740 (744) = 1966 SCR 608 — (1966) 1 SCR 709.

(11) An order passed under Article 359 (1) cannot be tested with the aid of Article 13 (2) under that very fundamental right the enforcement of which it suspends. AIR 1968 SC 765 (768, 769) = 1968 Lab IC 872 = 1968 Cri LJ 972 = (1968) 2 SCR 227. (AIR 1967 SC 1335, Overruled.)

(12) The Order of the President under the Article authenticated under Rule 2 (a) of Authentication (Orders and other Instruments) Rules cannot be called in question on the ground that they are not made or executed by the President. AIR 1966 Mys 207 (209, 210) = 1966 Cri LJ 929 = (1965) 2 Mys LJ 584 (DB).

(13) Emergency — Proclamation lifting emergency — Orders which could not be reviewed can be reviewed judicially. AIR 1969 Cal 474 (476).

2. Order affecting a class of persons. —

(1) Although the scope of the Order made by the President under Article 359 (1) of the Constitution will be confined to whole or a part of the territory of India and during certain periods, there is nothing in the Article which prevents the President from restricting the scope of the Order to a class of persons, provided the operation of the Order is confined to an area and to a period. AIR 1967 SC 1335 (1339) = 1967 Cri LJ 1204 = (1967) 2 SCR 271. (Order in respect of persons such as foreigners and persons governed by the Defence of India Rules. Overruled on another point in AIR 1968 SC 765.) * AIR 1964 SC 381 (399, 415) = 1964 (1) Cri LJ 269 = (1964) 4 SCR 797. (Order confined to persons deprived of any of the specified rights under the Defence of India Ordinance, 1962, or any Rule or Order made thereunder.)

3. Right to bring action to enforce specified fundamental rights suspended. — (1) Orders made by the President under the article — Effect of — Right of a person to move the Court for enforcement of his fundamental rights under Articles 14, 21 and 22 is suspended. AIR 1966 Mys 207 (209, 210) = 1966 Cri LJ 929 = (1965) 2 Mys LJ 584 (DB) * AIR 1968 SC 765 (770) = 1968 Cri LJ 972 = (1968) 2 SCR 227. (AIR 1967 SC 1335, Overruled. High Court decision taking the view adopted in AIR 1967 SC 1335 also must be held no longer good law.) * AIR 1964 SC 173 (176, 177) = 1964 (1) Cri LJ 132 = (1964) 3 SCR 442 * AIR 1966 Andh Pra 229 (231) = 1966 Cri LJ 871 = (1966) 1 Andh WR 116 (DB) * (1965) 69 Cal WN 913 = 1966 Cri LJ 826 (828).

(2) Detentions — Immunity from challenge under President's order — Not confined to cases of effective deprivations of the

rights by a constitutionally good and valid law. (1965) 1 Mys 176 (DB).

(3) Writ Petition filed during pendency of emergency — Validity of Rule 149 of Indian Railways Establishment Code, Vol. I challenged — In view of Order made by President petitioner not wishing to challenge under Article 14 but under Art. 16 — He cannot do so. AIR 1963 Assam 94 (97, 98) (FB). (Reversed on different point in AIR 1964 SC 600.)

(4) Detention under Defence of India Act not open to challenge by virtue of Presidential order under Article 359 (1) — Defence cannot get mere declaration that Defence of India Act is invalid. AIR 1964 SC 381 (403) = 1964 (1) Cri LJ 269 = (1964) 4 SCR 797.

(5) A fundamental right may be enforced in many ways. This article authorises the suspension of the right to move "any Court" to obtain the compulsory observance of a claim or the adherence to a fundamental right through a direction, order or decree. (1965) 1 Mys LJ 176 (DB) * AIR 1964 SC 381 (394, 397) = (1964) 1 Cri LJ 269 = (1964) 4 SCR 797 * AIR 1968 Mad 54 (56) = 1968 Cri LJ 177 = (1966) 2 Mad LJ 283.

(6) Repeal of Defence of India Ordinance — Effect of repeal — Section 8 of General Clauses Act, 1897 applies to President's order under Article 359 (1) — Person detained has no right to challenge vires of D. I. Act or Rules. AIR 1964 SC 173 (179) = (1964) 3 SCR 442 = 1964 (1) Cri LJ 132.

(7) Person charged with offence under Rule 126 (p) (2) of Defence of India (Part XII-A Gold Control) Rules (1962) — Cannot take recourse to Court during period of emergency, even if his rights under Article 21 are infringed. AIR 1970 Andh Pra 47 (53) = 1970 Cri LJ 199 (DB).

4. Legislative or executive acts can be challenged on other grounds. — (1) Validity of Ordinance or rule or order made under — Order can be challenged on grounds other than violation of Articles 14, 19, 21, 22. AIR 1967 SC 483 (485) = 1967 Cri LJ 520 = (1966) Supp SCR 464 * AIR 1966 SC 1078 (1080) = 1966 Cri LJ 812 = (1966) 2 SCR 573 * AIR 1966 SC 657 (661) = 1966 Cri LJ 586 = (1966) 2 SCR 406 * AIR 1964 SC 381 (399, 400, 401) = 1964 (1) Cri LJ 269 = (1964) 4 SCR 797.

(2) Order of President under Article 359 (1) — Suspension of right to move Court — Misuse of statutory power by authority — Court has jurisdiction to entertain applications under Arts. 32 and 226 on these grounds. AIR 1966 SC 740 (752) = 1966 Cri LJ 608 = (1966) 1 SCR 709 * AIR 1968 Mad 54 (59) = 1968 Cri LJ 177 = (1966) 2 Mad LJ 283 (DB) * AIR 1967 Mad 21 (24) = 1967 Cri LJ 85 = (1966) 2 Mad LJ 53 (DB) * AIR 1965 Mad 225 (229) = 1965 (1) Cri LJ 714 = (1965) 1

360. Provisions as to financial emergency.—(1) If the President is satisfied that a situation has arisen whereby the financial stability or credit of India or of any part of the territory thereof is threatened, he may by a Proclamation make a declaration to that effect.

(2) The provisions of clause (2) of Article 352 shall apply in relation to a Proclamation issued under this article as they apply in relation to a Proclamation of Emergency issued under Article 352.

(3) During the period any such Proclamation as is mentioned in clause (1) is in operation, the executive authority of the Union shall extend to the giving of directions to any State to observe such canons of financial propriety as may be specified in the directions, and to the giving of such other directions as the President may deem necessary and adequate for the purpose.

(4) Notwithstanding anything in this Constitution—

(a) any such direction may include—

(i) a provision requiring the reduction of salaries and allowances of all or any class of persons serving in connection with the affairs of a State;

(ii) a provision requiring all Money Bills or other Bills to which the provisions of Article 207 apply to be reserved for the consideration of the President after they are passed by the Legislature of the State;

(b) it shall be competent for the President during the period any Proclamation issued under this article is in operation to issue directions for the reduction of salaries and allowances of all or any class of persons serving in connection with the affairs of the Union including the Judges of the Supreme Court and the High Courts.

JAMMU AND KASHMIR

Article 360 shall be omitted — See Constitution (Application to Jammu and Kashmir) Order, 1954, Para 2, Sub-para 13 (c) (as substituted by C. O. 71 of 1964).

PART XIX

MISCELLANEOUS

361. Protection of President and Governors and Rajpramukhs.—(1) The President, or the Governor or Rajpramukh of a State, shall not be answerable to any

Article 359 — Note 4 (contd.)

Mad LJ 486 (DB) ** AIR 1965 Punj 74 (76, 77) = 66 Pun LR 724 (DB).

(3) Where the authority seeks to impose on a person detained under the Defence of India Act a restriction not prescribed by Rule 30 (4) of the Defence of India Rules the defence would not be barred by the Presidential order issued under this Article from moving the Court for a direction to the authority to act in accordance with law. AIR 1966 SC 424 (426, 427) = 1966 Cri LJ 311 = (1966) 1 SCR 702.

(4) Detention order — Effect of President's order under Article 359 is that during emergency the detenu is barred from asking detaining authority to supply grounds of detention order — But if allegations of bad faith can be substantiated by detenu without enforcement of right like the ones in Article 22 and if it is possible for the Court to hold that the order was not passed not in genuine exercise of powers but

out of ulterior considerations in bad faith it will strike down the order. AIR 1966 Pat 391 (395) = 1966 Cri LJ 1306 (DB).

5. Fundamental rights themselves are not affected by order.— (1) The suspension of a remedy cannot abrogate the right itself. Hence the rights conferred by Part III, in respect of which the remedy is suspended by the Presidential Order under Art. 359 (1), does not fall with the remedy. AIR 1964 SC 381 (407, 414, 415) = (1964) 1 Cri LJ 269 = (1964) 4 SCR 797 ** (1965) 1 Mys LJ 176 (DB).

(2) The Presidential order under Article 359 cannot widen the authority of the legislative or the executive. AIR 1964 SC 381 (393) = (1964) 1 Cri LJ 269 = (1964) 4 SCR 797 ** 1963 All WR (HC) 559. (Overruled on another point in AIR 1964 SC 381.)

ARTICLE 361—SYNOPSIS

1. Object.
2. Clause (1).

court for the exercise and performance of the powers and duties of his office or for any act done or purporting to be done by him in the exercise and performance of those powers and duties:

Provided that the conduct of the President may be brought under review by any court, tribunal or body appointed or designated by either House of Parliament for the investigation of a charge under Article 61:

Provided further that nothing in this clause shall be construed as restricting the right of any person to bring appropriate proceedings against the Government of India or the Government of a State.

(2) No criminal proceedings whatsoever shall be instituted or continued against the President, or the Governor ^{b[° ° °]} of a State, in any Court during his term of office.

(3) No process for the arrest or imprisonment of the President, or the Governor ^{b[° °]} of a State, shall issue from any Court during his term of office.

Article 361 — Synopsis (contd.)

3. "Powers and duties of his office."

4. Suit against Government.

5. Writ proceedings.

6. Proceedings against Legislature.

7. Clause (2).

8. Clause (3).

9. Clause (4).

1. Object.— (1) The object of the article is to protect from harassment the persons holding the high office of the executive head of State, in regard to their official acts which in democracy are done on the advice of Ministers. AIR 1955 Hyd 241 (246)= ILR (1955) Hyd 528= 1955 Cri L Jour 1488 (DB).

2. Clause (1).— (1) This clause confers on the President and the Governors of States an absolute immunity from any legal proceedings in regard to their official acts. AIR 1952 Cal 799 (801).

(2) So far as criminal proceedings are concerned, clause (2), confers an absolute immunity, whether the act or omission is in official or personal capacity. But this immunity is applicable only during the term of office of the President or the Governor. AIR 1955 Hyd 241 (246)= ILR (1955) Hyd 528= 1955 Cri LJ 1488 (DB).

(3) By virtue of the exemption under this clause no writ or direction can be issued against the Governor of a State to compel him to exercise or abstain from exercising any power. ILR (1967) Andh Pra 715 (727) (DB) ** AIR 1952 Cal 799 (801).

(4) The expression "for any act done or purporting to be done in the exercise of those powers" shows that the exemption under the clause extends also to acts incidental to the exercise of powers by the President or Governor. AIR 1952 Cal 799 (801, 802).

(5) The words "purporting to be done" in this clause are very wide and the exemption will apply if the act professes to be done under the Constitution and there is no improper motive or bad faith. AIR 1958 Andh Pra 240 (251) (DB) ** AIR 1953 Madh Bha 54 (55)= ILR (1953) Madh Bha

24 (DB) ** AIR 1952 Cal 799 (802) ** AIR 1952 Nag 330 (332)= ILR (1952) Nag 409 (DB).

(6) The nomination of members to the State Legislative Council by the Governor under Article 171 would be an act purporting to be done in the exercise of power conferred by the Constitution. AIR 1952 Cal 799 (802).

(7) The President or the Governor not being answerable to any Court, he will not be under any obligation to make any affidavit in answer to a rule issued on an application challenging any act of his purporting to be done in the exercise of his constitutional powers. AIR 1952 Cal 799 (802).

(8) This clause does not apply not only to acts done in a personal capacity but also to acts not done in official capacity as President or Governor. AIR 1954 Andhra 9 (11)= ILR (1955) Andhra 208.

[See however AIR 1962 Madh Pra 73 (75, 76, 77, 78, 79)= 1961 MPLJ 1316.]

(9) A decision of the Rajpramukh, after the Constitution, in the matter of recognition of a successor to a jagir, would be beyond his power and clause (1) of Article 361, would not bar a civil suit amongst the claimants themselves, for in such a suit the Rajpramukh shall not be required to answer to the Court. AIR 1955 Raj 135 (139)= ILR (1955) 5 Raj 693 (FB).

(10) A proclamation of emergency by the President pursuant to his constitutional power under Article 356 is not justiciable. The President not being amenable to the jurisdiction of Court in view of Article 361 (1), the Court cannot go into the validity or legality or propriety of his proclamation. AIR 1968 Punj 441 (450)= ILR (1969) 1 Punj 176 (DB).

(11) The High Court cannot issue a process to the Governor to dispose of the appeal in the exercise of his discretion after complying with requirements of law. (1957) 2 Andh WR 425 (432) (DB).

3. "Powers and duties of his office."—

(1) The powers of the Governor may be conferred by the Constitution or by any law.

(4) No civil proceedings in which relief is claimed against the President, or the Governor ^b[° °] of a State, shall be instituted during his term of office in any Court in respect of any act done or purporting to be done by him in his personal capacity, whether before or after he entered upon his office as President, or as Governor ^b[° °] of such State, until the expiration of two months next after notice in writing has been delivered to the President or the Governor ^o[° ° °], as the case may be, or left at his office stating the nature of the proceedings, the cause of action therefor, the name, description and place of residence of the party by whom such proceedings are to be instituted and the relief which he claims.

[Government of India Act (1935), Section 306.]

[a] Since the reorganisation of States, there are no Rajpramukhs in existence. While the Constitution (Seventh Amendment) Act, 1956, directs under Section 29 to carry out certain consequential and minor amendments in many Articles, including Clauses (2), (3) and (4) of this Article, it does not contain such direction in regard to clause (1) and the marginal note to this Article.

[b] The words 'or Rajpramukh' omitted by the Constitution (Seventh Amendment) Act, 1956, Section 29 and Schedule [1-11-1956].

[c] The words 'or the Rajpramukh' omitted, *ibid*.

Article 361 — Note 3 (contd.)

or rules made under any law. But whatever may be the source of the power the exemption under clause (1) will apply. AIR 1954 Andh 9 (10, 11) = ILR (1955) Andh 208.

4. Suit against Government.— (1) The personal immunity of the President and the Governor under this Article is no bar to the institution of the suit against the Government. AIR 1943 Lah 41 (47) = ILR (1943) Lah 617 (FB) °° AIR 1954 Pat 513 (524) = 1954 Cri LJ 1593 = ILR 33 Pat 603 (DB).

5. Writ proceedings.— (1) Writ proceedings cannot be brought against the President or Governor of a State with reference to any act or omission in his official capacity. AIR 1956 Pat 384 (392) (DB) °° AIR 1954 Andh 9 (11) = ILR (1955) Andh 208 °° AIR 1953 Madh Bha 54 (55) = ILR (1953) Madh Bha 24 (DB).

(2) There is no bar to the institution of writ proceedings against Government as such, whether of the Union or of a State. AIR 1950 SC 163 (165) = 1950 SCR 566 °° AIR 1950 SC 129 (134) = 1950 SCR 605 = 51 Cri LJ 1525 °° AIR 1954 Andh 9 (11) = ILR (1955) Andh 208 °° AIR 1952 Nag 330 (333) = ILR (1952) Nag 409 (DB) °° AIR 1951 Nag 181 (183) = ILR (1951) Nag 438.

[See also AIR 1950 SC 222 (236) = 1950 SCR 621.]

(3) The fact that the President or the Governor is personally immune from legal proceedings in a Court in respect of his official acts does not mean that his acts cannot be questioned in a Court of law in proceedings against the Government. AIR 1952 Nag 330 (333) = ILR (1952) Nag 409 (DB).

(4) Article 361 only gives personal protection to the Governor. Where a writ issued by the High Court directing arrest of the accused is returned unexecuted on ac-

count of an order issued by the Governor under Article 161 suspending the sentence of the accused, Article 361 is no bar to the examination by the Court of the legality of the Governor's order in order to determine whether there was a valid return to the writ issued by the High Court. AIR 1960 Bom 502 (505) = 1960 Cri LJ 1558 = 62 Bom LR 383 (FB).

(5) Under Article 361 (1) the Governor cannot be made a party to any proceedings in Court, where his decision could have been questioned on grounds available to a citizen against other authorities justifying the quashing of an impugned order. The second proviso to Article 361 (1) however shows that the party can file a writ petition against the State Government without making the Governor a party. AIR 1964 Cal 184 (189, 190) = 68 Cal WN 203 (DB).

6. Proceedings against Legislature. — (1) The Court has no jurisdiction to interfere with the proceedings of a Legislature and hence a Court cannot issue a mandamus against a Legislature to prevent it from passing an enactment which is in contravention of Fundamental Rights. AIR 1951 All 228 (233) = ILR (1951) 2 All 505 (DB).

7. Clause (2).— (1) If a criminal prosecution is pending at the time when the President's or Governor's term of office begins, such prosecution shall be suspended during the term of office. AIR 1955 Hyd 241 (247) = ILR (1955) Hyd 528 = 1955 Cri L Jour 1488 (DB).

(2) The clause only prohibits the institution of criminal proceedings in a Court, and hence investigation by the police on their own initiative or information reaching them is not prohibited. AIR 1955 Hyd 241 (252, 253) = ILR (1955) Hyd 528 = 1955 Cri L Jour 1488 (DB).

(3) The clause embraces every kind of criminal proceeding in a Court against the President or Governor, as is made clear by the words "no criminal proceedings what-

362. Rights and privileges of Rulers of Indian States.—In the exercise of the power of Parliament or of the Legislature of a State to make laws^b or in the exercise of the executive power of the Union or of a State, due regard shall be had to the guarantee or assurance given under any such covenant or agreement as is referred to in a[* * *] Article 291 with respect to the personal rights, privileges and dignities of the Ruler^c of an Indian State.

[a] The words, brackets, and figure "clause (1) of" were omitted by the Constitution (Seventh Amendment) Act, 1956, S. 29 and Schedule [1-11-1956].

[b] See special provision made under S. 87B of C. P. Code (1908).

[c] For interpretation of these terms, see Art. 366 (22) and (15) respectively.

JAMMU AND KASHMIR

Article 362 shall be omitted. — See the Constitution (Application to J. and K.) Order, 1954, Para 2, sub-para (14) (a) (as re-lettered by C. O. 74).

Article 361 — Note 7 (contd.)

soever". AIR 1955 Hyd 241 (254) = ILR (1955) Hyd 528 = 1955 Cri L Jour 1488 (DB) *° AIR 1966 All 305 (311) = 1966 Cri LJ 632 *° AIR 1958 Andh Pra 478 (479) = 1958 Cri LJ 857 = (1958) 1 Andh WR 521 *° AIR 1955 Hyd 264 (267, 268) = 1955 Cri LJ 1590 = ILR (1955) Hyd 571.

(4) Every action taken by a judicial Magistrate under the Criminal Procedure Code is a criminal proceeding and when, on information laid before a Magistrate of offences alleged to have been committed by the Governor of a State, he orders investigation by the Police, there is institution of criminal proceeding. AIR 1955 Hyd 241 (253) = ILR (1955) Hyd 528 = 1955 Cri L Jour 1488 (DB).

(5) The exemption under this clause is confined strictly to the President or the Governor, as the case may be, and does not extend to any other person alleged to have committed the offence at the Raj Bhavan. AIR 1955 Hyd 241 (254) = ILR (1955) Hyd 528 = 1955 Cri L Jour 1488 (DB).

8. Clause (3).— (1) There is no constitutional bar against the issue of a summons to the President or a Governor as witness. AIR 1955 Hyd 241 (245) = ILR (1955) Hyd 528 = 1955 Cri L Jour 1488 (DB).

9. Clause (4).— (1) Contract between contractor and Union of India but entered into in name of President of India — Arbitrator by mistake passing award against President — Mistake held could be corrected by Court under Section 15, Arbitration Act — Article 361 (4) protects the President from personal liability. AIR 1964 Cal 91 (93).

(2) Article 361 (4) which requires a notice to be delivered to the Governor before he is sued applies to all cases in which a Governor is sued in that way irrespective of the fact whether he was or was not the Ruler of the former Indian State. The protection under Article 361 (4) is in addition to that afforded under Section 87-B, C. P. C. AIR 1963 Mys 171 (172) = 40 Mys LJ 895.

ARTICLE 362 — SYNOPSIS

1. Scope.

2. "Any such covenant or agreement as is referred to in Article 291."

3. Personal rights and privileges.

4. Privileges in regard to legal proceedings.

5. Interpretation of covenants and merger agreements.

1. **Scope.**— (1) This article gives constitutional recognition to the personal rights, privileges and dignities which were guaranteed to Indian Rulers in the merger agreements made with them when their territories were incorporated into the Indian Union. AIR 1955 Bom 195 (196) = ILR (1955) Bom 62 (DB) *° AIR 1962 SC 73 (75) = (1962) 1 SCR 702 *° AIR 1960 Punj 565 (567) = 1960 Cri LJ 1491 = ILR (1960) 2 Punj 371.

(2) This article in terms provides that due regard shall be paid to the guarantee or assurance given under the agreement of merger. AIR 1952 Punj 97 (98) = ILR (1951) Punj 470 (DB).

(3) Article 362 does not import any legal obligation enforceable at the instance of the erstwhile Ruler of a former Indian State. AIR 1961 SC 196 (199) = (1961) 1 SCR 779.

(4) Unless the guarantee of exemption from personal appearance in Court given in the merger agreement and in this article is enacted in the form of law, it will stand only on the footing of an agreement, and cannot be given effect to in a Court of law. AIR 1953 Madh Bha 254 (256) = ILR (1952) Madh Bha 405 = 1953 Cri L Jour 1718.

(5) This article does not override Article 14 of the Constitution. AIR 1955 Bom 195 (197) = ILR (1955) Bom 62 (DB).

(6) Agreement between the ruler of a former native State and the Dominion of India transferring the administration of the State to Dominion — Special privileges granted to the ruler — His status held was that of a subject and not of a sovereign, for there cannot be two sovereigns in a State. AIR 1963 Pat 475 (477) = 1963 BLJR 570.

(7) Section 41 of the C. P. Court of Wards Act (24 of 1899) (as modified by Adaptation of Laws Order, 1950), in so far as it provides for assuming superintendence of such estates does not contravene Arti-

Article 362 — Note 1 (contd.)
 cles 291, 362 and 363. AIR 1961 Madh Pra 197 (198)= 1961 MPLJ 164 (DB).

2. "Any such covenant or agreement as is referred to in Article 291.— (1) Art. 362 is not restricted in its recommendation to agreements relating to privy purse and covers all agreements and covenants entered into by the Rulers of the Indian States before the commencement of the Constitution. AIR 1961 SC 196 (199)= (1961) 1 SCR 779 *° AIR 1955 Bom 195 (196, 197) = 57 Bom LR 60 °° AIR 1953 Nag 86 (88)= 1953 Nag LJ 1 (FB) °° AIR 1961 Manipur 40 (42).

(2) The reference to Article 291 in Article 362 merely indicates that those covenants or agreements were meant which the Ruler of any Indian State had entered into with the Central Government before the commencement of the Constitution. AIR 1962 SC 73 (75)= (1962) 1 SCR 702.

3. Personal rights and privileges. — (1) This article refers only to the personal rights, privileges and dignities of a Ruler of a merged State. It does not refer to his prerogative rights as sovereign of his State. AIR 1956 SC 142 (145)= (1955) 2 SCR 1022= 1956 Cri L Jour 315 *° AIR 1954 Hyd 15 (16)= ILR (1953) Hyd 620 (DB).

(2) Where the merger agreement recognizes the properties of the ex-Ruler as the private property of the Ruler, there is no violation of the covenant in acquiring the property by the Government compulsorily. AIR 1952 SC 252 (267) = 1952 SCR 889, 1020 and 1056= ILR 31 Pat 565 °° AIR 1963 Pat 475 (478)= 1963 BLJR 570.

(3) The covenant is not violated by the application to the merged area, of a statute which confers occupancy rights on the tenants of the Ruler because the whole legislation in that case proceeds on the basis of the Ruler being the owner of the lands. AIR 1958 SC 239 (243). (AIR 1954 Orissa 101, Reversed.)

[See (1955) 21 Cut LT 102 (DB).]

(4) The guarantee or assurance given to a Ruler under the terms of the Covenant with regard to the private property of the Ruler is not infringed by the passing of the Pepsu Tenancy and Agricultural Lands Act (13 of 1955) adversely affecting such a guarantee — The covenant was subject to a new legislation. After due consideration is paid to the guarantee given to him, the ex-ruler like an ordinary citizen enjoys no other immunity from the applicability of this provision to him. The Covenant is not infringed in the absence of any proof that due regard was not paid by the Legislature to the guarantee contained in the Covenant entered into by the Union of India with the Ruler. ILR (1963) 1 Punj 401 (427)= 65 Pun LR 82 (DB). (AIR 1958 SC 239, Rel. on.)

(5) The fixing of fair rent under the Rent Act in regard to the home-farm lands of the Ruler does not amount to any breach of the covenant assuring the recognition of his private property. AIR 1957 Orissa 24 (25, 26)= ILR (1957) Cut 169 (DB).

(6) Where the ex-Ruler has granted a lease of the lands and after merger the State has accepted the obligations under the lease, there is nothing to prevent the Legislature from making a law terminating the lease and releasing the State from its contractual obligation, although this cannot be done by a mere executive order. AIR 1956 Sau 32 (34, 35) (DB).

(7) Article 362 has nothing to do with an executive power like the suspension, remission or commutation of a sentence passed by a competent Court, but concerns itself only with the guarantee or assurance given under such covenant or agreement as is referred to in Cl. (1) of Article 291 with respect to the personal rights, privileges and dignities of the Ruler of an Indian State. ILR (1955) Trav-Co 788 (793, 794)= 1955 Ker LT 727.

(8) The use of the words 'personal rights' qua the Ruler has nothing to do with rights over private properties. AIR 1969 Andh Pra 423 (432) (DB).

(9) Certificate recognising person as sole successor to all private properties held by late Nawab — Government of India has no power or jurisdiction to issue such certificate — Rights in respect of private property will be governed by ordinary law of land including law of inheritance. AIR 1969 Andh Pra 423 (437) (DB).

(10) The personal rights, privileges and dignities which are for historical reasons recommended to be respected by Art. 362, avail the Rulers in their status as Indian Citizens and not in recognition of any sovereign authority continuing to remain vested in them. AIR 1964 SC 444 (447)= (1964) 5 SCR 1. (Whether commencement of proceedings under Industrial Disputes Act for adjudication of industrial dispute between Ruler of former Indian State and his employees infringes the guarantee under Article 362 (Quaere).)

(11) The guarantee or assurance to which due regard is to be had under Article 362 is limited to personal rights, privileges and dignities of the Ruler qua a Ruler. It does not extend to personal property which is different from personal rights. AIR 1961 SC 196 (198)= (1961) 1 SCR 779. (Ex ruler is a 'person' within the meaning of Section 2 (i) of the Orissa Agricultural Income Tax Act and cannot claim exemption from payment of agricultural Income Tax in respect of property — Resistance to payment of tax, held amounted to enforcement of merger agreement, which he could not do by virtue of Article 363.) *° AIR 1966 SC 1260 (1263)= (1966) 2 SCR 296. (Merger agreement with Nizam of Hyderabad

Article 362 — Note 3 (contd.)

— Articles 3 and 4 of the agreement guarantee only the personal privileges of the ex ruler — Those privileges do not justify a claim to immunity from taxation under Income-tax Act. AIR 1961 SC 196, Rel. on.)

(12) The personal rights, privileges and dignities referred to in Article 362 will not include exemption from civil proceedings in Courts. This is made clear by Ss. 82 to 87B of the Civil Procedure Code. AIR 1961 Manipur 40 (42).

(13) Immunity from civil action may be described as a privilege, because the word privilege is sufficiently wide enough to include an immunity. Hence the words 'personal rights and privileges' are sufficiently comprehensive to embrace an immunity of this character. AIR 1962 SC 73 (75, 76) = (1962) 1 SCR 702.

4. Privileges in regard to legal proceedings. — (1) Under Section 87-B of the Code of Civil Procedure read with Section 86 of the Code, the Rulers of former Indian States cannot be sued without the consent of the Central Government. This is only a recognition of the privilege which, before the merger, Rulers of Indian States enjoyed namely, the privilege of being exempt from being sued in the Courts in British India without the consent of the Governor-General. This personal privilege was guaranteed by the merger agreement and it is with regard to that personal privilege along with other personal privileges that this article casts an obligation upon Parliament and the Legislature of State to give due regard in passing any legislation. AIR 1955 Bom 195 (197) = ILR (1955) Bom 62 (DB).

[See also AIR 1965 SC 1798 (1800, 1801) = (1965) 3 SCR 201. (The rulers of former Indian States cannot claim immunity under Sections 86 and 87B Civil P. C. from proceedings other than suits such as a proceeding under Section 14 read with Section 17, Arbitration Act.)

[See also AIR 1951 All 603 (606) (DB).]

[See however AIR 1953 Sau 180 (188) (DB).]

(2) This Article does not override Article 14 of the Constitution. Section 87-B of the Civil Procedure Code is valid as it is based upon a reasonable classification and does not offend against Article 14. AIR 1955 Bom 195 (197) = ILR (1955) Bom 62 (DB) ** AIR 1962 SC 73 (76) = (1962) 1 SCR 702. (Section 87-B, Civil P. C. cannot be challenged as discriminatory because it arises from a classification based on historical facts.)

(3) In regard to criminal proceedings Section 197-A, Code of Criminal Procedure, provides that no Court shall take cognizance of any offence alleged to have been committed by the Ruler of a former Indian State except with the previous sanction of the Central Government. This section has

been enacted in pursuance of the power given by this Article. AIR 1953 Madh B. 254 (256) = ILR (1952) Madh B 405 = 1953 Cri L Jour 1718 ** AIR 1963 Madh Pra 162 (163) = 1963 (1) Cri LJ 600 = 1965 MPLJ 333.

(4) As regards the exemption from personal attendance in Court, Section 133 of the Civil Procedure Code provides that persons, to whom S. 87-B of the Code applies that is, Rulers of former Indian States, are entitled to exemption from personal appearance in Court. See AIR 1952 Punj 97 (98) = ILR (1951) Punj 470 (DB).

(5) As regards criminal cases, there is no provision exempting a complainant from personal attendance in Court. In the absence of a legal provision granting such exemption from personal attendance, the Ruler of a former Indian State will not be entitled to exemption merely on the strength of the covenant in the merger agreement. AIR 1953 Madh B 254 (256) = ILR (1952) Madh B 405 = 1953 Cri L Jour 1718.

(6) The Court will not coerce by arrest or any such process the attendance of the former Ruler as a witness except with the sanction of the Central Government. At the same time he is not entitled as of right to be examined on Commission in his own criminal complaint. The discretion rests with the Magistrate whether to allow the application under Section 503, Criminal P. C. AIR 1963 Madh Pra 162 (164) = 1965 MPLJ 333 = (1963) 1 Cr LJ 600. (Claim of right as Ruler to be exempted from personal attendance — Burden of proving it is on Ruler — Such claim not justified by Section 503 or Section 197-A, Cri. P. C. or by Constitution — Statement of White Paper on States not a statutory provision.)

(7) On the strength of the Covenant and constitutional guarantee the Ruler of a former Indian State is entitled to claim immunity from personal appearance in Court in a criminal case as a witness. AIR 1960 Punj 565 (567) = 1960 Cri LJ 1491 = ILR (1960) 2 Punj 371. (AIR 1953 Madh Bha 254, Diss. From.)

5. Interpretation of covenants and merger agreements. — (1) A merger agreement is more akin to a treaty entered into by various States rather than a statute passed by a Legislature, and hence the rules to be applied to its construction are those applicable to treaties rather than those applied to interpretation of legislative enactments. AIR 1952 Madh Bha 57 (62) = ILR (1952) Madh Bha 178 (FB).

(2) Travancore-Cochin Covenant, Art. 21 — Maharaja of Cochin cannot invoke powers of suspension, remission or commutation of death sentences reserved to him under Arti-

363. Bar to interference by courts in disputes arising out of certain treaties, agreements, etc.—(1) Notwithstanding anything in this Constitution but subject to the provisions of Article 143^a, neither the Supreme Court nor any other Court shall have jurisdiction in any dispute arising out of any provision of a treaty, agreement, covenant, engagement, sanad or other similar instrument which was entered into or executed before the commencement of this Constitution by any Ruler of an Indian State and to which the Government of the Dominion of India or any of its predecessor Governments was a party and which has or has been continued in operation after such commencement, or in any dispute in respect of any right accruing under or any liability or obligation arising out of any of the provisions of this Constitution relating to any such treaty, agreement, covenant, engagement, sanad or other similar instrument.

Article 362 — Note 5 (contd.)

Article 21, after commencement of Constitution. ILR (1955) Trav-Co 788 (791, 792).

(3) Covenant of Pepsu Union dated 5th May, 1948 for establishment of Pepsu Union entered into by Rulers of merging States Articles 6, 10 — Effect — Rulers of merging States not competent to enter into Supplementary Covenant, dated 9th April, 1949 as the effect of the original covenant was to completely divest the Rulers of their sovereign power. AIR 1963 SC 222 (229 to 231) = (1963) 2 SCR 353. (AIR 1959 Punj 440, Reversed; AIR 1953 Pepsu 161, Overruled.)

(4) The covenant entered into by the Rulers of Madhya Bharat States was an act of State and the guarantee given by the Government of India was in the nature of a treaty obligation which could not be enforced in municipal Courts. Its sanction is political and not legal. No doubt the guarantee for the periodical payments as privy purse was continued by Article 291 of the Constitution but its essential political character was preserved by Articles 362 and 363. Hence the periodical payments as privy purse on political considerations and political sanctions and not under a right legally enforceable in municipal courts were strictly political pensions within Section 60 (1) (g), Civil P. C. and as such exempt from attachment in execution. AIR 1965 SC 1798 (1802) = (1965) 3 SCR 201. (AIR 1962 MP 320, Reversed.)

ARTICLE 363 — SYNOPSIS

1. Scope.

2. Disputes arising out of agreements of accession or merger.

3. Disputes arising out of provisions of treaty, agreement, covenant, etc.

4. Rights of subjects of ex-Rulers — Enforcement after merger or accession.

5. Covenants — Interpretation.

6. Jurisdiction.

1. Scope.— (1) There are two conditions for the applicability of this article (i) The covenant with the Ruler of Indian State must have been entered into before the coming into force of the Constitution, and (ii) the covenant must continue in force after the commence-

ment of the Constitution. ILR (1955) 2 Cal 109 (150) (DB).

(2) The article refers to the numerous agreements and covenants entered into between the then Government of India and the Rulers of Indian States. These agreements and covenants were in the nature of treaties between two States and as such were Acts of State outside the purview of municipal Courts. AIR 1954 SC 447 (452) = 1955 SCR 415 ** AIR 1951 SC 253 (261) = 1951 SCR 474 ** AIR 1955 Pepsu 3 (14) = ILR (1955) Patiala 215 (DB) ** AIR 1952 Sau 49 (54) (FB).

(3) If the question involved is of the nature contemplated by this article, even a suit or other proceeding which was pending in the Federal Court at the commencement of the Constitution and which stood transferred to the Supreme Court under Article 374 (2) would be beyond the jurisdiction of the Supreme Court. AIR 1951 SC 253 (258) = 1951 SCR 474.

(4) This article is applicable not only when there is a direct dispute between the State and the citizen but even when the dispute arises in a case to which the State of India is not a party and a claim is made either on behalf of the State or by any other party to the dispute that the subject-matter of the dispute is covered by Article 363. AIR 1969 Raj 52 (58) = 1968 Raj LW 527 (DB) ** AIR 1955 Pepsu 3 (10) = ILR (1955) Patiala 215 (DB).

(5) It is not necessary for the application of the article that the dispute must have arisen after the coming into force of the Constitution. AIR 1951 SC 253 (258) = 1951 SCR 474 ** AIR 1955 Pepsu 3 (9) = ILR (1955) Patiala 215 (DB).

(6) If a dispute falls under Article 363, it cannot be decided by any Court in India. The remedy lies in making an appeal to the President to make a reference to the Supreme Court of India under Article 143 of the Constitution. AIR 1969 Raj 52 (58) = 1968 Raj LW 527 (DB).

(7) Article 363 is a provision which shuts out the jurisdiction of a Court of law and like any other provision of similar nature, it is to be construed

(2) In this article—

- (a) "Indian State" means any territory recognised before the commencement of this Constitution by His Majesty^b or the Government of the Dominion of India as being such a State; and
- (b) "Ruler" includes the Prince, Chief or other person recognised before such commencement by His Majesty or the Government of the Dominion of India as the Ruler of any Indian State.

[a] Article 143 deals with power of the President to refer a dispute of the kind mentioned in Art. 131(1).

[b] The meaning of these words is neither given in Art. 366 nor in the General Clauses Act, 1897. The words are to be taken to refer to the King of the United Kingdom.

Article 363 — Note 1 (contd.)

strictly so that a citizen of India may not be denied the opportunity, except when the case strictly falls under this Article to get his right adjudicated and decided by a civil Court. AIR 1969 Raj 52 (58) = 1968 Raj LW 527 (DB).

(8) In order to know whether any dispute arises out of the merger agreement or not, the Court has first to ascertain *prima facie* whether the subject-matter of the dispute falls within the scope and ambit of the agreement. If this is not so, it will be difficult to say whether in fact any dispute arises out of such an agreement. (1969) 1 Andh WR 425 = ILR (1969) Andh Pra 442.

(9) It is only in such cases where the court is satisfied that conflicting rights have to be decided between the parties that it must decline to decide the rights and must stay the action, but it ought not to stay the action before that point is reached. AIR 1969 Raj 52 (60) = 1968 Raj LW 527 (DB).

(10) The paramountcy which the British Crown enjoyed vis-a-vis the Indian States is not now enjoyed by Central Government. AIR 1963 Punj 461 (467).

(11) Acquisition of territories of Goa, Daman and Diu by military action is an Act of State by Government of India and is not justiciable in municipal Courts. AIR 1969 Goa 76 (82) = 1969 Lab IC 942.

(12) To be treated as a Ruler under Article 363 (1) the claimant must be recognised by the President of India as a Ruler under Article 366 (22). AIR 1966 Cal 570 (572) (DB).

2. Disputes arising out of agreements of accession or merger.— (1) In view of the provisions of Article 363 (1) any dispute arising out of the Merger Agreement or the Instrument of Accession is beyond the competence of the Courts to enquire into. AIR 1961 SC 775 (777) = (1961) 2 SCR 501 ** AIR 1953 Nag 86 (88) = 1953 Nag LJ 1 (FB) ** (1958) 60 Bom LR 721.

(2) If the Parliament or State Legislature makes laws inconsistent with personal rights, privileges of a Ruler of a State, the exercise of that legislative authority

cannot be questioned in any Court by relying on agreement or covenant in spite of any guarantee in that respect. AIR 1961 SC 196 (199) = (1961) 1 SCR 779 ** AIR 1961 All 280 (280, 281) (DB).

(3) Question whether The Rampur Thekedari and Pattedari (Abolition) Act (U. P. Act 10 of 1954) contravenes Para 8 of States Merger (Governor's Provinces) Order, 1949 — Court has no jurisdiction to decide by virtue of Article 363. AIR 1955 All 518 (520) = 1955 All LJ 398 (DB).

(4) The decision of a dispute between the Raja of Mandi and the Government, as to whether a certain property was the private property of the Raja would inevitably involve a reference to, and the interpretation of the Merger Agreement and the Note of Acceptance. Article 363 (1) bars the jurisdiction of the Courts to inquire into it. AIR 1967 Him Pra 6 (8, 9).

(5) Held on facts that Art. 7 of the Merger Agreement with Maharaja of Manipur exempts only the civil liability for acts done or omitted to be done by the Maharaja during his administration of the State as a Ruler and not acts done or omitted to be done after he ceased to administer the State. AIR 1961 Manipur 40 (42).

(6) Merger agreement entered into by late Nizam with Union of India — Jurisdiction of High Court to construe terms of agreement — Not barred under Art. 363 — Words 'Personal rights' in Article IV of agreement — Do not cover private property of late Nizam. (1969) Andh WR 425 = ILR (1969) Andh Pra 442.

(7) Estates of Rulers of Indian States — Act in so far as it provides for assuming superintendence of such estates does not contravene Articles 291, 362 and 363. AIR 1961 Madh Pra 197 (198) = 1961 MPLJ 164.

(8) Ruler of former Indian State is exempt from appearance in Court as a witness in criminal case. AIR 1960 Punj 565 (567) = 1960 Cri LJ 1491 = ILR (1960) 2 Punj 371.

3. Disputes arising out of provisions of treaty, agreement, covenant, etc.—(1) The bar of jurisdiction under this article ap-

Article 363 — Note 3 (contd.)

plies only in regard to disputes arising out of any provision of a treaty, covenant, etc. of the kind mentioned in the article. ILR (1955) 2 Cal 109 (150) (DB). (AIR 1935 Bom 439, Rel. on.)

(2) The article will not apply when the matter in dispute is not covered by the covenant at all. AIR 1953 Sau 180 (188) (DB) ** AIR 1950 Sau 7 (8) (DB).

(3) When the matter in dispute is covered by the treaty, covenant, etc., it cannot be entertained by any Court, whether the person seeking enforcement of the covenant is deemed to be a party to the covenant or not. AIR 1955 SC 540 (546) = (1955) 2 SCR 164 ** AIR 1951 SC 253 (259) = 1951 SCR 474 ** AIR 1959 SC 909 (912, 913) ** AIR 1959 Madh Pra 136 (139) = 1959 MPLJ 257 ** AIR 1953 Nag 86 (88) = ILR (1952) Nag 943 (FB) ** AIR 1957 Cal 576 (577) ** AIR 1957 Trav-Co 236 (237) ** AIR 1956 Sau 119 (120) (DB).

[But see AIR 1952 Sau 49 (54) (FB).]

(4) Agreement between Ruler and Government of India — Whether succession to personal or private property was made subject-matter of the guarantee or assurance — Court can look into terms of agreement. AIR 1969 Andh Pra 423 (431) (DB).

(5) Treaties which come within the prohibition of Article 363 are continuing or living treaties. They do not include past or dead treaties. ILR (1955) 2 Cal 109 (DB).

(6) Merger of States to form Union of Pepsu by Covenant by Rulers dated 5-5-1948 — Rulers are completely divested of their sovereign power by the covenant — They are not competent thereafter to enter into supplementary covenant. AIR 1963 SC 222 (230) = (1963) 2 SCR 353. (AIR 1959 Punj 440, Reversed; AIR 1953 Pepsu 161, Overruled.)

(7) Madhya Bharat Covenant— Nature of — It is an act of State — Guarantee for payment of privy purse under Article 11 (1) of Covenant — Obligation cannot be enforced in Municipal Courts. AIR 1965 SC 1798 (1802) = (1965) 3 SCR 201.

(8) Expenditure-tax on expenditure made out of amount of privy purse — Liability disputed — Dispute falls under Article 363 and is not justiciable. AIR 1963 Guj 98 (101, 102) = (1962) 3 Guj LR 479.

(9) Dispute as to liability of person to pay to State Bank of Patiala amounts determined in accordance with Patiala Recovery of State Dues Act — Reliance on Article 10 of Pepsu Covenant to get rid of liability — Article 363 applies. AIR 1963 SC 222 (231) = (1963) 2 SCR 353.

(10) Rights guaranteed by the Covenant of the United States of Rajasthan are merely political rights — Not justiciable

— Recognition as Ruler under Article 366 (22) of a person who is not a legal heir to his predecessor — No infringement of Article 19 (1) (f). AIR 1963 Punj 461 (467, 468).

(11) Where some dispute had arisen between a Ruler of a State and the Government of India and in pursuance of its settlement the Ruler had agreed to annual deduction from his privy purse, the Ruler cannot challenge the decision in Court as the Court action is definitely excluded under Article 363. (1968) 70 Punj LR 370 (374) (DB).

(12) Where the dispute is whether the law passed by the State Legislature constitutes a breach of the guarantees contained in the covenant, the jurisdiction of the Courts is barred under this article. AIR 1952 SC 252 (312) = 1952 SCR 889, 1020 and 1056 = ILR 31 Pat 565.

(13) Article 362 does not prohibit the acquisition of properties which are declared private properties by the covenant of merger. The guarantee contained in that Article is to a limited extent only. That guarantee has been fully respected by Bihar Land Reforms Act, 1950. In any event the question is not justiciable in a Court of law because of the comprehensive language of Art. 363. AIR 1963 Pat 475 (478) = 1963 BLJR 570 (DB). (AIR 1952 SC 252, Rel. on.)

(14) Where the covenant merely provides that questions of succession to Jagirdaris must be decided by the Rajpramukh, a dispute as to such succession is not one arising out of the provision in the covenant. AIR 1955 Raj 135 (139) = ILR (1955) 5 Raj 693 (FB).

(15) The question whether under the Constitution the Rajpramukh has the power which was given to him by the covenant cannot be said to be a dispute arising out of any provision of the covenant. AIR 1955 Raj 135 (139) = ILR (1955) 5 Raj 693 (FB).

(16) Where a covenant grants immunity from being sued in a Court of law to a Ruler of a State, the dispute in a suit for money by private person against the Ruler is not one arising out of the covenant and the jurisdiction of the Court is not barred under this article. AIR 1955 Bom 449 (450) = ILR (1956) Bom 22.

[See also AIR 1957 Bom 155 (160) = ILR (1957) Bom 656 (DB).]

(17) A dispute between the Ruler and his tenant relating to the right of the Ruler to eject the tenant from the land cannot be said to be a dispute arising out of any provisions of the agreement between the Ruler and the Government. AIR 1958 SC 239 (242, 243). (AIR 1954 Orissa 101, Reversed.)

(18) Recognition of successor — Certificate recognising person as sole successor to all private properties held by late Nawab — Jurisdiction of Courts not

Article 363 — Note 3 (contd.)

barred under Article 363 to agitate that matter subject to Section 87-B, Civil P. C. AIR 1969 Andh Pra 423 (435) (DB).

4. Rights of subjects of ex-Rules — Enforcement after merger or accession.—

(1) The covenants or treaties entered into by the Rulers of the former States are acts of State between the high contracting parties thereto and no action in a Court of law can be founded by a citizen of the new State on the strength of anything contained in the covenant. AIR 1960 Raj 138 (141) = ILR (1959) 9 Raj 1217 (DB).

(2) Where a change of sovereignty is brought about by cession the residents of the territories as subjects of the new sovereign have only such rights as are granted or recognised by the new sovereign. Such recognition may be by legislation or by agreement, expressed or implied. AIR 1961 Orissa 161 (164) = (1961) 2 Orissa JD 536 (DB) ** AIR 1964 SC 1043 (1070) = (1964) 6 SCR 461 ** AIR 1962 All 425 (429) (DB) ** AIR 1962 Orissa 189 = (1962) 4 Orissa JD 136 ** AIR 1960 Bom 516 (518) = 62 Bom LR 400 (DB).

(3) Even if in the merger agreement there is a clause providing for recognition by new sovereign of any existing rights, that clause is incapable of enforcement in the municipal Courts of the new sovereign. AIR 1961 Orissa 161 (164) = ILR (1961) Cut 133 (DB).

(4) Every subject of the ex-sovereign who wants to make good in the municipal Courts of the new sovereign the rights acquired by him must show that the new sovereign has waived or relinquished his power to ignore or repudiate those rights. AIR 1961 Guj 151 (175) = (1961) 2 Guj LR 343 (DB).

(5) Where the new sovereign assumes jurisdiction and it does some act and there is ambiguity as to whether the same amounts to a recognition of a pre-existing right or not, the covenant and the treaty might be looked at in order to ascertain the intention and purpose of that equivocal act. AIR 1964 SC 1043 (1063, 1064) = (1964) 6 SCR 461.

(6) Administration of Mayurbhanj State Order (1949) Clause 9 (g) — Merger of State — Rejection of claim by State Government — Amounts to Act of State — Municipal Courts have no jurisdiction to entertain it. AIR 1961 SC 1361 (1365) = (1962) 1 SCR 205.

(7) Administrative or executive order passed by ruler of covenanting State before merger — Right to property created by such order cannot be enforced in the Municipal Courts of the successor State, namely India unless recognised by the successor State. AIR 1966 Madh Pra 32 (34) = 1965 Jab LJ 154 (DB).

(8) Merger of several sovereign States to form a new State — At each stage

covenants keeping old laws in force and new State taking over assets and liabilities of component States — New State not repealing old laws by its legislation — Liabilities of component States continue to be enforceable — A subject thereof can enforce his rights by a suit against the new State. AIR 1964 SC 1495 (1499, 1500, 1501) = (1964) 7 SCR 174. [See also AIR 1960 Raj 256 (264) = 1960 Raj LW 257 (FB).]

(9) The Nizam being supreme in the three spheres, namely the executive, legislative and judicial, prior to the inauguration of the Constitution, his act in the capacity of a sovereign, whatever may be the consequences, cannot be attacked in a Court of law on the ground that it was illegal or unconstitutional. AIR 1959 Andh Pra 225 (229) = (1959) 1 Andh WR 31 (DB).

(10) Hyderabad (Abolition of Cash Grants) Act (XXXIII of 1952), Section 3 (1) — Resums mentioned in schedule to Hyderabad Act were Crown grants and were subject to resumption at pleasure of Crown — If Crown prerogatives disappeared with introduction of Constitution the right to resume cash grants disappeared with them. AIR 1955 Hyd 44 (46) = ILR (1955) Hyd 269 (DB).

(11) Order of Ruler of Sant State granting full proprietary rights in forests to Jagirdars — Not a legislative act but an executive act — Could not be continued in force by Clause 4. of Administration of Indian States Order. AIR 1961 Guj 151 (173) = (1961) 2 Guj LR 343. (Reversed on another point in AIR 1964 SC 1043.)

(12) Jaora State — Firman by Ruler D/- 25-1-1941 — All power of Ruler vested in Chief Minister — Order passed by incharge Chief Minister.

Held, on facts that even if the order in question had been made by the officiating or incharge Chief Minister, it was a competent order. 1960 MPLJ 1055 = 1960 Jab LJ 1040.

(13) Order of erstwhile Ruler in Vindhya Pradesh making cash grant is an executive act and has no force of law. AIR 1966 SC 704. (AIR 1962 Madh Pra 257, Reversed.)

(14) The Court of the District Judge has no jurisdiction to question the validity of the decision of the Ijlas-i-khas, made in a case, as that was command of the Sovereign, which had the force of the law as well as that of a decree. AIR 1958 Punj 116 (120, 121, 122) = 59 Punj LR 650 (DB).

(15) Firman of Maharana of Udaipur — Firman is declaration of the sovereign power and is law and binding on all. AIR 1962 Raj 196 (207) = 1962 Raj LW 317 (DB). (Reversed on another point in AIR 1963 SC 1638.)

(16) Held on facts, that as soon as the State of U. P. which was the successor Government decided to abolish the

364. Special provisions as to major ports and aerodromes.—(1) Notwithstanding anything in this Constitution, the President may by public notification^a direct that as from such date as may be specified in the notification—

- (a) any law made by Parliament or by the Legislature of a State shall not apply to any major port or aerodrome or shall apply thereto subject to such exceptions or modifications as may be specified in the notification, or

Article 363 — Note 4 (contd.)

jagirs, zamindaris and muafis in pursuance of a general policy to abolish all estates in the whole of Uttar Pradesh those deriving benefits from the contracts and agreements from the ex-Ruler could not put them forward against the general policy of the successor Government. AIR 1959 SC 909 (912, 913) ** 1955 All LJ 622 = ILR (1956) 1 All 391.

(17) Agreement between Ruler and Company in shape of contract exempting company from taxes and octroi and granting certain privileges in return for certain acts done by company — Agreement is not law. AIR 1964 SC 888 (891, 892) = (1964) 4 SCR 190.

(18) Where in an income-tax case the assessee relied upon certain tax concessions agreed to be granted to him by the Ruler of the Covenanted State, the dispute arises only out of the agreement between the assessee and the former Ruler of Covenanted States and not out of the covenant between the Ruler and the Government. AIR 1955 Pepsu 3 (10) = ILR (1955) Patiala 215 (DB).

[See also AIR 1958 Madh Pra 71 (79) (DB).]

(19) Succession to Jagir in former Jaipur State — Repeal of Jaipur Matmi Rules by Covenant and of Covenant by the Constitution — Procedure under Matmi Rules not revived — Suit to establish claim lies in Civil Court. ILR (1961) 11 Raj 93.

(20) Where a civil servant claims that according to the law of the covenanted State he is entitled to certain rights the dispute is one which arises under the law and not out of any provision of the covenant. AIR 1954 SC 680 (682).

[See also AIR 1955 Pepsu 65 (72) = ILR (1955) Patiala 327 (DB).]

(21) Article 16 of the covenant creating Madhya Bharat State taken by itself is not enforceable by an individual in the Courts for the reason that the Covenant has not been made a part of law of the State by any enactment. It does not, therefore, confer on the Civil Servants retiring after the formation of Madhya Bharat an enforceable right to pension. AIR 1953 Madh Bha 165 (172) = ILR (1953) Madh B 393 (DB).

(22) Merger of Rewa State in Vindhya Pradesh — Order of Maharaja of Rewa fixing pension of its servant prior to merger — Order not a law but only an executive order and the succeeding Gov-

ernment could set it aside by another executive order. AIR 1966 SC 820 (820) = (1966) 2 SCR 53. (AIR 1961 Madh Pra 154 (FB) Reversed.)

(23) Article 16 of the Rajasthan Covenant does not guarantee either the retention of any public officer or his continuance on a particular post. What an officer of a former covenanted State can legitimately claim is that if kept in service, his emoluments will not be reduced and if retired, he will receive compensation or proportionate pension. AIR 1956 Raj 104 (107) = 1956 Raj LW 497 (DB).

[See also AIR 1961 Ker 52 (53) = 1960 Ker LT 891.]

5. Covenants — Interpretation. — (1) The Covenant is more akin to a treaty entered into by various States rather than a Statute passed by a Legislature, and accordingly it is only appropriate if the rules to be applied to its construction are those applicable to treaties rather than those applied to interpretation of Legislative enactments. Any attempt to apply all the technical rules ordinarily used for the interpretation of a Statute or to put a legalistic and narrow interpretation upon such a document would be improper and defeat the intention of the parties thereto and the purposes for which it was brought into existence. AIR 1952 Madh Bha 57 (62) = ILR (1952) Madh B 178 (FB).

(2) The principle that time is of essence which is often discussed in Law Courts in cases arising out of breach of contracts cannot be applied to interpretation of the Covenant. AIR 1952 Madh Bha 57 (64, 65) = ILR (1952) Madh B 178 (FB).

6. Jurisdiction. — (1) The phrase "jurisdiction in any dispute" does not mean merely the jurisdiction to give a final decision on a lis and includes consultative jurisdiction as a reference under Section 66 of the Income-tax Act. AIR 1955 Pepsu 3 (8) = ILR (1955) Patiala 215 (DB).

[But see AIR 1966 All 440 (446) = (1966) 62 ITR 1 (FB). (Per Desai CJ).]

Article 364 — Note 1

(1) Where an industrial dispute relates to Marmagoa which is a major port, the order of reference by the Administrator is legal whether the territory of Goa falls within the Central or State sphere. AIR 1969 Goa 16 (28, 29) = 1969 Lab IC 151 = (1968) 2 Lab LJ 536.

- (b) any existing law^a shall cease to have effect in any major port or aerodrome except as respects things done or omitted to be done before the said date, or shall in its application to such port or aerodrome have effect subject to such exceptions or modifications as may be specified in the notification.

(2) In this Article —

(a) "major port" means a port declared to be a major port by or under any law^b made by Parliament or any existing law and includes all areas for the time being included within the limits of such port;

(b) "aerodrome"^c means aerodrome as defined for the purposes of the enactments relating to airways, aircraft and air navigation.

[a] For interpretation of 'public notification and' 'existing law', see Art. 366 (19) and (10) respectively.

[b] See Indian Ports Act (1908) S. 2 (8) and Major Port Trusts Act 1963 (38 of 1963) S. 2 (m); the latter Act applied to the Major Ports of Cochin, Kandla and Vishakhapatnam at the first instance and has now been extended to the ports of Marmagoa and Paradip; Bombay, Calcutta and Madras are such ports under the Indian Ports Act, 1908.

[c] The definition of 'aerodrome' as given in S. 2 (2) of the Indian Aircraft Act, 1934 (22 of 1934) is as follows: "Aerodrome means any definite or limited ground, or water area intended to be used either wholly or in part, for the landing or departure of aircraft, and includes all buildings, sheds, vessels, piers and other structures thereon or appertaining thereto."

Air Corporations Act, 1953 (27 of 1953), S. 2 (i) defines 'aircraft' as under: "'Aircraft means any machine which can derive support in the atmosphere from reactions of the air and includes balloons, whether fixed or free, airships, kites, gliders and flying machines."

365. Effect of failure to comply with, or to give effect to, directions given by the Union.— Where any State has failed to comply with, or to give effect to, any directions^a given in the exercise of the executive power of the Union under any of the provisions of this Constitution, it shall be lawful for the President to hold that a situation has arisen in which the government of the State cannot be carried on in accordance with the provisions of this Constitution.

[a] See Arts. 256, 257, 353 (a) and 360 (3) which empower the Union Government to give directions to the State Governments.

JAMMU AND KASHMIR

Article 365 shall be omitted — See the Constitution (Application to J. and K.) Order, 1954, Para. 2, sub-para. (19) (a) (as re-lettered by C. O. 74).

366. Definitions.—In this Constitution, unless the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them, that is to say—

(1) "agricultural income" means agricultural income as defined for the purposes of the enactments relating to Indian income-tax;

[Govt. of India Act (1935), S. 311 (2) "agricultural income"; Income-tax Act (1961), S. 2 (1).]

ARTICLE 366 — SYNOPSIS

1. General.

2. Clause 1 — "Agricultural income."

3. Clause 2 — "Anglo-Indian."

4. Clause (6) — "Corporation tax."

5. Clause (10) — "Existing law."

(a) General.

(b) Orders passed by Sovereign Rulers.

(c) Acts, Rules, Notifications judicially recognized as "existing laws."

(d) Acts etc. judicially not recognized as "existing law."

6. Clause (12) — "Goods"

7. Clause (14) — "High Court."

8. Clause (15) — "Indian State."

9. Clause (17) — "Pension."

(2) "an Anglo-Indian" means a person whose father or any of whose other male progenitors in the male line is or was of European descent but who is domiciled within the territory of India and is or was born within such territory of parents habitually resident therein and not established there for temporary purposes only;

(3) "Article" means an Article of this Constitution;

(4) "borrow" includes the raising of money by the grant of annuities, and "loan" shall be construed accordingly;

[Government of India Act, 1935, S. 311 (2): "borrow".]

(5) "clause" means a clause of the Article in which the expression occurs;

(6) "Corporation tax" means any tax on income, so far as that tax is payable by companies and is a tax in the case of which the following conditions are fulfilled:—

(a) that it is not chargeable in respect of agricultural income;

(b) that no deduction in respect of the tax, paid by companies is, by any enactments which may apply to the tax, authorised to be made from dividends payable by the companies to individuals;

(c) that no provision exists for taking the tax so paid into account in computing for the purposes of Indian income-tax the total income of individuals receiving such dividends, or in computing the Indian income-tax payable by, or refundable to, such individuals;

[Government of India Act (1935), Section 311 (2), "corporation tax".]

Article 366 — Synopsis (contd.)

10. Clause (19) — "Public Notification."

11. Clause (20) — "Railway."

12. Clause (22) — "Ruler."

13. Clause (24) — "Scheduled Castes."

14. Clause (25) — "Scheduled Tribes."

15. Clause (28) — "Taxation."

1. General. — (1) Although the expression "existing law" as defined in Clause (10) of this article refers only to enacted law and does not include principles of law not contained in statute law, this meaning is inappropriate in the context of Article 19, Clause (2) and the law of contempt, which is saved under Clause (2) of Article 19, will include not merely the statutory law but the entire law of contempt, as was recognized in India prior to the advent of the Constitution. AIR 1952 Orissa 318 (343) = ILR (1952) Cut 1 = 1952 Cri LJ 1605 (DB).

(2) The definitions given in this article are applicable only for the purpose of construing the provisions of this Constitution and they are not applicable to the interpretation of the same words occurring in other Acts. AIR 1957 SC 768 (774) = 1958 SCR 101 ** AIR 1953 Nag 86 (88) = ILR (1952) Nag 943 (FB).

[See also AIR 1929 PC 181 (183).]

2. Clause (1). — "Agricultural income." — (1) The meaning of "agricultural income" as given in this definition must be adopted regardless of any other considerations. AIR 1957 SC 768 (773) = 1958 SCR 101 ** AIR 1943 PC 20 (21) = 70 Ind App 14 = ILR (1943) 1 Cal 367 = ILR (1943) Kar (PC 28) ** AIR 1958 Cal 585 (586).

(2) The term "agriculture" has been used both in the narrow sense of the cultivation of the field and the wider sense of comprising all activities in rela-

tion to the land. AIR 1957 SC 768 (773) = 1958 SCR 101.

(3) The term "agriculture" cannot be confined merely to the production of grain and food products for human beings and beasts but must be understood as comprising all the products of the land which have some utility either for consumption or for trade and commerce. AIR 1957 SC 768 (789) = 1958 SCR 101 ** AIR 1950 Mad 566 (567, 569)

(4) Products, which grow wild on the land or of spontaneous growth not involving any human labour or skill upon the land, are not products of agriculture and the income derived therefrom is not agricultural income. AIR 1957 SC 768 (790) ** AIR 1949 PC 294 (296) = ILR (1950) Mad 275 = 76 Ind App 170 ** AIR 1949 PC 13 (15) = 75 Ind App 268 ** AIR 1952 Nag 205 (210) = ILR (1949) Nag 330 ** AIR 1951 Nag 425 (428) (DB)

(5) The provincial Act imposing tax on agricultural income will not be invalid merely because it adopts a definition of agricultural income narrower than the definition in the Income-tax Act. AIR 1942 FC 8 (10) = ILR (1942) Kar (FC) 1 = ILR 21 Pat 521 = 1942 FCR 1.

(5-A) "Agricultural income" about which a State Legislature may enact under Entry 46 of List 2 would be such income as defined in the Income-tax Act. Income derived from sale of tea grown and manufactured is not solely derived from agriculture. AIR 1963 SC 760 (164) = (1963) Supp (1) SCR 823.

(6) Explanation 2, added to S. 5 of Kerala Agricultural Income-tax Act, by Amending Act (9 of 1961) is not ultra vires. AIR 1964 SC 572 (574) = (1963) Supp 1 SCR 836.

(7) Assessment of Agricultural income from sale of tea grown and manufactured by seller — Computation of income already made by Central Income-tax auth-

(7) "corresponding Province", "corresponding Indian State" or "corresponding State" means in cases of doubt such Province, Indian State or State as may be determined by the President to be the corresponding Province, the corresponding Indian State or the corresponding State, as the case may be, for the particular purpose in question;

[Government of India Act (1935), S. 311 (2): "corresponding Province".]

(8) "debt" includes any liability in respect of any obligation to repay capital sums by way of annuities and any liability under any guarantee, and "debt charges" shall be construed accordingly;

[Government of India Act (1935), S. 311 (2), "debt".]

(9) "estate duty" means a duty to be assessed on or by reference to the principal value, ascertained in accordance with such rules as may be prescribed by or under laws^a made by Parliament or the Legislature of a State relating to the duty, of all property passing upon death or deemed, under the provisions of the said laws, so to pass:

[Government of India Act (1935), S. 311 (2): "Estate duty".]

[a] For law made by Parliament, see the Estate Duty Act, 1953 (34 of 1954).

(10) "existing law" means any law, Ordinance, order, bye-law, rule or regulation passed or made before the commencement of this Constitution by any Legislature, authority or person having power to make such a law, Ordinance, order, bye-law, rule or regulation:

[Government of India Act (1935), S. 311 (2)—"existing Indian law".]

Article 366 — Note 2 (contd.)

orities is binding on Agricultural Income-tax Officer. AIR 1968 SC 1213 (1216) = (1968) 2 SCR 745. ((1965) 56 ITR 193 (Ker) Overruled.)

(8) Agricultural lands are lands "assessed to land revenue" — Lands in respect of which royalty cess is payable are such lands — Rent or revenue derived from such lands is 'agricultural income'. (1963) 48 ITR 339 (341) (DB) (Ker).

(9) An income to be agricultural income should be derived from land and the land should be used for agricultural purposes. There should be a nexus between land, income and agricultural operation. (1969) 71 ITR 742 (746) (DB) (Mad).

3. Clause (2) — "Anglo-Indian". — (1) Person born of English father and Khasi mother can be classed as a Khasi Tribal, but decision will have to depend on circumstances and evidence. AIR 1958 Assam 128 (129, 130) (DB).

(2) Obiter — It may be reasonably contended that having regard to the context, the word 'parent' in Article 366 (2) should necessarily mean male parent and will not include the mother. AIR 1958 Assam 128 (137) = ILR (1958) 10 Assam 263 (DB).

4. Clause (6) — "Corporation tax". — (1) A tax, in order to be deemed a corporation tax, must be a tax on income and such tax must be payable by corporations and corporations alone. AIR 1960 Bom 470 (475, 476) = 62 Bom LR 187.

5. Clause (10) — "Existing law" — General.

(a) Orders passed by Sovereign Rulers.

(b) Acts, Rules, Notifications judicially recognized as existing law.

(c) Acts etc. judicially not recognized as 'existing law.'

5. Clause (10) — "Existing law" — General. — (1) Definitions in Articles 13 and 372 use the word "include" and do not purport to be exhaustive. But otherwise there does not appear to be any substantial difference between the definition of "existing law" in this article and that of "law in force" in Article 372, Explanation I. AIR 1956 Madh B 138 (139, 140) = 1956 Cri LJ 621 (FB) ** AIR 1957 Ker 146 (149) = ILR (1957) Ker 462 (DB).

(2) This clause contains an exhaustive definition of the expression "existing law" for the purpose of the Constitution and wherever the expression occurs in this Constitution, it will have the meaning given in this definition. AIR 1955 All 12 (16) (DB).

(3) Where the meaning as given in this clause will be repugnant to the context in which the expression occurs, the meaning will not apply. AIR 1954 Raj 100 (103) = ILR (1954) 4 Raj 84 (FB) ** AIR 1955 All 12 (16) (DB) ** AIR 1952 Orissa 318 (343) = ILR (1952) Cut 1 = 1952 Cri LJ 1605 (DB).

(4) The definition of "existing law" in this clause includes only enacted law and hence "existing law" does not include the principles of law which have not been embodied in statutory form. AIR 1956 Assam 166 (169) (DB) ** AIR 1956 Cal 26 (31) ** AIR 1949 Bom 71 (72) = ILR (1948) Bom 631 = 50 Cri LJ 147 (DB).

(5) Customary law is not covered by the expression "existing law." AIR 1954 Hyd 161 (163) = ILR (1954) Hyd 85 (FB) ** AIR 1957 Orissa 247 (252) = ILR (1957) Cut 299.

(11) "Federal Court" means the Federal Court constituted under the Government of India Act, 1935;

(12) "goods" includes all materials, commodities, and articles;

[Government of India Act (1935), S. 311 (2): "goods".]

(13) "guarantee" includes any obligation undertaken before the commencement of this Constitution to make payments in the event of the profits of an undertaking falling short of a specified amount;

[Government of India Act (1935), S. 311 (2): "guarantee".]

(14) "High Court" means any Court which is deemed for the purposes of this Constitution to be a High Court for any State and includes—

(a) any Court in the territory of India constituted or reconstituted under this Constitution as a High Court, and

(b) any other Court in the territory of India which may be declared by Parliament by law to be a High Court^a for all or any of the purposes of this Constitution;

[Government of India Act (1935), S. 311 (2): "High Court".]

[a] See the Judicial Commissioner's Courts (Declaration as High Courts) Act, 1950 (15 of 1950) and the Goa, Daman and Diu Judicial Commissioner's Court (Declaration as High Court) Act, 1964 (16 of 1964).

(15). "Indian State" means any territory which the Government of the Dominion of India recognised as such a State;

[Government of India Act 1935, S. 311 (1): "Indian State".]

Article 366 — Note 5 (a) (contd.)

(6) The definition is otherwise very wide and includes all forms of enacted or statutory law. AIR 1956 Madh B 138 (139) = 1956 Cri LJ 621 (FB).

(7) Regulations concerning the public services made under the Government of India Act, 1935, are "existing law." AIR 1957 All 436 (438) = ILR (1957) 1 All 269 ** AIR 1955 Pat 381 (384) = ILR 34 Pat 608 (DB).

[See however AIR 1958 Ker 79 (79) = ILR (1957) Ker 884 (DB).]

(8) A mere executive order will not be covered by the definition. AIR 1955 SC 25 (31) = 1955 SCR 735 ** AIR 1956 Madh B 138 (139) = 1956 Cri LJ 621 (FB) ** AIR 1958 Trav-Co 117 (118) (FB) ** AIR 1951 All 257 (323) (FB) ** AIR 1957 Madh Pra 145 (147) = 1957 Cri LJ 1134.

(9) Even a notification would come under the definition if it is issued by a competent authority under a delegated power of legislation. AIR 1956 Madh B 138 (139) = 1956 Cri LJ 621 (FB).

(10) Where a law was made before the Constitution, but its life was extended by an Act passed after the Constitution it does not cease to be an existing law for the purpose of this definition. AIR 1952 Cal 100 (101) (DB).

(11) A law will not be an existing law unless it was made by an authority which was competent to make it. AIR 1955 All 12 (16, 17) (DB) ** AIR 1965 SC 1096 (1101) = (1965) 1 SCR 636.

(12) A law passed by a Legislature or other authority will be an existing law only for the territory for which such Legislature or other authority had the power to make the law. AIR 1954 Raj 97 (98) = ILR (1953) 3 Raj 921 (FB).

(13) Law passed by the Legislature of

an Indian State would be an existing law for the territory covered by the State. AIR 1954 Hyd 207 (209, 210) = ILR (1954) Hyd 419 (FB) ** AIR 1956 J and K 26 (27) (DB).

(14) Where an Indian enactment although passed before the commencement of the Constitution is not applicable to a particular territory, it will not be existing law as regards that territory. AIR 1955 Manipur 41 (47) = 1955 Cri LJ 1603.

(15) The definition of the expression 'existing law' includes only laws passed by a competent authority as well as rules, bye-laws and regulations made by virtue of statutory powers. It would, therefore, not include administrative orders. AIR 1964 SC 1043 (1064) = (1964) 6 SCR 461.

(16) The expression "law in force" has been generally used as synonymous or interchangeable with the expression "existing law" but this will be of no avail in taking the matter any further. "In force" means "in effect". (1967) 33 Cut LT 263 (292) = 9 Orissa JD 41 (DB).

(17) An enactment enacted before the Constitution by a competent Legislature is an existing law. However if that enactment has been declared to be void it no longer remains an existing law. AIR 1961 Orissa 196 (202) = (1960) 2 Orissa JD 218 (DB).

(18) The provisions of Section 386 (1) (a), Calcutta Municipal Act (33 of 1951) neither by express terms nor by necessary implication bind the Government. Hence the prosecution by the Government through one of its officers under Section 488, W. B. Act (3 of 1923), is not maintainable in law. AIR 1960 SC 1355 (1359, 1360) = 1960 Cri LJ 1684 = (1961) 1 SCR 158. (AIR 1955 Cal 282, Reversed; ILR 25 Mad 457, Overruled.)

(16) "Part" means a Part of this Constitution;

(17) "Pension" means a pension, whether contributory or not, of any kind whatsoever payable to or in respect of an person, and includes retired pay so payable, a gratuity so payable and any sum or sums so payable by way of the return, with or without interest thereon or any other addition thereto, of subscriptions to a provident fund;

[Government of India Act (1935), S. 311 (2): "pension".]

(18) "Proclamation of Emergency" means a Proclamation issued under clause (1) of Article 352.

(19) "public notification" means a notification in the Gazette of India, or, as the case may be, the Official Gazette of a State;

[Government of India Act (1935), S. 311 (2): "public notification".]

(20) "railway" does not include—

(a) a tramway wholly within a municipal area, or

(b) any other line of communication wholly situate in the State and declared by Parliament by law not to be a railway;

[Government of India Act (1935), S. 311 (2): "railway".]

(21) (Rajpramukh) [omitted by the Constitution (Seventh Amendment) Act, 1956, Section 29 and Schedule [1-11-1956].

Article 366 — Note 5 (a) (contd.)

(19) The reference to the law-making bodies in the definition is wide enough to include an outside body like the Parliament of the United Kingdom. AIR 1959 Mad 410 (416).

(20) In a conflict between 'existing Indian law' (namely, Land Improvement Loans Act, 1883 and Agriculturists' Loans Act, 1884) and Central Act (namely 1954 Act) the Central Act prevails. AIR 1961 Punj 34 (42) = 62 Pun LR 795 (FB).

(21) Of the three terms "law," "law in force" and "existing law" the last is much wider in scope and import and includes such things as orders, rules, bye-laws, etc. AIR 1951 Mad 1015 (1020) = 1952 Cri LJ 170 (DB).

5 (a). Orders passed by Sovereign Rulers. — (1) Orders issued by absolute monarch like Ruler of erstwhile Gwalior State had force of law and would amount to existing law. AIR 1961 SC 298 (302, 303) = (1961) 1 SCR 957. (AIR 1953 Madh Bha 257 (FB) Reversed.)

(2) Whenever a dispute arises as to whether an order passed by the monarch is legislative or otherwise, it has to be scrutinized. If it is a legislative order it becomes "Existing law". AIR 1964 SC 1793 (1799) = (1964) 7 SCR 112.

(3) Order of Ruler holding certain houses to be private property of Ruler held to be executive and not law. It is only "existing law" in pre-existing States that would be law under Art. 366 (10). AIR 1967 Madh Pra 6 (11) = 1967 MPLJ 79 (DB).

(4) Firman of Maharana of Udaipur — Firman is declaration of the sovereign Power and is law binding on all. AIR 1962 Raj 196 (207) = 1962 Raj LW 317 (DB).

5 (b). Acts, Rules, Notifications judicially recognized as existing law. — (1) Law of Contempt of Court was an "existing law" when the Constitution came into force. AIR 1968 Ker 301 (309) = 1968 Cri LJ 1424 = 1968 Ker LT 157

(DB) ** AIR 1969 Delhi 201 (207) = 1969 Cri LJ 884 (DB).

(2) Assam Motor Vehicle Taxation Act (1936) satisfies the definition of "existing law." ILR (1966) 18 Assam 494.

(3) Approved scheme under Ch. IV-A of Motor Vehicles Act (1939), is a 'law'. AIR 1968 Mys 1 (2) = (1967) 1 Mys LJ 148 (FB).

(4) Land Acquisition Act is an "existing law." AIR 1958 All 872 (876) = 1959 All LJ 17 (DB). (Reversed on another point in AIR 1962 SC 764.) ** AIR 1959 Punj 538 (541) = ILR (1958) Punj 1451 ** AIR 1965 Bom 224 (238) = 67 Bom LR 101 (DB).

(5-7) Provisions of Section 27 of U. P. Tenancy (Amendment) Act (10 of 1947) came into force before the Constitution came into existence and so it is an existing law. AIR 1961 All 191 (195) = 1960 All LJ 936 (DB).

(8) Hyderabad Markets Act (2 of 1339-F) being an "existing law" cannot be challenged on the ground that its application to Telengana area violates Article 301 or affects interstate trade or commerce. AIR 1964 Andh Pra 373 (377) = (1963) 2 Andh LT 485 (DB).

(9) The Letters Patent fall under the definition of existing law. AIR 1958 Madh Pra 333 (335) = 1958 MPLJ 298 (DB).

(10) Provisions of Weekly Holidays Act prevail over Ajmer Shops and Commercial Establishments Act (4 of 1956) as the former is an existing law and the new law is repugnant to it. AIR 1959 Raj 257 (259) = 1959 Raj LW 678 (DB).

(11) Punjab Tahsildari Rules (1932) whether made under Section 9 Punjab Land Revenue Act (17 of 1887) or under Government of India Act (1919), continue in force under Section 276 Government of India Act 1935 and under Article 313 of Constitution. AIR 1960 Punj 168 (169) = 61 Pun LR 370 (DB).

(12) Bihar Public Service Commission (Limitation of Functions) Regulations

(22) "Ruler" in relation to an Indian State means the Prince, Chief or other person by whom any such covenant or agreement as is referred to in clause (1) of Article 291 was entered into and who for the time being is recognised by the President as Ruler of the State, and includes any person who for the time being is recognised by the President as the successor of such Ruler;

[Government of India Act (1935), S. 311 (1) : "Ruler".]

(23) "Schedule" means a Schedule to this Constitution;

(24) "Scheduled Castes" means such castes, races or tribes or parts of or groups within such castes, races or tribes as are deemed under Art. 341 to be Scheduled Castes for the purposes of this Constitution;

(25) "Scheduled Tribes" means such tribes or tribal communities or parts of or groups within such tribes or tribal communities as are deemed under Article 342 to be Scheduled Tribes for the purposes of this Constitution;

(26) "Securities" includes stock;

[Government of India Act (1935), S. 311 (2): "securities".]

(27) "Sub-clause" means a sub-clause of the clause in which the expression occurs;

(28) "taxation" includes the imposition of any tax or impost, whether general or local or special, and "tax" shall be construed accordingly;

[Government of India Act (1935), S. 311 (2): "taxation".]

(29) "tax on income" includes a tax in the nature of an excess profits tax;

[Government of India Act (1935), S. 311 (2): "tax on income".]

^a[(30) "Union territory" means any Union territory specified in the First Schedule and includes any other territory comprised within the territory of India but not specified in that Schedule.]

[a] Substituted for original clause (30) by the Constitution (Seventh Amendment) Act, 1956, S. 29 and Schedule [1-11-1956].

Article 366 — Note 5 (c) (contd.)

(1944) Reg. 11 (1) is an existing law and continues to be in force until altered, repealed or amended. AIR 1956 Pat 228 (233) = 1956 Pat LR 110 (DB).

(13) The provisions of City of Bangalore Improvement Act (5 of 1945) modifying the provisions of the Mysore Land Acquisition Act (7 of 1894) are clearly provisions of an existing law. AIR 1962 Mys 218 (231) = 39 Mys LJ 859 (DB). (Reversed on another point in AIR 1969 SC 477.)

(14) The Mysore Agriculturists Relief Act (18 of 1928) is an existing law within the meaning of Article 366 (10) and therefore is saved by Article 372. AIR 1965 Mys 54 (58) (FB).

(15) Indian Ports Act (1908) S. 3 is an "existing law" when it was extended to Goa, Daman and Diu. AIR 1969 Goa 16 (25).

(16) Travancore Taxation on Income (Investigation Commission) Act (14 of 1124) was existing law. AIR 1962 Ker 38 (40) = 1961 Ker LT 558 (FB).

(17) Travancore Adaptation and Application of Laws Order was good law in force after 26th January, 1950. AIR 1952 Trav-Co 14 (19) = 1950 Ker LT 159.

(18) S. 60 of Cantonments Act (1924) was "a law in force" at the time of commencement of Constitution and is saved by Art. 372. AIR 1967 All 15 (19).

(19) Act not violating S. 299 (2) of Government of India Act is an existing law within the meaning of Art. 366 (10).

AIR 1967 Punj 225 (232) = 68 Pun LR 752 (FB).

(20) Mysore Forest Act (11 of 1900) S. 37 conferring powers to make rules is an "existing law" but not the "rules" framed after the Constitution. AIR 1967 SC 1189 (1192) = (1967) 2 SCR 361. (AIR 1963 Orissa 24, Overruled.)

(21) Bihar Sugar Factories Control Act, 1937 and Rules framed thereunder were an existing law within the Article till Essential Commodities Act, 1955 was passed and enforced. AIR 1969 Pat 8 (10) (DB).

5 (c). Acts, etc. judicially not recognized as "existing law." — (1) Sales Tax Act passed before commencement of Constitution — Material and substantial alterations made by amendments subsequently — Amendment even making new law for some areas of States — Original Act ceases to be "existing law" within Article 306. AIR 1963 Ker 202 (209, 210) = 1963 Ker LT 141. (AIR 1962 Cal 269 Dissented.)

(2) The rules in Bihar and Orissa Education Code are merely departmental regulations which do not create any statutory or legally binding rights and duties. AIR 1952 Orissa 259 (259) = 18 Cut LT 334 (DB).

(3) Entry in appendix IV, East Punjab Land Resettlement Manual has no force of law. (1965) 67 Pun LR 867 (870) (DB).

(4) First and second provisos to the sub-section are ultra vires Section 299 (2) of the Government of India Act 1935

Article 366 — Note 5 (d) (contd.)

being still-born are not "existing law" within the meaning of Article 366. AIR 1966 Punj 507 (509) = (1966) 68 Pun LR (D) 240 ** AIR 1970 Delhi 44 (52) (DB).

(5) Notification under Section 27, Bihar and Orissa Excise Act (2 of 1915) imposing countervailing duty on foreign liquor imported into State — Later notification in 1961, enhancing the duty — **Held**, the Act and previous notification being 'existing law' were saved by Articles 305 and 372 and notification was valid — Later notification was not 'existing law' and must be struck down as invalid as it violated Articles 301 and 304. AIR 1966 SC 1686 (1691, 1692) = (1966) 1 SCR 865. (ILR (1963) Cut 93 partly Reversed.)

(6) Rule imposing restrictions on trade and commerce made after the Constitution under rule making power conferred by Pre-Constitution Act is not 'existing law.' Mere existence of authority in State under a Pre-Constitution Act to make rules will not make rules made under that authority after Constitution as existing law. AIR 1967 SC 1189 (1192) = (1967) 2 SCR 361. (AIR 1963 Orissa 24, Overruled.)

(7) Provision in Pre-Constitution Act void ab initio is not existing law. AIR 1970 Delhi 44 (52) (DB).

6. Clause 12 — "Goods." — (1) This definition is very wide and includes all materials, commodities and articles. AIR 1957 Cal 326 (328) ** AIR 1957 Madh Pra 45 (45).

(2) The term "goods" carries with it the implication that the materials, commodities, etc., are for purposes of trade. The expression would not include within its ambit luggage and personal effects. AIR 1955 Assam 249 (260) (SB).

(3) Animals and 'birds in captivity' are moveable property and are therefore "goods." AIR 1960 Ker 360 (360) = 1960 Ker LT 538.

(4) Word "Goods" has not been defined in Article 366 (12) in an exhaustive manner so as to exclude incorporeal movable property from the definition. AIR 1969 Mad 284 (289) = (1968) 1 Mad LJ 480 (DB).

(5) Expression 'goods' includes 'electricity'. AIR 1970 Cal 75 (78) = 73 Cal WN 701.

7. Clause (14) — "High Court." — (1) The former High Court of Bhopal cannot be regarded as a High Court for purposes of Article 132 as it does not come under any of the clauses of this definition. AIR 1951 Bhopal 11 (12).

(2) The definition of a High Court in Explanation 1 to Article 124 (3) is a special one with reference to the qualifications necessary for the appointment of a person as Judge of the Supreme Court and it does not conflict with the definitions contained in this clause or

Article 214, Clause (2). AIR 1951 Pat 305 (307) = ILR 29 Pat 904 = 1952 Cri LJ 540 (DB).

(3) Explanation (b) to Clause (2) of Article 317 does not conflict with the definition of a High Court in Article 214 (2) (since repealed) or in this clause. AIR 1951 Pat 305 (307) = ILR 29 Pat 904 = 1952 Cri LJ 540 (DB).

(4) Special Appellate Tribunal under Madras Act (30 of 1956) is neither a High Court nor a Court— Application for leave to appeal to Supreme Court against its decision not maintainable. AIR 1962 Mad 508 (509, 510) = (1963) 1 Mad LJ 127 (DB).

8. Clause (15) — "Indian State." — (1) The Court can take judicial notice of recognition by the Government of the Dominion of India on production of such documents as the Court might consider necessary to enable it to take judicial notice of it. AIR 1944 Sind 188 (190) = ILR (1944) Kar 293 = 46 Cri LJ 110 (DB).

9. Clause (17) — "Pension." — (1) Whether cash grant mentioned in M. P. Abolition of Cash Grants Act (16 of 1963) is pension as defined in Article 366 (17) Quaere. AIR 1965 Madh Pra 77 (81) = 1964 MPLJ 874 (DB).

(2) Allowance granted by a Ruler to his brother on his marriage is a maintenance allowance and cannot be a "pension." AIR 1969 Madh Pra 127 (129) = 1969 MPLJ 69 (DB).

10. Clause (19) — "Public Notification." — (1) Printing of notice in official gazette which was not out of the press — It cannot be deemed to be good notice to public at large. AIR 1968 Raj 24 (27) = 1967 Raj LW 116 (DB).

(2) The term Notification has to be considered in the light of the meaning provided by Rajasthan General Clauses Act and a Government order will in law become a notification when (1) it is published in Government Gazette and (2) when the publication is under proper authority. AIR 1966 Raj 142 (150) = 1965 Raj LW 455 (DB).

11. Clause (20) — "Railway." — (1) Company originally registered as tramway under Tramways Act became a Railway after the Railways Act was applied to it except Section 135 of the same. AIR 1967 SC 1747 (1751, 1753) = (1967) 3 SCR 243.

12. Clause (22) — "Ruler." — (1) 'Ruler' in relation to an Indian State must satisfy two conditions: (i) he must have signed an agreement as provided by Article 291, and (ii) he must be recognized by the President as the Ruler of the State. AIR 1955 Bom 195 (196) = ILR (1955) Bom 62 (DB).

(2) The definition of Ruler in this clause is artificial and is therefore applicable only for interpreting the provisions of the Constitution. AIR 1953 Nag 86 (88) = ILR (1952) Nag 943 (FB).

Article 366 — Note 12 (contd.)

(3) Recognition as a Ruler does not alter his status as an Indian citizen which he has after the Constitution. AIR 1964 SC 444 (447) = (1964) 5 SCR 1.

(4) "Ruler" as defined in Orissa Private Lands of Ruler (Assessment of Rent) Act (13 of 1958) has a wider import than the definition in Article 366 (22). AIR 1964 SC 1195 (1199) — (1964) 6 SCR 301.

(5) The definition of 'Ruler' prescribed by Article 366 (22) is an inclusive definition and its latter part takes in successors of a 'Ruler' who satisfy the test of its first part, and so, the son who has been recognised by the President as the successor of his deceased father, must be held to be a Ruler under Art. 366 (22). AIR 1964 SC 1663 (1665) = (1965) 1 SCJ 273.

(6) Consent to sue a former Ruler is no consent to sue his successor. Successor recognised under Article 366 (22) has, in his own independent right, the personal immunity from civil action. AIR 1969 Andh Pra 106 (108) = (1969) 1 Andh WR 271 (DB).

(7) To be treated as a Ruler under Article 363 (1) the claimant must be recognized by the President as a Ruler under Article 366 (22). AIR 1966 Cal 570 (572) (DB).

(8) Orissa State Lands of Rulers (Assessment of Rent) Act (13 of 1958), S. 5 proviso would apply to the private lands of Rulers as defined in Article 366 (22) but not to the private lands of their dependants or relatives. ILR (1964) Cut 948 (951) (DB).

(9) The rights guaranteed to a Ruler are not "property", and as such non-recognition of a legal heir of a past Ruler does not involve infringement of property rights under Article 19 (1) (f). AIR 1963 Punj 461 (467).

(10) The Paramountcy which the British Crown enjoyed vis-a-vis the Indian States is not now enjoyed by Central Government. AIR 1963 Punj 461 (467) (DB).

(11) Ruler of former State of Bastar which had ceded to Government is an Ex-Ruler for the purposes of M. P. Abolition of Proprietary Rights (Estate, Mahals, Alienated Lands) Act (1 of 1951) — By agreement of merger, a Ruler of former State ceases to be a Ruler but for purposes of Constitution and for privy purse — Even a Court may not recognize him as Ruler for purposes outside Constitution. AIR 1961 SC 775 (778) = (1961) 2 SCR 501.

(12) Provisions of Section 87-B Civil P. C. granting personal privilege of immunity are not ultra vires of Arts. 14 and 19 (1) (f). AIR 1969 Andh Pra 106 (107) = (1969) 1 Andh WR 271 (DB).

(13) The power of President to recognise a Ruler is a political power which is not justiciable. President also has power

to withdraw such recognition. Recognition does not invest a Ruler with the private property of ex-ruler. (1969) 2 SCWR 699 ** AIR 1969 Andh Pra 423 (435, 437) (DB).

13. Clause (24) — "Scheduled Castes." — (1) For determination of backward classes, caste cannot be exclusive consideration. AIR 1967 Andh Pra 353 (359) = (1966) 1 Andh WR 403 (DB).

(2) Reserved seat for Backward Classes for election to Panchayat Election Board under Madras Village Panchayat Act cannot be contested by a convert to Christianity. ILR (1963) Andh Pra 500 (507) (DB).

14. Clause (25) — "Scheduled Tribes." — (1) Members embracing Christianity do not cease to be Oraons and are entitled to rights and privileges of tribals — They can contest election to Parliamentary seat meant for Scheduled Tribes. AIR 1964 Pat 201 (206) (DB).

15. Clause 28 — "Taxation." — (1) The special contribution payable by an employer under Chapter V-A of the Employees' State Insurance Act, 1948, is a "tax". AIR 1957 All 136 (139, 141) (DB).

(2) Toll levied by Government on motor vehicles passing over a certain bridge was held to be a "tax." AIR 1958 Raj 138 (139).

(3) There can be no doubt that Customs duty or Excise duty is an impost within the meaning of Article 366 (28). Effect of Article 366 (28) read with Articles 245, 285 (1) and 289 (1) is that property of the Union is not to be taxed in State and vice versa. AIR 1963 SC 1760 (1781) = (1964) 3 SCR 787.

(4) Licence fee under Sections 298 (2) and 294 on owners and drivers of rickshaws is not tax but fee involving element of quid pro quo — Fee fixed held disproportionate to service rendered and was ultra vires. AIR 1962 All 277 (285) = 1962 All LJ 63 (FB).

(5) Levy is also a kind of tax and Constitution does not make any distinction between the two. AIR 1967 All 19 (23) = 1966 All LJ 622 (DB).

(6) The word "tax" would include not only taxes but also cesses and fees. AIR 1966 Goa 1 (16) (FB).

(7) Under Article 366 (28) the tax includes imposition of any tax or impost which means every variety of impost, and the mandate is that the word 'tax' shall be construed accordingly. (1967) 11 Law Rep 40 (58) = (1968) 1 Mys LJ 524 (DB).

(8) Royalty on minerals under Bihar Minor Mineral Concession Rules, 1964 is not fee but tax within Article 366 (28). AIR 1965 Pat 491 (494) = 1966 BLJR 325 (DB).

(9) Royalty under Punjab Minor Mineral Concession Rules (1964) can neither be classed as tax nor fees but it is more akin to rent. AIR 1969 Punj 79 (90) = ILR (1969) 1 Punj 680 (DB).

367. Interpretation.—(1) Unless the context otherwise requires, the General Clauses Act, 1897, shall, subject to any adaptations and modifications that may be made therein under Article 372, apply for the interpretation of this Constitution as it applies for the interpretation of an Act of the Legislature of the Dominion of India.

(2) Any reference in this Constitution to Acts or laws of, or made by, Parliament or to Acts or laws of, or made by, the Legislature of a State ^{a[° °]}, shall be construed as including a reference to an Ordinance made by the President or, to an Ordinance made by a Governor, ^{b[° ° °]} as the case may be.

(3) For the purposes of this Constitution “foreign State” means any State other than India :

Provided that, subject to the provisions of any law made by Parliament, the President may by order^c declare any State not to be a foreign State for such purposes as may be specified in the order.

[a] The words “specified in Part A or Part B of the First Schedule” omitted by the Constitution (Seventh Amendment) Act, 1956, S. 29 and Schedule (1-11-1956).

[b] The words “or Rajpramukh”, omitted, *ibid*.

[c] See the Constitution (Declaration as to Foreign States) Order, 1950, published as C. O. 2, dated 23-1-1950, declaring Commonwealth countries as not foreign States for the purposes of the Constitution—Gaz. Ind., 1950, Ext. p. 80N.

ARTICLE 367 — SYNOPSIS

1. Applicability of General Clauses Act to interpretation of the Constitution — (Clause (1)).

2. “Foreign State” Clause (3).

3. Definition of State. See Notes under Art. 12.

4. Person.

5. Pre-Constitution Laws.

1. Applicability of General Clauses Act to interpretation of the Constitution — (Clause (1)).— (1) The General Clauses Act, 1897, was enacted for the purpose of the interpretation of the enactments of the Central Legislature. Under Art. 372 this Act continues in force even after the Constitution. AIR 1951 All 703 (708) = ILR (1953) 1 All 458 = 52 Cri LJ 1094.

(2) The word “interpretation” in the clause has been used in the sense which would include “construction” also. AIR 1951 All 703 (708) = ILR (1953) 1 All 458 = 52 Cri LJ 1094.

(3) Not only the “general definitions” in the General Clauses Act, but also the “General Rules of Construction” in the Act will apply to the Constitution. AIR 1951 All 703 (708) = ILR (1953) 1 All 458 = 52 Cri LJ 1094. (AIR 1951 Bom 188 (FB), *Rel. on.*)

(4) The General Clauses Act is to be used for all purposes for which it is used in respect of Acts. AIR 1951 All 703 (708) = ILR (1953) 1 All 458 = 52 Cri LJ 1094.

(5) Under Section 5 (3) of the General Clauses Act, an Act comes into operation immediately on the expiration of the day preceding the commencement of the Act. Applying the same principle to the Constitution (which under Article 394 came into force on the 26th January

1950, except certain provisions), it must be deemed to have come into operation immediately on the expiration of the 25th January 1950 and not after 10 A. M. on the 26th January 1950 when the President took the oath. AIR 1952 Madh B 31 (35) = ILR (1952) Madh B 145 (DB).

(6) Notification, dated 25th May, 1961 altering age of superannuation from 58 years to 55 years — Governor was competent to issue notification in view of Article 309 read with Article 367 (1). AIR 1962 All 328 (332) = 1962 All LJ 31 (FB).

(7) By virtue of S. 16 of the General Clauses Act, the power of “appointment” conferred by Article 229 (1) of the Constitution on the Chief Justice of a High Court would include the power of dismissal. AIR 1956 SC 285 (291) = (1955) 2 SCR 1331.

(8) Definition of ‘offence’ contained in Section 3 (38) of the General Clauses Act applies to Article 20 (3). AIR 1958 Cal 682 (685) = 1958 Cri LJ 1469 (DB). (Overruled on another point in AIR 1962 SC 759.)

(9) Applying Section 21 of General Clauses Act read with Article 367 (1), it becomes clear that power of Rajpramukh or Governor under Article 309 includes a power to add, to amend, vary or rescind the Civil Service Rules once made. AIR 1961 Mys 37 (41) = 38 Mys LJ 828 (DB).

(10) Interpretation of Statutes — Provisions should be so read as to harmonise one with the other and as to advance the remedy intended by the statute. (1967) 2 Andh WR 53 = (1967) 1 Andh LT 253 (DB).

(11) On reading Sections 14 and 21 of the General Clauses Act, it would follow

JAMMU AND KASHMIR

In its application to the State of Jammu and Kashmir, to Art. 367 shall be added the following clause, namely :—

“(4) For the purposes of this Constitution as it applies in relation to the State of Jammu and Kashmir,—

- (a) references to this Constitution or to the provisions thereof shall be construed as references to the Constitution or the provisions thereof as applied in relation to the said State.
- (aa) references to the person for the time being recognised by the President on the recommendation of the Legislative Assembly of the State as the *Sadar-i-Riyasat* of Jammu and Kashmir, acting on the advice of the Council of Ministers of the State for the time being in office, shall be construed as references to the Governor^a of Jammu and Kashmir;
- (b) references to the Government of the said State shall be construed as including references to the Governor of Jammu and Kashmir acting on the advice of his Council of Minister :

Provided that in respect of any period prior to the 10th day of April, 1965, such references shall be construed as including references to the *Sadar-i-Riyasat* acting on advice of his Council of Ministers;

Article 367 — Note 1 (contd.)

that the power to make rules regulating the conditions of service also implies a power to vary, amend or rescind these provisions issued in the form of Notifications, Orders or Rules. (1967) 10 Law Rep 555 (DB).

(12) Inclusive definition of State in Section 3 (58), General Clauses Act, being repugnant to subject or context of Article 246 does not apply by virtue of Article 367. AIR 1968 SC 637 (641) = (1968) 2 SCR 103.

(13) By virtue of this article, Section 3 (58), General Clauses Act applies to interpretation of Article 3. Hence “State” in that article includes Union Territories. AIR 1966 SC 644 (648) = (1967) 1 SCR 430. (The contrary assumptions in AIR 1966 SC 845 held not correct.)

2. “Foreign State” — (Clause (3)). —

(1) When a question arises as to the boundary between one country and foreign country adjacent to it, the municipal Courts can only act on the view of the Government of the country and cannot decide the question independently. AIR 1949 FC 143 (146, 147) = 1949 FCR 309 = ILR (1950) 1 Cal 530.

(2) Under the proviso to clause (3) read with Article 392 (3), the Governor-General has promulgated the Constitution (Declaration as to Foreign States) Order, 1950. The effect of the Order is only that a State in the Commonwealth is not a foreign State for the purpose of the particular article of the Constitution in which the expression “foreign State” occurs. AIR 1957 Madh B 1 (3) (DB) ** AIR 1956 Madh B 211 (213) (DB).

(3) Where the question was whether a decree passed on 3-1-1951 by Palghat Court which was a foreign Court vis-à-vis the State of Travancore by virtue of the definition in Section 2 (5). Travancore

Civil P. C. (1100 M. E.), could be executed in a Court at Perumbavoor in Travancore it was held that the interpretation clause in Article 367 (3) could not have any effect on the question. AIR 1958 Ker 15 (17) = ILR (1957) Ker 1036 (FB).

(4) Declaration as to Foreign States Order, 1950 does not have the effect of making citizens of Pakistan, Indian citizens for purposes of Article 7. AIR 1961 Pat 112 (115, 116) = 1961 (1) Cri LJ 412 = 1961 BLJR 60 (DB).

(5) By reason of Article 367 (3) State of West Bengal was no longer a foreign State with reference to the State of Mysore. But this only applied to judgments pronounced after commencement of the Constitution. AIR 1960 Mys 1 (6) = 37 Mys LJ 645 (DB).

(6) The old Mysore State and State of Madras are now not foreign States in relation to each other. AIR 1952 Mys 69 (73) = 30 Mys LJ 69 (DB).

(7) Pakistan may not be foreign State by virtue of Clause 2 of the Constitution (Declaration as to Foreign States) Order, 1950 — But that does not mean that a citizen of Pakistan becomes a citizen of India in order to claim fundamental right under Article 19. AIR 1965 Cal 312 (320) = 1965 (1) Cri LJ 679 (DB).

(8) The Constitution (Declaration as to Foreign States) Order 1950, made under Article 392 (3) read with Article 367 (3) does not take Pakistan outside the category of foreign powers. Pakistan is a foreign power for purpose of Section 3 of Preventive Detention Act (1950). AIR 1960 SC 625 (627, 628) = 1960 Cri LJ 764 = (1960) 2 SCR 784.

3. Definition of State. See Notes under Article 12.

4. Person. — (1) Ad hoc committee superseding managing committee of a

- (c) references to a High Court shall include references to the High Court of Jammu and Kashmir;
- (d) references to the permanent residents of the said State shall be construed as meaning persons who, before the commencement of the Constitution (Application to Jammu and Kashmir) Order, 1954, were recognised as State subjects under the laws in force in the State or who are recognised by any law made by the Legislature of the State as permanent residents of State; and
- (e) references to a Governor shall include references to the Governor of Jammu and Kashmir;

Provided that in respect of any period prior to the 13th day of April, 1965, such references shall be construed as references to the person recognised by the President as Sadar-in-Riyasat of Jammu and Kashmir and as including references to any person recognised by the President as being competent to exercise the powers of Sadar-i-Riyasat" — See the Constitution (Application to J. and K.) Order, 1954, Para 2, sub-para. 14(b) (as substituted, amended, relettered by C. O. 56 and C. O. 74.)

- (a) J. and K. has a Governor now. See J. and K. Constitution (Sixth Amendment) Act, 1965, S. 3.

PART XX

AMENDMENT OF THE CONSTITUTION

368. Procedure for amendment of the Constitution.—An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a major-

Article 367 — Note 4 (contd.)

school is a domestic tribunal. The domestic tribunal is a 'person' as per definition in the General Clauses Act. AIR 1959 Tripura 27 (32, 33).

(2) Word 'person' — Managing Committee of School is a 'person' as per definition in Section 3 (42) of the General Clauses Act. AIR 1969 Orissa 30 (31) = 34 Cut LT 1162 (DB).

(3) Under Section 3 (42) of the General Clauses Act, "person" shall include any company or association or body of individuals, whether incorporated or not. The same meaning must be applied to the word "person" used in Article 226 or elsewhere in the Constitution also. AIR 1953 Cal 289 (291).

(4) A corporation which is a person by virtue of Section 3 (42), General Clauses Act read with Article 367, is a citizen and eligible for rights under Article 19. AIR 1961 Ker 268 (280) = 1961 Ker LT 54.

5. Pre-Constitution Laws. — (1) The expression 'Law made by the Legislature of State' in Article 254 (1) and Art. 367 (2) refers to a post-Constitution law. AIR 1960 Bom 532 (538, 539) = 62 Bom LR 277 (DB).

(2) Consultations under Article 234 held before 26-1-1950 — Section 6 of the General Clauses Act read with Article 367 will save validity of the consultation.

AIR 1968 All 67 (73) = ILR (1967) 2 All 271.

(3) The declaration by the Government must be declared void as from date of enforcement of Constitution. AIR 1954 All 608 (617, 622) = ILR (1955) 1 All 162 (DB).

(4) C. P. and Berar Sales Tax Act (XXI of 1947) Section 2 (g), Expl. II (as originally enacted and in force during the material period was intra vires by virtue of Section 6 of General Clauses Act read with Article 367. 1961 MPLJ 894 (DB).

(5) Offence committed and prosecution launched before Constitution came into force — Result of prosecution not affected in view of Section 6 of the General Clauses Act. AIR 1951 Mys 26 (27) = 52 Cr LJ 251 (DB).

ARTICLE 368 — SYNOPSIS

1. Scope.
2. Methods of amendment.
3. Procedure.
4. Amendment of Fundamental Rights.
5. Constitution (17th Amendment) Act 1964.

1. Scope.— (1) Any attempt to amend the Constitution by a Legislature other than the Parliament and in a manner different from that provided in the article will be void and inoperative. AIR 1958 Bom 94 (98) (DB).

ity of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, it shall be presented to the President for his assent and upon such assent being given to the Bill, the Constitution shall stand amended in accordance with the terms of the Bill :

Provided that if such amendment seeks to make any change in—

- (a) Article 54, Article 55, Article 73, Article 162 or Article 241, or
- (b) Chapter IV of Part V, Chapter V of Part VI, or Chapter I of Part XI, or
- (c) any of the Lists in the Seventh Schedule, or
- (d) the representation of States in Parliament, or
- (e) the provisions of this article,

the amendment shall also require to be ratified by the Legislatures of not less than one-half of the States a[* * *] by resolutions to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent.^b

[a] The words “specified in Part A or Part B of First Schedule” omitted by the Constitution (Seventh Amendment) Act, 1956, S. 29 and Schedule (1-11-1956).

[b] For matters not deemed to be amendments of the Constitution within this Article, See Art. 4 (2); Art. 169 (3); Art. 240 (2); Sch. V, Para. 7 (2); Sch. VI, Para. 21 (2).

JAMMU AND KASHMIR

In its application to the State of Jammu and Kashmir, to Art. 368, a proviso shall be added, namely :—

“Provided further that no such amendment shall have effect in relation to the State of Jammu and Kashmir unless applied by order of the President under clause (1) of Art. 370”—See Constitution (Application to J. and K.) Order, 1954, Para. 2, sub-para. (15).

Article 368 — Note 1 (contd.)

(2) Section 9 of the Industrial Disputes Act, 1947, cannot take away the jurisdiction of the High Court under Article 226, inasmuch as such right can only be abridged by an amendment as provided in this article. AIR 1951 Raj 161 (163) = ILR (1951) 1 Raj 361 (DB).

(3) It cannot be said that the power of amending the Constitution provided for under this article is conferred not on Parliament but on the two Houses of Parliament as a designated body. AIR 1951 SC 458 (461) = 1952 SCR 89 = 30 Pat 1176.

(4) Since constitutional amendment falls within the exclusive power of Parliament, the fact that the effect of such amendment is to save matters covered by the State List in the Seventh Schedule is of no consequence. AIR 1951 SC 458 (464) = 1952 SCR 89 = 30 Pat 1176.

(5) This article does not in terms exempt Article 1 or the First Schedule from its operation. AIR 1957 Andh Pra 734 (736) = ILR (1957) Andh Pra 345 (DB).

(6) Article 4 is as much a part of the Constitution as this article. Both of them should, therefore, be read together. AIR 1957 Andh Pra 734 (738) = ILR (1957) Andh Pra 345 (DB) ** AIR 1957 Bom 165 (168) = ILR (1958) Bom 32 (DB)

** AIR 1960 SC 845 (859) = (1960) 3 SCR 250. (Overruled in AIR 1966 SC 644 on another point.) ** AIR 1961 Andh Pra 50 (53) = (1960) 2 Andh WR 479 (DB).

(7) Section 6 (a) of the Judicial Commissioners' Courts (Declaration as High Courts) Act, 1950, does not purport to amend any part of the Constitution and, therefore, it is not ultra vires. AIR 1952 Him Pra 5 (6) = 1952 Cri LJ 114.

(8) It was held by the Supreme Court that the adaptation of this article made by the President by the Constitution (Removal of Difficulties) Order No. 2 of 26-1-1950 was within the powers conferred on him by Article 392 and was valid and constitutional. AIR 1951 SC 458 (462, 463) = 1952 SCR 89 = 30 Pat 1176.

(9) Dispute regarding boundaries between India and Pakistan — Reference to Tribunal by both countries — Transfer of certain territory to Pakistan in pursuance of award — It is not cession of Indian territory — No alteration in Article 1 involved — Constitutional amendment under Article 368 not necessary. AIR 1969 Delhi 64 (71, 72) (DB).

(10) Debates in Constituent Assembly cannot be taken into account for interpretation of Article 368. AIR 1967 SC 1643 (1682, 1728) = (1967) 2 SCR 762.

Article 368 — Note 1 (contd.)

(11) Preamble cannot prohibit or control in any way or impose any implied prohibitions or limitations on powers to amend Constitution contained in Article 368. Nor can the marginal note to it control the meaning of Art. 368. **AIR 1967 SC 1643 (1682, 1683) = (1967) 2 SCR 762.**

(12) Power of Parliament to amend Constitution is derived from Articles 245, 246 and 248 read with Sch. VII, List I, Item 97 and not from Article 368 which only deals with procedure. **AIR 1967 SC 1643 (1669) = (1967) 2 SCR 762.**

(13) Article 368 provides for the procedure for the amendment of the Constitution. The power to amend Constitution must inevitably include the power to amend Article 1 and that logically would include the power to cede national territory in favour of a foreign State. **AIR 1960 SC 845 (856) = (1960) 3 SCR 250.**

(14) Division of Berubari Union No. 12 — Act intends division half and half in substance and not in a mathematical way. **AIR 1966 SC 644 (650) = (1966) 1 SCR 430.**

(15) The Chandernagore Merger Act promulgated by Parliament under Article 3 is not to be deemed to be an amendment of the Constitution for purpose of Article 368. **AIR 1962 Cal 248 (250) = (1961) 43 ITR (ED) 59.**

2. Methods of amendment.— (1) There are constitutions which can only be altered with some special formality, while there are other constitutions the terms of which may be modified or repealed with no other formality than is necessary in the case of other legislation. The former may be described as "controlled" and the latter as "uncontrolled" constitutions. **AIR 1920 PC 91 (96).**

(2) The Indian Constitution is a controlled Constitution. **AIR 1951 All 257 (295) = ILR (1951) 1 All 269 (FB).**

(3) Various methods of constitutional amendments have been adopted in written constitutions, such as by referendum, by a special convention, by legislation under a special procedure and so on. **AIR 1951 SC 458 (461) = 1952 SCR 89 = 30 Pat 1176.**

(4) The Indian Constitution provides for three classes of amendments. **AIR 1951 SC 458 (461) = 1952 SCR 89 = 30 Pat 1176.**

(5) Amendment of the Constitution — Procedure to be followed — Alteration of text of existing provision not necessary. **AIR 1966 All 377 (382).**

(6) In India the procedure followed to amend the Constitution was to alter the text of any existing provision by adding or deleting or substituting words. **AIR 1966 All 377 (382).**

3. Procedure. — (1) This article is not a "complete code" in respect of the procedure provided by it. There are gaps in

the procedure as to how and after what notice a Bill is to be introduced, how it is to be passed by each House and how the President's assent is to be obtained. **AIR 1951 SC 458 (461) = 1952 SCR 89 = 30 Pat 1176.**

(2) Assuming that amendment of the Constitution is not legislation even where it is carried out by ordinary legislation by passing a Bill introduced for the purpose and that Articles 107 to 111 cannot in terms apply when Parliament is dealing with a Bill under Article 368, there is no obvious reason why Parliament should not adopt, on such occasions, its normal procedure, so far as that procedure can be followed consistently with statutory requirements. **AIR 1951 SC 458 (462) = 1952 SCR 89 = 30 Pat 1176.**

(3) Indo-Pakistan Agreement relating to division of Berubari Union and Exchange of Cooch-Bihar Enclaves — Involves cession of national territory in favour of Pakistan — Implementation of agreement by legislative action essential — Law relating to Article 368 would be sufficient. **AIR 1960 SC 845 (855, 461) = (1960) 3 SCR 250. (Overruled in AIR 1966 SC 644 on another point.)**

(4) Amendment of Constitution — Ratification by State Legislatures — Assent of Governor not required — Legislature does not include Governor — Constitution (Fifteenth Amendment) Act (1963) — Amendment valid. **AIR 1964 Cal 500 (502, 503) = 68 Cal WN 958.**

(5) Ratification — Amendment need not be placed before or considered by all States. **AIR 1964 Cal 500 (502, 503) = 68 Cal WN 958.**

(6) The broad scheme of Article 368 is that if Parliament proposes to amend any provision of the Constitution not enshrined in the proviso, the procedure prescribed by the main part of the Article has to be followed. The Bill introduced for the purpose of making the amendment in question, has to be passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting. After the bill is passed as aforesaid, it has to be presented to the President for his assent and when he gives his assent, the Constitution shall stand amended in accordance with the terms of the bill. That is the position in regard to the amendment of the provisions of the Constitution to which the proviso does not apply. **AIR 1965 SC 845 (850, 851) = (1965) 1 SCR 933.**

(7) Article 226 is one of the constitutional provisions which fall under Cl. (b) of the proviso; and so if Parliament intends to amend the provisions of Article 226, the bill proposing to make such an amendment must satisfy the require-

PART XXI

[TEMPORARY, TRANSITIONAL AND SPECIAL PROVISIONS]

369. Temporary power to Parliament to make laws with respect to certain matters in the State List as if they were matters in the Concurrent List.—Notwithstanding anything in this Constitution, Parliament shall, during a period of five years from the commencement of this Constitution, have power to make laws with

Article 368 — Note 3 (contd.)

ments of the proviso. AIR 1965 SC 845 (851) = (1965) 1 SCR 933.

(8) If the direct effect of the amendment of fundamental rights is to make a substantial inroad on the High Courts' powers under Article 226, it would become necessary to consider whether the proviso would cover such a case or not. The proviso would apply where the amendment in question seeks to make any change, inter alia, in Article 226, and the question in such a case would be does the amendment seek to make a change in the provisions of Article 226? The answer to this question would depend upon the effect of the amendment made in the fundamental rights. AIR 1965 SC 845 (851, 852) = (1965) 1 SCR 933.

(9) Chapter VI of Part VI is not covered by the Proviso to Article 368. So it was not necessary to follow the procedure laid down in the proviso in order to add Article 233-A in Part VI Chapter VI. AIR 1969 All 594 (599) (FB).

4. Amendment of Fundamental Rights. — (1) Fundamental rights are outside amendatory process and Parliament will have no power in future to amend provisions of Part III so as to abridge or take away fundamental rights therein — Any further inroad into these rights will be illegal and unconstitutional unless it complies with Part III in general and Article 13 (2) in particular. AIR 1967 SC 1643 (1669, 1718) = (1967) 2 SCR 762.

(2) The Constitution (First Amendment) Act, 1951, (Fourth Amendment) Act, 1955, and (Seventeenth Amendment) Act 1964 abridge the scope of the fundamental rights. But on the basis of earlier decisions they were declared valid by applying the principle of prospective overruling. AIR 1967 SC 1643 (1669, 1692, 1718, 1727, 1742) = (1967) 2 SCR 762 ** AIR 1968 SC 1395 (1401) = 1968 Lab IC 1525 = (1968) 3 SCR 712 = 71 Bom LR 141.

(3) In view of the decision in Golaknath's case. AIR 1967 SC 1643, the following cases holding that fundamental rights in Part III of the Constitution can be modified or abridged may be treated as impliedly overruled and no longer good law. AIR 1951 SC 458 = 1952 SCR 89 ** AIR 1965 SC 845 = (1965) 1 SCR 933 in so far as it conceded the power of the Parliament to amend Part III of the Constitution (on an erroneous inter-

pretation of Articles 13 (2) and 368.) ** (1967) 33 Cut LT 263 = ILR (1967) Cut 333 (DB) ** AIR 1967 Guj 229 (241) = 7 Guj LR 597 (DB).

(4) Per Hidayatullah, J.— We cannot abridge or take away the Fundamental Rights by the ordinary amending process. Parliament must amend Article 368 to convoke another Constituent Assembly, pass a law under Item 97 of the First List of Schedule VII to call a Constituent Assembly and then that assembly may be able to abridge or take away the Fundamental Rights if desired. AIR 1967 SC 1643 (1705) = (1967) 2 SCR 762.

5. Constitution (17th Amendment) Act 1964. — (1) Per majority. — Pith and substance of the Act falls within substantive part of Art. 368 and not under Cl. (b) of proviso to Article 368 — Act is constitutionally valid. AIR 1965 SC 845 (853, 854) = (1965) 1 SCR 933.

(2) Per majority:— The Act is not ultra vires of Parliament under Arts. 245 and 246 — It is not land legislation falling under Sch. 7, List 2, Entry 18 but merely validates land legislation passed by States. AIR 1965 SC 845 (853, 854) = (1965) 1 SCR 933.

(3) Per majority. — Power to amend Constitution can be exercised retrospectively — Constitution (17th Amendment) Act 1964 not unconstitutional on ground that it validates Act added to ninth schedule but declared invalid. AIR 1965 SC 845 (854) = (1965) 1 SCR 933.

(4) It is declared by the Special Bench that the Constitution (Seventeenth Amendment) Act (1964) is valid though on different reasonings. Hidayatullah, J. however upheld the validity of S. 2 of the Constitution (Seventeenth Amendment) Act, 1964, but declared that S. 3 was ultra vires the amending process. AIR 1967 SC 1643 (1669) = (1967) 2 SCR 762.

(5) Acts included in Sch. 9 — Amendments to those Acts made subsequent to such inclusion are not entitled to protection under Art. 31-B. AIR 1959 J and K 35 (39, 41) (FB).

(6) Ninth Schedule as amended by Constitution (17th Amendment) Act (1964), together with Article 31-B saves Assam Act 9 of 1961. AIR 1966 Assam 51 (54).

Article 369 — Note 1

(1) This article gives power to Parliament for a period of five years from the commencement of the Constitution to

respect to the following matters as if they were enumerated in the Concurrent List, namely :—

- (a) trade and commerce within a State in, and the production, supply and distribution of, cotton and woollen textiles, raw cotton (including ginned cotton and unginned cotton or kapas), cotton seed, paper (including newsprint), foodstuffs (including edible oilseeds and oil), cattle fodder (including oil-cakes and other concentrates), coal (including coke and derivatives of coal), iron, steel and mica;
- (b) offences against laws with respect to any of the matters mentioned in clause (a), jurisdiction and powers of all courts except the Supreme Court with respect to any of those matters, and fees in respect of any of those matters but not including fees taken in any court;

but any law made by Parliament, which Parliament would not but for the provisions of this article have been competent to make, shall, to the extent of the incompetency, cease to have effect on the expiration of the said period, except as respects things done or omitted to be done before the expiration thereof.

[a] Substituted for 'Temporary and Transitional Provisions' by the Constitution (Thirteenth Amendment) Act, 1962, S. 2 (a) (w. e. f. 1-12-1963).

JAMMU AND KASHMIR

In its application to the State of Jammu and Kashmir, Art. 369 shall be omitted—
See Constitution (Application to J. and K.) Order, 1954, Para. 2, sub-para. 16(a).

370. Temporary provisions with respect to the State of Jammu and Kashmir.—

(1) Notwithstanding anything in this Constitution,—

- (a) the provisions of Article 238^a shall not apply in relation to the State of Jammu and Kashmir;

Article 369 — Note 1 (contd.)

make laws with respect to certain matters mentioned in Clauses (a) and (b), as if they were matters mentioned in the Concurrent List. AIR 1951 Cal 120 (123) = ILR (1952) 2 Cal 296 = 52 Cri LJ 934 (FB).

(2) The effect of the words "as if they were enumerated in the Concurrent List" is that the provisions of Art. 254 are attracted in respect of the laws passed by Parliament in exercise of the powers conferred by this article. See AIR 1955 Bom 35 (36) = ILR (1955) Bom 49 (DB).

(3) The duty under the Dhoties (Additional Excise Duty) Act, 1953, is an excise duty which Parliament has the authority to levy under Entry 84 of List 1. The validity of the legislation cannot be questioned on the ground of Parliament's encroachment on the State field under Entries 24 and 27 of List 2 as production, supply and distribution of cotton textiles is the matter mentioned in Cl. (a) of this article and as the legislation is made within the period of five years prescribed by the article. AIR 1955 Raj 114 (119) = ILR (1955) 5 Raj 832 (DB).

(4) The words "things done or omitted to be done before the expiry thereof" authorise the trial and conviction of a person after the expiration of a temporary Act for the offence committed during the life of the Act. AIR 1956 Orissa 194 (199) = ILR (1956) Cut 374 = 1956 Cri LJ 1334 (DB).

(5) The Essential Supplies (Temporary Powers) Act, 1946, being a law made by Parliament, did come to an end after expiry of five years as provided by Article 369 but a prosecution started against accused could be continued even after expiry of the temporary Act. AIR 1959 Madh Pra 93 (93, 95) = 1959 Cri LJ 325 = 1959 MPLJ 65.

(6) The phrase "things done or omitted to be done" is sufficiently wide to continue a prosecution not completed under a temporary Act. AIR 1959 Madh Pra 93 (94, 95) = 1959 Cri LJ 325 = 1959 MPLJ 65.

(7) Defence of India Rules (1962), Rule 35 (5) — Essential commodity — Inclusion of wheat and wheat products — Not repugnant to any Article in Constitution. AIR 1964 Cal 279 (283) = 1964 (1) Cri LJ 662.

Article 370 — Note 1

(1) The policy of the Constitution which appears from this article is that the Constitution was framed for the entire Union of India but the provisions of that Constitution should not apply to the territories of the State of Jammu and Kashmir until and unless the President made an order that they shall apply. AIR 1956 J and K 1 (3) = 1956 Cri LJ 48 (FB).

(2) The effect of the article was to give jurisdiction to the Union Parliament to make laws for the State on matters specified either in the Instrument of Ac-

(b) the power of Parliament to make laws for the said State shall be limited to—

- (i) those matters in the Union List and the Concurrent List which, in consultation with the Government of the State, are declared by the President to correspond to matters specified in the Instrument of Accession governing the accession of the State to the Dominion of India as the matters with respect to which the Dominion Legislature may make laws for that State; and
- (ii) such other matters in the said Lists as, with the concurrence of the Government of the State, the President may by order specify.

Explanation.—For the purposes of this article, the Government of the State means the person for the time being recognised by the President as the Maharaja of Jammu and Kashmir acting on the advice of the Council of Ministers for the time being in office under the Maharaja's Proclamation dated the fifth day of March, 1948;

(c) the provisions of Article (1) and of this article shall apply in relation to that State;

Article 370 — Note 1 (contd.)

cession or by later additions made with the concurrence of the State Government. AIR 1953 J and K 25 (30) = 11 J and KLR 1 (DB).

(3) The President under this article can issue an Order applying the provisions of the Constitution after a mere consultation with the State Government only where those provisions relate to a matter specified in the Instrument of Accession itself. AIR 1956 J and K 1 (13, 14) = 1956 Cri LJ 48 (FB) ** AIR 1953 J and K 25 (32) = 11 J and K LR 1 (DB).

(4) The power conferred on the President by this article to make Orders is not a delegated power. Hence the considerations which apply to delegated legislations cannot be applied to the Orders made by the President under this article. AIR 1956 J and K 1 (3) = 1956 Cri LJ 48 (FB).

(5) The article empowers the President to make exceptions and modifications when applying the provisions of the Constitution to the State of Kashmir. The words "exceptions" and "modifications" cannot be interpreted by reference to the meaning given to them when they occur in the other provisions of this Constitution. AIR 1956 J and K 1 (4) = 1956 Cri LJ 48 (FB). (President can except particular thing, person or place from operation of provision.)

(6-8) In the context of the Constitution the court must give the widest effect to the meaning of the word 'modification' used in Article 370 (1) and in that sense it includes an amendment. Therefore the President had the power to make the modification which he did in Art. 81. AIR SCR 688 ** AIR 1956 J and K 1 (13, 14) = 1956 Cr LJ 48 (FB).

(9) The expression "modification" also means addition. AIR 1959 J and K 35 (40) (FB).

(10) When the President added Cl. (c) to Article 35 what he did was to modify the provisions of that article and hence had not acted beyond his powers. AIR 1966 J and K 1 (4, 13, 14) = 1956 Cri LJ 48 (FB).

(11) Clause (c) added by the President to Article 35 in its application to Jammu and Kashmir engrafted an exception on the Constitution in respect of Fundamental Rights and was not ultra vires the power of the President. AIR 1956 SC 197 (201) = (1955) 2 SCR 1101 = 1956 Cri LJ 421 (2).

(12) The President on 26-1-1950 issued the Constitution (Application to Jammu and Kashmir) Order, 1950. By that Order he specified the matters in the Union List which corresponded to the matters mentioned in the Instrument of Accession and also made the Constitution applicable to the State with certain omissions, exceptions and modifications. That Order was later on superseded by the Constitution (Application to Jammu and Kashmir) Order, 1954.

(13) J. and K. Big Landed Estates (Abolition) Act (XVII of 2007) was passed when Yuvaraj had plenary legislative powers and hence its validity cannot be challenged. AIR 1959 SC 749 (761) = (1959) Supp (2) SCR 270.

(14) The inclusion of an Act or provision of an Act in the ninth Schedule is not made as a matter of course — What was brought into the Act subsequently was outside the scope of the Ninth Schedule and consequently outside the scope of the protection of Article 31-B. AIR 1959 J and K 35 (38, 39) (FB).

(15) Jammu and Kashmir Detention Act, 13 of 1964 — Not ultra vires of State Legislature. AIR 1969 J and K 77 (87) = 1969 Cri LJ 907 (DB).

- (d) such of the other provisions of this Constitution shall apply in relation to that State subject to such exceptions and modifications as the President may by order^b specify :

Provided that no such order which relates to the matters specified in the Instrument of Accession of the State referred to in paragraph (i) of sub-clause (b) shall be issued except in consultation with the Government of the State :

Provided further that no such order which relates to matters other than those referred to in the last preceding proviso shall be issued except with the concurrence of that Government.

(2) If the concurrence of the Government of the State referred to in paragraph (ii) of sub-clause (b) of clause (1) or in the second proviso to sub-clause (d) of that clause be given before the Constituent Assembly for the purpose of framing the Constitution of the State is convened, it shall be placed before such Assembly for such decision as it may take thereon.

(3) Notwithstanding anything in the foregoing provisions of this article, the President may, by public notification, declare that this article shall cease to be operative or shall be operative only with such exceptions and modifications and from such date as he may specify :

Provided that the recommendation of the Constituent Assembly of the State referred to in clause (2) shall be necessary before the President issues such a notification.

[a] Part VII, which contained Art. 238, is now omitted by the Constitution (Seventh Amendment) Act, 1956. There is no change made by the said Act in Art. 370.

[b] See the Constitution (Application to Jammu and Kashmir) Order, 1954, as amended from time to time.

JAMMU AND KASHMIR

In exercise of powers conferred by clause (3) of Art 370, the President, on the recommendation of the Constituent Assembly of the State of Jammu and Kashmir, is pleased to declare that, as from the 17th day of November, 1952, the said Art. 370 shall be operative with the modification that for the "Explanation" in clause (1) thereof the following Explanation is substituted, namely:—

"Explanation.—For the purposes of this Article the Government of the State means the person for the time being recognised by the President on the recommendation of the Legislative Assembly of the State as the Sadar-i-Riyasat^a of Jammu and Kashmir, acting on the advice of the Council of Ministers of the State for the time being in office." — See C. O. 44 published in Gaz. Ind., 1952, Pt. II, S. 3, Ext., p. 916.

[a] Sub-sec. (3) of S. 2 of the Constitution of Jammu and Kashmir (as inserted by the J. and K. Constitution (Sixth Amendment) Act, 1965, S. 3) runs as follows :

"(3) Any reference in this Constitution to the Sadar-i-Riyasat shall, unless the context otherwise requires, be construed as a reference to the Governor."

Section 27 of that Constitution as substituted by the said Amending Act, speaks of appointment of a Governor by the President (of India) by warrant under his hand and seal.

^a[371. Special provision with respect to the States of Andhra Pradesh, Punjab, Maharashtra and Gujarat.—(1) Notwithstanding anything in this Constitution, the President may, by order made with respect to the State of Andhra Pradesh ^b[^c ^d]

Article 371 — Note 1

(1) Member of the Punjab Legislature or Regional Committee enjoys no special privilege or immunity in matter of preventive detention — Non obstante clause in Article 371 cannot have effect of conferring some special immunity or privilege on member of Legislature. AIR 1966 Punj 255

(256, 258) = 1966 Cri LJ 793 = 67 Pun LR 1165.

(2) Andhra Pradesh Regional Committee Order (1958), Para 3 — Regional Committee constituted under Para 3 — Defect in procedure in holding its meetings — Bill in pursuance of its report passed into an

provide for the constitution and functions of regional committees of the Legislative Assembly of the State, for the modifications to be made in the rules of business of the Government and in the rules of procedure of the Legislative Assembly of the State and for any special responsibility of the Governor in order to secure the proper functioning of the regional committees.

(2) Notwithstanding anything in this Constitution, the President may by order made with respect to "[the State of Maharashtra or Gujarat,]" provide for any special responsibility of the Governor for—

- (a) the establishment of separate development boards for Vidarbha, Marathwada, "[and the rest of Maharashtra or, as the case may be,]" Saurashtra, Kutch and the rest of Gujarat with the provision that a report on the working of each of these boards will be placed each year before the State Legislative Assembly;
- (b) the equitable allocation of funds for developmental expenditure over the said areas, subject to the requirements of the State as a whole; and
- (c) an equitable arrangement providing adequate facilities for technical education and vocational training, and adequate opportunities for employment in services under the control of the State Government, in respect of all the said areas, subject to the requirements of the State as a whole.]

[a] Substituted for the original Art. 371 by the Constitution (Seventh Amendment) Act, 1956, S. 22 (1-11-1956).

[b] The words 'or Punjab' omitted by the Punjab Reorganisation Act, 1966 (31 of 1966), S. 26 (1-11-1966).

[c] Substituted for 'the State of Bombay' by the Bombay Reorganisation Act, 1960 (11 of 1960) S. 85 (a) (w. e. f. 1-5-1960).

[d] Substituted for 'the rest of Maharashtra,' by the Bombay Reorganisation Act, 1960 (11 of 1960), S. 85 (b) (1-5-1960).

OBJECTS AND REASONS

"It is proposed to replace Art. 371 by another Article making a special provision with respect to the States of Andhra Pradesh and Punjab. This article will enable the President to constitute regional committees of the State Legislative Assembly and secure their proper functioning by directing suitable notifications to be made in the rules of business of Government and in the rules of procedure in the Assembly."—S. O. R., Gaz. Ind., 1956, Pt. II, S. 2, Ext., p. 221.

JAMMU AND KASHMIR

Article 371 shall be omitted—See Constitution (Application to J. and K.) Order, 1954, Para. 2, sub-para. (16) (a).

Article 371 — Note 1 (contd.)

Act — Article 212 (1) applies — Validity cannot be questioned on ground of irregularity of procedure. AIR 1965 Andh Pra 306 (310, 313) = (1965) 1 Andh WR 304.

(3) Andhra Pradesh Regional Committee Order (1958) and bye-laws made thereunder — Andhra Pradesh Legislative Assembly Rules — 'Regional' bill referred to Regional Committee — Bill passed by Legislature after considering Regional Committee's report — Absence of notice to some members of the Regional Committee about its meeting — Effect — Proceedings of Committee, if null and void — Injunction to restrain Council of Ministers from presenting the Bill to the Governor for assent — Power of High Court. AIR 1965 Andh Pra 306 (314, 315) = (1965) 1 Andh WR 304.

(4) Reservation of seats for Multi-purpose candidates under Osmania University Act (9 of 1959) — Source of power is Sec. 26 of Act and Article 371 of the Constitution — Reservation cannot be challenged. AIR 1962 Andh Pra 212 (218, 219) = (1962) 1 Andh WR 60 (DB).

(5) A. P. Regional Committee's Order (1958), Para 1 — Purpose of Order — Avowed purpose is to protect regional interests of Telangana. (1968) 2 Andh WR 273 (277) = ILR (1969) Andh Pra 129 (DB).

(6) Andhra Pradesh Buildings (Lease, Rent and Eviction) Control Act (XV of 1960) is not a legislation on markets and hence the procedure laid down in item 8 of the Andhra Pradesh Regional Committee Order 1958 need not be followed. ILR (1969) Andh Pra 129 = (1968) 2 Andh WR 273 (284) (DB).

^a[371A. Special provision with respect to the State of Nagaland.—(1) Notwithstanding anything in this Constitution,—

- (a) no Act of Parliament in respect of—
 - (i) religious or social practices of the Nagas,
 - (ii) Naga customary law and procedure,
 - (iii) administration of civil and criminal justice involving decisions according to Naga customary law,
 - (iv) ownership and transfer of land and its resources,
 shall apply to the State of Nagaland unless the Legislative Assembly of Nagaland by a resolution so decides;
- (b) the Governor of Nagaland shall have special responsibility with respect to law and order in the State of Nagaland for so long as in his opinion internal disturbances occurring in the Naga Hills-Tuensang Area immediately before the formation of that State continue therein or in any part thereof and in the discharge of his functions in relation thereto the Governor shall, after consulting the Council of Ministers, exercise his individual judgment as to the action to be taken:

Provided that if any question arises whether any matter is or is not a matter as respects which the Governor is under this sub-clause required to act in the exercise of his individual judgment, the decision of the Governor in his discretion shall be final, and the validity of anything done by the Governor shall not be called in question on the ground that he ought or ought not to have acted in the exercise of his individual judgment:

Provided further that if the President on receipt of a report from the Governor or otherwise is satisfied that it is no longer necessary for the Governor to have special responsibility with respect to law and order in the State of Nagaland, he may by order direct that the Governor shall cease to have such responsibility with effect from such date as may be specified in the order;

- (c) in making his recommendation with respect to any demand for a grant, the Governor of Nagaland shall ensure that any money provided by the Government of India out of the Consolidated Fund of India for any specific service or purpose is included in the demand for a grant relating to that service or purpose and not in any other demand;
- (d) as from such date as the Governor of Nagaland may by public notification in this behalf specify, there shall be established a regional council for the Tuensang district consisting of thirty-five members and the Governor shall in his discretion make rules providing for—
 - (i) the composition of the regional council and the manner in which the members of the regional council shall be chosen:

Provided that the Deputy Commissioner of the Tuensang district shall be the Chairman ex officio of the regional council and the Vice-Chairman of the regional council shall be elected by the members thereof from amongst themselves;

- (ii) the qualifications for being chosen as, and for being, members of the regional council;
- (iii) the term of office of, and the salaries and allowances, if any, to be paid to members of, the regional council;
- (iv) the procedure and conduct of business of the regional council;

Article 371-A — Note 1

(1) Scheduled Districts Act (1874), Sections 6 and 7 — Validity — Act was not invalid on ground of excessive delegation of legislative authority — Rules for Administration of Justice and Police in the Naga

Hills District made in 1906 and revised in 1937 — Rules were validly enacted and continue to apply in Nagaland and are not also hit either by Article 21 or by Article 14 of Constitution. AIR 1967 SC 212 (223) = 1967 Cri LJ 265 = (1966) 3 SCR 830.

(v) the appointment of officers and staff of the regional council and their conditions of services; and

(vi) any other matter in respect of which it is necessary to make rules for the constitution and proper functioning of the regional council.

(2) Notwithstanding anything in this Constitution, for a period of ten years from the date of the formation of the State of Nagaland or for such further period as the Governor may, on the recommendation of the regional council, by public notification specify in this behalf,—

(a) the administration of the Tuensang district shall be carried on by the Governor;

(b) where any money is provided by the Government of India to the Government of Nagaland to meet the requirements of the State of Nagaland as a whole, the Governor shall in his discretion arrange for an equitable allocation of that money between the Tuensang district and the rest of the State;

(c) no Act of the Legislature of Nagaland shall apply to the Tuensang district unless the Governor, on the recommendation of the regional council, by public notification so directs and the Governor in giving such direction with respect to any such Act may direct that the Act shall in its application to the Tuensang district or any part thereof have effect subject to such exceptions or modifications as the Governor may specify on the recommendation of the regional council:

Provided that any direction given under this sub-clause may be given so as to have retrospective effect;

(d) the Governor may make regulations for the peace, progress and good government of the Tuensang district and any regulations so made may repeal or amend with retrospective effect, if necessary, any Act of Parliament or any other law which is for the time being applicable to that district;

(e) (i) one of the members representing the Tuensang district in the Legislative Assembly of Nagaland shall be appointed Minister for Tuensang affairs by the Governor on the advice of the Chief Minister and the Chief Minister in tendering his advice shall act on the recommendation of the majority of the members as aforesaid.^b

(ii) the Minister for Tuensang affairs shall deal with, and have direct access to the Governor on, all matters relating to the Tuensang district but he shall keep the Chief Minister informed about the same;

(f) notwithstanding anything in the foregoing provisions of this clause, the final decision on all matters relating to the Tuensang district shall be made by the Governor in his discretion;

(g) in Articles 54 and 55 and clause (4) of Article 80, references to the elected members of the Legislative Assembly of a State or to each such member shall include references to the members or member of the Legislative Assembly of Nagaland elected by the regional council established under this article;

(h) in Article 170—

(i) clause (1) shall, in relation to the Legislative Assembly of Nagaland, have effect as if for the word 'sixty', the words 'forty-six' had been substituted;

(ii) in the said clause, the reference to direct election from territorial constituencies in the State shall include election by the members of the regional council established under this article;

(iii) in clauses (2) and (3), references to territorial constituencies shall mean references to territorial constituencies in the Kohima and Mokokchung districts.

(3) If any difficulty arises in giving effect to any of the foregoing provisions of this article, the President may by order do anything (including any adaptation or modification of any other article) which appears to him to be necessary for the purpose of removing that difficulty :

Provided that no such order shall be made after the expiration of three years from the date of the formation of the State of Nagaland.

Explanation.—In this article, the Kohima, Mokokchung and Tuensang districts shall have the same meanings as in the State of Nagaland Act, 1962.]

[a] Inserted by the Constitution (Thirteenth Amendment) Act, 1962, S. 2 (w. e. f. 1-12-1963).

[b] Constitution (Removal of Difficulties) Order No. X, Para. 2, (w. e. f. 1-12-1963), provides that Art. 371A shall have effect as if the following proviso were added to clause (2) (e) (i) thereof, namely :—

“Provided that the Governor may, on the advise of the Chief Minister, appoint any person as Minister for Tuensang affairs to act as such until such time as persons are chosen in accordance with law to fill the seats allocated to the Tuensang district in the Legislative Assembly of Nagaland.”—See Gaz. Ind., 29-11-1963, Pt. II, S. 3 (i), Ext., p. 833.

JAMMU AND KASHMIR

Article 371A shall be omitted—See the Constitution (Application to J. and K.) Order, 1954, Para. 2, sub-para. (16) (a) (as amended by C. O. 74).

^a[371B. Special provision with respect to State of Assam.—Notwithstanding anything in this Constitution, the President may, by order made with respect to the State of Assam, provide for the constitution and functions of a committee of the Legislative Assembly of the State consisting of members of that Assembly elected from the tribal areas specified in Part A of the table appended to paragraph 20 of the Sixth Schedule and such number of other members of that Assembly as may be specified in the order and for the modifications to be made in the rules of procedure of that Assembly for the constitution and proper functioning of such committee.]

[a] Inserted by the Constitution (Twenty-second Amendment) Act, 1969, S. 4 (25-9-1969).

372. Continuance in force of existing laws and their adaptation.—(1) Notwithstanding the repeal by this Constitution of the enactments referred to in Article 395 but subject to the other provisions of this Constitution, all the law in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority.

ARTICLE 372 — SYNOPSIS

1. Scope.
2. “Notwithstanding the repeal by this Constitution.
3. “Subject to the other provisions of this Constitution.”
4. “All the law in force.”
5. Explanation I.
6. “In the territory of India.”
7. “Until altered or repealed or amended by a competent Legislature or other competent authority.”
8. President’s power to make adaptations and modifications of any law in force — Clause (2).
9. Adaptation of Laws Order, 1950.

10. “Any such adaptation or modification shall not be questioned in a Court of Law” — Clause (2).

11. Explanation III.

1. Scope. — (1) Clause (1) of the article provides for the continuance of all the law in force notwithstanding the repeal of the Indian Independence Act, 1947, and the Government of India Act, 1935 by Article 395. The continuance of the law contemplated by this clause is subject to the other provisions of the Constitution. AIR 1956 SC 142 (145) = (1955) 2 SCR 1022 = 1956 Cri L Jour 315.

(2) The Defence of India Act, 1939, which expired on 30-9-1946 could not be

(2) For the purpose of bringing the provisions of any law in force in the territory of India into accord with the provisions of this Constitution, the President may by order make such adaptations and modifications of such law,^a whether by way of repeal or amendment, as may be necessary or expedient, and provide that the law shall, as from such date as may be specified in the order, have effect subject to the adaptations and modifications so made, and any such adaptation or modification shall not be questioned in any court of law.

(3) Nothing in clause (2) shall be deemed—

(a) to empower the President to make any adaptation or modification of any law after the expiration of ^b[three years] from the commencement of this Constitution; or

(b) to prevent any competent Legislature or other competent authority from repealing or amending any law adapted or modified by the President under the said clause.

Explanation I.—The expression “law in force” in this article shall include a law passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that it or parts of it may not be then in operation either at all or in particular areas.

Article 372 — Note 1 (contd.)

deemed to have been continued by virtue of this article. AIR 1954 SC 683 (686)= 1954 Cri L Jour 1736.

(3) This article does not have the effect of making Section 6 of the General Clauses Act, 1897, applicable to the Defence of India Act, 1939, and to the rules and orders made thereunder. AIR 1957 Punj 265 (268) (DB).

(4) The rule of construction that the Crown is not bound by a statute save by express provision or by necessary implication cannot be called the law of the land after the Constitution. It is not ‘a law in force’ within Article 372. AIR 1967 SC 997 (1007)= 1967 Cri LJ 950= (1967) 2 SCR 170. (AIR 1960 SC 1355 and AIR 1947 PC 34, Overruled.)

(5) Article 372 must be read subject to Article 277 in fiscal matters. ILR (1964) Mys 116 *° AIR 1964 SC 1172 (1178, 1179)= (1964) 6 SCR 962.

(6) Between the provision in Art. 372 (3) (b) of the Constitution and the words in Section 120 of the States Reorganisation Act, 1956, there is no distinction. The law as adapted or modified occupies the field for purpose of future amendments equally effectively in both cases. AIR 1959 Ker 182 (182, 183)= 1958 Ker LT 1144 (FB).

(7) Article 372 cannot be invoked for the purpose of coming to the conclusion that Section 122, Civil P. C. ceased to be in force on commencement of Constitution — Applicability of Article 372 postulates that there is inconsistency between Section 122 Civil P. C. and Proviso to Article 227 of Constitution. AIR 1969 Guj 18 (20)= 9 Guj LR 873 (DB).

(8) By the execution of the agreement between President of India and Rajpramukh of Travancore-Cochin, the effect of Article 277 has been completely wiped

out between the parties and it is no longer open to the State to fall back upon Article 277 after the expiry of the agreement. AIR 1968 Ker 105 (112)= 1968 Ker LT 1001 (FB). (1964 Ker LJ 738, Overruled.)

(9) Deputy Minister of State — Not disqualified under Article 191 (1) (a) from being member of Legislative Assembly or Legislative Council — Protection under Article 191 (2) available. AIR 1968 Bom 219 (221)= 69 Bom LR 871.

(10) U. P. Agricultural Income-tax Act (III of 1949) (as amended by U. P. Agricultural Income-tax (Amendment) Act (XIV of 1953), Section 2, Clause (II), Explanation — Amendment by Explanation is effective under Article 372. 1955 All LJ 322 (322, 323) *° 1955 All LJ 325.

(11) Emergence of new State or change of sovereignty within State does not bring about any change in private rights of its citizens or law governing such rights. AIR 1959 Mad 410 (417).

(12) As the Court-fees Act (1870) cannot be deemed to have been continuing as a Central Act when the Constitution came into operation it cannot thereafter be considered to be an Act of the Union of India. This is so by virtue of Article 372 (1). AIR 1960 Bom 96 (98)= 61 Bom LR 996.

2. “Notwithstanding the repeal by this Constitution.” — (1) This saving clause limits the operation of Article 395 to the enactments actually mentioned therein and excludes from its operation the legislation passed under such enactments. AIR 1956 Assam 166 (168) (DB) *° AIR 1956 Cal 222 (223) (DB).

(2) Article 372 saves Essential Supplies (Temporary Powers) Act, 1946, in spite of the repeal of the Indian (Central Government and Legislature) Act, 1946 on the commencement of the Constitution. AIR 1952 Pat 185 (191)= ILR 31 Pat 97= 1952 Cri L Jour 493 (FB).

Explanation II.—Any law passed or made by a Legislature or other competent authority in the territory of India which immediately before the commencement of this Constitution had extra-territorial effect as well as effect in the territory of India shall, subject to any such adaptations and modifications as aforesaid, continue to have such extra-territorial effect.

Explanation III.—Nothing in this article shall be construed as continuing any temporary law in force beyond the date fixed for its expiration or the date on which it would have expired if this Constitution had not come into force.

Explanation IV.—An Ordinance promulgated by the Governor of a Province under Section 88 of the Government of India Act, 1935, and in force immediately before the commencement of this Constitution shall, unless withdrawn by the Governor of the corresponding State earlier, cease to operate at the expiration of six weeks from the first meeting after such commencement of the Legislative Assembly of that State functioning under clause (1) of Article 382,^c and nothing in this article shall be construed as continuing any such Ordinance in force beyond the said period.

[Government of India Act (1935), Ss. 292, 293: See also the India and Burma (Existing Laws) Act, 1937 (1 Edw. 8 and 1 Geo. 6, C. 1), S. 1.]

[a] See the Adaptation of Laws Order, 1950, (C. O. 4), Gaz. Ind., 26-1-1950, Ext., p. 449 as amended by S. R. O. 115, Gaz. Ind., 5-6-1950, Pt. II, S. 3, Ext., p. 51; by S. R. O. 8170, Gaz. Ind., 4-11-1950, Pt. II, S. 3, Ext., p. 903: S. R. O. 508, Gaz. Ind., 4-4-1951, Pt. II, S. 3, Ext., p. 287: S. R. O. 1140B, Gaz. Ind., 3-7-1952, Pt. II, S. 3, p. 616 I.

[b] Substituted for 'two years' by the Constitution (First Amendment) Act, 1951, S. 12 (18-6-1951).

[c] Article 382 is now omitted by the Constitution (Seventh Amendment) Act, 1956 (1-11-1956).

Article 372 — Note 2 (contd.)

(3) The purpose of the first clause of this article was clearly to negative the possibility of any existing law being held to be no longer in force by reason of the repeal of the law which authorised its enactment and it is a safeguard usually inserted by draftsmen in similar circumstances. AIR 1941 FC 16 (24) = 1940 FCR 110 = ILR (1941) Kar (FC) 72.

(4) The use of the expression "notwithstanding the repeal by this Constitution" can be fully explained as one designed to stress the fact of the subsidiary legislation being still alive while the present Act stands repealed. AIR 1956 Cal 222 (224) (DB).

(5) Even an Act repealed by Article 395 will continue in force subject to the other provisions of the Constitution by virtue of this article. AIR 1957 SC 540 (556) = 1957 SCR 488.

[But see AIR 1954 Mad 543 (547) = ILR (1954) Mad 643 (DB).]

(6) Section 6 of the General Clauses Act 1897, had no application to the repeal of statutes made by Parliament in England, (which repeal has been brought about by the Constitution) and it is for this reason that this article provides that notwithstanding the repeal of those statutes, the laws enacted under them and in force immediately before the commencement of the Constitution shall continue in force thereafter also. AIR 1954 SC 683 (686) = 1954 Cri L Jour 1736.

(7) Section 6 of the General Clauses Act which is made applicable to the interpretation of the Constitution by Article 367 (1), can have no application to preserve rights and privileges acquired while the Government of India Act was in force. AIR 1954 SC 158 (163) = 1954 SCR 541.

(8) The effect of the words "notwithstanding the repeal" is that the existing laws have been continuous in their operation. See AIR 1945 FC 25 (29) = 1945 FCR 1 = ILR (1945) Kar (FC) 39.

(9) Santhal Parganas Settlement Regulations (Reg. 3 of 1872) — Was law in force before advent of Constitution — Still holds good by virtue of Article 372. AIR 1969 Pat 331 (333) (DB).

(10) The repeal of the Government of India Act, 1935, would not confer constitutional validity on a notification, which was ultra vires as contravening the prohibition as contained in Section 296 of that Act, from the date on which the Constitution came into force. AIR 1953 Assam 170 (175) = ILR (1953) 5 Assam 363 (DB).

3. "Subject to the other provisions of this Constitution." — (1) These words mean that if there are other provisions in the Constitution which make a law passed before the Constitution invalid, such a law cannot be continued by the provisions of this article. AIR 1958 All 126 (131).

(2) What these words mean is that if any law happens to be contrary to any

JAMMU AND KASHMIR

In its application to the State of Jammu and Kashmir, in Article 372—

- (i) clauses (2) and (3) shall be omitted;
- (ii) references to laws in force in the territories of India shall include references to hidayats, ailians, ishtihars, circulars, robkars, irshads, yadashts, State Council Resolutions, Resolutions of the Constituent Assembly, and other instruments having the force of law in the territory of the State of Jammu and Kashmir; and
- (iii) references to the commencement of the Constitution shall be construed as references to the commencement of this Order.

—See Constitution (Application to J. and K.) Order, 1954, Para. 2, sub-para. (16) (b) (14-5-1954).

Article 372 — Note 3 (contd.)

provision of the Constitution, to that extent that law would cease to continue in force, that is, it would be rendered void. AIR 1955 All 99 (104)= ILR (1956) 1 All 107 ** AIR 1958 J and K 29 (34)= 1958 Cri L Jour 885 (FB) ** AIR 1964 SC 207 (213, 214)= (1964) 4 SCR 280. (AIR 1962 Ker 72 (FB), Reversed.)

(3) There is an irreconcilable conflict between Section 69 read with Section 29 of the Cochin Abkari Act (1 of 1077, M. E.) and Articles 245 (1) and 246 (3) and hence the provisions of the Constitution shall prevail. AIR 1965 Ker 8 (11, 12, 13)= 1964 Ker LT 189.

(4) The general intent of the Constitution is that pre-existing laws are to operate after the Constitution only so far as they are consistent with the Constitution and that so far as they are not so consistent they are to cease to operate. AIR 1955 Cal 451 (455) (DB).

(5) Phrase "Subject to the provisions of this Constitution" in Article 372 applied to a law made before the Constitution came into force — It has no reference to competence of Parliament or of a State Legislature to enact such a law after Constitution came into force. AIR 1958 All 872 (875, 876)= 1959 All LJ 17 (DB). (Reversed on another point in AIR 1962 SC 764.)

(6) Under Article 372 (1) only such existing laws as are in consonance with the scheme of the Constitution are saved. 1955 Andh LT (Cri) 205.

(7) The general proposition that the word law for the purposes of Article 372, as well as for Article 265, need not necessarily be statute law but any law that had the force of law prior to the Constitution would be saved by virtue of Article 372 has no validity. (1965) 2 Andh LT 297. (AIR 1965 SC 1061, Distinguished.)

(8) Notification under Section 27, Bihar and Orissa Excise Act (2 of 1915) imposing countervailing duty on foreign liquor imported into State saved by Articles 305 and 372 — Later notification in 1961, enhancing the duty invalid as violating Articles 301 and 304. AIR 1966 SC 1686 (1690)= (1966) 1 SCR 865.

(9) Expression "subject to other provisions of the Constitution" means that if there is conflict between pre-existing law and provision of the Constitution, latter will prevail — Article 372 is subject to Article 278. AIR 1964 SC 207 (213, 214, 215)= (1964) 4 SCR 280. (AIR 1962 Ker 72 (FB), Reversed.)

(10) The U. P. Sales Tax Act (15 of 1948) continued to be in force in the State of Uttar Pradesh only to the extent to which it did not contravene the provisions of Article 286, Clause (1) (a). AIR 1955 All 99 (104)= ILR (1956) 1 All 107.

(11) The U. P. Municipalities Act (2 of 1916) was continued in force by Section 292 of the Government of India Act, 1935 and Section 18 (3) of the Indian Independence Act, 1947, and is even now in force by virtue of the provisions of Art. 372. AIR 1961 All 583 (586, 588)= 1961 All LJ 386.

(12) The Kerala General Sales Tax Act (11 of 1125) does not violate Article 277 and is therefore within legislative competence. AIR 1968 Ker 105 (109)= 1968 Ker LT 1001 (FB).

(13) No more than Article 13, Clause (1) does Article 372 (1) operate as an automatic repeal of a statute at the commencement of the Constitution even if the statute fails to satisfy the test imposed by this Article in the phrase "subject to the other provisions of this Constitution." AIR 1953 Mad 729 (732)= 1953 Cri L Jour 1364 (DB).

(14) The words "subject to the provisions of this Constitution" do not make this Article subject to the provisions of Articles 245 and 246. AIR 1958 All 126 (131).

(15) Motor Vehicles Act (1939), Chapter IV-A, Section 68-B (as amended by Act 100 of 1956) — Not void as it is not repugnant to Article 372 — It is not a fetter on future legislation. AIR 1959 Andh Pra 292 (299, 300)= (1958) 2 Andh WR 211 (DB).

(16) The validity of an Act passed by a competent Legislature prior to the Constitution cannot be tested in the light of the legislative distribution of powers effected by Seventh Schedule. AIR 1958 All 126 (131) ** AIR 1957 Ker 146 (149, 150)= ILR (1957) Ker 462 (DB) ** AIR 1954 Pat 346 (346, 347) (DB).

Article 372 — Note 3 (contd.)

(17) U. P. Zamindari Abolition and Land Reforms Act (1 of 1951) — Act does not cease to be operative when provincial legislature which passed it was dissolved. AIR 1953 All 92 (93, 94) = 1952 All LJ 677 (DB).

(18) Scheduled Districts Act (1874), Ss. 6 and 7 — Act and Rules thereunder were not invalid on ground of excessive delegation of legislative authority nor are they hit either by Art. 21 or 14. AIR 1967 SC 212 (223) = 1967 Cri LJ 265 = (1966) 3 SCR 830.

(19) The words "subject to the other provisions of this Constitution" do not render the laws passed by a competent authority as non-existent. AIR 1958 All 126 (131, 132) * AIR 1955 All 99 (104) = ILR (1956) 1 All 107.

(20) The laws which had been passed by the Central Legislature prior to the Constitution do not automatically cease to have effect. AIR 1957 Punj 91 (92) = ILR (1956) Punj 1377 = 1957 Cri L Jour 540 * AIR 1958 J and K 29 (35) = 1958 Cri L Jour 885 (FB) * AIR 1951 All 816 (817) = ILR (1952) 1 All 862 = 52 Cri L Jour 1474 (DB) * AIR 1958 Cal 365 (373).

(21) The Essential Supplies (Temporary Powers) Act, 1946, which is a Central Act does not cease to be in force at the date of the commencement of the Constitution. AIR 1951 All 816 (817) = ILR (1952) 1 All 862 = 52 Cri L Jour 1474 (DB).

(22) The Police Act, 1861, remains in force at the commencement of the Constitution. AIR 1957 Punj 91 (92) = ILR (1956) Punj 1377 = 1957 Cri L Jour 540 * AIR 1958 Cal 365 (372).

(23) Article 13 expressly renders all laws in force in the territory of India immediately before the commencement of the Constitution void so far as they are inconsistent with the Fundamental Rights contained in Part III. AIR 1950 Cal 274 (285, 286) = 51 Cri L Jour 1110 (SB) * AIR 1958 All 126 (131, 132) * AIR 1950 Pat 265 (270) = ILR 29 Pat 335 = 51 Cri L Jour 1081 (DB).

(24) The following laws have been judicially held to be inconsistent with Part III and, therefore, not continued after the Constitution:

(a) Section 14, Fugitive Offenders Act, 1881 (44 and 45 Vict. c. 69) AIR 1953 Mad 729 (732, 736) = 1953 Cri L Jour 1364 (DB).

(b) Section 124A, Penal Code, 1860. AIR 1951 Punj 27 (29, 30) = ILR (1951) Punj 193 = 52 Cri L Jour 449 (DB).

[Note: The validity of this section is now not open to question under Art. 19 — See in this connection. AIR 1962 SC 955 (969) = 1962 (2) Cri LJ 103 = 1962 Supp (2) SCR 769.]

(c) Bengal Criminal Law Amendment Act 1930 and W. B. Security Ordinance

(No. 2 of 1949). AIR 1950 Cal 274 (286) = 51 Cri L Jour 1110 (SB).

(d) C. P. and Berar Public Safety Act, 1948. AIR 1950 Nag 203 (206) = 51 Cri L Jour 1372 (DB).

(e) The customary Law of Pre-emption as enforced by the Courts prior to the Constitution. AIR 1954 Hyd 161 (163) = ILR (1954) Hyd 85 (FB) * AIR 1954 Raj 100 (103) = ILR (1954) 4 Raj 84 (FB).

(25) The following laws have been held to be not unconstitutional and hence continued by this Article

(a) Section 2 (g), Expl. II of C. P. and Berar Sales Tax Act (21 of 1947). 1961 MPLJ 894.

(b) Section 20 of Punjab Courts Act (6 of 1918). AIR 1969 Punj 331 (334, 335) (DB).

(c) The Mysore Agriculturists' Relief Act (18 of 1928). AIR 1965 Mys 54 (58) (FB).

(d) Madras Motor Vehicles Rules (1940) Rule 160-C. AIR 1956 Andhra 129 (132) = 1956 Andh WR 142 (DB).

(e) Mysore House Rent and Accommodation Control Order (1948), Cl. 9 (1). AIR 1961 SC 272 (274) = (1961) 1 SCR 591.

(f) Rajasthan Stamp Law (Adaptation) Act (7 of 1952), Section 6, Second Proviso. AIR 1961 Raj 181 (181) = 1960 Raj LW 647 (DB).

(26) The C. P. and Berar Prohibition Act (7 of 1938) continues to be in force by operation of this article. AIR 1951 Nag 58 (84, 85, 87, 89) = ILR (1951) Nag 646 = 52 Cri LJ 1140 (FB).

(27) The Service Rules framed by the Orissa Government prescribing knowledge of Oriya of a certain standard do not violate Article 16, and, hence they are continued in force by virtue of this Article. AIR 1955 Orissa 113 (115) = ILR (1955) Cut 510 (DB).

(28) Civil Servant — Misconduct prior to Constitution — Final action taken after Constitution should be in accordance with Constitution and not according to pre-Constitution Rules which ceased to have effect. AIR 1960 Andh Pra 479 (482) = ILR (1960) 2 Andh Pra 148 (DB).

(29) The prerogative of an ex-Ruler of an Indian State relating to death sentences is inconsistent with the provisions of Arts. 72, 161 and 238 (now repealed) and, therefore, a covenant affirming the prerogative no longer survives. AIR 1956 SC 142 (145) = (1955) 2 SCR 1022 = 1956 Cri L Jour 315.

(30) Every order of an ex-Ruler of a former princely State cannot be regarded as law, particularly those which were in violation of his own laws. 1968 Jab LJ 108 (113) (SC).

(31) Power of Maharaja of Cochin to grant suspension, remission or commutation of

Article 372 — Note 3 (contd.)

sentence cannot be invoked or exercised after commencement of Constitution. ILR (1955) Trav-Co 788 (DB).

(32) Order by Ruler determining nature of some grant — Order is final and fully effective — Parties cannot question it or can go behind it. ILR (1966) 16 Raj 497 = 1966 Raj LW 469 (DB).

(33) Article 133 overrides the right of appeal under Section 109, Civil P. C. AIR 1951 Mad 1051 (1055) = ILR (1953) Mad 65 (DB).

(34) The right of appeal under Sec. 476B, Criminal P. C., must yield to the restricted right of appeal under Article 134 of the Constitution. AIR 1951 Mad 1060 (1063) = ILR (1952) Mad 638 = 1952 Cri L Jour 61 (DB).

(35) Section 85 (5) of the U. P. Panchayat Raj Act (26 of 1947), must be read subject to the provisions of Articles 226 and 227. AIR 1952 All 963 (964) = ILR (1952) 1 All 558 = 1952 Cri L Jour 1695 (DB).

(36) A law may also be repugnant to a law made by Parliament and, therefore, it will not be continued in force under this article read with Article 254. AIR 1952 Hyd 187 (190) = ILR (1952) Hyd 684 = 1952 Cri L Jour 1740 (FB).

(37) Regulation 52 of the Regulations framed under Section 266, sub-section (3) of the Government of India Act, 1935, is not consistent with the Constitution. AIR 1955 Cal 451 (454, 457) (DB).

(38) There is nothing in Sections 3 and 4 of the Madhya Bharat Interim Legislative Assembly Act (23 of 1949) which is inconsistent with any provision of the Constitution. AIR 1952 Madh Bha 31 (34) = ILR (1952) Madh Bha 145 (DB).

(39) The provisions of the Manipur Constitution Act, continue to remain in force under this article. AIR 1955 Manipur 41 (46) = 1955 Cri L Jour 1603.

4. "All the law in force." — (1) This expression is not defined for the purposes of this article. In the absence of any definition, the expression would bear its natural and grammatical meaning. AIR 1956 Assam 166 (169) (DB).

(2) There is not any material difference between the expressions "existing law" and a "law in force." The words "law in force" are wide enough to include not merely a legislative enactment but also any regulation or order. AIR 1955 SC 25 (31) = 1955 SCR 735 ** AIR 1957 Ker 146 (149) = ILR (1957) Ker 462 (DB) ** AIR 1966 Assam 29 (34) (DB).

(3) No doubt the expression "law in force" has been generally used as synonymous or interchangeable with the expression "existing law", it is of no avail in taking the matter any further. (1957) 33 Cut LT 263 = 9 Orissa JD 41 (DB).

(4) The Letters Patent falls under the definition of 'existing law' in Article 366 (10) of the Constitution as it is an order made under statutory authority. AIR 1958 Madh Pra 333 (335, 336) = 1958 MPLJ 298 (DB). (AIR 1953 SC 357 and AIR 1955 SC 25, Foll.)

(5) Bihar Sugar Factories Control Act 1937 was an existing law within Art. 366 (10) and continued to be in force under Article 372 till the Essential Commodities Act was passed by Parliament. AIR 1969 Pat 8 (9, 10) (DB).

(6) The expression "all the law in force" includes any statutory law. AIR 1954 SC 680 (682) ** AIR 1953 SC 63 (65) = 1953 SCR 644 = 1953 Cri L Jour 515 ** AIR 1954 Trav-Co 131 (135) = ILR (1953) Trav-Co 1145 (FB) ** AIR 1952 Pat 185 (191) = ILR 31 Pat 97 = 1952 Cri L Jour 493 (FB) ** AIR 1951 Nag 58 (84, 85, 87, 89) = ILR (1951) Nag 646 = 52 Cri L Jour 1140 (FB) ** AIR 1962 SC 167 (169, 170) = (1962) 3 SCR 88 ** AIR 1961 SC 964 (967) = (1962) 1 SCR 1 ** AIR 1967 All 15 (19).

(7) The expression "existing laws" includes not only Acts passed by the Central Legislature but also Acts passed by Governor-General-in-Council and the Provincial Legislature on concurrent topics, as well as the rules made under any of these Acts. (1967) 69 Bom LR 326 (338) = 1967 Mah LJ 674 (DB).

(8) There is no repugnancy between Bombay Forward Contract Control Act (64 of 1947) and the Essential Supplies (Temporary Powers) Act (1946). Article 372 continued both these Acts after the Constitution. AIR 1961 SC 823 (827) = (1961) 2 SCR 780.

(9) The expression "all the law in force" includes an Ordinance. AIR 1956 J & K 26 (27) (DB) ** AIR 1955 Cal 614 (615) = 1955 Cri L Jour 1582 (DB) ** AIR 1955 Pepsu 23 (25) = ILR (1954) Patiala 671 ** AIR 1952 Pat 148 (Pr 5) = ILR 31 Pat 170 = 1952 Cri L Jour 476 (DB) ** AIR 1952 Raj 137 (138) = ILR (1951) 1 Raj 853 (DB) ** AIR 1952 Trav-Co 66 (69) = 1950 Trav-Co LR 215 ** AIR 1960 SC 1312 (1316) = 1961 Cri LJ 165 ** AIR 1969 J and K 5 (6) = 1969 Cri LJ 67 = 1968 Kash LJ 299 (FB).

(10) An order by a competent authority is covered by the expression "all the law in force." AIR 1956 Assam 166 (169) (DB) ** AIR 1952 Assam 95 (96) (DB).

(11) The expression "all the law in force" includes a rule. AIR 1956 Andhra 161 (164, 165) = ILR (1956) Andhra 13 = 1956 Cri LJ 1049 (FB) ** AIR 1956 Raj 145 (150) (DB) ** AIR 1955 Pat 381 (384) = ILR 34 Pat 608 (DB) ** AIR 1954 Mad 543 (547) = ILR (1954) Mad 643 (DB) ** AIR 1951 Mys 65 (65) = 52 Cri L Jour 822 (DB) ** AIR 1956 Andhra 161 (164, 165) = 1956

Article 372 — Note 4 (contd.)

Cri LJ 1049 = 1956 Andh WR 456 (FB) ** (1967) 9 Orissa JD 139 = ILR (1967) Cut 735 (DB).

(12) Rules framed by erstwhile Nawab of Tonk are not mere executive orders or domestic instructions — Rules amount to existing law within Article 366 (10). 1961 Raj LW 386 = ILR (1961) 11 Raj 596 (604, 605) (DB).

(13) So long as the Legislature does not pass any Act regarding the recruitment and conditions of service of the persons appointed to the service of the State, the *Saddar-i-Riyasat* is free to make such rules as it desires in order to regulate the conditions of service of the State. AIR 1964 J and K 14 (15) = 1963 Kash LJ 125 (DB).

(14) Jaintia Hills Autonomous District (Administration of Justice) Rules (1953), R. 22 — Rule is valid provision. AIR 1963 Assam 31 (36) (DB).

(15) A regulation is a law in force within this article. AIR 1957 All 436 (438) = ILR (1957) 1 All 269.

(16) Patiala State Forces Regulations — Provision being mandatory could not be disregarded — Order against provisions held illegal. ILR (1965) 1 Punj 752 = 1965 Cur LJ 269.

(17) Regulation 11 (1) of Bihar Public Service Commission (Limitation of Functions) Regulation being an existing Law continues to be in force until altered, repealed or amended. AIR 1956 Pat 228 (232, 233) = 1956 Pat LR 110 (DB).

(17A) Bihar Sugar Factories Control Act (1937) is a pre-Constitution Act and it could have continued to be in force only till it was altered, repealed or amended by a competent Legislature or other competent authority. AIR 1970 SC 267 (269) = (1969) 2 SCC 34.

(18) Section 11 of Regulation of 1358-F not being in conflict with any of the provisions of the Constitution must be held to be in force. AIR 1959 Andh Pra 159 (164, 165) = (1959) 1 Andh WR 275 (DB).

(19) A mere executive order cannot come within the definition of "existing law" and is not, therefore, "a law in force". AIR 1955 SC 25 (31) = 1955 SCR 735 ** AIR 1956 Trav-Co 117 (118) = ILR (1955) Trav-Co 1274 (FB) ** AIR 1958 Ker 79 (79) = ILR (1957) Ker 884 (DB) ** AIR 1956 Pepsu 26 (28) = ILR (1955) Patiala 703 ** AIR 1966 Madh Pra 32 (34) = 1967 MPLJ 658 (DB) ** AIR 1965 Madh Pra 183 (185) = 1965 MPLJ 754 (DB).

(20) Order holding certain houses to be private property of Ruler held to be executive and not law. AIR 1967 Madh Pra 6 (11, 12) = 1967 MPLJ 79.

(21) A notification issued by the Government or any competent authority in the exercise of delegated power of legislation is a part of the law itself. AIR 1956 Madh Bha 138 (139) = 1956 Cri L Jour 621 (FB)

** AIR 1953 Nag 228 (230) = ILR (1952) Nag 802 (DB).

(22) A notification issued in the exercise of executive functions cannot be said to be a law in force. AIR 1956 Madh Bha 138 (139) = 1956 Cri L Jour 621 (FB) ** AIR 1952 Trav-Co 14 (19) = 1950 Trav-Co LR 162.

(23) A notification issued by the Governor-General under Section 94, sub-sec. (3), Government of India Act, 1935, was an order and it was held to come within the expression "law in force". AIR 1955 SC 25 (31) = 1955 SCR 735.

(24) A notification issued under Section 4 of the Essential Supplies (Temporary Powers) Act, 1946, was an order and was a law in force. AIR 1957 Madh Pra 145 (147) = 1957 Cri L Jour 1134 (DB).

(25) The Army Instructions cannot be taken to be a law within the meaning of this article. AIR 1955 Cal 543 (547) (DB).

(26) The Covenants entered into by the Rulers of the former Indian States with the Government of India have not the status of law and are not saved by this article. AIR 1955 Raj 135 (139, 140) = ILR (1955) 5 Raj 693 (FB) ** AIR 1953 Madh Bha 65 (74) = ILR (1952) Madh Bha 422 (FB).

(27) Laws of Covenanted States continue to operate after merger. AIR 1960 Raj 256 (276) = 1960 Raj LW 257 (FB).

(28) Agreement between Rulers and Company in shape of contract, exempting company from taxes and octroi and granting certain privileges in return for certain acts done by company — Agreement is not law AIR 1964 SC 888 (891) = (1964) 4 SCR 190 ** AIR 1963 SC 953 (958, 959) = 1963 Supp (2) SCR 515 ** AIR 1965 Raj 162 (166) = 1965 Raj LW 188 (DB).

(29) Personal grant by Ruler of Nabha as a sovereign — It is law — Grant repudiated by new Pepsu State — Repudiation is not act of State and is justiciable in municipal Courts. AIR 1960 Punj 644 (645) = ILR (1959) Punj 2341.

(30) Order by former Ruler of Indian State fixing certain monthly allowance to be paid to his brother — Held order was not law. AIR 1966 SC 704 (706, 707) = (1966) 2 SCR 56. (AIR 1962 Madh Pra 257, Reversed.) ** AIR 1964 SC 1793 (1796, 1797, 1798, 1799) = (1964) 7 SCR 112.

(31) Order by Ruler of former State of Rewa granting pension to State servant — Order held was not law — Order held did not make a grant. AIR 1966 SC 820 (820, 821). (AIR 1961 Madh Pra 154 (FB) Reversed.)

(32) Right in forest created by Ruler of Indian State by Tharao — Right not recognised by Government after merger of State — Right cannot be enforced in Municipal Court — Tharao held was not law. AIR 1964 SC 1043 (1056, 1075, 1082, 1092) = (1964) 6 SCR 461. (AIR 1961 Guj 151, Reversed.)

Article 372 — Note 4 (contd.)

(33) Managing agent's commission — No deduction can be made in computing profits — Notification of Ruler disallowing such deduction has the force of law. AIR 1963 SC 332 (336) = (1962) 2 SCR 859.

(34) Kalambandis of 1912 and 1935 — Orders issued by absolute monarch like Ruler of erstwhile Gwalior State had force of law and would amount to existing law. AIR 1961 SC 298 (303) = (1961) 1 SCR 957. (AIR 1953 Madh Bha 257, Reversed.)

(35) Only those orders of the Ruler which are jurisprudentially legislative acts will continue as laws under Article 372. AIR 1964 SC 1903 (1910, 1911, 1912, 1913) = (1964) 7 SCR 892. (AIR 1960 Madh Pra 330, Reversed.)

(36) Conditions laid down by British Government in respect of Jagir land — Conditions cannot be deemed to become inoperative on wake of independence and holders of land do not become absolute owners thereof. 1965 Cur LJ 752.

(37) The article applies not only to statutory enactments then in force but to all laws, including even personal laws, customary laws and common laws. AIR 1941 FC 16 (31) = 1940 FCR 110 = ILR (1941) Kar (FC) 72 ** AIR 1954 Raj 100 (103) = ILR (1954) 4 Raj 84 (FB).
ILR (1954) 4 Raj 84 (FB) ** AIR 1965 Bom 9 (11) = 1965 (1) Cri LJ 18 = 66 Bom LR 356 (DB) ** AIR 1960 Bom 552 (554) = 62 Bom LR 277 (DB) ** AIR 1959 Madh Pra 212 (216) = 1959 MPLJ 415 (DB) ** AIR 1958 Madh Pra 423 (425) = 1958 MPLJ 419.

[But see AIR 1952 Bom 84 (89) = ILR (1951) Bom 775 = 1952 Cri L Jour 354 (DB) ** AIR 1952 Bom 16 (25) (DB).]

(38) The article applies to personal and customary laws, like Hindu and Muhammadan laws. AIR 1954 Hyd 161 (163) = ILR (1954) 1 Hyd 85 (FB) ** AIR 1954 Raj 100 (103) = ILR (1954) 4 Raj 84 (FB) ** AIR 1956 Cal 222 (224) (DB).

(39) The article applies to the principles of English Common Law which have been held by judicial decisions to be applicable to India. AIR 1956 Cal 26 (31) ** AIR 1955 Bom 305 (313) = ILR (1955) Bom 654 (DB) ** AIR 1955 Cal 423 (428) ** AIR 1965 SC 1061 (1068) = (1965) 2 SCR 289 ** AIR 1965 All 474 (477, 478) = 1964 All LJ 956 (DB) ** AIR 1961 Punj 292 (294, 295) = ILR (1960) 1 Punj 809 ** AIR 1959 Punj 533 (534, 535) = 60 Punj LR 142.

(40) The article occurs in Part XXI of the Constitution which provides for temporary and transitional provisions. It was necessary that the law in force should continue and, therefore, instead of using the expression "existing law" which refers to statutes, a comprehensive expression "all the law in force" was used in the article. AIR 1956 Assam 166 (169) (DB).

(41) The Explanation is not exhaustive but only illustrative of the meaning of "law in force", for the purpose of this article. AIR 1956 Cal 222 (224) (DB).

(42) The levy, assessment and collection of land revenue, in respect of ryotwari lands, not having been rendered illegal by reason of Article 265, are continued by force of this article. AIR 1958 Mad 539 (543) = ILR (1958) Mad 798 (DB).

(43) The decisions of the Judicial Committee of the Privy Council are binding on the High Courts as law in force. AIR 1953 Orissa 117 (119, 120) = ILR (1953) Cal 12 (SB) ** AIR 1953 Bom 209 (212) ** AIR 1952 Nag 205 (207, 210) = ILR (1949) Nag 330 ** AIR 1965 All 65 (67, 68) = 1964 All LJ 389 (FB) ** AIR 1953 Cal 524 (526) = 57 Cal WN 127 (DB).

[But see AIR 1955 Cal 282 (284, 288) = 1955 Cri L Jour 792 (DB) ** AIR 1954 Assam 139 (143) = ILR (1953) 5 Assam 389 (DB).]

(44) The Supreme Court will not be bound by the decisions of the Privy Council or of the Federal Court. AIR 1954 SC 245 (249) = 1954 SCR 786 ** AIR 1964 Cal 396 (399) (DB).

(45) The law settled by the Federal Court will continue to be applicable even after the advent of this Constitution till it is altered by the Supreme Court or by a competent authority. AIR 1959 Andh Pra 359 (360) (DB).

(46) Privy Council decisions are entitled to very great respect. AIR 1950 SC 169 (171) = 1950 SCR 453 = 51 Cri L Jour 1270 ** AIR 1952 Pat 341 (345) = ILR 31 Pat 446 (SB).

(47) In those cases in which judgments of Federal Court were reversed by P. C. what determines the rights of the parties and to be given effect to is the decision of the P. C. because of Articles 372 and 295. AIR 1951 Mys 72 (75) = 52 Cri LJ 992 = ILR (1951) Mys 284 (FB).

(48) Treaties which are part of International Law do not form part of the law of the land, and, unless expressly made so by the legislative authority, cannot be continued under this article. AIR 1951 Raj 127 (129) = 52 Cri L Jour 1021 (DB).

(49) After the attainment of a sovereign independent status, the Courts in India are not bound to follow the English rules of Private International Law or for the matter of that, any rule, excepting their own. AIR 1952 Cal 508 (516, 523).

(50) Section 12 or Section 14 of the Fugitive Offenders Act, 1881 (44 & 45 Vict., c. 69), which is an Act of the British Parliament, has no force in India by reason of the provisions of this article. AIR 1954 SC 517 (519) = 1955 SCR 280 = 1954 Cri L Jour 1337.

(51) Institution incorporated under Royal Charter — Approval from Privy Council not obtained as required by the Charter — Suit

Article 372 — Note 4 (contd.)

by member to restrain giving effect to bye-laws not maintainable — It could not be said that by virtue of Clause 22 of Adaptation of Laws Order read with Article 372 of Constitution Crown could exercise under Clause 18 of Charter any authority. AIR 1964 Cal 73 (75, 76) = 67 Cal WN 960.

(52) Article 372 (1) read with the explanation, provides for keeping intact the summary jurisdiction of the High Courts to punish for contempt of Court which was valid law prior to enforcement of Constitution. AIR 1960 Pat 430 (446) = 1960 Cri LJ 1254 = 1960 BLJR 622 (FB) ** AIR 1969 Delhi 201 (207) = 1969 Cri LJ 884 (FB) ** AIR 1968 Ker 301 (309) = 1968 Cri LJ 1424 = 1968 Ker LT 157 (DB).

(53) Provisions for administration of justice made by notification of 1903 did not form part of law in force in territories of India immediately before commencement of Constitution — Hence Article 372 has no application to those provisions. (1965) 69 Cal WN 692.

(54) Hindu Women's Rights to Property Act (1937), does not apply to devolution or succession to agricultural lands even after enactment of Constitution. AIR 1965 Punj 254 (256) = 65 Pun LR 1103 (DB) ** AIR 1968 Cal 83 (85) = 71 Cal WN 321 (DB).

(55) Orissa Mining Areas Development Fund Act (27 of 1952) — Validity — Subject-matter of Act falls under List II, Entries 23 and 66 of Sch. 7 of the Constitution — Validity not impaired by List I, Entries 52 and 54 read with Central Act 65 of 1951 and Central Act 53 of 1948 respectively. AIR 1961 SC 459 (472, 473) = (1961) 2 SCR 537.

(56) The Madras City Municipal Act having been enacted while the powers of the Local Legislatures were governed by the Government of India Act, 1915, the constitutional validity of the legislation is not open to any challenge. AIR 1964 SC 1172 (1174) = (1964) 6 SCR 846.

5. Explanation I.— (1) This Explanation provides that even though a law has not been brought into force at all or in any particular area, it shall still be regarded as a 'law in force' if it has been passed by a Legislature or other competent authority in the territory of India and has not been repealed. AIR 1956 Cal 222 (225) (DB).

(2) The Constitution has given an extended meaning to the expression "law in force" by including therein any law or any part thereof which may not be in operation at the date of the commencement of the Constitution at all or in particular areas. AIR 1952 Bom 16 (23, 24) (DB).

(3) The phrase "in the territory of India" in Expl. I to Article 372, governs the expression 'the law made by the authority'. AIR 1956 Andhra 161 (165) = ILR (1956) Andhra 13 = 1956 Cri L Jour 1049 (FB).

(4) The term "other competent authority" in Explanation I is wide enough to include the Governor or any other authority which has been empowered to make rules and regulations having the force of law. AIR 1954 All 813 (814, 815) = ILR (1955) 2 All 800 (DB).

(5) When the Constitution intends to refer to a law which is in force at the time of the Constitution it uses the expression "law in force" and "existing law" means law enacted before the Constitution though it may not have been brought into operation in whole or in part. AIR 1954 Mad 621 (631, 632) (DB).

(6) In this Explanation the emphasis is on laws duly passed by a Legislature but not yet brought into force. It thus contemplates a particular class of Acts and does not seek to restrict the scope of the expression "law in force" in clause (1) of the article. AIR 1956 Cal 222 (225) (DB).

(7) The Police Act, 1861, is a piece of legislation which though in existence does not come into force in any area by itself. In view of this Explanation, this Act would be a "law in force". AIR 1957 Raj 28 (29) = ILR (1956) 6 Raj 636 (DB).

(8) Held on facts that the expression "cease to be in force" in Clause 8 of Provinces and States (Absorption of Enclaves) Order (1950) was not analogous to repeal; it only suspended the operation of the C. P. and Berar Panchayats Act on 20-1-50 so far as the village in question was concerned and, therefore, that Act continued to be in force in that village as it was a "law in force" as expounded by this Explanation. AIR 1954 Madh Bha 78 (80) = ILR (1954) Madh Bha 366 = 1954 Cri L Jour 795 (DB).

(9) The Indore Stamp Act Adaptation Act (5 of 1950), which received the assent of the Rajpramukh on 24-11-1949, but became operative from 29-1-1950 is a law continuing in force after the commencement of the Constitution by virtue of this article read with the Explanation. AIR 1956 Madh Bha 177 (178) = ILR (1956) Madh Bha 339 (DB).

(10) In order that a law not in operation at the date of the commencement of the Constitution may be included in the expression "law in force" it is necessary that it should have been passed or made by a Legislature or other competent authority before the commencement of the Constitution. AIR 1958 All 126 (131).

(11) The High Court is a "competent authority" for the purpose of the Rules of Procedure made by it under the Code of Civil Procedure. AIR 1956 Andhra 161 (165) = ILR (1956) Andhra 13 = 1956 Cri L Jour 1049 (FB).

(12) The phrase "in the territory of India" in this Explanation governs the expression "the law made by the authority." If the

Article 372 — Note 5 (contd.)

authority though residing outside the territory of India, had jurisdiction to make law in India, it is a law made by an authority in the territory of India. AIR 1956 Andhra 161 (165) = ILR (1956) Andhra 13 = 1956 Cri L Jour 1049 (FB).

6. "In the territory of India."— (1) This article refers to those laws which were in force in the territory of India and does not in terms continue any laws which had international implications. AIR 1951 Punj 356 (356).

(2) This article has not the effect of keeping alive Section 122 of the British Bankruptcy Act, 1914 (4 & 5 Geo. V, C. 59). AIR 1951 Punj 356 (356).

(3) The Imperial Copyright Act of 1911 was "a law in force in the territory of India immediately before the commencement of the Constitution" and it continues in force by virtue of Article 372 (1). AIR 1959 Mad 410 (416).

7. "Until altered or repealed or amended by a competent Legislature or other competent authority."— (1) The article recognises the contingency of an existing law being altered, repealed or amended. AIR 1953 Mad 260 (260) (DB).

(2) The article confers necessary power on a competent Legislature or other authority to alter, repeal or amend, although the expression "until altered or repealed, etc." is expressed in a negative form. (1953) 24 ITR 280 (297) (DB) (Cal).

(3) Letters Patent (Bombay), Clause 16 — States Reorganisation Act (1956), Sections 52 and 69 — High Courts Act (1861), Sections 1 and 9 — Jurisdiction conferred by Clause 16 of Letters Patent — Not impervious to legislative interference by State Legislature. AIR 1965 Mys 76 (84) = (1965) 1 Mys LJ 158 (DB).

(4) Power of Parliament to legislate — Power overrides restrictions imposed by pre-Constitution legislations. AIR 1966 Pat 375 (378) = 1966 Cri LJ 1183 (DB).

(5) Where an authority is given power to exercise legislative functions by means of an order such order is legislative in its nature. 1962 Ker LT 766.

(6) The word "until" ordinarily connotes a point of time and the expression "until altered, repealed or amended" is equivalent to saying "until the alteration, repealment or amendment." AIR 1941 FC 16 (31) = 1940 FCR 110 = ILR (1941) Kar (FC) 72.

(7) The word "until" in this article does not refer to the date on which the law altering or repealing or amending the existing law may be made, but refers to the date with effect from which such law may be made to operate, whether that date be in the future or in the past. (1953) 24 ITR 280 (297) (DB) (Cal).

(8) There is nothing in this article which debars a competent Legislature, which has altered, repealed or amended a previously

existing law, from giving the new provision a retrospective effect from dates earlier than when the Act was passed. AIR 1941 FC 16 (31) = 1940 FCR 110 = ILR (1941) Kar (FC) 72. (AIR 1940 All 272 (280) (FB), Reversed.) * AIR 1953 Madh Bha 65 (74) = ILR (1952) Madh Bha 422 (FB) ** AIR 1941 Lah 182 (183) (FB) ** (1953) 24 ITR 280 (297) (DB) (Cal) ** AIR 1953 Mad 260 (260) (DB) ** AIR 1951 Bom 438 (439) = ILR (1952) Bom 590 (DB) * AIR 1941 Pat 413 (414, 415) (DB) ** ILR (1956) 2 Cal 516 (528) = 24 ITR 280 (DB).

(9) Unless there is an Act which actually alters, repeals or amends it, that law must, in view of the provisions of this article, continue in force and cannot be considered as non-existent. AIR 1941 FC 16 (31) = 1940 FCR 110 = ILR (1941) Kar (FC) 72.

(10) Madras Hindu Religious Endowments Act (II of 1927), Section 69 — Constitutionality — Act was valid and continued to be in force till it was replaced by Madras Act (XIX of 1951) by reason of Article 372. AIR 1963 Andh Pra 292 (294, 295) (DB).

(11) It is not absolutely necessary that a statute must be repealed by express language. Repeal, and certainly alteration or amendment, can be effected by necessary implication. AIR 1941 FC 16 (31) = 1940 FCR 110 = ILR (1941) Kar (FC) 72.

(12) The prerogative of the Maharaja of Cochin relating to the execution of the death sentences must be deemed to have been repealed or abrogated by competent legislative authority after the coming into force of the Constitution. AIR 1956 SC 142 (145) = (1955) 2 SCR 1022 = 1956 Cri L Jour 315.

(13) The Acts, which are repugnant to each other, need not necessarily be of different Legislatures; one may be the main Act and the other, an amending one. 1955 All L Jour 325 (326).

(13-A) The provisions of the two statutes should be so incompatible that obedience to one should necessarily mean the breach of the other. AIR 1956 Madh Bha 199 (206) = ILR (1956) Madh Bha 353 (DB).

(14) There is a considerable difference between a case of an implied repeal and the contention that an existing State law shall not prevail because it is repugnant to the law made by the Parliament. What is repealed ceases to exist, and is, excepting for certain limited purposes, as if it was never enacted. But that is not so with the latter case. AIR 1956 Madh Bha 199 (206) = ILR (1956) Madh Bha 353 (DB).

(15) Bombay City Land Revenue Act (2 of 1876), was in force in India immediately before the commencement of the Constitution and it must continue in force until altered or repealed or amended. AIR 1955 Bom 305 (313) = 57 Bom LR 345 (DB).

Article 372 — Note 7 (contd.)

(16) Coal Production Fund Ordinance (1944) was permanent — Repealing Ordinance (6 of 1947) after its expiry could not have any effect on Ordinance of 1944 to the extent saved. AIR 1962 SC 1281 (1286) = (1962) Supp 3 SCR 436.

(17) The "Mulki Rules" in force in former Hyderabad State to the extent they were not inconsistent with the constitutional provisions were good law even after the Constitution came into force until they were repealed by a Parliament Act 44 of 1957. ILR (1968) Andh Pra 101 (109) (DB).

8. President's power to make adaptations and modifications of any law in force — Clause (2).— (1) This clause empowers the President to make such adaptations and modifications of any law in force as may be necessary or expedient and provides that thereafter that law will have effect subject to the adaptations and modifications so made. AIR 1950 Nag 203 (206) = 51 Cri L Jour 1372 (DB).

(2) The power to make adaptations and modifications was given to the President to suit the new circumstances brought about by the Constitution. AIR 1951 Cal 120 (122) = ILR (1952) 2 Cal 296 = 52 Cri L Jour 934 (FB).

(3) By the expression "any law in force" in this clause must, of course, be understood existing law as defined by Article 366, Clause (10), for non-statutory law, cannot obviously be subject to any adaptation or modification. AIR 1952 Bom 84 (89) = ILR (1951) Bom 775 = 1952 Cri L Jour 354 (DB).

(4) The general intent of the Constitution is that existing laws are to operate after the Constitution only so far as they are consistent with the Constitution and that so far as they are not so consistent, they are to cease to operate. AIR 1955 Cal 451 (455) (DB).

(5) The governing direction in this clause is that the dealing by the President with existing laws must be for the purpose of bringing such laws "into accord with the provisions of this Constitution." AIR 1956 All 321 (323) (DB) ** AIR 1955 Cal 451 (455) (DB).

(6) As the President has only power to make adaptations and modifications for the purpose of bringing an Act into conformity with the provisions of the Constitution, it follows that an adaptation which is inconsistent with any provision of the Constitution will be invalid. AIR 1958 SC 468 (488) ** AIR 1956 All 321 (323) (DB) ** AIR 1955 Cal 451 (455, 456) (DB).

(7) An adaptation actually made must be construed as if the President had not intended to exceed his powers unless the words used make it wholly impossible to do so. AIR 1955 Cal 451 (455) (DB).

(8) The mere fact that an Act has been made the subject of an Adaptation Order

will not make the Act valid if it is otherwise invalid as offending any provision of the Constitution. AIR 1941 Lah 182 (184) (FB) ** AIR 1950 Cal 274 (276) = 51 Cri L Jour 1110 (SB) ** AIR 1958 Mad 729 (732) = 1953 Cri L Jour 1364 (DB) ** AIR 1950 Pat 265 (270) = ILR 29 Pat 335 = 51 Cri L Jour 1081 (DB).

(9) The President cannot, by an Adaptation Order, direct the continuance of an Act repealed by the Constitution. AIR 1954 Mad 543 (547) = ILR (1954) Mad 643 (DB).

(10) Clause (2) is strictly limited to bringing an Act into accord with the provisions of the Constitution. AIR 1951 Cal 120 (122) = ILR (1952) 2 Cal 296 = 52 Cri L Jour 934 (FB).

(11) The fact that an Act has not been adapted by the President does not affect the question whether it continued in force after the commencement of the Constitution. AIR 1953 Mad 729 (732) = 1953 Cri L Jour 1364 (DB).

(12) There is nothing in the clause to prevent the President from repealing the whole or a part of any existing law. AIR 1951 SC 128 (129) = 1951 SCR 228 = ILR (1951) Hyd 294 = 52 Cri L Jour 860 ** AIR 1954 Bom 505 (507) = ILR (1954) Bom 1367 (DB).

(13) Where the President, under Art. 373, exercises the powers of Parliament conferred by Article 22 (7) it is not tantamount to exercising his power of adaptation under this clause. AIR 1950 Nag 203 (206) = 51 Cri L Jour 1372 (DB).

(14) After the imposition of the Presidents' rule in Pepsu under Article 356 the President was competent to promulgate under Article 309 read with Articles 313 and 372, the Bank of Patiala Regulation and Management Order, 1954 superseding the commands of the Ruler of erstwhile Patiala State dated 8-4-1941 which had the force of law. AIR 1963 Punj 345 (349, 350) = ILR (1963) 1 Punj 621 (DB).

9. Adaptation of Laws Order, 1950.—

(1) Clause 3 of the Order does not in any way confer, recognise or continue the power of the High Court to prescribe court-fees for the Original Side of the High Court, nor does clause 22 thereof save such power. AIR 1954 Mad 543 (547) = ILR (1954) Mad 643 (DB).

(2) Clause 19 of the Order cannot be so construed as if it purported to keep in force even laws which might be inconsistent with the Constitution. AIR 1955 Cal 451 (457) (DB).

(3) Clause 23 of the Order cannot be said to substitute the Supreme Court in the place of the State Judicial Committee of the former Hyderabad State. AIR 1956 Hyd 136 (138) = ILR (1956) Hyd 555 (DB).

(4) It has been held that Clause 28 of the Order which directs a Court to construe the law with all such adaptations as

^a[372A. Power of the President to adapt laws.—(1) For the purposes of bringing the provisions of any law in force in India or in any part thereof, immediately before the commencement of the Constitution (Seventh Amendment) Act, 1956, into accord with the provisions of this Constitution as amended by that Act, the President may by order^b made before the 1st day of November, 1957, make

Articles 372 — Note 9 (contd.)

are necessary for the purpose of bringing it into accord with the provisions of the Constitution, notwithstanding that the Order makes no provision is contrary to the express provisions of clause (2) of this article. AIR 1950 Cal 274 (285, 286) = 51 Cri L Jour 1110 (SB).

(5) It has been held that the adaptation or modification made by way of amending Section 1 (3) of the Essential Supplies (Temporary Powers) Act, 1946, so as to substitute "the 1st day of April 1951" for the period originally mentioned in the sub-section was neither illegal nor beyond the competency of the President within the meaning of this clause. AIR 1952 Pat 185 (191, 192) = ILR 31 Pat 97 = 1952 Cri L Jour 493 (FB).

(6) Article 225 in terms preserves the powers of the High Court derived under the Letters Patent and the rules already made by the High Court are continued under this article. Even assuming that the Order by implication revoked the powers of the High Court conferred by the Letters Patent, the rules already made are saved under the express provisions of clause 17 of this Order. AIR 1956 Andhra 161 (165) = ILR (1956) Andhra 13 = 1956 Cri L Jour 1049 (FB).

(7) The Fugitive Offenders Act, 1881 (44 & 45 Vict., c. 69), has been left severely alone in the Adaptation Order. It has, therefore, ceased to be in force after the Constitution. AIR 1954 SC 517 (519) = 1955 SCR 280 = 1954 Cri L Jour 1337.

(8) The definition of 'State' in Section 3 (58) (b) of the General Clauses Act, adopted under Article 372 by the Adaptation of Laws Order 1950 can be used to interpret the word 'State' used in the Constitution only when a State is Part A, B or C. AIR 1969 Delhi 246 (252, 253) = 1969 Lab IC 974 (DB).

10. "Any such adaptation or modification shall not be questioned in a Court of law."— Clause (2).— (1) In spite of these words in clause (2), it is the established view that an adaptation, which is inconsistent with any provisions of the Constitution, is invalid and its validity can be questioned in a Court of law. AIR 1958 SC 468 (488) ** AIR 1955 Cal 451 (456) (DB).

(2) The last words of clause (2) only precluded the action of the President in making the adaptation from being questioned in a Court of law. AIR 1955 Cal 451 (455) (DB).

(3) Under clause (2) the President cannot legislate except for the purpose of bringing the provisions of any law in force into accord with the provisions of the Constitution and so, he cannot, by an Adaptation Order extend the life of an Act. AIR 1951 Cal

120 (122) = ILR (1952) 2 Cal 296 = 52 Cri L Jour 934 (FB).

(4) A provision made by the President by virtue of his special power under clause (2) is, nonetheless, a "law" although under the last words of clause (2), such provision, unlike legislative provisions in general, is specially made exempt from being questioned in a Court of law. AIR 1958 SC 468 (487, 488).

11. Explanation III.— (1) The Explanation III does not apply to the Indian Independence Act, and hence, notwithstanding the repeal of the Act, the Indian Independence (Legal Proceedings) Order, 1947, continues in force under clause (1) of this article. AIR 1956 Cal 222 (223) (DB).

(2) The expression "temporary law" in Explanation III was held to include an Ordinance promulgated by the Rajpramukh of a Part B State. AIR 1951 Madh Bha 149 (153) = 52 Cri L Jour 1467 (FB).

(3) The Explanation merely provides that temporary statutes will not have their lives automatically extended by virtue of the provisions of clause (1). AIR 1952 Cal 118 (120) = ILR (1953) 1 Cal 71.

(4) If as a result of the operation of any other article, a legal position, which was brought about by a temporary law, is perpetuated and continued after the Constitution, the result cannot be avoided by invoking Explanation III. AIR 1951 Madh Bha 149 (152) = 52 Cri L Jour 1467 (FB).

(5) Where a temporary Act mentions a certain period for its duration and the President's Adaptation Order, purely as a matter of adaptation under clause (2) of this article, replaces the words used in the temporary Act relating to its duration by words which specify a certain date for the expiration of the Act, there is no question of the temporary Act being continued in force beyond the date on which it would have expired and hence, Explanation III does not come into play in such a case at all. AIR 1952 Pat 185 (192) = ILR 31 Pat 97 = 1952 Cri L Jour 493 (FB).

(6) Where a temporary Act expires, it should be regarded as having never existed except as to matters and transactions past and closed. AIR 1957 Punj 265 (268) (DB).

Article 372-A — Note 1

(1) Definition of 'State' in Section 3 (58) (b) General Clauses Act as adopted under Article 372-A not applicable for interpreting Constitution. AIR 1969 Delhi 246 (252, 253) = 1969 Lab IC 974 (DB).

(2) Delhi Special Police Establishment Act (1946), Section 2 — Substitution of words "Union Territories" for words "Part C States" by Adaptation of Laws Order (3

such adaptations and modifications of the law, whether by way of repeal or amendment, as may be necessary or expedient, and provide that the law shall, as from such date as may be specified in the order, have effect subject to the adaptations and modifications so made, and any such adaptation or modification shall not be questioned in any court of law.

(2) Nothing in clause (1) shall be deemed to prevent a competent legislature or other competent authority from repealing or amending any law adapted or modified by the President under the said clause.]

[a] Inserted after Article 372 by the Constitution (Seventh Amendment) Act, 1956, S. 23 (1-11-1956).

[b] See the following Adaptation Orders so made—

(1) Adaptation of Laws (No. 1) Order, 1956, Gaz. Ind., 1-11-1956, Pt. II, S. 3, Ext., p. 2261.

(2) Adaptation of Laws (No. 2) Order, 1956, *ibid*, p. 2263.

(3) Adaptation of Laws (No. 3) Order, 1956, Gaz. Ind., 31-12-1956, Pt. II, S. 3, Ext., p. 2775.

JAMMU AND KASHMIR

Article 372A shall be omitted—See the Constitution (Application to J. and K.) Order, 1954, Para. 2, sub-para. (16) (a) (as amended by C. O. 56).

373. Power of President to make order in respect of persons under preventive detention in certain cases.—Until provision is made by Parliament under clause (7) of Article 22,^a or until the expiration of one year from the commencement of this Constitution, whichever is earlier, the said article shall have effect as if for any reference to Parliament in clauses (4) and (7) thereof there were substituted a reference to the President and for any reference to any law made by Parliament in those clauses there were substituted a reference to an order made by the President.

[a] Article 22 deals with protection from arrest and detention in certain cases.

JAMMU AND KASHMIR

Article 373 shall be omitted—See the Constitution (Application to J. and K.) Order, 1954, Para. 2, sub-para. (16) (a).

Article 372-A — Note 1 (contd.)
of 1956) — Does not bring Act of (1946), into conflict with Entry 80. AIR 1969 Delhi 330 (342, 344) (DB).

(3) Delhi Special Police Establishment Act, 1946, which has been enacted validly prior to the Constitution cannot become unconstitutional merely because of the adaptation made into it by the President under Article 372-A. AIR 1969 Delhi 330 (344) (DB).

Article 373 — Note 1

(1) Neither the Parliament nor the President acting under Article 373 can prescribe what it or he is empowered to do under Article 22 (7) (a) and (b) in respect of detention made under a law in force prior to the commencement of the Constitution. AIR 1951 Mad 1015 (1041) = 1952 Cri LJ 170 (DB).

(2) Powers of President under Article 373 are not wider than those conferred on Parliament by Article 22 (7) and therefore he cannot order the continuance of detention

of a person even in a case not covered by that clause. AIR 1950 Nag 203 (207) = 51 Cri LJ 1372 = 1951 Nag LJ 1 (DB).

(3) Section 2 (1) (a) being still extant, is 'any law' within the meaning of expression used in sub-clause (a) of clause (7) of Art. 22 and hence the President can by virtue of powers conferred on him, by order, prescribe the circumstances under which the period of detention may extend beyond three months without obtaining the opinion of the Advisory Board. AIR 1950 Nag 203 (207, 208) = 51 Nag LJ 1372 = 1951 Nag LJ 1 (DB).

(4) The Preventive Detention (Extension of Duration) Order dated 26th January 1950 and purported to be signed by Governor-General is of no value at all for purposes of adaptation of the Constitution Act; nor can it be of any value for purpose of Article 373 because under that Article, it is only the President who can act after the commencement of the Constitution. AIR 1950 Pat 265 (280) = 51 Cri LJ 1081 = ILR 29 Pat 335 (DB).

374. Provisions as to Judges of the Federal Court and proceedings pending in the Federal Court or before His Majesty in Council.—(1) The Judges of the Federal Court holding office immediately before the commencement of this Constitution shall, unless they have elected otherwise, become on such commencement the Judges of the Supreme Court and shall thereupon be entitled to such salaries and allowances and to such rights in respect of leave of absence and pension as are provided for under Article 125 in respect of the Judges of the Supreme Court.

(2) All suits, appeals and proceedings, civil or criminal, pending in the Federal Court at the commencement of this Constitution shall stand removed to the Supreme Court, and the Supreme Court shall have jurisdiction to hear and determine the same, and the judgments and orders of the Federal Court delivered or made before the commencement of this Constitution shall have the same force and effect as if they had been delivered or made by the Supreme Court.

(3) Nothing in this Constitution shall operate to invalidate the exercise of jurisdiction by His Majesty in Council to dispose of appeals and petitions from, or in respect of, any judgment, decree or order of any court within the territory of India in so far as the exercise of such jurisdiction is authorised by law, and any order of His Majesty in Council made on any such appeal or petition after the commencement of this Constitution shall for all purposes have effect as if it were an order or decree made by the Supreme Court in the exercise of the jurisdiction conferred on such Court by this Constitution.

(4) On and from the commencement of this Constitution the jurisdiction of the authority functioning as the Privy Council in a State specified in Part B of the First Schedule^a to entertain and dispose of appeals and petitions from or in respect of any judgment, decree or order of any court within that State shall cease,

Article 374 — Note 1

(1) Where a suit in respect of a dispute concerning a document of the description referred to in Article 363 was filed in the Federal Court before the Constitution came into force and stood transferred to the Supreme Court under clause (2) of this article after the Constitution came into force, the Supreme Court will have no jurisdiction to hear and determine those matters by virtue of Article 363. AIR 1951 SC 253 (258) = 1951 SCR 474.

(2) The latter part of clause (2) has not the effect of endowing the judgments of the Federal Court delivered before the commencement of the Constitution with the same authority as judicial precedents as the decisions of the Supreme Court. AIR 1954 Bom 351 (357) = ILR (1954) Bom 915 (DB) ** AIR 1951 Mys 72 (75) = ILR (1951) Mys 284 = 52 Cri L Jour 992 (FB) ** AIR 1953 Punj 118 (120, 122) = ILR (1955) Punj 934 ** AIR 1952 Bom 37 (46) = ILR (1952) Bom 269 (DB) ** AIR 1951 All 205 (221) = ILR (1952) 2 All 467 (DB).

[But see AIR 1951 Mad 115 (119) = 52 Cri L Jour 396 (DB).]

(3) The High Courts in the former Indian States were not bound immediately before the commencement of the Constitution by the judgments of the Federal Court or the Privy Council. Under Article 372, the position will continue to be the same even after the coming into force of the Constitution. AIR 1951 Mys 72 (75) = ILR (1951) Mys 284 = 52 Cri L Jour 992 (FB).

(4) By virtue of combined operation of Sections 2, 4 (b), 5 and 8, Abolition of Privy Council Jurisdiction Act, 1949 and Articles 135 and 374 (2) of the Constitution, Supreme Court must be deemed in law to be the Court which passed the decree and therefore competent to entertain an application for cancellation of decree under Section 10, Bombay Hereditary Offices Act. AIR 1960 SC 808 (809, 810) = (1960) 3 SCR 221.

(5) Drawing up of decrees passed by the Judicial Committee of Hyderabad having been vested in the High Court of Hyderabad under a statutory Regulation, such proceeding was not pending before the Judicial Committee and hence was not liable to be transferred to the Supreme Court. AIR 1959 Andh Pra 159 (164, 165) = (1959) 1 Andh WR 275 (DB).

(6) Law settled by the Federal Court will continue to be applicable even after the advent of the Constitution till it is altered by the Supreme Court or by a competent authority. AIR 1959 Andh Pra 359 (360) ** AIR 1961 Cal 125 (133) = 65 Cal WN 213 (SB) ** AIR 1955 Orissa 160 (162) = ILR (1955) Cut 405 (DB).

(7) Appeals and Petitions pending before Judicial Committee of Hyderabad were transferred on and from the Commencement of the Constitution to the Supreme Court for disposal under this Article. (1963) 1 Ker LR 400 ** AIR 1968 Raj 81 (84) = 1968 Raj LW 62. (Decision in AIR 1953 SC 419 is decision of the Supreme Court of India and is of binding authority.)

and all appeals and other proceedings pending before the said authority at such commencement shall be transferred to, and disposed of by, the Supreme Court.

(5) Further provision may be made by Parliament by law to give effect to the provisions of this article.

[a] In the First Schedule as substituted by the Constitution (Seventh Amendment) Act, 1956, there is no Part B. The names of the States that were included in Part B were: Hyderabad, Jammu and Kashmir, Madhya Bharat, Mysore, Patiala and East Punjab States Union, Rajasthan, Saurashtra and Travancore-Cochin.

JAMMU AND KASHMIR

In its application to the State of Jammu and Kashmir, in Art. 374,—

- (i) in clause (4), the reference to the authority functioning as the Privy Council of a State shall be construed as a reference to the Advisory Board constituted under Jammu and Kashmir Constitution Act, 1996, and references to the commencement of the Constitution shall be construed as references to the commencement of this Order;
- (ii) Clauses (1), (2), (3) and (5) shall be omitted—See Constitution (Application to J. and K.) Order, 1954, Para. 2, sub-para. (16) (a), (c).

375. Courts, authorities and officers to continue to function subject to the provisions of the Constitution.—All courts of civil, criminal and revenue jurisdiction, all authorities and all officers, judicial, executive and ministerial, throughout the territory of India, shall continue to exercise their respective functions subject to the provisions of this Constitution.

376. Provisions as to Judges of High Courts.—(1) Notwithstanding anything in clause (2) of Article 217, the Judges of a High Court in any Province holding office immediately before the commencement of this Constitution shall, unless they have elected otherwise, become on such commencement the Judges of the High Court in the corresponding State, and shall thereupon be entitled to such salaries and allowances and to such rights in respect of leave of absence and pension as are provided for under Article 221 in respect of the Judges of such High Court.

^a[Any such Judge shall, notwithstanding that he is not a citizen of India, be eligible for appointment as Chief Justice of such High Court, or as Chief Justice or other Judge of any other High Court.]

Article 375 — Note 1

(1) Where a Magistrate in Hyderabad territory had become duly vested with jurisdiction to try a criminal case pending before him, the subsequent transfer of the territory where the offence was committed, to the State of Bombay under the India and Hyderabad Exchange of Enclaves Order, 1950, will not affect the vested jurisdiction. AIR 1950 Hyd 71 (72)= ILR (1951) Hyd 291= 52 Cri L Jour 1398 (DB).

(2) The Speaker though an officer of the Legislature, will not come within the category of officers contemplated by this article. AIR 1952 Trav-Co 66 (69)= 1950 Trav-Co LR 215.

(3) A village Munsif who claims to be in office at the commencement of this Constitution in spite of an order of dismissal passed against him long before, does not continue to function as such by virtue of this article. AIR 1952 Mad 865 (871)= ILR (1953) Mad 262 (DB).

(4) The General Manager of the East Indian Railway Administration who was ex-officio authorised to act for the Dominion of India in respect of all judicial proceed-

ings involving East Indian Railway Administration will continue to function as such even after the commencement of the Constitution by virtue of this article. AIR 1956 Pat 511 (517) (DB).

(5) On coming into force of the Constitution, the laws prevailing in different parts of the country and the Courts which administered them were continued by virtue of the express provisions in Articles 372 and 375. AIR 1955 Madh Bha 1 (11)= ILR (1955) Madh Bha 31 (FB).

Article 376 — Note 1

(1) Clause 2 provides for the continuance in office of the Judges of the High Courts in the former Indian States which were incorporated as Part B States under the Constitution. In the case of such Judges, the clause provides that they can continue in office for such time as the President may by order determine, notwithstanding that they may have passed the age limit of sixty years fixed for retirement of High Court Judges, under Article 217. AIR 1951 Trav-Co 45 (46, 53)= 1950 Trav-Co LR 306 (DB).

(2) The Judges of a High Court in any Indian State corresponding to any State specified in Part B^b of the First Schedule holding office immediately before the commencement of this Constitution shall, unless they have elected otherwise, become on such commencement the Judges of the High Court in the State so specified and shall, notwithstanding anything in clauses (1) and (2) of Article 217 but subject to the proviso to clause (1) of that article, continue to hold office until the expiration of such period as the President may by order determine.

(3) In this article, the expression "Judge" does not include an acting Judge or an additional Judge.

[a] Added by the Constitution (First Amendment) Act, 1951, S. 13 (18-6-1951).

[b] See foot-note (a) under Article 374.

JAMMU AND KASHMIR

Article 376 shall be omitted—See Constitution (Application to J. and K.) Order, 1954, Para. 2, sub-para. (16) (a).

377. Provisions as to Comptroller and Auditor-General of India.—The Auditor-General of India holding office immediately before the commencement of this Constitution shall, unless he has elected otherwise, become on such commencement the Comptroller and Auditor-General of India and shall thereupon be entitled to such salaries and to such rights in respect of leave of absence and pension as are provided for under clause (3) of Article 148 in respect of the Comptroller and Auditor-General of India and be entitled to continue to hold office until the expiration of his term of office as determined under the provisions which were applicable to him immediately before such commencement.

JAMMU AND KASHMIR

Article 377 shall be omitted—See Constitution (Application to J. and K.) Order, 1954, Para. 2, sub-para. (16) (a).

378. Provisions as to Public Service Commissions.—(1) The members of the Public Service Commission for the Dominion of India holding office immediately before the commencement of this Constitution shall, unless they have elected otherwise, become on such commencement the members of the Public Service Commission for the Union and shall, notwithstanding anything in clauses (1) and (2) of Article 316 but subject to the proviso to clause (2) of that article, continue to hold office until the expiration of their term of office as determined under the rules which were applicable immediately before such commencement to such members.

(2) The members of a Public Service Commission of a Province or of a Public Service Commission serving the needs of a group of Provinces holding office immediately before the commencement of this Constitution shall, unless they have elected otherwise, become on such commencement the members of the Public Service Commission for the corresponding State or the members of the Joint State Public Service Commission serving the needs of the corresponding States, as the case may be, and shall notwithstanding anything in clauses (1) and (2) of Article 316 but subject to the proviso to clause (2) of that article, continue to hold office until the expiration of their term of office as determined under the rules which were applicable immediately before such commencement to such members.

JAMMU AND KASHMIR

Article 378 shall be omitted—See Constitution (Application to J. and K.) Order, 1954, Para. 2, sub-para. (16) (a).

^a[378A. Special provision as to duration of Andhra Pradesh Legislative Assembly.—Notwithstanding anything contained in Article 172, the Legislative

Article 378-A — Note 1

(1) After the passing of the States Re-organisation Act, 1956, the new State of Andhra Pradesh was formed by addition of some districts of Hyderabad to Andhra. The number of the sitting members of Hyderabad Assembly who would become

Assembly of the State of Andhra Pradesh as constituted under the provisions of Sections 28 and 29 of the States Reorganisation Act, 1956, unless sooner dissolved, continue for a period of five years from the date referred to in the said Section 29 and no longer and the expiration of the said period shall operate as a dissolution of that Legislative Assembly.]

[a] Inserted by the Constitution (Seventh Amendment) Act, 1956, S. 24 (1-11-1956).

JAMMU AND KASHMIR

Article 378A shall be omitted—See Constitution (Application to J. and K.) Order, 1954, Para 2, sub-para. (16) (a) (as amended by C. O. 56.)

379—391. [Omitted by the Constitution (Seventh Amendment) Act, 1956, S. 29 and Sch. (1-11-1956).]

Article 378-A — Note 1 (contd.)

members of Andhra Pradesh on 1-11-1956 was, however, only a little more than half the number of the then existing Andhra Assembly. It was, therefore, decided that general elections for the Hyderabad area only should be held and not for the whole of the Andhra Pradesh. Section 29 of the States Reorganisation Act 1956, gives effect to this decision. The present article which was inserted by the Constitution (Seventh Amendment) Act, 1956, provides for the duration of the period of five years of the Legislative Assembly of Andhra Pradesh formed under the above conditions. Gazette of India, Dated 18-4-1956, Part II, Section 2, Extra. p. 223 (282).

Article 379 — Note 1

(1) This Article is not to be interpreted in its isolated relation to Article 368 alone. It is to be viewed and interpreted in wider perspective of scheme of the Constitution. AIR 1951 SC 458 (462) = 1952 SCR 89.

(2) The Constitution (First Amendment) Act of 1951, though enacted by the Provisional Parliament does not cease to be valid even after the first meeting of the Parliament which is duly constituted after the general election. AIR 1953 Pat 386 (388, 389) = 1953 BLJR 508 (DB).

Article 382 — Note 1

(1) The old Legislature in the State of Uttar Pradesh continued to function after the Constitution until the Legislature of that State was freshly constituted and summoned to meet for the first session under the Constitution. AIR 1952 All 88 (90) = 1952 All LJ 52 (DB).

(2) Provisional Legislatures were set up by the Constituent Assembly to tide over the transition stage before Legislatures formed under the Constitution of India took over — A law made by a provisional Legislature need not have a provisional character. AIR 1953 All 92 (93, 94, 95) = 1952 All LJ 677 (DB) ** AIR 1953 Pat 386 (389, 390) = 1953 BLJR 508.

Article 385 — Note 1

(1) Election of new President — Necessity — Object of the article is to import into the Union the old legislative machinery in Part B States lock, stock and bar-

rel. AIR 1952 Madh Bha 31 (34, 36) = ILR (1952) Madh Bha 145 (DB). (Overruled on another point in AIR 1959 SC 395.)

(2) The Rajpramukh is empowered to make laws by Article 385 and the mode of exercise of that power is given in Article 212-A inserted by the Constitution (Removal of Difficulties) Order (II of 1950). AIR 1954 Raj 224 (227) = 1955 Raj LW 355 (DB) ** AIR 1951 Hyd 1 (6, 7) (FB).

(3) Article 385 does not in terms apply to the State of Jammu and Kashmir — J. and K. Big Landed Estates (Abolition) Act (2007) is not ultra vires of the powers of Shree Yuvraj nor is it open to review by the Courts. AIR 1953 J and K 25 (32, 33, 34) = 11 J and K LR 1 (DB).

(4) (Per Dixit, J.) — Article 385 does not protect from challenge the validity of the Constitution of a body which though functioning immediately before the commencement of the Constitution as the Legislature of the State was not legally entitled to do so under the law of the State. AIR 1952 Madh Bha 57 (64, 78) = ILR (1952) Madh Bha 178 (FB).

(5) This Article has no application to ordinance promulgated by Rajpramukh before commencement of Constitution. AIR 1952 Raj 137 (138) = 1952 Raj LW 71 (DB).

(6) After the Constitution came into force laws could be enacted in Part B States in the manner provided in Articles 385 and 212-A. AIR 1957 Raj 28 (29) = 1957 Raj LW 52 (DB).

(7) Rajpramukh of Part B State and who functioned as legislative authority prior to Constitution continued to exercise those powers by virtue of Article 385 until the meeting of the first session of Legislative Assembly. AIR 1954 Raj 169 (170) = 1954 Raj LW 154 (DB) ** 1955 Raj LW 368 (369) = ILR (1955) 5 Raj 239 (DB).

(8) The Rajpramukh of Part B State was competent to give assent to the Act on the same date on which the Legislature was summoned by him in the absence of proof that the summoning was prior to the giving of assent to the Act. AIR 1952 Hyd 163 (170, 176) = ILR (1952) Hyd 595 (FB).

392. Power of the President to remove difficulties.—(1) The President may, for the purpose of removing any difficulties, particularly in relation to the transition from the provisions of the Government of India Act, 1935, to the provisions of the Constitution by order^a direct that this Constitution shall, during such period as may be specified in the order, have effect subject to such adaptations, whether by way of modification, addition or omission, as he may deem to be necessary or expedient :

Provided that no such order shall be made after the first meeting of Parliament duly constituted under Chapter II of Part V.

(2) Every order made under clause (1) shall be laid before Parliament.

(3) The powers conferred on the President by this article, by Article 324, by clause (3) of Article 367 and by Article 391^b shall, before the commencement of this Constitution, be exercisable by the Governor-General of the Dominion of India.

[a] So far ten such Orders have been passed and amended from time to time.

[b] Article 391 is omitted by Constitution (Seventh Amendment) Act, 1956, S. 29 and Sch. (1-11-1956).

JAMMU AND KASHMIR

Article 392 shall be omitted—See Constitution (Application to J. and K.) Order, 1954, Para. 2, sub-para. (16) (a).

Article 385 — Note 1 (contd.)

(Hyderabad Atiyat Enquiries Act 1952 is not contrary to Article 385.)

(9) By reason of the provision for the continuity of the existence of the State Legislative Assembly, the Speaker who is an essential part of the Assembly is also intended to continue in office in the absence of express words to the contrary. AIR 1952 Trav-Co 205 (206)= 1951 Ker LT 612 (DB) ** AIR 1952 Trav-Co 66 (69)= 1950 Ker LT 371.

(10) The question as to the legality of the continuance of a person in the office of the Speaker under Article 385 is not one relating to the internal affairs of the Assembly. It is a question of declaring the status of person on the interpretation of the Constitution and the High Court can give declaration on such status. AIR 1952 Madh Bha 31 (45)= ILR (1952) Madh Bha 145 (DB).

Article 389 — Note 1

(1) A Bill pending before Dominion Legislature or Legislature of the Province before the Constitution is continued in the Parliament or Legislature of the corresponding State when it is formed. AIR 1952 All 88 (90)= 1952 All LJ 52 (DB).

Article 392 — Note 1

(1) The Constituent Assembly being invested by British Parliament with all powers of the Dominion Legislature to frame the Constitution decided to bring the Constitution into being in two instalments and enacted this Article so that this Article and certain others should come into force "at once" i. e., on 26-11-1949 when the Constitution was enacted, while remaining Articles were to come into force on 26-1-1950. AIR 1953 SC 63 (64, 65)= 1953

SCR 644= 1953 Cri LJ 515 ** AIR 1952 Madh Bha 31 (36)= ILR (1952) Madh B 145 (DB). (Overruled on another point in AIR 1959 SC 395.)

(2) It was not necessary in the exercise of the power under this article that, at the time of such exercise, the occasion for the removal of such difficulties must have actually arisen. AIR 1951 SC 458 (462)= 1952 SCR 89= ILR 30 Pat 1176.

(3) This Article is widely expressed and so also the nature of adaptation to be made. Whether adaptation should be by modification, addition or omission is left to the opinion of the President and if he makes adaptation by omission of certain words in the Article he does not exceed his power. AIR 1959 SC 512 (516)= 1959 (Sup) 1 SCR 792.

(4) This Article has a limited scope as it is intended only for the purpose of removing difficulties and for bringing about a smoother transition. Hence order made by the President cannot attract Article 368 as the Article envisages introduction of a bill in the Parliament for contemplated amendment. AIR 1967 SC 1643 (1659)= (1967) 2 SCR 762.

(5) Since Article 392 gives power to the President to remove the difficulties, the President has to decide whether there is a difficulty or not. Hence it is the subjective test and not the objective test that is to be applied. AIR 1952 Madh Bha 31 (36)= ILR (1952) Madh B 145 (DB). (Overruled on another point in AIR 1959 SC 395.)

(6) Per Dixit, J. — The words "whether by way of modification, addition, or omission" in Article 392 (2) are sufficiently comprehensive to include an adaptation by

PART XXII

SHORT TITLE, COMMENCEMENT AND REPEALS

393. Short title.—This Constitution may be called the Constitution of India.

394. Commencement.—This article and Articles 5, 6, 7, 8, 9, 60, 324, 366, 367, ^a[379, 380, 388, 391,] 392 and 393 shall come into force at once,^b and the remaining provisions of this Constitution shall come into force on the twenty-sixth day of January, 1950, which day is referred to in this Constitution as the commencement of this Constitution.

[a] These articles are now omitted by the Constitution (Seventh Amendment) Act, 1956 (1-11-1956).

[b] That is 26-11-1949. See the Preamble of this Constitution. The Constitution of India as passed by the Constituent Assembly has been authenticated by the President of the Assembly by affixing his signature thereto on 26-11-1949 and is published under Notification No. CA/83/Cons./49 dated 26-11-1949 in the Gazette of India, 1949, Extra-Ordinary, p. 2347.

By a proclamation it is proclaimed 'that on and from this, the twenty-sixth day of January, 1950, India, that is Bharat, shall be a Sovereign Democratic Republic, and the Union and its component units, the States, shall exercise all powers and functions of Government and administration in accordance with the provisions of the said Constitution.' The Proclamation is published under Notification No. F/35/4/49-Public, dated 26-1-1950, in the Gazette of India, Extraordinary, p. 445.

JAMMU AND KASHMIR

Article 394 shall be omitted—See the Constitution (Application to J. and K.) Order, 1954, Para. 2, sub-para. (17).

395. Repeals.—The Indian Independence Act, 1947, and the Government of India Act, 1935, together with all enactments amending or supplementing the

Article 392 — Note 1 (contd.)

way of substitution. Substitution of one Article of the Constitution by another is in substance nothing but an omission of one Article and the addition in its place of another. AIR 1952 Madh Bha 31 (40)= ILR (1952) Madh B 145 (DB). (Overruled on another point in AIR 1959 SC 395.)

(7) The word 'modify' conveys the sense of a partial change and not complete change when under the Constitution. (Removal of Difficulties) Order No. 2, Article 178 was substituted by new Article by deleting the first part and retaining the latter it amounts to modification. AIR 1952 Madh Bha 31 (36)= ILR (1952) Madh B 145 (DB). (Overruled on another point in AIR 1959 SC 395.)

(8) Constitution (Declaration as to Foreign State) Order, 1950 was made by the Governor-General-of-India under Article 392 (3) read with Article 367 (3). Although Pakistan is not a Foreign State for the purposes of the Constitution it is a Foreign power for the purpose of Section 3 of Preventive Detention Act (4 of 1950). AIR 1960 SC 625 (627, 628)= 1960 Cri LJ 764= (1960) 2 SCR 784.

(9) Preventive Detention (Extension of Duration) Order, 1950 made on 26th January 1950 and purported to be signed by Governor-General — It is of no value for purposes of Adaptation of the Constitution Act — Governor-General could not sign

after commencement of Constitution. AIR 1950 Pat 265 (270)= 1951 Cri LJ 1081= ILR 29 Pat 335 (DB).

(10) This Article does not confer upon the President any power to abridge any of the fundamental rights conferred upon a citizen of India under Part III of the Constitution. AIR 1950 Nag 203 (204)= 1951 Cri LJ 1372= 1951 Nag LJ 1 (DB).

(11) The sovereignty of Indian States having been, by their accession to the Dominion of India, considerably impaired and wholly transformed they became subject to the provisions of the Government of India Act, 1935 to the extent specified in their instruments of Accession. Thus there was transition from the provisions of the said Act to the provision of the Constitution in respect of Indian States. AIR 1952 Madh B 31 (40)= ILR (1952) Madh B 145 (DB). (Overruled on another point in AIR 1959 SC 395.)

ARTICLE 395 — SYNOPSIS

1. Effect of repeal of enactments mentioned in the article.
2. Applicability of Section 6, General Clauses Act.
3. Repeal of Indian Independence Act, 1947 (10 and 11 Geo. VI, c. 30).
4. "But not including the Abolition of Privy Council Jurisdiction Act, 1949."
5. "Enactments amending or Supplementing Government of India Act, 1935."

latter Act, but not including the Abolition of Privy Council Jurisdiction Act, 1949, are hereby repealed.

JAMMU AND KASHMIR

Article 395 shall be omitted—See Constitution (Application to J. and K.) Order, 1954, Para. 2, sub-para. (17).

Article 395 (contd.)

1. Effect of repeal of enactments mentioned in the article. — (1) The general principle is that where a parent Act is repealed, all the laws passed under that Act stand repealed, unless there is a saving provision in the repealing enactment. AIR 1940 All 272 (280) = ILR (1940) All 455 (FB). (Reversed on another point in AIR 1941 FC 16.)

(2) In the case of the Indian Constitution a saving clause is contained in Art. 372, notwithstanding the repeal of the Indian Independence Act, 1947 (10 and 11 Geo. VI, c. 30) and the Government of India Act, 1935 (26 Geo. V and 1 Edw. VIII, c. 2), together with all enactments amending and supplementing the latter Act, all the legislation passed under those Acts continues in force even after the commencement of the Constitution. AIR 1952 Pat 185 (192) = ILR 31 Pat 97 = 1952 Cri L Jour 493 (FB).

(3) The Federal Court (Enlargement of Jurisdiction) Act, 1947, is one of the enactments amending or supplementing the Government of India Act, 1935, and as such, was repealed by Article 395. AIR 1957 SC 540 (556) = 1957 SCR 488. (Overruling AIR 1953 Mad 878 (FB), AIR 1951 Mad 1051, AIR 1954 Cal 289, AIR 1956 All 321, AIR 1956 All 638, AIR 1956 Punj 228).

[But see AIR 1954 Mad 543 (547) = ILR (1954) Mad 643 (DB).]

(4) Where a Government notification was void under the Government of India Act 1935, the mere fact that the Government of India Act, 1935, has been repealed by Article 395 will not make such notification valid from the date of the coming into force of the Constitution. AIR 1953 Assam 170 (175) = ILR (1953) 5 Assam 363 (DB).

2. Applicability of S. 6, General Clauses Act. — (1) Notwithstanding the provision of Art. 367, Sec. 6 of the General Clauses Act has no application to the repeal of a statute made by Parliament in England and the repeal of which has been brought about by this Constitution. AIR 1954 SC 683 (686) = 1954 Cri L Jour 1736 ** ILR (1956) 8 Assam 379 (392) (FB).

[See also AIR 1954 SC 158 (163) = 1954 SCR 541. (AIR 1951 Raj 94 (2), Reversed.)]

[But see AIR 1950 Cal 463 (464) = ILR (1951) 1 Cal 654 (DB) ** AIR 1951 Bom 188 (189, 190) = ILR (1950) Bom 529 = 52 Cri L Jour 80 (FB).]

(2) Article 372 was enacted providing that notwithstanding the repeal by this Constitution of the enactments referred to in Article 395, the law in force in the

territory of India immediately before the commencement of the Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority. AIR 1954 SC 683 (686) = 1954 Cri L Jour 1736 ** AIR 1957 Punj 265 (268) (DB).

(3) Article 372 has no application to laws that had previously been repealed or which had died a natural death on the expiry of the period during which they were to continue. AIR 1954 SC 683 (685) = 1954 Cri LJ 1736.

(4) With the repeal of the Government of India Act, 1935, by Article 395 of the Constitution, Section 76 of the former Act also vanished and a Bill pending before the Governor-General could not survive the repeal. Section 6 of the General Clauses Act cannot apply to the case. ILR (1956) 8 Assam 379 (391, 392) (FB).

3. Repeal of Indian Independence Act, 1947 (10 and 11 Geo. VI, c. 30). — (1) On the maxim *expressio unius, exclusio alterius*, the Orders passed under the Indian Independence Act, 1947, must be deemed not to have been repealed by Art. 395, and further these Orders are continued in force by virtue of Article 372. AIR 1957 Punj 201 (203) = ILR (1957) Punj 1097 (DB) ** AIR 1956 Assam 166 168, 169 (DB) ** AIR 1956 Cal 222 (224) (DB).

4. "But not including the Abolition of Privy Council Jurisdiction Act, 1949". — (1) The Constitution by Article 395 continued the Abolition of Privy Council Jurisdiction Act, 1949. Though the latter Act being an Act amending or supplementing the Government of India Act, 1935, was repealed yet notwithstanding such repeal the provisions of the Act were continued in force under Article 372 (1) subject to the other provisions of the Constitution. AIR 1957 SC 540 (556) = 1957 SCR 488.

5. "Enactments amending or supplementing Government of India Act, 1935. — (1) The Letters Patent is not an enactment which amends or supplements the Government of India Act. Therefore, it does not stand repealed under the express terms of Article 395. AIR 1958 Madh Pra 333 (335) = 1958 MPLJ 298 (DB).

(2) Section 3 (2) of the Santhal Parganas Settlement Regulation (3 of 1872) restricting the applicability of enactments unless otherwise expressly named has lost its force after the coming into force of the Constitution. AIR 1966 Pat 375 (378, 379) = 1966 Cri LJ 1183. (Land Customs Act, 1924 did not apply to Santhal Parganas in the absence of notifications extending the Act to such area).

^a[FIRST SCHEDULE

[Articles 1 and 4]

I. THE STATES

Name

Territories

1. **ANDHRA PRADESH** — ^b[The territories specified in sub-section (1) of Section 3 of the Andhra State Act, 1953, Sub-section (1) of Section 3 of the States Reorganisation Act, 1956, the First Schedule to the Andhra Pradesh and Madras (Alteration of Boundaries) Act, 1959, and the Schedule to the Andhra Pradesh and Mysore (Transfer of Territory) Act, 1968, but excluding the territories specified in the Second Schedule to the Andhra Pradesh and Madras (Alteration of Boundaries) Act, 1959.]
2. **ASSAM** — The territories which immediately before the commencement of this Constitution were comprised in the Province of Assam, the Khasi States and the Assam Tribal Areas, but excluding the territories specified^{bb} in the Schedule to the Assam (Alteration of Boundaries) Act, 1951 ^c[and the territories specified in sub-section (1) of section 3 of the State of Nagaland Act, 1962.]
3. **BIHAR** — ^d[The territories which immediately before the commencement of this Constitution were either comprised in the Province of Bihar or were being administered as if they formed part of that Province, and the territories specified in clause (a) of sub-section (1) of S. 3 of the Bihar and Uttar Pradesh (Alteration of Boundaries) Act, 1968, but excluding the territories specified in sub-section (1) of Section 3 of the Bihar and West Bengal (Transfer of Territories) Act, 1956, and the territories specified in clause (b) of sub-section (1) of Section 3 of the first mentioned Act.]
- ^{dd}[4. **GUJARAT** — The territories referred to in sub-section (1) of Section 3 of the Bombay Reorganisation Act, 1960.]

SCHEDULE 1 — NOTE 1

(1) Though constitutionality of the Constitution Ninth Amendment Act, 1960 transferring part of Berubari Union cannot be challenged, the executive act of demarcation can be restrained by a person who continues to be a citizen of India till the demarcation is effected until Art. 31 (2) has been complied with. AIR 1967 Cal 216 (221) = 71 Cal WN 82.

(2) Mere passing of the Constitution Ninth Amendment Act to effect transfer of Berubari to Pakistan does not operate as pro tanto abrogation of Art. 31 (2). (1968) 72 Cal WN 349 (371) ** AIR 1967 Cal 216 (221) = 71 Cal WN 82.

(3) Jammu and Kashmir is mentioned at serial no. 15 — Sale from dealer in U. P. to dealers in J and K State — Would be inter-state sale liable to tax under Central Sales Tax Act. AIR 1969 All 516 (517) (DB).

(4) (Before Amendment in 1956) — Hyderabad was part of India as the Constitution had placed it in Part B of Sch. 1. AIR 1955 Nag 160 (162) = 1955 Cri LJ 974 = ILR (1955) Nag 93.

(5) Entry 3 — By virtue of the States Merger (Governor's Provinces) Order, 1949 State of Seraikella was administered by the Province of Bihar before commencement of Constitution on the ground as if it formed part of Province. AIR 1963 Pat 475 (477) = 1963 BLJR 570 (DB).

(6) Entry 13—Clause commencing with "as if" in the entry now renumbered as 14 does not include territories which are administered with full knowledge that they had to be transferred to Pakistan under Radcliffe award — The clause refers only to territories which originally did not belong to West Bengal but became a part thereof by reason of merger agreements. AIR 1966 SC 644 (653) = (1966) 1 SCR 430.

(7) Entry 15 Art. 1 read with this entry indicates that Jammu and Kashmir is one of the States in the Union of India. (1965) 67 Pun LR 891.

(8) Second Part—By virtue of the Constitution (Twelfth Amendment) Act, 1962 Goa, Daman & Diu became constitutionally part of India. AIR 1968 Goa 17, (19, 20) = 1968 Cri LJ 316.

5. **KERALA** — The territories specified in sub-section (1) of Section 5 of the States Reorganisation Act, 1956.
6. **MADHYA PRADESH** — The territories specified in sub-section (1) of Section 9 of the States Reorganisation Act, 1956 ^{dd}[and the First Schedule to the Rajasthan and Madhya Pradesh (Transfer of Territories) Act, 1959.]
7. **TAMIL NADU** — The territories which immediately before the commencement of this Constitution were either comprised in the Province of Madras or were being administered as if they formed part of that Province and the territories specified in Section 4 of the States Reorganisation Act, 1956, ^{ee}[and the Second Schedule to the Andhra Pradesh and Madras (Alteration of Boundaries) Act, 1959] but excluding the territories specified in sub-section (1) of Section 3 and sub-section (1) of Section 4 of the Andhra State Act, 1953, and ^{ee}[the territories specified in clause (b) of sub-section (1) of Section 5, Section 6 and clause (d) of sub-section (1) of Section 7 of the States Reorganisation Act, 1956 and the territories specified in the First Schedule to the Andhra Pradesh and Madras (Alteration of Boundaries) Act, 1959.]
8. **MAHARASTRA**. — The territories specified in Sub-section (1) of Section 8 of the States Reorganisation Act, 1956, but excluding the territories referred to in sub-section (1) of Section 3 of the Bombay Reorganisation Act, 1960.]
9. **MYSORE**. — The territories specified in Sub-section (1) of Section 7 of the States Reorganisation Act, 1956, ^h[but excluding the territory specified in the Schedule to the Andhra Pradesh and Mysore (Transfer of Territory) Act, 1968.]
10. **ORISSA** — The territories which immediately before the commencement of this Constitution were either comprised in the Province of Orissa or were being administered as if they formed part of that Province.
11. **PUNJAB** — The territories specified in Section 11 of the States Reorganisation Act, 1956 ⁱ[and the territories referred to in Part II of the First Schedule to the Acquired Territories (Merger) Act, 1960] ^j[but excluding the territories referred to in Part II of the First Schedule to the Constitution (Ninth Amendment) Act, 1960] ^k[and the territories specified in sub-section (1) of Section 3, Section 4 and sub-section (1) of Section 5 of the Punjab Reorganisation Act, 1966.]
12. **RAJASTHAN** — The territories specified in Section 10 of the States Reorganisation Act, 1956 ^l[but excluding the territories specified in the First Schedule to the Rajasthan and Madhya Pradesh (Transfer of Territories) Act, 1959.]
13. **UTTAR PRADESH**—^m[The territories which immediately before the commencement of this Constitution were either comprised in the Province known as the United Provinces or were being administered as if they formed part of that Province and the territories specified in clause (b) of sub-section (1) of Section 3 of the Bihar and Uttar Pradesh (Alteration of Boundaries) Act, 1968, but excluding the territories specified in clause (a) of sub-section (1) of Section 3 of that Act.]
14. **WEST BENGAL** — The territories which immediately before the commencement of this Constitution were either comprised in the Province of West Bengal or were being administered as if they formed part of that Province and the territory of Chandernagore as defined in clause (c) of Section 2 of the Chandernagore (Merger) Act, 1954 and also the territories specified in sub-section (1) of Section 3 of the Bihar and West Bengal (Transfer of Territories) Act, 1956.
15. **JAMMU AND KASHMIR** — The territory which immediately before the commencement of this Constitution was comprised in the Indian State of Jammu and Kashmir.

ⁿ[16. NAGALAND. — The territories specified in Sub-section (1) of Section 3 of the State of Nagaland Act, 1962.]

^o[17. HARYANA — The territories specified in sub-section (1) of Section 3 of the Punjab Reorganisation Act, 1966.]

II. THE UNION TERRITORIES

Name

Extent

1. **DELHI.** — The territory which immediately before the commencement of this Constitution was comprised in the Chief Commissioner's Province of Delhi.
 2. **HIMACHAL PRADESH.** — The territories which immediately before the commencement of this Constitution were being administered as if they were Chief Commissioners' Provinces under the names of Himachal Pradesh and Bilaspur ^p[and the territories specified in Sub-section (1) of Section 5 of the Punjab Reorganisation Act, 1966.]
 3. **MANIPUR** — The territory which immediately before the commencement of this Constitution was being administered as if it were a Chief Commissioner's Province under the name of Manipur.
 4. **TRIPURA** — The territory which immediately before the commencement of this Constitution was being administered as if it were a Chief Commissioner's Province under the name of Tripura.
 5. **THE ANDAMAN AND NICOBAR ISLANDS** — The territory which immediately before the commencement of this Constitution was comprised in the Chief Commissioner's Province of the Andaman and Nicobar Islands.
 6. **The LACCADIVE, MINICOY AND AMINDIVI ISLANDS** — The territory specified in Section 6 of the States Reorganisation Act, 1956.
 - ^q[7. **DADRA AND NAGAR HAVELI** — The territory which immediately before the eleventh day of August, 1961 was comprised in Free Dadra and Nagar Haveli.]
 - ^r[8. **GOA, DAMAN AND DIU** — The territories which immediately before the twentieth day of December, 1961 were comprised in Goa, Daman and Diu.]
 - ^s[9. **PONDICHERRY** — The territories which immediately before the sixteenth day of August, 1962, were comprised in the French Establishments in India known as Pondicherry, Karikal, Mahe and Yanam.]
 - ^t[10. **CHANDIGARH** — The territories specified in Section 4 of the Punjab Reorganisation Act, 1966].
- [a] Substituted for the First Schedule, as amended by the States Reorganisation Act, 1956 (37 of 1956) and the Bihar and West Bengal (Transfer of Territories) Act, 1956 (40 of 1956), by the Constitution (Seventh Amendment) Act, 1956, Section 2 (1-11-1956).
- [b] Substituted by the Andhra Pradesh and Mysore (Transfer of Territory) Act, 1968 (36 of 1968) Section 4 (a) [1-10-1968].
- [bb] For formation of autonomous State of Meghalaya within the State of Assam, see the Assam Reorganisation Act (55 of 1969), S. 3.
- [c] Added by the State of Nagaland Act, 1962 (27 of 1962), Section 4 (w.e.f. 1-12-1963).
- [d] Substituted by the Bihar and Uttar Pradesh (Alteration of Boundaries) Act, 1968 (24 of 1968), Section 4(a).
- [dd] Substituted for entry 4 by the Bombay Reorganisation Act, 1960 (11 of 1960) [1-5-1960.]
- [ddd] Inserted by Section 4 of the Rajasthan and Madhya Pradesh (Transfer of Territories) Act, 1959 (47 of 1959) (w.e.f. 1-10-1959).
- [e] Substituted for 'Madras' by the Madras State (Alteration of Name) Act, 1968 (53 of 1968), Section 5 (w.e.f. 14-1-1969).
- [ee] Inserted by Andhra Pradesh, and Madras (Alteration of Boundaries) Act, 1959 (56 of 1959), Section 6 (w.e.f. 1-4-1960).
- [eee] Substituted, *ibid*.
- [f] Inserted by the Bombay Reorganisation Act, 1960 (11 of 1960), Section 4 (w.e.f. 1-5-1960).

- [g] Original entries 8 to 14, renumbered as 9 to 15, *ibid*.
- [h] Inserted by the Andhra Pradesh and Mysore (Transfer of Territories) Act, 1968 (36 of 1968), Section 4(b) (w.e.f. 1-10-1968).
- [i] Inserted by the Acquired Territories (Merger) Act, 1960 (64 of 1960), Section 4 (w.e.f. 17-1-1961).
- [j] Added by the Constitution (Ninth Amendment) Act, 1960, Section 3 (w.e.f. 17-1-1961).
- [k] Inserted by the Punjab Reorganisation Act, 1966 (31 of 1966), S. 7 (1-11-1966).
- [l] Inserted by the Rajasthan and Madhya Pradesh (Transfer of Territories) Act, 1959 (47 of 1959), Section 4 (w.e.f. 1-10-1959).
- [m] Substituted by the Bihar and Uttar Pradesh (Alteration of Boundaries) Act, 1968 (24 of 1968), Section 4(b).
- [n] Inserted by the State of Nagaland Act, 1962 (27 of 1962), Section 4 (w.e.f. 1-12-1963).
- [o] Inserted by the Punjab Reorganisation Act, 1966 (31 of 1966), Sec. 7 (1-11-1966).
- [p] Inserted, *ibid*.
- [q] Inserted by the Constitution (Tenth Amendment) Act, 1961, Section 2 (w.r.e.f. 11-8-1961).
- [r] Inserted by the Constitution (Twelfth Amendment) Act, 1962, Section 2 (w.r.e.f. 20-12-1961).
- [s] Inserted by the Constitution (Fourteenth Amendment) Act, 1962, Section 3 (w.r.e.f. 16-8-1962).
- [t] Inserted by Section 7 of the Punjab Reorganisation Act, 1968 (w.e.f. 1-11-1966).

SECOND SCHEDULE

[Articles 59 (3), 65 (3), 75 (6), 97, 125, 148 (3), 158 (3), 164 (5), 186 and 221]

PART A

Provisions as to the President and the Governors of States a[* * * * *]

1. There shall be paid to the President and to the Governors of the State a[* * *] the following emoluments per mensem, that is to say:—

The President	.....	10,000 rupees.
The Governor of a State	.....	5,500 rupees

2. There shall also be paid to the President and to the Governors of the States b[* * *] such allowances as were payable respectively to the Governor-General of the Dominion of India and to the Governors of the corresponding Provinces immediately before the commencement of this Constitution.

3. The President and the Governors of c[the States] throughout their respective terms of office shall be entitled to the same privileges to which the Governor-General and the Governors of the corresponding Provinces were respectively entitled immediately before the commencement of this Constitution.

4. While the Vice-President or any other person is discharging the functions of, or is acting as, President, or any person is discharging the functions of the Governor, he shall be entitled to the same emoluments, allowances and privileges as the President or the Governor whose functions he discharges or for whom he acts, as the case may be.

[a] The words 'specified in Part A of the First Schedule' were omitted by the Constitution (Seventh Amendment) Act, 1956, S. 29 and Schedule (1-11-1956).

[b] The words 'so specified', omitted, *ibid*.

[c] Substituted for the words 'such States', *ibid*.

PART B

[Part B was omitted by the Constitution (Seventh Amendment) Act, 1956, S. 29 and Schedule (1-11-1956).]

PART C

PROVISIONS AS TO THE SPEAKER AND THE DEPUTY SPEAKER OF THE HOUSE OF THE PEOPLE AND THE CHAIRMAN AND THE DEPUTY CHAIRMAN OF THE COUNCIL OF STATES AND THE SPEAKER AND THE DEPUTY SPEAKER OF THE LEGISLATIVE ASSEMBLY ^a[° ° ° °] AND THE CHAIRMAN AND THE DEPUTY CHAIRMAN OF THE LEGISLATIVE COUNCIL OF ^b[A STATE].

7. There shall be paid to the Speaker of the House of the People and the Chairman of the Council of States such salaries and allowances as were payable to the Speaker of the Constituent Assembly of the Dominion of India immediately before the commencement of this Constitution, and there shall be paid to the Deputy Speaker of the House of the People and to the Deputy Chairman of the Council of States such salaries and allowances as were payable to the Deputy Speaker of the Constituent Assembly of the Dominion of India immediately before such commencement.

8. There shall be paid to the Speaker and the Deputy Speaker of the Legislative Assembly ^a[° ° ° °] and to the Chairman and the Deputy Chairman of the Legislative Council ^c[of a State] such salaries and allowances as were payable respectively to the Speaker and the Deputy Speaker of the Legislative Assembly and the President and the Deputy President of the Legislative Council of the corresponding Province immediately before the commencement of this Constitution and, where the corresponding Province had no Legislative Council immediately before such commencement, there shall be paid to the Chairman and the Deputy Chairman of the Legislative Council of the State such salaries and allowances as the Governor of the State may determine.

[a] The words 'of a State specified in Part A of the First Schedule' were omitted by the Constitution (Seventh Amendment) Act, 1956, S. 29 and Schedule (1-11-1956).

[b] Substituted for 'any such State', *ibid*.

[c] Substituted for the words "of such State," *ibid*.

PART D

PROVISIONS AS TO THE JUDGES OF THE SUPREME COURT AND OF THE HIGH COURTS ^a[° ° ° °]

9. (1) There shall be paid to the Judges of the Supreme Court, in respect of time spent on actual service, salary at the following rates per mensem, that is to say :—

The Chief Justice	5,000 rupees.
Any other Judge	4,000 rupees:

Provided that if a Judge of the Supreme Court at the time of his appointment is in receipt of a pension (other than a disability or wound pension) in respect of any previous service under the Government of India or any of its predecessor Governments or under the Government of a State or any of its predecessor Governments, his salary in respect of service in the Supreme Court ^b[shall be reduced—

- (a) by the amount of that pension, and
- (b) if he has, before such appointment, received in lieu of a portion of the pension due to him in respect of such previous service the commuted value thereof, by the amount of that portion of the pension, and
- (c) if he has, before such appointment, received a retirement gratuity in respect of such previous service, by the pension equivalent of that gratuity.]

(2) Every Judge of the Supreme Court shall be entitled without payment of rent to the use of an official residence.

(3) Nothing in sub-paragraph (2) of this paragraph shall apply to a Judge who, immediately before the commencement of this Constitution,—

(a) was holding office as the Chief Justice of the Federal Court and has become on such commencement the Chief Justice of the Supreme Court under clause (1) of Article 374, or

(b) was holding office as any other Judge of the Federal Court and has on such commencement become a Judge (other than the Chief Justice) of the Supreme Court under the said clause,

during the period he holds office as such Chief Justice or other Judge, and every Judge who so becomes the Chief Justice or other Judge of the Supreme Court shall, in respect of time spent on actual service as such Chief Justice or other Judge, as the case may be, be entitled to receive in addition to the salary specified in sub-paragraph (1) of this paragraph as special pay an amount equivalent to the difference between the salary so specified and the salary which he was drawing immediately before such commencement.

(4) Every Judge of the Supreme Court shall receive such reasonable allowances to reimburse him for expenses incurred in travelling on duty within the territory of India and shall be afforded such reasonable facilities in connection with travelling as the President may from time to time prescribe.

(5) The rights in respect of leave of absence (including leave allowances) and pension of the Judges of the Supreme Court shall be governed by the provisions which, immediately before the commencement of this Constitution, were applicable to the Judges of the Federal Court.

[a] Paragraph 9—The words 'in States in Part A of the First Schedule' were omitted by the Constitution (Seventh Amendment) Act, 1956, S. 25 (1-11-1956).

[b] Paragraph 9—Substituted for the words 'shall be reduced by the amount of that pension', *ibid.*

10. (1) There shall be paid to the Judges of High Courts, in respect of time spent on actual service, salary at the following rates per mensem, that is to say,—

The Chief Justice	4,000 rupees.
Any other Judge	3,500 rupees :

Provided that if a Judge of a High Court at the time of his appointment is in receipt of a pension (other than a disability or wound pension) in respect of any previous service under the Government of India or any of its predecessor Governments or under the Government of a State or any of its predecessor Governments, his salary in respect of service in the High Court shall be reduced—

(a) by the amount of that pension, and

(b) if he has, before such appointment, received in lieu of a portion of the pension due to him in respect of such previous service the commuted value thereof, by the amount of that portion of the pension, and

(c) if he has before such appointment, received a retirement gratuity in respect of such previous service, by the pension equivalent of that gratuity.]

(2) Every person who immediately before the commencement of this Constitution—

(a) was holding office as the Chief Justice of a High Court in any Province and has on such commencement become the Chief Justice of the High Court in the corresponding State under clause (1) of Article 376, or

Schedule 2, Part D, Paras 10 and 11 — Note 1

(1) Constitutionally the Judge of a High Court is not prohibited from undertaking to perform functions other than those of a Judge in the absence of the President's permission and at the request of a State. AIR 1953 Nag 331 (332) = ILR (1953) Nag 901 (DB).

(2) The operation of the definition of 'actual service' in sub-para. (b) is confined to the purposes of Part D and is relevant only to the question of the remuneration payable to him as a Judge for the period he is engaged in the performance of such other functions. AIR 1953 Nag 331 (332, 333) = ILR (1953) Nag

(b) was holding office as any other Judge of a High Court in any Province and has on such commencement become a Judge (other than the Chief Justice) of the High Court in the corresponding State under the said clause,

shall, if he was immediately before such commencement drawing a salary at a rate higher than that specified in sub-paragraph (1) of this paragraph, be entitled to receive in respect of time spent on actual service as such Chief Justice or other Judge, as the case may be, in addition to the salary specified in the said sub-paragraph as special pay an amount equivalent to the difference between the salary so specified and the salary which he was drawing immediately before such commencement.

^d[(3) Any person who, immediately before the commencement of the Constitution (Seventh Amendment) Act, 1956, was holding office as the Chief Justice of the High Court of a State specified in Part B of the First Schedule and has on such commencement become the Chief Justice of the High Court of a State specified in the said Schedule as amended by the said Act, shall, if he was immediately before such commencement drawing any amount as allowance in addition to his salary, be entitled to receive in respect of time spent on actual service as such Chief Justice, the same amount as allowance in addition to the salary specified in sub-paragraph (1) of this paragraph.]

REMOVAL OF DIFFICULTIES

Paragraph 2 of the Constitution (Removal of Difficulties) Order, No. IV provides that as from 26-1-1950, the Second Schedule to the Constitution of India shall have effect subject to the following adaptation, namely:—

“(2) In sub-para. (2) of Paragraph 10, for all words after clause (b), the following shall be substituted—

“shall, in respect of time spent on actual service as such Chief Justice or other Judge, as the case may be, be entitled to receive in addition to the salary specified in sub-paragraph (1) of this paragraph as special pay the amount, if any, by which that salary falls short of the salary payable to the Chief Justice, or, as the case may be, any other Judge, of the High Court, in the Province immediately before the commencement.”

OBJECTS AND REASONS

“Sometimes it becomes necessary to appoint a retired district Judge as a Judge of the High Court. In the absence of a legal provision for withholding the pension due to such a Judge, it has been the practice to obtain from him an undertaking that he would not claim the pension for the period for which he serves as a High Court Judge. Since this is obviously unsatisfactory, it is proposed to add a Proviso to Paragraph 10(1) of the Second Schedule on the same lines as the Proviso to Paragraph 9 (1) thereof regulating the salary of a Judge of the Supreme Court in similar circumstances”—Gaz. of Ind., 1956, Pt. II, S. 2, Ext., p. 222.

[c] Paragraph 10—Substituted for sub-paragraph (1) by the Constitution (Seventh Amendment) Act, 1956, S. 25.

[d] Paragraph 10—Substituted for sub-paragraphs (3) and (4), *ibid*.

Schedule 2, Part D, Paras 10 and 11 — Note 1 (contd.)

901 (DB) ** AIR 1956 Punj 58 (70) = ILR (1956) Punj 236 (DB).

(3) The absence of President's permission may result in the period spent by the Judge of a High Court in the performance of other functions not being counted for the purpose of payment to him of the salary of a Judge. AIR 1953 Nag 331 (332) = ILR (1953) Nag 901 (DB) ** AIR 1956 Punj 58 (70) = ILR (1956) Punj 236 (DB).

(4) A commission appointed by the Nizam of Hyderabad to go into the question of succession to the estate of a deceased nobleman was incompetent because of the inclusion therein of a Judge of the High Court without obtaining the permission of the President. AIR 1953 Hyd 105 (110a) = ILR (1953) Hyd 1 (FB).

(5) Judicial Commissioner can act as arbitrator without President's permission. AIR 1958 Manipur 38 (40).

11. In this Part, unless the context otherwise requires,—

- (a) the expression "Chief Justice" includes an acting Chief Justice, and a "Judge" includes an ad hoc Judge;
- (b) "actual service" includes—
 - (i) time spent by a Judge on duty as a Judge or in the performance of such other functions as he may at the request of the President undertake to discharge;
 - (ii) vacations, excluding any time during which the Judge is absent on leave; and
 - (iii) joining time on transfer from a High Court to the Supreme Court or from one High Court to another.

PART E

PROVISIONS AS TO THE COMPTROLLER AND AUDITOR-GENERAL OF INDIA

12. (1) There shall be paid to the Comptroller and Auditor-General of India a salary at the rate of four thousand rupees per mensem.

(2) The person who was holding office immediately before the commencement of this Constitution as Auditor-General of India and has become on such commencement the Comptroller and Auditor-General of India under Article 377 shall in addition to the salary specified in sub-paragraph (1) of this paragraph be entitled to receive as special pay an amount equivalent to the difference between the salary so specified and the salary which he was drawing as Auditor-General of India immediately before such commencement.

(3) The rights in respect of leave of absence and pension and the other conditions of service of the Comptroller and Auditor-General of India shall be governed or shall continue to be governed, as the case may be, by the provisions which were applicable to the Auditor-General of India immediately before the commencement of this Constitution and all references in those provisions to the Governor-General shall be construed as references to the President.

THIRD SCHEDULE

[Articles 75 (4), 99, 124 (6), 148 (2), 164 (3), 188 and 219.]

FORMS OF OATHS OR AFFIRMATIONS

I

Form of oath of office for a Minister for the Union :—
swear in the name of God

I, A.B., do _____ that I will bear true faith and
solemnly affirm

allegiance to the Constitution of India as by law established, ^a[that I will uphold the sovereignty and integrity of India,] that I will faithfully and conscientiously discharge my duties as a Minister for the Union and that I will do right to all manner

Schedule 3 — Note 1

(1) Words 'having been nominated' in form clearly show that oath or affirmation cannot be made by candidate before he is nominated — Word 'nominated' in form cannot be interpreted to mean validly

nominated as provided in Section 36 (8), Representation of the People Act. AIR 1968 SC 1064 (1068) = (1968) 2 SCR 812.

(2) Form VII-A (As amended in 1963 by 16th Amendment) — Expression 'having been nominated' in Form VII-A

of people in accordance with the Constitution and the law, without fear or favour, affection or illwill."

[a] Inserted by the Constitution (Sixteenth Amendment) Act, 1963, S. 5 (a) (5-10-1963).

JAMMU AND KASHMIR

Third Schedule applies to the State of Jammu and Kashmir subject to the exceptions, namely, that Forms V, VI, VII and VIII shall be omitted.—See Constitution (Application to J. and K.) Order, 1954, Para. 2, sub-para. (20).

II

Form of oath of secrecy for a Minister for the Union:—
swear in the name of God

"I, A.B., do _____ that I will not directly or indirectly
solemnly affirm
communicate or reveal to any person or persons any matter which shall be brought
under my consideration or shall become known to me as a Minister for the Union
except as may be required for the due discharge of my duties as such Minister."

a[III]

Form of oath or affirmation to be made by a candidate for election to Parlia-
ment:—

A

"I, A.B., having been nominated as a candidate to fill a seat in the Council of
States (or the House of the People) do _____ swear in the name of God
that I will
solemnly affirm
bear true faith and allegiance to the Constitution of India as by law established
and that I will uphold the sovereignty and integrity of India."

B

Form of oath or affirmation to be made by a member of Parliament:—
"I, A.B., having been elected (or nominated) a member of the Council of
States (or the House of the People) do _____ swear in the name of God
that I will
solemnly affirm
bear true faith and allegiance to the Constitution of India as by law established,
that I will uphold the sovereignty and integrity of India and that I will faithfully
discharge the duty upon which I am about to enter."

[a] Substituted for original Form III by the Constitution (Sixteenth Amendment) Act,
1963, S. 5 (b) (5-10-1963).

IV

Form of oath or affirmation to be made by the Judges of the Supreme Court
and the Comptroller and Auditor-General of India:—

"I, A.B., having been appointed Chief Justice (or a Judge) of the Supreme
Court of India (or Comptroller and Auditor-General of India) do _____ swear in the name
of God
_____ that I will bear true faith and allegiance to the Constitution of India as
affirm
solemnly

Schedule 3 — Note 1 (contd.)
means 'when nomination paper is duly
delivered'. AIR 1966 Madh Pra 255 (260)
= 1966 MPLJ 77 (DB).

(3) Form VIII of oath of allegiance
by Judge does not warrant him in
ignoring the rule relating to the bind-
ing nature of the precedents which is

uniformly followed. AIR 1968 SC 372
(377) = (1968) 1 SCR 455 = 70 Bom
LR 73.

(4) For becoming eligible for the elec-
tion of a President a candidate has not
to take any oath. AIR 1968 SC 904 (909,
910) = (1968) 2 SCR 133.

by law established, ^a[that I will uphold the sovereignty and integrity of India,] that I will duly and faithfully and to the best of my ability, knowledge and judgment perform the duties of my office without fear or favour, affection or illwill and that I will uphold the Constitution and the laws."

[a] Inserted by the Constitution (Sixteenth Amendment) Act, 1963, S. 5 (c) (5-10-1963).

V

Form of oath of office for a Minister for a State :—

swear in the name of God

"I, A.B., do _____ that I will bear true faith and solemnly affirm

allegiance to the Constitution of India as by law established, ^a[that I will uphold the sovereignty and integrity of India,] that I will faithfully and conscientiously discharge my duties as a Minister for the State of.....and that I will do right to all manner of people in accordance with the Constitution and the law without fear or favour, affection or illwill."

[a] Inserted by the Constitution (Sixteenth Amendment) Act, 1963, S. 5 (c) (5-10-1963).

JAMMU AND KASHMIR

Not applicable to the State of Jammu and Kashmir—See note under Form I.

VI

Form of oath of secrecy for a Minister for a State :—

swear in the name of God

"I, A.B., do _____ that I will not directly or indirectly solemnly affirm

communicate or reveal to any person or persons any matter which shall be brought under my consideration or shall become known to me as a Minister for the State ofexcept as may be required for the due discharge of my duties as such Minister."

JAMMU AND KASHMIR

Not applicable to the State of Jammu and Kashmir—See note under Form I.

^a[VII

Form of oath or affirmation to be made by a candidate for election to the Legislature of a State :—

A

"I, A.B., having been nominated as a candidate to fill a seat in the Legislative Assembly (or Legislative Council), do _____ swear in the name of God

that I will solemnly affirm bear true faith and allegiance to the Constitution of India as by law established and that I will uphold the sovereignty and integrity of India."

B

Form of oath or affirmation to be made by a member of the Legislature of a State :—

"I, A.B., having been elected (or nominated) a member of the Legislative Assembly (or Legislative Council), do _____ swear in the name of God

that I will bear solemnly affirm true faith and allegiance to the Constitution of India as by law established, that I will uphold the sovereignty and integrity of India and that I will faithfully discharge the duty upon which I am about to enter."

[a] Substituted by the Constitution (Sixteenth Amendment) Act, 1963, S. 5 (c) (5-10-63).

JAMMU AND KASHMIR

Not applicable to the State of Jammu and Kashmir—See note under Form I.

VIII

Form of oath or affirmation to be made by the Judges of a High Court:—

"I, A.B., having been appointed Chief Justice (or a Judge) of the High Court swear in the name of God at (or of)..... do _____ that I will bear true solemnly affirm faith and allegiance to the Constitution of India as by law established, ^a[that I will uphold the sovereignty and integrity of India,] that I will duly and faithfully and to the best of my ability, knowledge and judgment perform the duties of my office without fear or favour, affection or illwill and that I will uphold the Constitution and the laws."

[a] Inserted by the Constitution (Sixteenth Amendment) Act, 1963, S. 5 (c) (5-10-1963).

JAMMU AND KASHMIR

Not applicable to the State of Jammu and Kashmir—See note under Form I.

^a[FOURTH SCHEDULE

[Articles 4 (1) and 80 (2).]

ALLOCATION OF SEATS IN THE COUNCIL OF STATES

To each State or Union territory specified in the first column of the following table, there shall be allotted the number of seats specified in the second column thereof opposite to that State or that Union territory, as the case may be.

TABLE

1. Andhra Pradesh	18
2. Assam	7
3. Bihar	22
^b [4. Gujarat	11]
^c [5. Haryana	5]
^d [6.] Kerala	9
7. Madhya Pradesh	16
8. ^e [Tamil Nadu]	^e [18]
^f [9. Maharashtra	19]
10. Mysore	12
11. Orissa	10
12. Punjab	^g [7]
13. Rajasthan	10
14. Uttar Pradesh	34
15. West Bengal	16
16. Jammu and Kashmir	4
^h [17. Nagaland	1]
18. Delhi	3
19. Himachal Pradesh	ⁱ [3]
20. Manipur	1
21. Tripura	1
^j [22. Pondicherry	1]

^k[228]

[a] Substituted for the Fourth Schedule (as amended by the States Reorganisation Act, 1956 and the Bihar and W. B. (Transfer of Territories) Act, 1956) by the Constitution (Seventh Amendment) Act, 1956, S. 3 (2), (1-11-1956).

[b] Substituted for 'Bombay' by the Bombay Reorganisation Act, 1960 (11 of 1960), S. 6 (1-5-1960).

[c] Inserted by the Punjab Reorganisation Act, 1966 (31 of 1966), S. 9 (1-11-1966).

[d] Original entries 5 to 21 renumbered, as 6 to 22, *ibid*.

[e] Substituted for '17' by Andh. Pra. and Madras (Alteration of Boundaries) Act, 1959 (56 of 1959), S. 8 (w. e. f. 1-4-1960).

- [f] Added by the Bombay Reorganisation Act, 1960 (11 of 1960), S. 6 (1-5-1960).
- [g] Substituted for '11' w. e. f. 1-11-1966 by Act 31 of 1966, S. 9.
- [h] Inserted by the State of Nagaland Act, 1962 (27 of 1962), S. 6 (w. e. f. 1-12-1963).
- [i] Substituted for "2" by Act 31 of 1966, S. 9 (1-11-1966).
- [j] Inserted by the Constitution (Fourteenth Amendment) Act, 1962, S. 6 (a) (28-12-1962).
- [k] Substituted for the figure '226' by the Punjab Reorganisation Act, 1966 (31 of 1966) S. 9 (1-11-1966).
- [l] Substituted for 'Madras' by Act, 53 of 1968 (w. e. f. 14-1-1969).

FIFTH SCHEDULE

[Article 244 (1).]

PROVISIONS AS TO THE ADMINISTRATION AND CONTROL OF SCHEDULED AREAS AND SCHEDULED TRIBES

PART A GENERAL

1. **Interpretation.**—In this Schedule, unless the context otherwise requires, the expression "State" ^a[° ° °] does not include the State of Assam.

2. **Executive power of a State in Scheduled Areas.**—Subject to the provisions of this Schedule, the executive power of a State extends to the Scheduled Areas therein.

3. **Report by the Governor ^b[° ° °] to the President regarding the administration of Scheduled Areas.**—The Governor ^b[° ° °] of each State having Scheduled Areas therein shall annually, or whenever so required by the President, make a report to the President regarding the administration of the Scheduled Areas in that State and the executive power of the Union shall extend to the giving of directions to the State as to the administration of the said areas.

[a] The words "means a State specified in Part A or Part B of the First Schedule but" were omitted by Constitution (Seventh Amendment) Act, 1956, S. 29 and Schedule (1-11-1956).

[b] The words 'or Rajpramukh', omitted, *ibid*.

JAMMU AND KASHMIR

Schedule V does not apply to the State of Jammu and Kashmir.

PART B

ADMINISTRATION AND CONTROL OF SCHEDULED AREAS AND SCHEDULED TRIBES

4. **Tribes Advisory Council.**—(1) There shall be established in each State having Scheduled Areas therein and, if the President so directs, also in any State having Scheduled Tribes but not Scheduled Areas therein, a Tribes Advisory Council consisting of not more than twenty members of whom, as nearly as may be, three-fourths shall be the representatives of the Scheduled Tribes in the Legislative Assembly of the State :

Provided that if the number of representatives of the Scheduled Tribes in the Legislative Assembly of the State is less than the number of seats in the Tribes Advisory Council to be filled by such representatives, the remaining seats shall be filled by other members of those tribes.

(2) It shall be the duty of the Tribes Advisory Council to advise on such matters pertaining to the welfare and advancement of the Scheduled Tribes in the State as may be referred to them by the Governor ^a[° ° °].

(3) The Governor '[* *]' may make rules^c prescribing or regulating, as the case may be,—

- (a) the number of members of the Council, the mode of their appointment and the appointment of the Chairman of the Council and of the officers and servants thereof;
- (b) the conduct of its meetings and its procedure in general; and
- (c) all other incidental matters.

5. Law applicable to Scheduled Areas.—(1) Notwithstanding anything in this Constitution, the Governor, '[* * *]' may by public notification direct that any particular Act of Parliament or of the Legislature of the State shall not apply to a Scheduled Area or any part thereof in the State or shall apply to a Scheduled Area or any part thereof in the State subject to such exceptions and modifications as he may specify in the notification and any direction given under this sub-paragraph may be given so as to have retrospective effect.

(2) The Governor '[* * *]' may make regulations for the peace and good government of any area in a State which is for the time being a Scheduled Area.

In particular and without prejudice to the generality of the foregoing power, such regulations may—

- (a) prohibit or restrict the transfer of land by or among members of the Scheduled Tribes in such area;

Schedule V, Part B, Para 5

1. Governor's power to issue notifications — Clause (1). — (1) The power of making a notification under this clause is a legislative and not an administrative power. see AIR 1947 FC 32 (34, 35) = ILR 26 Pat 442 = ILR (1947) Kar (FC) 72 = 1947 FCR 116.

(2) This clause must be read in the context of Art. 245 (1) under which the Parliament has power to make laws for the whole or any part of the territory of India, and the State Legislature has power to make laws for the whole or any part of the State. AIR 1954 Pat 159 (160) = ILR 32 Pat 119 (DB).

(3) There is nothing in this clause to show that the Governor must issue a notification before any such Act can be enforced in a Scheduled Area. AIR 1955 Pat 317 (319, 320) = 1955 Cri L Jour 1089.

(4) The clause expressly provides that any direction given in a notification under it may be made to have retrospective effect. AIR 1958 Pat 366 (369) (DB).

(5) The power is granted under sub-para (1) mainly to protect the interests of the scheduled area or the persons residing in the scheduled area in which no doubt the majority of the persons are scheduled tribes. AIR 1965 Andh Pra 332 (333) = (1965) 1 Andh WR 142. (DB). (AIR 1962 Andh Pra 212, Rel. on; AIR 1960 SC 1208, Disting.)

(6) Para 5(1) envisages that post-Constitution Acts are applicable to Scheduled areas unless otherwise directed by the Governor. AIR 1966 Pat 375 (379) = 1966 Cri LJ 1183 (DB).

2. Governor's power to make regulations. — (1) Clause (2) gives the Gov-

ernor plenary powers of legislation concerning a Scheduled Area by framing regulations for the peace and good government of that Area, see AIR 1949 FC 175 (183) = 1949 FCR 595 = ILR 28 Pat 703 = 50 Cri L Jour 897 ** AIR 1947 Pat 13 (14) = ILR 25 Pat 719 (SB).

(2) If the very tenor and subject of a Regulation makes it obvious that it is for the peace and good government of the area, it is wholly unnecessary to make statement in the preamble of the Regulation to indicate that it was for the peace and good government of the area. AIR 1947 Pat 13 (14) = ILR 25 Pat 719 (SB).

(3) Madras Scheduled Areas Estates (Abolition and Conversion into Ryotwari) Regulation (IV of 1951) is valid. AIR 1967 SC 71 (74) = (1962) 2 SCR 535.

(4) Madras Scheduled Areas Estates (Abolition and Conversion into Ryotwari) (Regulation IV of 1951) — Governor was competent to make the Regulation bringing into effect retrospectively the Madras Act XXVI of 1948 — Regulation is valid. (1963) 2 Andh LT 106 = ILR (1964) Andh Pra 578 (583).

(5) Madhya Pradesh Scheduled Tribes Debt Relief Regulations, 1962, are not unconstitutional on ground that they operate retrospectively. AIR 1967 Madh Pra 52 (53) = 1966 MPLJ 842.

(6) Phrase 'peace and good government' is wide enough to justify even total prohibition of any business provided it is for protection and promotion of welfare of scheduled tribes. AIR 1967 Madh Pra 52 (53) = 1966 MPLJ 842.

(b) regulate the allotment of land to members of the Scheduled Tribes in such area;

(c) regulate the carrying on of business as money-lender by persons who lend money to members of the Scheduled Tribes in such area.

(3) In making any such regulation as is referred to in sub-paragraph (2) of this paragraph, the Governor ^{b[° °]} may repeal or amend any Act of Parliament or of the Legislature of the State or any existing law which is for the time being applicable to the area in question.

(4) All regulations made under this paragraph shall be submitted forthwith to the President and, until assented to by him, shall have no effect.

(5) No regulation shall be made under this paragraph unless the Governor ^{b[° ° °]} making the regulation has, in the case where there is a Tribes Advisory Council for the State, consulted such Council.

[a] The words 'or Rajpramukh, as the case may be,' omitted by the Constitution (Seventh Amendment) Act, 1956, S. 29 and Sch. (1-11-1956).

[b] The words 'or Rajpramukh' and 'or the Rajpramukh' omitted, *ibid*.

[c] Para 4 (3):

See (1) The Bihar Tribes Advisory Council Rules, 1951—Bih. Gaz, 1951, Pt. II, p. 1721.

(2) M. P. Tribes Advisory Council Rules, 1950—M. P. Gaz., 1950, Pt. I, p. 733 and 1951, Pt. I, p. 247.

(3) Gujarat Tribes Advisory Council Rules, 1960—Guj. Govt. Gaz., 1-9-1960, Pt. IV-A p. 71.

(4) Maharashtra Tribes Advisory Council Rules, 1960—Maha. Govt. Gaz., 8-9-1960, Pt. IV-A, p. 270.

(5) Madras Tribes Advisory Council Rules, 1961—Ft. St. Geo. Gaz., 13-9-1961, Pt. V, p. 989.

(6) Advisory Council for Welfare of Scheduled Tribes Living in Plains Districts of Assam Rules, 1967—Assam Gaz., 21-6-1967, Pt. II-A, p. 1517.

(7) Manipur Tribal Advisory Council Rules — Manipur Gaz., 18-3-1964, Pt. II, p. 3.

PART C

SCHEDULED AREAS

6. Scheduled Areas.—(1) In this Constitution, the expression "Scheduled Areas" means such areas as the President may by order^a declare to be Scheduled Areas.

(2) The President may at any time by order—

(a) direct that the whole or any specified part of a Scheduled Area shall cease^b to be a Scheduled Area or a part of such an area;

(b) alter, but only by way of rectification of boundaries, any Scheduled Area;

(c) on any alteration of the boundaries of a State or on the admission into the Union or the establishment of a new State, declare any territory not previously included in any State to be, or to form part of, a Scheduled Area;

and any such order may contain such incidental and consequential provisions as appear to the President to be necessary and proper, but save as aforesaid, the order made under sub-paragraph (1) of this paragraph shall not be varied by any subsequent order.

[a] See (1) the Scheduled Areas (Part A States) Order, 1950 (C. O. 9) published in Gaz. of Ind., 1950, Ext., p. 670 and (2) The Scheduled Areas (Part B States) Order, 1950, published in Gaz. of Ind., 1950, Ext., Pt. II, S. 3, p. 975.

[b] See the Madras Scheduled Areas (Cesser) Order, 1951 (C. O. 30) — Gaz. of Ind., 1951, Pt. II, S. 3, Ext., p. 843 and the Andhra Scheduled Areas (Cesser) Order, 1955, (C. O. 50) published in Gaz. of Ind., 12-9-1955, Pt. II, S. 3, Ext., p. 1997.

PART D

AMENDMENT OF THE SCHEDULE

7. **Amendment of the Schedule.**—(1) Parliament may from time to time by law amend by way of addition, variation or repeal any of the provisions of this Schedule and, when the Schedule is so amended, any reference to this Schedule in this Constitution shall be construed as a reference to such Schedule as so amended.

(2) No such law as is mentioned in sub-paragraph (1) of this paragraph shall be deemed to be an amendment of this Constitution for the purposes of Article 368.

SIXTH SCHEDULE

[Articles 244 (2) and 275 (1)]

PROVISIONS AS TO THE ADMINISTRATION OF TRIBAL AREAS IN ASSAM

1. **Autonomous districts and autonomous regions.**—(1) Subject to the provisions of this paragraph, the tribal areas in each item of Part A of the table appended to paragraph 20 of this Schedule shall be an autonomous district.

(2) If there are different Scheduled Tribes in an autonomous district, the Governor may, by public notification, divide the area or areas inhabited by them into autonomous regions.

(3) The Governor may, by public notification,—

- (a) include any area in Part A of the said table,
- (b) exclude any area from Part A of the said table,
- (c) create a new autonomous district,
- (d) increase the area of any autonomous district,
- (e) diminish the area of any autonomous district,
- (f) unite two or more autonomous districts or parts thereof so as to form one autonomous district,
- ^a[(ff) alter the name of any autonomous district,]
- (g) define the boundaries of any autonomous district:

Provided that no order shall be made by the Governor under clauses (c), (d), (e) and (f) of this sub-paragraph except after consideration of the report of a Commission appointed under sub-paragraph (1) of paragraph 14 of this Schedule.

[a] Inserted by the Assam Reorganisation (Meghalaya) Act, 1969 (55 of 1969), S. 74 and Sch. IV.

JAMMU AND KASHMIR

Schedule VI is not applicable to the State.

2. **Constitution of District Councils and Regional Councils.**—^a[(1) There shall be a District Council for each autonomous district consisting of not more

Schedule 6, Para 1 — Note 1

(1) Administration of Tribal areas in Assam is governed by provisions of Sch. VI and not by other relevant provisions of the Constitution this schedule purports to provide a self-contained Code and deals with all relevant topics in that behalf. AIR 1966 SC 1220 (1224) = (1966) 2 SCR 770.

(2) Scheme of Sixth Schedule shows that District Council is both administrative and legislative body and that all administrative and legislative powers were vested in Governor by para 19 till

District Councils were constituted. AIR 1961 SC 276 (279) = (1961) 1 SCR 750.

(3) Governor's Notification creating new autonomous District is intra vires of para 1 (3) and does not require parliamentary legislation to make it effective. AIR 1966 SC 1220 (1228) = (1966) 2 SCR 770. (AIR 1966 Assam 1, Affirmed.)

Schedule 6, Para 2 — Note 1

(1) Siem or Chief appointed by Governor and later confirmed by District Council being administrative officer

than thirty members, of whom not more than four persons shall be nominated by the Governor and the rest shall be elected on the basis of adult suffrage.]

[a] Substituted by Act 55 of 1969, S. 74 and Sch. IV.

(2) There shall be a separate Regional Council for each area constituted an autonomous region under sub-paragraph (2) of paragraph 1 of this Schedule.

(3) Each District Council and each Regional Council shall be a body corporate by the name respectively of "the District Council of (name of district)" and "the Regional Council of (name of region)," shall have perpetual succession and a common seal and shall by the said name sue and be sued.

(4) Subject to the provisions of this Schedule, the administration of an autonomous district shall, in so far as it is not vested under this Schedule in any Regional Council within such district, be vested in the District Council for such district and the administration of an autonomous region shall be vested in the Regional Council for such region.

(5) In an autonomous district with Regional Councils, the District Council shall have only such powers with respect to the areas under the authority of the Regional Council as may be delegated to it by the Regional Council in addition to the powers conferred on it by this Schedule with respect to such areas.

(6) The Governor shall make rules for the first constitution of District Councils and Regional Councils in consultation with the existing tribal Councils or other representative tribal organisations within the autonomous districts or regions concerned, and such rules shall provide for—

(a) the composition of the District Councils and Regional Councils and the allocation of seats therein;

(b) the delimitation of territorial constituencies for the purpose of elections to those Councils;

(c) the qualifications for voting at such elections and the preparation of electoral rolls therefor;

(d) the qualifications for being elected at such elections as members of such Councils;

(e) the term of office of members of ^a[Regional Councils;]

[a] Substituted by Act 55 of 1969, S. 74 and Sch. IV.

(f) any other matter relating to or connected with elections or nominations to such Councils;

(g) the procedure and the conduct of business ^a[(including the power to act notwithstanding any vacancy)] in the District and Regional Councils;

[a] Inserted by Act 55 of 1969, S. 74 and Sch. IV.

(h) the appointment of officers and staff of the District and Regional Councils.

^a[(6A) The elected members of the District Council shall hold office for a term of five years from the date appointed for the first meeting of the Council after general elections to the Council, unless the District Council is sooner dissolved under paragraph 16 and a nominated member shall hold office at the pleasure of the Governor:]

Schedule 6 Para 2 — Note 1 (contd.)
under the control of District Council is removable by Executive Committee of the District Council. AIR 1961 SC 276 (279, 280, 281, 282, 283) = (1961) 1 SCR 750.

(2) Village surveyor under Garo Hills District Council in Assam is not member of Civil service under the State of

Assam. Art. 311 does not apply. AIR 1961 Assam 69 (70) = (1960) 1 Assam LR 136 (DB).

(3) Appointment and removal of Myntri and declaration of his election as void is within jurisdiction of District Council. AIR 1969 Assam 139 (143) (DB).

Provided that the said period of five years may, while a Proclamation of Emergency is in operation or if circumstances exist which, in the opinion of the Governor, render the holding of elections impracticable, be extended by the Governor for a period not exceeding one year at a time and in any case where a Proclamation of Emergency is in operation not extending beyond a period of six months after the Proclamation has ceased to operate:

Provided further that a member elected to fill a casual vacancy shall hold office only for the remainder of the term of office of the member whom he replaces.]

[a] Inserted by the Assam Reorganisation (Meghalaya) Act, 1969 (55 of 1969), S. 74 and Sch. IV.

(7) The District or the Regional Council may after its first constitution make rules ^a[with the approval of the Governor] with regard to the matters specified in sub-paragraph (6) of this paragraph and may also make rules ^a[with like approval] regulating—

(a) the formation of subordinate local Councils or Boards and their procedure and the conduct of their business; and

(b) generally all matters relating to the transaction of business pertaining to the administration of the district or region, as the case may be:

Provided that until rules are made by the District or the Regional Council under this sub-paragraph the rules made by the Governor under sub-paragraph (6) of this paragraph shall have effect in respect of elections to, the officers and staff of, and the procedure and the conduct of business in, each such Council:

b[° ° ° ° °].

[a] Inserted by Act 55 of 1969, S. 74 and Sch. IV.

[b] Second proviso omitted, *ibid*.

3. Powers of the District Councils and Regional Councils to make laws.—

(1) The Regional Council for an autonomous region in respect of all areas within such region and the District Council for an autonomous district in respect of all areas within the district except those which are under the authority of Regional Councils, if any, within the district shall have power to make laws with respect to—

(a) the allotment, occupation or use, or the setting apart, of land, other than any land which is a reserved forest, for the purposes of agriculture or grazing or for residential or other non-agricultural purposes or

Schedule 6, Para 3 — Note 1

(1) Any purpose likely to promote the interest of the inhabitants could include the holding of markets. Hence, the United Khasi-Jaintia Hills Autonomous District (Management and Control of Markets) Act (5 of 1953) passed by the District Council was within its legislative competence. AIR 1956 Assam 162 (163) = ILR (1956) 8 Assam 511 (DB) ** ILR (1960) 12 Assam 26.

(2) The Lushai Hills District (Reduction of Fathang) Act (3 of 1953), which relates to reduction of rent payable for "Jhumming" or for purpose of shifting cultivation was within the legal competence of the District Council. AIR 1956 Assam 5 (6) = ILR (1955) 7 Assam 419 (DB).

(3) The District Council has alone jurisdiction to appoint elected Syiem and on such appointment he becomes administrative officer under its control. AIR 1969 Assam 94 (98, 99) (DB).

(4) The provisions of the Sixth Schedule do not make the District Council the owner of the entire land of the United Khasi and Jaintia Hills. AIR 1960 Assam 131 (132) = ILR (1959) 11 Assam 213 (DB).

(5) The Constitution does not forbid repeal by District Council of existing laws relating to matters within the scope of its legislative authority. Garo Hills Act (I of 1952) is not ultra vires the District Council. ILR (1957) 9 Assam 57.

(6) United Khasi-Jaintia Hills District (Transfer of Land) Act, 1953, is ultra vires the powers of the District Council under Para 3 (1) (a) of Sch. VI to the Constitution. AIR 1968 Assam 43 (47).

(7) Para 3 (1) is in fact something like a legislative list and enumerates the subjects on which District Council is competent to make laws. AIR 1961 SO 276 (281) = (1961) 1 SCR 750.

for any other purpose likely to promote the interests of the inhabitants of any village or town :

Provided that nothing in such laws shall prevent the compulsory acquisition of any land, whether occupied or unoccupied, for public purposes by the ^a[Government of Assam or the Government of Meghalaya] in accordance with the law for the time being in force authorising such acquisition;

[a] Substituted by Act 55 of 1969, S. 74 and Sch. IV.

- (b) the management of any forest not being a reserved forest;
- (c) the use of any canal or water-course for the purpose of agriculture;
- (d) the regulation of the practice of jhum or other forms of shifting cultivation;
- (e) the establishment of village or town committees or councils and their powers;
- (f) any other matter relating to village or town administration, including village or town police and public health and sanitation;
- (g) the appointment or succession of Chiefs or Headmen;
- (h) the inheritance of property;
- ^a[(i) marriage and divorce];

[a] Substituted by Act 55 of 1969, S. 74 and Sch. IV.

(j) social customs.

(2) In this paragraph, a "reserved forest" means any area which is a "reserved forest" under the Assam Forest Regulation, 1891, or under any other law for the time being in force in the area in question.

(3) All laws made under this paragraph shall be submitted forthwith to the Governor and, until assented to by him, shall have no effect.

4. Administration of justice in autonomous districts and autonomous regions.—(1) The Regional Council for an autonomous region in respect of areas within such region and the District Council for an autonomous district in respect of areas within the district other than those which are under the authority of the Regional Councils, if any, within the district may constitute village councils or courts for the trial of suits and cases between the parties all of whom belong to Scheduled Tribes within such areas, other than suits and cases to which the provisions of sub-paragraph (1) of paragraph 5 of this Schedule apply, to the exclusion of any Court in the State, and may appoint suitable persons to be members of such village councils or presiding officers of such Courts, and may also appoint such officers as may be necessary for the administration of the laws made under paragraph 3 of this Schedule.

(2) Notwithstanding anything in this Constitution, the Regional Council for an autonomous region or any Court constituted in that behalf by the Regional

Schedule 6, Para 3 — Note 1 (contd.)

(8) United Khasi Jaintia Hills Autonomous District (Appointment and Succession of Chiefs and Headmen) Act (Assam Act 2 of 1959) is passed under Para 3(1) (g), Sch. 6 and is valid and is applicable to the case of removal of Myntri by District Council, even though his election took place prior to commencement of the Act. AIR 1969 Assam 139 (143) (DB).

Schedule 6, Para 4 — Note 1

(1) The Rules framed by the District Council of the United Khasi and Jaintia Hills District for the administration of justice in the autonomous District have no application, because of Paragraph 20 (2), to the administered area

or the area of the State of Myllem falling within the Shillong Municipality. AIR 1956 Assam 129 (136) = ILR (1956) 8 Assam 89 (SB).

(2) United Khasi-Jaintia Hills Autonomous District (Administration of Justice) Rules (1953) were framed under Para 4 (4). AIR 1965 Assam 51 (52) = 1965 (2) Cri LJ 72 (DB).

(3) The power to frame rules regarding administration of justice includes within its ambit the power to provide for trial of suits and cases by existing Courts for such time as the District Council provides under the rules. AIR 1963 Assam 31 (35, 36) = 1961 (1) Cri LJ 417 = ILR (1952) 14 Assam 244.

Council or, if in respect of any area within an autonomous district there is no Regional Council, the District Council for such district, or any Court constituted in that behalf by the District Council, shall exercise the powers of a Court of appeal in respect of all suits and cases triable by a village council or Court constituted under sub-paragraph (1) of this paragraph within such region or area, as the case may be, other than those to which the provisions of sub-paragraph (1) of paragraph 5 of this Schedule apply, and no other Court except the High Court and the Supreme Court shall have jurisdiction over such suits or cases.

(3) The High Court of Assam shall have and exercise such jurisdiction over the suits and cases to which the provisions of sub-paragraph (2) of this paragraph apply as the Governor may from time to time by order specify.^a

[a] See the Assam High Court (Jurisdiction over District Council Courts) Order, 1954 — Assam Gaz., 20-1-1954, Pt. II-A, p. 61.

(4) A Regional Council or District Council, as the case may be, may with the previous approval of the Governor make rules regulating—

- (a) the constitution of village councils and Courts and the powers to be exercised by them under this paragraph;
- (b) the procedure to be followed by village councils or Courts in the trial of suits and cases under sub-paragraph (1) of this paragraph;
- (c) the procedure to be followed by the Regional or District Council or any Court constituted by such Council in appeals and other proceedings under sub-paragraph (2) of this paragraph;
- (d) the enforcement of decisions and orders of such Councils and Courts;
- (e) all other ancillary matters for the carrying out of the provisions of sub-paragraphs (1) and (2) of this paragraph.

^a[(5) On and from such date as the President may, after consulting the Government of Assam or, as the case may be, the Government of Meghalaya, by notification appoint in this behalf, this paragraph shall have effect in relation to such autonomous district or region as may be specified in the notification, as if—

- (i) in sub-paragraph (1), for the words 'between the parties all of whom belong to Scheduled Tribes within such areas, other than suits and cases to which the provisions of sub-paragraph (1) of paragraph 5 of this Schedule apply,' the words "not being suits and cases of the nature referred to in sub-paragraph (1) of paragraph 5 of this Schedule, which the Governor may specify in this behalf," had been substituted;
- (ii) sub-paragraphs (2) and (3) had been omitted;
- (iii) in sub-paragraph (4)—
 - (a) for the words "A Regional Council or District Council, as the case may be, may with the previous approval of the Governor make rules regulating," the words "The Governor may make rules regulating" had been substituted; and
 - (b) for clause (a) the following clause had been substituted, namely :—
 - "(a) the constitution of village councils and Courts, the powers to be exercised by them under this paragraph and the Courts to which appeals from decisions of village councils and Courts shall lie;"
 - (c) for clause (c), the following had been substituted, namely :—
 - "(c) the transfer of appeals and other proceedings pending before the Regional or District Council or any Court constituted by such Council immediately before the date appointed by the President under sub-paragraph (5);" and

(d) in clause (e), for the words brackets, and figures “sub-paragraphs (1) and (2),” the word, brackets and figure “sub-paragraph (1)” had been substituted.”]

[a] Inserted by the Assam Reorganisation (Meghalaya) Act, 1969 (55 of 1969), S. 74 and Sch. IV, Item 4.

5. Conferment of powers under the Code of Civil Procedure, 1908, and the Code of Criminal Procedure, 1898, on the Regional and District Councils and on certain courts and officers for the trial of certain suits, cases and offences.—(1) The Governor may, for the trial of suits or cases arising out of any law in force in any autonomous district or region being a law specified in that behalf by the Governor, or for the trial of offences punishable with death, transportation for life, or imprisonment for a term of not less than five years under the Indian Penal Code or under any other law for the time being applicable to such district or region, confer on the District Council or the Regional Council having authority over such district or region or on Courts constituted by such District Council or on any officer appointed in that behalf by the Governor, such powers under the Code of Civil Procedure, 1908, or, as the case may be, the Code of Criminal Procedure, 1898, as he deems appropriate, and thereupon the said Council, Court or officer shall try the suits, cases or offences in exercise of the powers so conferred.

(2) The Governor may withdraw or modify any of the powers conferred on a District Council, Regional Council, Court or officer under sub-paragraph (1) of this paragraph.

(3) Save as expressly provided in this paragraph, the Code of Civil Procedure, 1908, and the Code of Criminal Procedure, 1898, shall not apply to the trial of any suits, cases or offences in an autonomous district or in any autonomous region to which the provisions of this paragraph apply.

^a[(4) On and from the date appointed by the President under sub-paragraph (5) of paragraph 4 in relation to any autonomous district or autonomous region, nothing contained in this paragraph shall, in its application to that district or region, be deemed to authorise the Governor to confer on the District Council or Regional Council or on Courts constituted by the District Council any of the powers referred to in sub-paragraph (1) of this paragraph.]

[a] Inserted by the Assam Reorganisation (Meghalaya) Act, 1969 (55 of 1969), S. 74 and Sch. IV, Item 5.

^a[6. Powers of the District Council to establish primary schools, etc.—(1) The District Council for an autonomous district may establish, construct, or manage primary schools, dispensaries, markets, cattle pounds, ferries, fisheries, roads, road transport and waterways in the district and may, with the previous approval of the Governor, make regulations for the regulation and control thereof and, in particular may prescribe the language and the manner in which primary education shall be imparted in the primary schools in the district.

(2) The Governor may, with the consent of any District Council, entrust either conditionally or unconditionally to that Council or to its officers functions in relation to agriculture, animal husbandry, community projects, co-operative

Schedule 6, Para 5 — Note 1

(1) Garo Hills Autonomous District (Administration of Justice) Rules, 1953—Cases mentioned in Para 5 (1) are cases referred to in R. 23 (1) (a) and provision of R. 24 (2) will be attracted to such cases. AIR 1962 Assam 62 (64, 65) = 1962 (1) Cri LJ 560 = ILR (1962) 14 Assam 169.

(2) Offence of adultery falls under Para 5 (1) — District Council Courts not authorised to try such offences under R. 23 (1) of Rules framed relating to Mizo Hills Administration under Para 4 — Magistrate could try the offence. 1961 (2) Cri LJ 459 (460) (Assam) (DB).

societies, social welfare, village planning or any other matter to which the executive power of the State of Assam or Meghalaya, as the case may be, extends.]

[a] Substituted for the original paragraph 6 by the Assam Reorganisation (Meghalaya) Act, 1969 (55 of 1969), S. 74 and Sch. IV, Item 6.

7. District and Regional Funds.—(1) There shall be constituted for each autonomous district, a District Fund and for each autonomous region, a Regional Fund to which shall be credited all moneys received respectively by the District Council for that District and the Regional Council for that region in the course of the administration of such district or region, as the case may be, in accordance with the provisions of this Constitution.

^a[(2) The Governor may make rules for the management of the District Fund, or, as the case may be, the Regional Fund and for the procedure to be followed in respect of payment of money into the said Fund, the withdrawal of moneys therefrom, the custody of moneys therein and any other matter connected with or ancillary to the matters aforesaid.

(3) The accounts of the District Council or, as the case may be, the Regional Council shall be kept in such form as the Comptroller and Auditor-General of India may, with the approval of the President, prescribe.

(4) The Comptroller and Auditor-General shall cause the accounts of the District and Regional Councils to be audited in such manner as he may think fit, and the reports of the Comptroller and Auditor-General relating to such accounts shall be submitted to the Governor who shall cause them to be laid before the Council.]

[a] Substituted for original sub-paragraph (2) by the Assam Reorganisation (Meghalaya) Act, 1969 (55 of 1969), S. 74 and Sch. IV, Item 7.

8. Powers to assess and collect land revenue and to impose taxes.—(1) The Regional Council for an autonomous region in respect of all lands within such region and the District Council for an autonomous district in respect of all lands within the district except those which are in the areas under the authority of Regional Councils, if any, within the district, shall have the power to assess and collect revenue in respect of such lands in accordance with the principles for the time being followed by the Government of Assam in assessing lands for the purpose of land revenue in the State of Assam generally.

(2) The Regional Council for an autonomous region in respect of areas within such region and the District Council for an autonomous district in respect of all areas in the district except those which are under the authority of Regional Councils, if any, within the district, shall have power to levy and collect taxes on lands and buildings, and tolls on persons resident within such areas.

(3) The District Council for an autonomous district shall have the power to levy and collect all or any of the following taxes within such district, that is to say—

- (a) taxes on professions, trades, callings and employments;
- (b) taxes on animals, vehicles and boats;
- (c) taxes on the entry of goods into a market for sale therein, and tolls on passengers and goods carried in ferries; and
- (d) taxes for the maintenance of schools, dispensaries or roads.

Schedule 6, Para 8 — Note 1

(1) After the constitution of a District Council according to the provisions of this Schedule it is only that body and not the Lyngdoh which has the power of levying taxes or fees. Lyngdoh cannot enhance the licence fee or direct the cancellation of the licence or settle the business on some other person. AIR 1958 Assam 33 (33).

(2) The District Council under paragraph 3 read with this paragraph had

the authority to enact the United Khasi-Jaintia Hills Autonomous District (Management and Control of Markets) Act (5 of 1953). AIR 1956 Assam 162 (163) = ILR (1956) 8 Assam 511 (DB). ** ILR (1960) 12 Assam 26.

(3) District Council and not village Durbar was competent to levy and collect compulsory contribution which is a tax. See AIR 1967 Assam 8 (9) = ILR (1962) 14 Assam 71.

(4) A Regional Council or District Council, as the case may be, may make regulations to provide for the levy and collection of any of the taxes specified in sub-paragraphs (2) and (3) of this paragraph ^a[and every such regulation shall be submitted forthwith to the Governor and, until assented to by him, shall have no effect.]

[a] Inserted by Act 55 of 1969, S. 74 and Sch. IV, Item 8.

9. Licences or leases for the purpose of prospecting for, or extraction of, minerals.—(1) Such share of the royalties accruing each year from licences or leases for the purpose of prospecting for, or the extraction of, minerals granted by the Government of Assam in respect of any area within an autonomous district as may be agreed upon between the Government of Assam and the District Council of such district shall be made over to that District Council.

(2) If any dispute arises as to the share of such royalties to be made over to a District Council, it shall be referred to the Governor for determination and the amount determined by the Governor in his discretion shall be deemed to be the amount payable under sub-paragraph (1) of this paragraph to the District Council and the decision of the Governor shall be final.

10. Power of District Council to make regulations for the control of money-lending and trading by non-tribals.—(1) The District Council of an autonomous district may make regulations for the regulation and control of money-lending or trading within the district by persons other than Scheduled Tribes resident in the district.

(2) In particular and without prejudice to the generality of the foregoing power, such regulations may—

- (a) prescribe that no one except the holder of a licence issued in that behalf shall carry on the business of money-lending;
- (b) prescribe the maximum rate of interest which may be charged or be recovered by a money-lender;
- (c) provide for the maintenance of accounts by money-lenders and for the inspection of such accounts by officers appointed in that behalf by the District Council;
- (d) prescribe that no person who is not a member of the Scheduled Tribes resident in the district shall carry on wholesale or retail business in any commodity except under a licence issued in that behalf by the District Council :

Provided that no regulations may be made under this paragraph unless they are passed by a majority of not less than three-fourths of the total membership of the District Council :

Provided further that it shall not be competent under any such regulations to refuse the grant of a licence to a money-lender or a trader who has been carrying on business within the district since before the time of the making of such regulations.

(3) All regulations made under this paragraph shall be submitted forthwith to the Governor and, until assented to by him, shall have no effect.

11. Publication of laws, rules and regulations made under the Schedule.—All laws, rules and regulations made under this Schedule by a District Council or a Regional Council shall be published forthwith in the Official Gazette of the State and shall on such publication have the force of law.

Schedule 6, Para 10 — Note 1
(1) (Per Bachawat J. Dissenting) —
Section 3 of Lushai Hills District (Trading by non-Tribals) Regulation which

is in strict conformity with it, cannot be regarded as violative of Arts. 14 and 19 (1) (g). AIR 1967 SC 829 (835) = (1967) 1 SCR 1012.

12. Application of Acts of Parliament and of the Legislature of the State to autonomous districts and autonomous regions.—(1) Notwithstanding anything in this Constitution—

- (a) no Act of the Legislature of the State in respect of any of the matters specified in paragraph 3 of this Schedule as matters with respect to which a District Council or a Regional Council may make laws, and no Act of the Legislature of the State prohibiting or restricting the consumption of any non-distilled alcoholic liquor shall apply to any autonomous district or autonomous region unless in either case the District Council for such district or having jurisdiction over such region by public notification so directs, and the District Council in giving such direction with respect to any Act may direct that the Act shall in its application to such district or region or any part thereof have effect subject to such exceptions or modifications as it thinks fit;
 - (b) the Governor may, by public notification, direct that any Act of Parliament or of the Legislature of the State to which the provisions of clause (a) of this sub-paragraph do not apply shall not apply to an autonomous district or an autonomous region, or shall apply to such district or region or any part thereof subject to such exceptions or modifications as he may specify in the notification.
- (2) Any direction given under sub-paragraph (1) of this paragraph may be given so as to have retrospective effect.

^a[12A. Special provisions as respects application of laws in Meghalaya.—
(1) Notwithstanding anything contained in paragraph 12—

- (a) if any provision of a law made by a District or Regional Council in Meghalaya with respect to any of the matters specified in clause (b) or clause (c) of sub-paragraph (1) of paragraph 3 of this Schedule is repugnant to any provision of a law made by the Legislature of the State of Assam with respect to any project declared by the Legislature of that State to be of State importance, then, the law made by the District Council or, as the case may be, the Regional Council, whether made before or after the law made by the Legislature of the State of Assam, shall, to the extent of the repugnancy, be void and the law made by the Legislature of the State of Assam shall prevail;
 - (b) if any provision of a law made by a District or Regional Council in Meghalaya with respect to any of the matters specified in clause (b) or clause (c) or clause (f) of sub-paragraph (1) of paragraph 3 of this Schedule is repugnant to any provision of a law made by the Legislature of Meghalaya with respect to that matter, then, the law made by the District Council or, as the case may be, the Regional Council, whether made before or after the law made by the Legislature of Meghalaya, shall, to the extent of Legislature of Meghalaya shall prevail.
- (2) If it appears to two or more District Councils or Regional Councils in Meghalaya to be desirable that any of the matters with respect to which they have the power to make laws under paragraph 3 of this Schedule should be regulated by the Legislature of Meghalaya by law, and if resolutions to that effect are passed by the said District Councils or Regional Councils, it shall be lawful for the Legislature of Meghalaya to pass an Act regulating that matter accordingly, and any Act so passed shall apply to the autonomous districts or regions concerned, and to any other autonomous district or region the District or Regional Council whereof adopts it afterwards by resolution passed in this behalf.
- (3) Any Act passed by the Legislature of Meghalaya under sub-paragraph (2) of this paragraph may be amended or repealed by an Act of the Legislature of

Meghalaya passed in like manner, but shall not, as respects any autonomous district or region to which it applies, be amended or repealed by any law made by the District or Regional Council thereof.

(4) The Governor may, with respect to any Act of the Legislature of the State of Assam, and the President may, with respect to any Act of Parliament, by public notification direct, that it shall not apply to Meghalaya, or shall apply thereto, or to any part thereof subject to such exceptions or modifications as he may specify in the notification, and any such direction may be so given as to have retrospective effect.

(5) The provisions of clause (b) of sub-paragraph (1) of paragraph 12 shall not apply to Meghalaya.]

[a] Inserted by the Assam Reorganisation (Meghalaya) Act, 1969 (55 of 1969), S. 74 and Sch. IV, Item 9.

13. Estimated receipts and expenditure pertaining to autonomous districts to be shown separately in the annual financial statement.—The estimated receipts and expenditure pertaining to an autonomous district which are to be credited to, or is to be made from, the Consolidated Fund of the State of Assam shall be first placed before the District Council for discussion and then after such discussion be shown separately in the annual financial statement of the State to be laid before the Legislature of the State under Article 202.

14. Appointment of Commission to inquire into and report on the administration of autonomous districts and autonomous regions.—(1) The Governor may at any time appoint a Commission to examine and report on any matter specified by him relating to the administration of the autonomous districts and autonomous regions in the State, including matters specified in clauses (c), (d), (e) and (f) of sub-paragraph (3) of paragraph 1 of this Schedule, or may appoint a Commission to inquire into and report from time to time on the administration of autonomous districts and autonomous regions in the State generally and in particular on—

(a) the provision of educational and medical facilities and communications in such districts and regions;

(b) the need for any new or special legislation in respect of such districts and regions; and

(c) the administration of the laws, rules and regulations made by the District and Regional Councils;

and define the procedure to be followed by such Commission.

(2) The report of every such Commission with the recommendations of the Governor with respect thereto shall be laid before the Legislature of the State by the Minister concerned together with an explanatory memorandum regarding the action proposed to be taken thereon by the Government of Assam.

(3) In allocating the business of the Government of the State among his Ministers the Governor may place one of his Ministers specially in charge of the welfare of the autonomous districts and autonomous regions in the State.

15. Annulment or suspension of acts and resolutions of District and Regional Councils.—(1) If at any time the Governor is satisfied that an act or resolution of a District or a Regional Council is likely to endanger the safety of India ^a[or is likely to be prejudicial to public order], he may annul or suspend such act or resolution and take such steps as he may consider necessary (including the suspension of the Council and the assumption to himself of all or any of the powers

Schedule 6, Para 14 — Note 1

(1) What Para 14 (2) requires is that before the report of the Commission goes to the Legislature of the State, the Governor must apply his mind to it and make his recommendations on it. AIR 1966 SC 1220 (1230) = (1966) 2 SCR

770. (Notification No. TAD/R/50/64, D/-23-11-64 creating new autonomous district Jowai is valid. AIR 1966 Assam 1, Affirmed.)

(2) Submission of memorandum to Legislature with report of Commission — This is substantial compliance with Para 14 (2). AIR 1966 Assam 1 (8) (FB).

vested in or exercisable by the Council) to prevent the Commission or continuance of such act, or the giving of effect to such resolution.

(2) Any order made by the Governor under sub-paragraph (1) of this paragraph together with the reasons therefor shall be laid before the Legislature of the State as soon as possible and the order shall, unless revoked by the Legislature of the State, continue in force for a period of twelve months from the date on which it was so made:

Provided that if and so often as a resolution approving the continuance in force of such order is passed by the Legislature of the State, the order shall, unless cancelled by the Governor, continue in force for a further period of twelve months from the date on which under this paragraph it would otherwise have ceased to operate.

[a] Inserted by the Assam Reorganisation (Meghalaya) Act, 1969 (55 of 1969), S. 74 and Sch. IV, Item 10.

16. Dissolution of a District or a Regional Council.—^a[(1)] The Governor may, on the recommendation of a Commission appointed under Paragraph 14 of this Schedule by public notification, order the dissolution of a District or a Regional Council and—

(a) direct that a fresh general election shall be held immediately for the reconstitution of the Council, or

(b) subject to the previous approval of the Legislature of the State assume the administration of the area under the authority of such Council himself or place the administration of such area under the Commission appointed under the said paragraph or any other body considered suitable by him for a period not exceeding twelve months:

Provided that when an order under clause (a) of this paragraph has been made, the Governor may take the action referred to in clause (b) of this paragraph with regard to the administration of the area in question pending the reconstitution of the Council on fresh general election:

Provided further that no action shall be taken under clause (b) of this paragraph without giving the District or Regional Council, as the case may be, an opportunity of placing its views before the Legislature of the State.

^a[(2)] If at any time the Governor is satisfied that a situation has arisen in which the administration of an autonomous district or region cannot be carried on in accordance with the provisions of this Schedule, he may, by public notification, assume to himself all or any of the functions or powers vested in or exercisable by the District Council or, as the case may be, the Regional Council and declare that such functions or powers shall be exercisable by such person or authority as he may specify in this behalf, for a period not exceeding six months:

Provided that the Governor may, by a further order or orders, extend the operation of the initial order by a period not exceeding six months on each occasion.

(3) Every order made under sub-paragraph (2) of this paragraph with the reasons therefor shall be laid before the Legislature of the State and shall cease to operate at the expiration of thirty days from the date on which the State Legislature first sits after the issue of the order, unless before the expiry of that period it has been approved by the State Legislature.]

[a] Original paragraph 16 renumbered as sub-paragraph (1) and sub-paragraphs (2) and (3) inserted by the Assam Reorganisation (Meghalaya) Act, 1969 (55 of 1969), Section 74 and Schedule IV, item 11.

17. Exclusion of areas from autonomous districts in forming constituencies in such districts.—For the purposes of elections to the Legislative Assembly of Assam, the Governor may by order declare that any area within an autonomous district shall not form part of any constituency to fill a seat or seats in the Assembly reserved for any such district but shall form part of a constituency to fill a seat or seats in the Assembly not so reserved to be specified in the order.

18. Application of the provisions of this Schedule to areas specified in Part B of the table appended to paragraph 20.—(1) The Governor may—

(a) subject to the previous approval of the President, by public notification, apply all or any of the foregoing provisions of this Schedule to any tribal area specified in Part B of the table appended to paragraph 20 of this Schedule or any part of such area and thereupon such area or part shall be administered in accordance with such provisions; and

(b) with like approval, by public notification, exclude from the said table any tribal area specified in Part B of that table or any part of such area.

(2) Until a notification is issued under sub-paragraph (1) of this paragraph in respect of any tribal area specified in Part B of the said table or any part of such area, the administration of such area or part thereof, as the case may be, shall be carried on by the President through the Governor of Assam as his agent and the provisions of ^a[Article 240] shall apply thereto as if such area or part thereof were a ^b[Union territory specified in that Article.]

(3) In the discharge of his functions under sub-paragraph (2) of this paragraph as the agent of the President, the Governor shall act in his discretion.

[a] Substituted for "Part IX" by the Constitution (Seventh Amendment) Act, 1956, S. 29 and Schedule [1-11-1956].

[b] Substituted for "territory specified in Part D of the First Schedule", *ibid*.

19. Transitional provisions.—(1) As soon as possible after the commencement of this Constitution the Governor shall take steps for the constitution of a District Council for each autonomous district in the State under this Schedule and, until a District Council is so constituted for an autonomous district, the administration of such district shall be vested in the Governor and the following provisions shall apply to the administration of the areas within such district instead of the foregoing provisions of this Schedule, namely:—

(a) no Act of Parliament or of the Legislature of the State shall apply to any such area unless the Governor by public notification so directs; and the Governor in giving such a direction with respect to any Act may direct that the Act shall, in its application to the area or to any specified part thereof, have effect subject to such exceptions or modifications as he thinks fit;

(b) the Governor may make regulations for the peace and good government of any such area and any regulations so made may repeal or amend any Act of Parliament or of the Legislature of the State or any existing law which is for the time being applicable to such area.

(2) Any direction given by the Governor under clause (a) of sub-paragraph (1) of this paragraph may be given so as to have retrospective effect.

(3) All regulations made under clause (b) of sub-paragraph (1) of this paragraph shall be submitted forthwith to the President and, until assented to by him, shall have no effect.

Schedule 6, Para 19 — Note 1

(1) The order passed by the Governor of Assam on 25-1-1950 for the administration of justice in the Khasi States would govern the administration of criminal justice in those States as existing law even after the Constitution until it is repealed or amended by the Governor of Assam. AIR 1952 Assam 3 (4) = ILR (1951) 3 Assam 256 = 1952 Cri L Jour 104.

(2) The administrative powers of the Chief of Khasi States as they existed before 26-1-1950 came to an end with coming into force of the Constitution

and during the transitional period all administrative powers vested in the Governor which could be exercised by those appointed by him under his powers under Para 19. AIR 1961 SC 276 (278, 279, 280) = (1961) 1 SCR 750.

(3) United Khasi-Jaintia Hills District (Application of Laws) Regulation (5 of 1952), was passed by Governor under Para 19 (1) (b) — Notification of 8-9-1961 issued by Governor under Section 2 of the Regulation extending Excise Act of 1910 to United Khasi-Jaintia Hills District is not valid. AIR 1966 Assam 29 (33).

20. Tribal areas.—(1) The areas specified in Parts A and B of the table below shall be the tribal areas within the State of Assam.

(2) The United Khasi-Jaintia Hills District shall comprise the territories which before the commencement of this Constitution were known as the Khasi States and the Khasi and Jaintia Hills District, excluding any areas for the time being comprised, within the cantonment and municipality of Shillong, but including so much of the area comprised within the municipality of Shillong as formed part of the Khasi State of Myllem:

Provided that for the purposes of clauses (e) and (f) of sub-paragraph (1) of paragraph 3, paragraph 4, paragraph 5, paragraph 6, sub-paragraph (2), clauses (a), (b) and (d) of sub-paragraph (3) and sub-paragraph (4) of paragraph 8, and clause (d) of sub-paragraph (2) of paragraph 10 of this Schedule, no part of the area comprised within the municipality of Shillong shall be deemed to be within the District.

^a[(2A) The Mizo District shall comprise the area which at the commencement of this Constitution was known as the Lushai Hills District.]

^b[
° ° ° ° °]

(3) Any reference in the table below to any district (other than the United Khasi-Jaintia Hills District ^a[and the Mizo District]) or administrative area ^a[° ° °] shall be construed as a reference to that district or area at the commencement of this Constitution:

Provided that the tribal areas specified in Part B of the table below shall not include any such areas in the plains as may, with the previous approval of the President, be notified by the Governor of Assam in that behalf.

[a] Sub-paragraph (2A) was inserted by the Lushai Hills District (Change of Name) Act, 1954 (18 of 1954), S. 3 [1-9-1954].

[b] Sub-paragraph (2B) as inserted by the Naga Hills-Tuensang Area Act, 1957 (42 of 1957), S. 3 (w.e.f. 1-12-1957), was omitted by the State of Nagaland Act, 1962 (27 of 1962), S. 5 (a) (i) (w.e.f. 1-12-1963).

[c] Inserted by Act 18 of 1954, Section 3.

[d] Words and brackets "(other than the Naga Hills-Tuensang Area)" omitted by the State of Nagaland Act, 1962 (27 of 1962), Section 5 (a) (ii) (w.e.f. 1-12-1963).

TABLE PART A

1. The United Khasi-Jaintia Hills district.^d
2. The Garo Hills District.]^d
3. ^a[The Mizo District.]
- ^b[° ° ° °]
5. The North Cachar Hills.
6. The Mikir Hills.

Schedule 6, Para 20 — Note 1

(1) The provisions contained in this paragraph may be altered by action taken by the Governor under Para 1 of the Schedule. That alteration is valid notwithstanding the provisions of Para 21. AIR 1954 Assam 97 (98) = ILR (1955) 7 Assam 231 = 1954 Cri L Jour 836 (DB).

(2) The effect of the proviso to cl. (2) of this Paragraph is to deny jurisdiction to the District Council over that part of the Khasi State of Myllem falling

within the Municipality of Shillong for the purposes specified under Para 4 although that area remained a part of the United Khasi and Jaintia Hills District. AIR 1956 Assam 129 (135, 136) = ILR (1956) 8 Assam 89 (SB).

(3) Notification No. TAD/R/50/64, D/- 23-11-64 creating new autonomous district of Jowai is intra vires of Governor's power under Para 1 (3) and parliamentary legislation not necessary to make it effective. AIR 1966 SC 1220 (1230) = (1966) 2 SCR 770.

PART B

1. North-East Frontier Tract including Balipara Frontier Tract, Tirap Frontier Tract, Abor Hills District and Misimi Hills District.

[• • • • •]

[a] Substituted for the words "Lushai Hills District" by the Lushai Hills District (Change of Name) Act, 1954 (18 of 1954), Section 3.

[b] Item "4. Naga Hills District" omitted by the Naga Hills-Tuensang Area Act, 1957 (42 of 1957), Section 3 (w.e.f. 1-12-1957).

[c] Item "2. Naga Hills-Tuensang Area" omitted by the State of Nagaland Act, 1962 (27 of 1962), Section 5 (b) (w.e.f. 1-12-1963).

[d] These districts comprise the Meghalaya State as formed under Act 55 of 1969.

^a[20A. Interpretation.—(1) In this Schedule,—

(a) "Governor", in relation to Meghalaya, means the Governor of Assam acting on the aid and advice of the Council of Ministers for Meghalaya, except in so far as he is by or under this Schedule required to exercise his functions in his discretion or to exercise his powers under sub-paragraph (4) of paragraph 12A;

(b) "Meghalaya" means the autonomous State formed under Article 244A.

(2) Subject to any express provision made in this behalf, the provisions of this Schedule shall, in their application to Meghalaya, have effect—

(i) as if references to the Government of Assam, State of Assam, State and Legislature of the State were references respectively to the Government of Meghalaya, autonomous State of Meghalaya, Meghalaya and Legislature of Meghalaya;

(ii) as if in paragraph 13, the words and figures "under Article 202" had been omitted.]

[a] Inserted by the Assam Reorganisation (Meghalaya) Act, 1969 (55 of 1969), S. 74 and Schedule IV, item 12.

21. Amendment of the Schedule.—(1) Parliament may from time to time by law amend by way of addition, variation or repeal any of the provisions of this Schedule and, when the Schedule is so amended, any reference to this Schedule in this Constitution shall be construed as a reference to such Schedule as so amended.

(2) No such law as is mentioned in sub-paragraph (1) of this paragraph shall be deemed to be an amendment of this Constitution for the purposes of Article 368.

SEVENTH SCHEDULE

(Article 246)

LIST I — UNION LIST

1. Defence of India and every part thereof including preparation for defence and all such acts as may be conducive in times of war to its prosecution and after its termination to effective demobilisation.

[Government of India Act, 1935 — Note: — Unless mentioned otherwise, the item number under this heading refers to the item number of List I of Schedule VII of that Act.]

Schedule 6, Para 21 — Note 1

(1) Parliament is clothed with legislative competence of the widest amplitude in relation to any changes it likes to make in Sixth Schedule. AIR 1966 SC 1220 (1225, 1228) = (1966) 2 SCR 770.

Schedule 7 (General)

(1) In the interpretation of the scope of items in the legislative lists in Sch. VII widest possible amplitude must be given to the words used and each gene-

ral word must be held to extend to ancillary and subsidiary matters which can fairly be said to be comprehended in it. AIR 1960 SC 424 (429) = (1960) 2 SCR 362 ** AIR 1963 SC 90 (95) = (1963) 3 SCR 209 ** AIR 1961 SC 652 (655) = (1961) 3 SCR 242 ** AIR 1959 Assam 221 (225) (SB) ** AIR 1962 Punj 337 (342) = 64 Pun LR 504 (FB) ** AIR 1969 Mys 23 (35) = (1968) 2 Mys LJ 78 (DB) ** (1967) 11 Law Rep 40 =

JAMMU AND KASHMIR

Seventh Schedule of the Constitution applies by virtue of the Constitution (Application to Jammu and Kashmir) Order, 1954, to the State of Jammu and Kashmir. Of the three lists, Union List applies to that State, subject to certain exceptions and modifications. These exceptions and modifications are mentioned under the respective entries. The State List shall be omitted.

Entry I applies to Jammu and Kashmir — Constitution (Application to Jammu and Kashmir) Order, 1954 (14-5-1954).

2. Naval, military and air forces; any other armed forces of the Union.

[Government of India Act, 1935 — Item 1.]

Schedule 7 (General) (contd.)

(1968) 1 Mys LJ 524 ** AIR 1965 Guj 60 (64) = (1965) 16 STC 329 (DB) ** AIR 1964 Punj 513 (517) = (1965) 1 Lab LJ 656 (DB) ** AIR 1961 Andh Pra 75 (77) = (1960) 40 ITR 567 ** AIR 1960 Assam 76 (83) = (1961) 41 ITR 80 (DB) ** AIR 1960 Punj 462 (463) ** AIR 1957 Cal 326 (329, 330, 331) = (1957) 61 Cal WN 55.

(2) The task of interpretation being to ascertain the limits of the powers granted by the Constitution, the Courts cannot extend these limits by way of interpretation. AIR 1961 SC 652 (655, 658) = (1961) 3 SCR 242 ** AIR 1964 SC 925 (935) = (1964) 5 SCR 975.

(3) The entries in the Lists in the Seventh Schedule should be so construed as to give effect to all of them and a construction which will result in any of them being rendered futile or otiose must be avoided. AIR 1963 SC 90 (95) = (1963) 3 SCR 209.

(4) The principles governing the interpretation of the entries in the three lists are:— (1) Liberal construction with widest amplitude. (2) Broad interpretation to ambit of an express legislative power at the expense of unspecified residuary powers. (3) Reconciliation to avoid conflict. (4) In considering validity doctrine of "pith and substance" should be followed. AIR 1962 Bom 12 (15) = 63 Bom LR 379 ** (1967) 11 Law Rep 40 = (1968) 1 Mys LJ 524 (DB).

(5) The various entries in the Lists in the Seventh Schedule of the Constitution are not powers of legislation but fields of legislation. AIR 1952 All 88 (89) = 1952 All LJ 52 (DB).

(6) Per Jagdish Sahai J. :— The Constitution makers, purposely used general and comprehensive words having a wide import without trying to particularise. AIR 1961 All 487 (499, 500) = 1961 All LJ 408 (FB).

(7) Where the three lists in Sch. VII come in conflict, the precedence is in the following order No. 1, No. 3 and No. 2. AIR 1958 Cal 373 (376) = 62 Cal WN 405.

(8) Courts can look into Constituent Assembly debates only to find out circumstances under which the Constitution and organisation of High Court

was taken out of the State list and vested in the Parliament. No further aid in its construction can be received. AIR 1957 Cal 534 (541) = 61 Cal WN 630

(9) The resort to residuary power should be the very last refuge and it is only when all the categories in the three lists are absolutely exhausted that one can think of falling back upon a non-descript. AIR 1962 Ker 97 (100) = 1961 Ker LT 859 (DB).

(10) Articles in the Constitution are not controlled by the various items in the list of Sch. VII. AIR 1950 Madh-B 46 (50) = ILR (1952) Madh B 231 (DB). (Overruled on another point in AIR 1950 Madh B 60.)

(11) Entries cannot be restricted by legislative history. (1967) 11 Law Rep 40 = (1968) 1 Mys LJ 524 (DB).

(12) Allocation of the subject in the three lists is not on basis of scientific definition but is by way of simple enumeration of broad categories. AIR 1953 Trav Co. 540 (540) = 1953 Cri LJ 1786 = 1953 Ker LT 482.

(13) Art. 246 has nothing to do with the question of interpreting the Union and State entries. AIR 1968 Guj 124 (139) (DB).

(14) The powers of State Legislature under the State list are as large as they are in a sovereign Parliament. (1967) 33 Cut LT 263 = 9 Orissa JD 41 (DB).

Schedule 7, List 1, Entry 1 — Note 1

(1) Merely because the Bihar Land Reforms Act, 30 of 1950, affects the lands comprised in Ghatwali tenures or merely because the Act has the indirect effect of abolishing semi-military tenures, it cannot be argued that the Act is a legislation with respect to Entries 1 and 2 of the Union List. AIR 1957 Pat 270 (274) (DB).

Schedule 7, List 1, Entry 2 — Note 1

(1) From the mere fact that the Bihar Land Reforms Act, 30 of 1950, affects the land comprised in Ghatwali tenure or has indirect effect of abolishing semi-military tenures of Handa Ghatwalis, it cannot be held that the legislation falls under this entry. AIR 1957 Pat 270 (274) = ILR 36 Pat 15 (DB).

3. Delimitation of cantonment areas, local self-government in such areas, the constitution and powers within such areas of cantonment authorities and the regulation of house accommodation (including the control of rents) in such areas.

[Government of India Act, 1935 — Item 2.]

JAMMU AND KASHMIR

For entry 3, substitute the following entry :

“3. Administration of cantonments.”

4. Naval, military and air force works.

[Government of India Act, 1935 — Item 2.]

5. Arms, firearms, ammunition and explosives.

[Government of India Act, 1935 — Items 29, 30.]

6. Atomic energy and mineral resources necessary for its production.

7. Industries declared by Parliament by law to be necessary for the purpose of defence or for the prosecution of war.

8. Central Bureau of Intelligence and Investigation.

[Government of India Act, 1935 — Item 1.]

JAMMU AND KASHMIR

Omit Item 8.

Schedule 7, List 1, Entry 2 — Note 1 (contd.)

(2) The Bihar Land Reforms Act (30 of 1950) has no connection whatsoever with the defence of India or armed forces of Union. It has no relation with Entries 1 and 2 of List 1. AIR 1961 SC 189 (195) = (1961) 1 SCR 695.

(3) (Case from U.S. A.) The Constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping. AIR 1969 USSC 7 (13).

Schedule 7, List 1, Entry 3 — Note 1

(1) Administration of justice is a State subject falling under Entry 3 of List 2 and would also include administration of justice in cantonment areas in view of the absence of that subject from List 1, Entry 3. AIR 1939 FC 58 (69) = 1939 FCR 124 = ILR (1939) Kar (FC) 98 = 40 Cri L Jour 403.

(2) The power of Parliament to regulate the house accommodation by law extends to all houses in cantonment area irrespective of its being owned by or in possession of the civilians. AIR 1970 SC 228 = (1969) 1 SCA 671 = (1969) 2 SCC 289.

(3) Entry 3 in List 1 empowers Parliament to regulate eviction matters in private houses in Cantonment area. AIR 1970 SC 228 = (1969) 2 SCC 289. [AIR 1954 Bom 204; AIR 1954 Bom 254; AIR 1956 Nag 268; AIR 1961 Pat 207, Overruled.] ** AIR 1967 Madh Pra 265 (266) = 1957 MPLJ 564 (DB) ** AIR 1962 Raj 190 (194, 195) = 1961 Raj LW 162 (DB). (AIR 1954 Bom 254, Diss. from.)

(4-5) The State Legislature has no power to include cantonment areas within the ambit of accommodation requisitioning statute. AIR 1951 All 830 (831) (DB).

(6) The State Legislature has power to extend the provisions of an Act dealing with house accommodation and control of rents to an area which has ceased to be a cantonment area. AIR 1953 Madh B 5 (6, 7) = ILR (1952) Madh B 105 (DB) ** AIR 1955 Madh B 76 (78).

(7) Where Rent Control legislation was extended by State Legislature to an area after it ceased to be a cantonment area, even if such area is subsequently declared to be a cantonment area, the statute would continue to apply to such area until the Act is repealed by the Parliament or the Parliament makes some other legislation on the subject or the Act is spent up. AIR 1955 Madh B 76 (78).

(8) State Legislature has no power either to enact for or to extend to cantonment areas Accommodation or Rent Control Acts. Only Parliament can do it. Notification extending provisions of West Bengal Premises Tenancy Act (1956) to Barrackpore Cantonment Area is thus ultra vires. AIR 1967 Cal 355 (358, 359) (DB) ** AIR 1961 Pat 207 (208, 209) = 1961 BLJR 219 (DB).

(9) The Legislature by enacting the East Punjab Urban Rent Restriction Act (3 of 1949) has not impinged upon the powers of the Union as there is no provision in the Act which has the effect of regulating house accommodation in cantonment areas. (1960) 62 Pun LR 143 (144) = ILR (1960) Punj 135 (DB).

9. Preventive detention for reasons connected with Defence, Foreign Affairs, or the security of India; persons subjected to such detention.

[Government of India Act, 1935 — Item 1.]

JAMMU AND KASHMIR

Omit Item 9.

10. Foreign affairs; all matters which bring the Union into relation with any foreign country.

[Government of India Act, 1935 — Item 3.]

11. Diplomatic, consular and trade representation.

12. United Nations Organisation.

13. Participation in international conferences, associations and other bodies and implementing of decisions made thereat.

14. Entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries.

Schedule 7, List 1, Entry 9 — Note 1

(1) It is obvious from this entry and Entry 3 in List 3 that the personal liberty of the individual was only meant to be curtailed for grave reasons. AIR 1955 Raj 6 (9) = ILR (1954) 4 Raj 51 = 1955 Cri L Jour 95 (DB).

(2) If preventive detention is desirable for any other reasons besides those enumerated in this entry and Entry 3 of List 3 recourse must be had to the residuary power vesting in the Parliament under Article 248, Clause (1). See AIR 1949 All 513 (516) = ILR (1950) All 615 = 50 Cri L Jour 798 (FB).

(3) Legislation that deals with the right of a State to keep foreigners under preventive detention without trial, such as Section 3 (1) (b) of the Preventive Detention Act, 1950, and Foreigners Act, 1946, brings the Union of India into relation with a foreign country within Entry 10 of this List. AIR 1955 SC 367 (371) = 1955 SCR 1284 = 1955 Cri L Jour 876.

(4) It is only the Parliament that can make laws for preventive detention for reasons connected with defence, and other matters mentioned in this entry. AIR 1949 All 158 (159) = 50 Cri L Jour 224.

(5) The expression "reasons connected with defence" has been held to be wide enough to include 'public safety or interest'. AIR 1943 FC 75 (83) = 1944 FCR 1 = ILR (1943) Kar (FC) 103 Sup = 45 Cri L Jour 341.

(6) Efficient prosecution of war is directly connected with defence of India and as the effective prosecution of war depends on the maintenance of public safety, interest or public order, on the maintenance of relations with foreign powers, etc., these matters are also connected with Defence. AIR 1943 Cal 377 (383) (SB).

(7) There is no authoritative definition of the term 'preventive detention' in Indian law. The word 'preventive' is used in contradistinction to the word

'punitive'. The object is not to punish a man for having done something but to intercept him before he does it and to prevent him from doing it. AIR 1950 SC 27 (91, 92) = 51 Cri LJ 1383 = 1950 SCR 88.

(8) Constitution (Declaration as to foreign States) Order ((1950) read with Article 367 (3) does not take Pakistan outside the category of foreign power. AIR 1960 SC 625 (628) = 1960 Cri LJ 764 = (1960) 2 SCR 784.

(9) Preventive Detention Act (1950) has a bearing not only on List 1, Entry 9 but also on List III, Entry 3 (1). AIR 1951 Pat 47 (51) = 1952 Cri LJ 406 = ILR 30 Pat 630 (DB).

(10) Provision of Section 3 (1) (b) of Preventive Detention Act 1950 is not ultra vires the legislature being well within Entry 9 List I. AIR 1969 Delhi 45 (54) = 1969 Cri LJ 186 (FB).

Schedule 7, List 1, Entry 10 — Note 1

(1) Legislation that deals with the right of a State to keep foreigners under preventive detention without trial brings the Union into relation with a foreign country. AIR 1955 SC 367 (370) = 1955 SCR 1284 = 1955 Cri L Jour 876.

(2) The power to legislate in respect of treaties lies with the Parliament under Entries 10 and 14 of List 1. AIR 1969 SC 783 (807) = (1969) 1 SCA 491.

Schedule 7, List 1, Entry 14 — Note 1

(1) Making a treaty is an executive act and not a legislative act and the entry leaves untouched the power of the Executive to enter into treaties. AIR 1954 Cal 615 (616) = ILR (1956) 1 Cal 493 (DB).

(2) Treaties which are part of the international law do not form part of the law of the land unless expressly made so by the legislative authority. AIR 1951 Raj 127 (129) = 52 Cri L Jour 1021 (DB) ** AIR 1969 Delh 64 (74) (DB).

(3) The words "agreements with foreign countries and implementing of

15. War and peace.
16. Foreign jurisdiction.
17. Citizenship, naturalisation and aliens.

[Government of India Act, 1935 — Item 49.]

Schedule 7, List 1, Entry 14 — Note 1 (contd.)

"treaties" have to be read in their broadest sense and so read the Parliament has power not only to make rules as to the mode in which treaties and agreements with foreign countries should be regulated but also to make laws on the subject-matters of the treaties and agreements. AIR 1953 All 613 (615) = ILR (1953) 2 All 735 = 1953 Cri L Jour 1384 (DB).

(4) The Abducted Persons (Recovery and Restoration) Act, 1949, does not merely deal with any consequential result of the subject-matter of the agreement between India and Pakistan but it deals with the implementing of the agreement itself. AIR 1953 All 613 (615) = ILR (1953) 2 All 735 = 1953 Cri L Jour 1384 (DB).

(5) Entry 19 read with this entry would also indicate that the Parliament is competent to pass laws by which the citizens of India may be expelled from this country in accordance with treaties and agreements with foreign countries. AIR 1952 Punj 309 (334) = ILR (1952) Punj 381 = 1952 Cri L Jour 1313 (FB).

(6) (Per Shah, J.) The power to legislate in respect of treaties lies with the Parliament under Entries 10 and 14 of List 1 of Seventh Schedule. AIR 1969 SC 783 (807) = (1969) 1 SCA 491.

(7) The treaty-making power would have to be exercised in the manner contemplated by the Constitution and subject to the limitations imposed by it. AIR 1960 SC 845 (857) = (1960) 3 SCR 250 ** AIR 1959 Cal 506 (515, 516) = 63 Cal WN 485.

(8) The question as to how treaties can be made by a sovereign State in regard to cession of national territory and how treaties when made can be implemented would be governed by the provisions in the Constitution of the country. AIR 1960 SC 845 (857) = (1960) 3 SCR 250 ** AIR 1959 Cal 506 (516, 517) = 63 Cal WN 485.

(9) The making and performance of treaties are acts of State vide Entry 14 of the Union list. AIR 1966 Goa 38 (43) (FB).

(10) A municipal Court might have interpreted the agreement between India and Pakistan (1947) for avoidance of double taxation if Parliament had made a law for its implementation. In absence of such law the Courts are helpless in face of the error in the agreements. (1965) 69 Cal WN 640 = (1965) 57 ITR 235.

(11) Treaty made by Indian Government with Pakistan to abide by decision of Tribunal respecting boundary dispute — Implementation of award of Executive is valid. AIR 1969 Delhi 64 (73, 74) (DB).

(12) Treaty making and implementation of treaties is a subject which falls under this Entry. Implementation of every treaty does not require legislative sanction. AIR 1969 Delhi 64 (73, 74) (DB).

Schedule 7, List 1, Entry 15 — Note 1

(1) Seizure or annexation of land or goods in right of conquest or the declaration of war or blockade are acts of State. AIR 1966 Goa 38 (43) (FB).

(2) Conquest by military action over territory of Goa, Daman and Diu was an act of State — True view of an act of State is that it is a catastrophic change constituting a new departure. AIR 1966 Goa 38 (43) (FB).

(3) The Constitution makes no provision making legislation a condition of the entry into an international treaty in time of war or peace. AIR 1969 SC 783 (807) = (1969) 1 SCA 491.

Schedule 7, List 1, Entry 17 — Note 1

(1) It was held that the Bombay District Police Act (4 of 1890) did not deal with citizenship and, as such, did not fall under this entry. AIR 1950 Bom 374 (375) = ILR (1950) Bom 564 = 52 Cri L Jour 1059 (FB).

(2) The West Bengal Land Development and Planning Act (21 of 1948) which purported to acquire lands for settlement of refugees from East Pakistan does not purport to legislate with regard to aliens and is not, therefore, hit by this entry. AIR 1952 Cal 679 (682).

(3) The executive power of the Union extends to matters relating to aliens as per Entry 17 in List 1. AIR 1963 Cal 369 (373) = 1963 (2) Cri LJ 9 = 67 Cal WN 206 ** AIR 1968 Goa 17 (28) = 1968 Cri LJ 316.

(4) The Rules of evidence framed in Cl. 3 of Schedule III of the Citizenship Rules 1956 are not violative of Article 19 and the Central Government has power to determine the question of citizenship in accordance with those rules. AIR 1962 All 383 (390) = 1962 (2) Cri LJ 166 = 1962 All LJ 123 (DB).

(5) Parliament was competent to enact Section 9 of the Citizenship Act and to make rules of evidence. AIR 1962 All 383 (386) = 1966 (2) Cri LJ 166 = 1962 All LJ 123 (DB) ** AIR 1969 SC 1234 (1237).

(6) Question whether person is citizen of India is outside scope of Art. 19

18. Extradition.

[Government of India Act, 1935 — Item 3.]

19. Admission into, and emigration and expulsion from India; passports and visas.

[Government of India Act, 1935 — Item 17.]

Schedule 7, List 1, Entry 17 — Note 1 (contd.)

and is dependent upon the relevant law which Parliament can make under Article 11 and Entry 17 of the Union list. AIR 1961 Mad 129 (136) = (1960) 2 Mad LJ 290 (DB).

(7) Acquisition of territory by State by military action — Acquiring State not bound to recognize liability of former State towards its citizens — Rights under import licences — Obtained by citizen of former Portuguese territories before their acquisition by military action were not recognised by the Government of India. AIR 1966 SC 442 (444, 446) = (1966) 1 SCR 357.

Schedule 7, List 1, Entry 18 — Note 1

(1) Entry 18 empowers the Parliament to make laws in regard to extradition even of aliens. AIR 1955 SC 367 (374) = 1955 SCR 1284 = 1955 Cri L Jour 876 ** AIR 1952 Punj 309 (319) = ILR (1952) Punj 381 = 1952 Cri L Jour 1313 (FB). (Reversed on another point in AIR 1953 SC 10.)

(2) "Extradition" is a different and distinct subject from "expulsion" although both may overlap in certain aspects. AIR 1955 SC 367 (374) = 1955 SCR 1284 = 1955 Cri L Jour 876.

(3) The Bombay District Police Act, 1890, has nothing to do with either citizenship or extradition or admission into and emigration and expulsion from India. Hence the Act is not ultra vires the powers of the State Legislature. AIR 1950 Bom 374 (375) = ILR (1950) Bom 564 = 52 Cri L Jour 1059 (FB).

(4) A treaty between two Governments confers on the contracting parties the right to ask from each other the surrender of an offender. AIR 1955 SC 367 (374) = 1955 SCR 1284 = 1955 Cri L Jour 876.

(5) The absence of a treaty will not mean that the Government cannot grant extradition under its own municipal laws which provide for the surrender. AIR 1950 SC 155 (157) = 1950 SCR 573 = 51 Cri L Jour 1153.

(6) Where an extradition treaty remained a treaty only, the detention of a person under its provisions was not one according to procedure established by law within the meaning of Article 21 of the Constitution. AIR 1951 Raj 127 (129) = 52 Cri L Jour 1021 (DB).

(7) Courts must before they grant extradition insist upon strict compliance with the provisions of the Extradition Act, 1903. AIR 1955 SC 367 (375) = 1955 SCR 1284 = 1955 Cri L Jour 876 ** AIR 1948 All 129 (130, 131) = ILR (1948) All

86 = 49 Cri L Jour 98 (DB).

(8) Extradition was legally permissible under Section 7 or Section 9 of Extradition Act, though the provisions of the Fugitive Offenders Act, 1881, invoked by Ceylon Government were no longer in force in India. AIR 1960 Mad 548 (559, 564) = 1960 Cri LJ 1625 = (1960) 2 Mad LJ 425 (FB).

(9) The executive powers of the Union extend to matters relating to extradition and may be entrusted by the Central Government to the State Government. AIR 1963 Cal 369 (373) = 1963 (2) Cri LJ 9 = 67 Cal WN 206.

Schedule 7, List 1, Entry 19 — Note 1

(1) The right to expel a foreigner includes a right to make arrangement for preventing any evasion or breach of the order. AIR 1955 SC 367 (371, 372) = 1955 SCR 1284 = 1955 Cri L Jour 876.

(2) Extradition and expulsion from a State are different and distinct subjects though they may overlap. They form different entries in List 1. The Union Government is vested with absolute power to expel foreigners from India. There is no provision in the Constitution fettering this discretion. The law of extradition is quite different. AIR 1955 SC 367 (374) = 1955 SCR 1284 = 1955 Cri L Jour 876.

(3) The introduction of permit system by Section 7 of the Influx from Pakistan (Control) Act, 1949, for entry of an Indian citizen into the Union territory was held to amount to imposition of restrictions on the exercise of rights conferred by Article 19 (1) (d). AIR 1951 Nag 185 (187) = ILR (1951) Nag 328 = 52 Cri L Jour 74 (DB).

(4) There is no provision in the Constitution against a citizen being sent out of India and Entry 19 read with Entry 14 of List 1 of Schedule VII of the Constitution indicates that the Union Parliament is competent to pass laws whereby a citizen of India might be expelled from the country in accordance with treaties and agreements with foreign countries. AIR 1952 Punj 309 (334) = 1952 Cri L Jour 1313 = ILR (1952) Punj 381 (FB). (Reversed on another point in AIR 1953 SC 10.)

(5) By its terms, a passport requests and requires in the name of the Government of the issuing country, all whom it may concern, to allow the bearer to pass freely without let or hindrance and to afford him every assistance and protection of which he may stand in need. AIR 1957 Andh Pra 1047 (1052) = ILR (1957) Andh Pra 755 (DB)

20. Pilgrimages to places outside India.

[Government of India Act, 1935 — Item 17.]

21. Piracies and crimes committed on the high seas or in the air; offences against the law of nations committed on land or the high seas or in the air

22. Railways.

[Government of India Act, 1935 — Item 20.]

23. Highways declared by or under law made by Parliament to be national highways.

24. Shipping and navigation on inland waterways, declared by Parliament by law to be national waterways, as regards mechanically propelled vessels; the rule of the road on such waterways.

25. Maritime shipping and navigation, including shipping and navigation on tidal waters; provision of education and training for the mercantile marine and regulation of such education and training provided by States and other agencies.

[Government of India Act, 1935 — Item 21.]

26. Lighthouses, including lightships, beacons and other provision for the safety of shipping and aircraft.

[Government of India Act, 1935 — Item 25.]

27. Ports declared by or under law made by Parliament or existing law to be major ports, including their delimitation, and the constitution and powers of port authorities therein.

[Government of India Act, 1935 — Item 22.]

28. Port quarantine, including hospitals connected therewith; seamen's and marine hospitals.

[Government of India Act, 1935 — Item 18.]

29. Airways; aircraft and air navigation; provision of aerodromes; regulation and organisation of air traffic and of aerodromes; provision for aeronautical education and training and regulation of such education and training provided by States and other agencies.

[Government of India Act, 1935 — Item 24.]

Schedule 7, List 1, Entry 19 — Note 1 (contd.)

** AIR 1954 Mad 240 (244) = ILR (1954) Mad 399 (DB).

(6) A citizen cannot compel the State in the absence of legislation to make a request to a foreign Government on his behalf. AIR 1954 Mad 240 (244) = ILR (1954) Mad 399 (DB).

[But see AIR 1966 Bom 54 (58, 64) = 67 Bom LR 544.]

(7) A passport is not the basis of legal evidence to establish the fact of citizenship. AIR 1957 Andh Pra 1047 (1052) = ILR (1957) Andh Pra 755 (DB).

(8) The function of issuing passports is vested in the Union, by virtue of Entry 19 in List 1. AIR 1966 Bom 54 (57) = 67 Bom LR 544.

(9) The executive power of the Union extends to matters relating to admissions into and emigration and expulsion from India and passport and visas. AIR 1963 Cal 369 (373) = 1963 (2) Cri LJ 9 = 67 Cal WN 206.

Schedule 7, List 1, Entry 21 — Note 1

(1) Actual robbery is not an essential element in the crime of piracy *jure gentium* (by the law of nations). A frustrated attempt to commit a piratical robbery is equally piracy *jure gentium*. AIR 1934 PC 220 (221).

(2) According to International Law, the criminal jurisdiction of Municipal law is recognised as extending to piracy committed on the high seas by any national on any ship, because a person guilty of such piracy has placed himself beyond the protection of any State. He is no longer a national but *hostis humani generis* (an enemy of the human race) and as such he is justiciable by any State anywhere. AIR 1934 PC 220 (221).

Schedule 7, List 1, Entry 23 — Note 1

(1) This Entry entitles Parliament to make any law in respect of national highways. There is no conflict between this Entry and Entry No. 59 of State List. AIR 1969 J and K 113 (115) = 1968 Kash LJ 350 (FB).

30. Carriage of passengers and goods by railways, sea or air, or by national waterways in mechanically propelled vessels.

[Government of India Act, 1935 — Item 26.]

31. Posts and telegraphs; telephones, wireless, broadcasting and other like forms of communication.

[Government of India Act, 1935 — Item 7.]

32. Property of the Union and the revenue therefrom, but as regards property situated in a State ^a[° ° °] subject to legislation by the State, save in so far as Parliament by law otherwise provides.

[Government of India Act, 1935 — Item 10.]

[a] The words “specified in Part A or Part B of the First Schedule” omitted by the Constitution (Seventh Amendment) Act, 1956, S. 29 and Schedule.

33. [Omitted by the Constitution (Seventh Amendment) Act, 1956, S. 26 (1-11-1956).]

Schedule 7, List 1, Entry 30 — Note 1

(1) Levy of Sales Tax on in corporeal moveable property (copyright) is not ultra vires Article 366 (12). AIR 1969 Mad 284 (290) = (1968) 1 Mad LJ 480 (DB).

Schedule 7, List 1, Entry 31 — Note 1

(1) The substance of the Ajmer (Sound Amplifiers Control) Act (3 of 1956), does not purport to encroach upon the field of Entry 31 of the Union List, though it incidentally touches upon a matter provided there. AIR 1959 SC 544 (547) = 1959 Cri LJ 660 = 1959 Supp 1 SCR 904.

(2) Whatever liability might have fastened on the Bharatpur State or the Rajasthan State in connection with the maintenance of the transmitter pertaining to the period prior to coming into force of the Constitution became the liability of the Indian Union, because the purpose in connection with which this liability fell to be incurred was a purpose related to a matter within Item No. 31 of List 1. AIR 1964 Raj 205 (214, 215, 216) = 1964 Raj LW 313 (DB).

Schedule 7, List 1, Entry 32 — Note 1

(1) Competence of State Legislature to pass Act — Fact that rights are subject to overriding power of the President to resume ownership does not render the property Union property under Entry 32, List 1 — Punjab Consolidation of Land Proceedings (Validation) Act (VI of 1957) Section 3. AIR 1959 Punj 8 (13) = 60 Pun LR 461 (FB). (Overruled on another point in AIR 1959 SC 519.)

(2) Legislation in respect of property, which has ceased to be evacuee property having been acquired by the Central Government under the Displaced Persons (Compensation and Rehabilitation) Act 1954, made by the State legislature does not fall under Entry 32 of List I. AIR 1959 Punj 8 (12) = 60 Pun LR 461 (FB).

(3) The Legislative power of the Parliament in Entry 32 of List I cannot be taken as abridged by the legislative

power under Entry 18 in List II in favour of the State. (1967) 69 Pun LR 76 = ILR (1967) 1 Punj 869 ((DB).

Schedule 7, List 1, Entry 33 — Note 1

(Cases before amendment)

(1-A) This entry has been omitted by the 7th Amendment of the Constitution. The corresponding matter is now included in Entry 42 of List III (Concurrent List).

(1) The obligation to pay compensation is not implicit in the legislative Entry 33 of List 1. AIR 1969 SC 453 (459) = (1969) 1 SCJ 854.

(2) Entry 33 in List 1, Entry 36 in List 2 and Entry 42 in List 3 of the Seventh Schedule (as they stood before the passing of the Constitution) (Seventh Amendment) Act (1956), indicate that the Constitution recognised a trichotomy of public purpose, viz., a purpose of the Union, a purpose of the State and any other public purpose. AIR 1961 All 520 (521).

(3) Legislation relating to acquisition of property falls within Entry 33 of List 1. The Iron and Steel Companies Amalgamation Act, 1952, was validly enacted by the Parliament. AIR 1953 Cal 695 (699, 700).

(4) Requisitioning of premises under Section 75-A, Defence of India Rules, 1939 — Government is not tenant of premises — House Controller's authority to make order of allotment after derequisitioning was held to be without jurisdiction. AIR 1957 Pat 637 (638) = 1957 BLJR 145 (DB).

(5) “Any other public purpose” — State Government is competent to make requisition for office accommodation of National Cadet Corps. AIR 1957 Pat 100 (110, 111) = 1957 BLJR 562.

(6) (Per Sinha, J.) — Taking possession under Article 31 has reference to the power of requisitioning under Entry 33 of List 1 and Entry 36 of List 2 of Schedule 7 to the Constitution. AIR 1950 Pat 392 (415, 416) = ILR 29 Pat 790 (SB).

34. Courts of wards for the estates of Rulers of Indian States.

JAMMU AND KASHMIR

Omit Entry 34.

35. Public debt of the Union.

[Government of India Act, 1935 — Item 6.]

36. Currency, coinage and legal tender; foreign exchange.

[Government of India Act, 1935 — Item 5.]

37. Foreign loans.

38. Reserve Bank of India.

39. Post Office Savings Bank.

[Government of India Act, 1935 — Item 7.]

40. Lotteries organised by the Government of India or the Government of a State.

[Government of India Act, 1935 — Item 48.]

41. Trade and commerce with foreign countries; import and export across customs frontiers; definition of customs frontiers.

[Government of India Act, 1935 — Item 19.]

Schedule 7, List 1, Entry 33 — Note 1 (contd.)

(7) Entry 33 of List 1 refers to acquiring of property for the purposes of the Union. It does not lay down in whom the property should vest after it has been acquired. AIR 1959 SC 475 (479) = (1959) Supp (1) SCR 478.

Schedule 7, List 1, Entry 34 — Note 1

(1) The C. P. Court of Wards Act (24 of 1950) was covered by Entry 22 of List II and Entry 34 of List I of the 7th Schedule. AIR 1961 Madh Pra 197 (198) = 1961 MPLJ 164 (DB).

Schedule 7, List 1, Entry 36 — Note 1

(1) This Entry specifically confers jurisdiction on Parliament to legislate in relation to foreign exchange and would embrace laws relating to control of foreign exchange as also relating to its acquisition. AIR 1959 SC 1124 (1131) = (1960) 1 SCR 39.

(2) The object of the Sugar Export Promotion Act (30 of 1958) is to obtain foreign exchange. AIR 1959 SC 1124 (1131) = (1960) 1 SCR 39.

Schedule 7, List 1, Entry 40 — Note 1

(1) Under this entry Parliament is given the competence to deal with lotteries organised by the Government of India or the Government of a State and with regard to all other types of lotteries competence is conferred upon the State Legislature under Entry 34 of List 2. AIR 1956 Bom 1 (6) = ILR (1955) Bom 680 (DB). (Reversed on another point in AIR 1957 SC 699.)

(2) A lottery has been described as a scheme for distributing prizes by lot or chance. AIR 1956 Bom 1 (6) = ILR (1955) Bom 680 (DB).

(3) It is not necessary to constitute a scheme a lottery that the prizes should

be distributed wholly by chance. In order to take the scheme out of the category of lottery, it is essential that there must be a substantial element of skill, although that element may not be the preponderating element. AIR 1956 Bom 1 (6) = ILR (1955) Bom 680 (DB). (Reversed on another point in AIR 1957 SC 699.)

Schedule 7, List 1, Entry 41 — Note 1

(1) It has been held that the amended Section 14-B of the Bombay Abkari Act 1878, was within the competence of the State Legislature to enact, because it dealt only with the possession of intoxicating liquors including foreign liquors, a subject covered by Item 31, List 2 of the Government of India Act, 1935. AIR 1950 FC 69 (71) = 1949 FCR 650 = 51 Cri L Jour 1018. (AIR 1950 Bom 221, Affirmed.)

(2) The provisions of the Bombay Prohibition Act, 1949, in so far as they purported to restrict possession, use and sale of foreign liquor, were covered by Item 31 of List 1 of Schedule VII of the Government of India Act, 1935. AIR 1951 SC 318 (322) = 1951 SCR 682 = 52 Cri L Jour 1361.

(3) The word 'import' in Item 19 of List 1, standing by itself did not include sale or possession of the article imported into the country. AIR 1951 SC 318 (323, 324) = 1951 SCR 682 = 52 Cri L Jour 1361.

(4) The Government of India, which, under Item 19 of List 1 of the Government of India Act, 1935, possessed the power to define the customs frontiers, defined them by a notification dated 1-4-1937 as "the frontier, whether one or more than one, whether sea or land, whether exterior or interior, of British

42. Inter-State trade and commerce.

43. Incorporation, regulation and winding up of trading corporations, including banking, insurance and financial corporations but not including co-operative societies.

[Government of India Act, 1935—Item 33].

Schedule 7, List 1, Entry 41 — Note 1 (contd.)

India. AIR 1940 Bom 307 (310) = ILR (1940) Bom 777 = 42 Cri L Jour 74 (SB).

(5) Customs frontiers of India extend to its territorial waters. The import of goods must be regarded as complete as soon as the frontier is crossed by the goods. AIR 1960 Andh Pra 619 (620) = (1960) 11 STC 533 (DB).

(6) The subject matter of regulation of imports into the country is within the exclusive jurisdiction of the Union. AIR 1965 Mys 143 (149) (DB).

(7) The exclusive powers of taxation have to be correlated with the exclusive powers of the Parliament to legislate with respect to trade and commerce with foreign countries, import and export duties across customs frontiers and definition of customs frontiers. AIR 1963 SC 1760 (1770) = (1964) 3 SCR 787.

(8) Duties of custom and duties of excise are within the exclusive power of legislation by Parliament. AIR 1963 SC 1760 (1770) = (1964) 3 SCR 787.

(9) Disposal of applications for import licence — State Government constituting committee including State Government Officer who was acting as sponsoring authority under Import and Export (Control) Act — Order constituting committee amounted to encroachment upon exclusive jurisdiction of Union Government. AIR 1965 Mys 143 (149) (DB).

(10) Customs duties (export or import) and excise duties by Union on property of State — Levy not covered by exemption and can be validly imposed. AIR 1963 SC 1760 (1777) = (1964) 3 SCR 787.

(11) Entries 41 and 42 of List 1 do not confer any power on the Union Parliament to make laws for the imposition of taxes. The aim and object of those two entries is altogether different from that of Entry 52 of List II. AIR 1960 Andh Pra 234 (242) = ILR (1960) Andh Pra 42 (DB).

(12) Sale of oils to foreign ships for their consumption from bonded warehouse takes place then and there and is not exempt from sales tax. AIR 1960 Andh Pra 619 (621) = (1960) 11 STC 533 (DB).

Schedule 7, List 1, Entry 42 — Note 1

(1) The Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948, did not deal with inter-State Commerce and, therefore, could not be condemned as a legislation by the State upon a matter, which was within the exclusive competence of Parliament. AIR 1954 Mad 291 (302) = ILR (1953) Mad 1175 (DB).

(2) List 1, Items 41 and 42 deal with topics regulating matters indicated in them. They do not authorise imposition of taxes. AIR 1960 Andh Pra 234 (242) = ILR (1960) 1 Andh Pra 42 (DB).

(3) Hyderabad Municipal Corporation Act (2 of 1956) does not fall within the scope of Entries 41 and 42 of List 1. AIR 1960 Andh Pra 234 (242) = ILR (1960) 1 Andh Pra 42 (DB).

(4) If the State Legislature legislates with regard to trade and commerce outside the State it has overstepped its limits became interstate trade and commerce is within the competence of the Parliament. AIR 1956 Bom 1 (8) = 57 Bom LR 288 (DB). (Reversed on another point in AIR 1957 SC 699.)

(5) The provisions of Art. 289 do not preclude the Union from imposing or authorising the imposition of customs duties on the import or export of the property of a State used for purposes other than those specified in clause (2) of that Article. AIR 1963 SC 1760 (1767, 1777) = (1964) 3 SCR 787.

(6) The immunity granted to the States in respect of Union Taxation under Art. 289 (1) does not extend to duties of customs including export duties or duties of excise. AIR 1963 SC 1760 (1767, 1777) = (1964) 3 SCR 787.

(7) The provision of Art. 289 do not preclude the Union from imposing or authorising imposition of excise duties on the production or manufacture in India, of the property of a State used for purposes other than those specified in Cl. (2) of Art. 289. AIR 1963 SC 1760 (1767, 1777) = (1964) 3 SCR 787.

Schedule 7, List 1, Entry 43 — Note 1 Companies and Corporations.

(1) Life Insurance Corporation Act is above reproach of unconstitutionality. AIR 1968 Mys 71 (72) = 1968 Lab IC 455 = (1966) 2 Mys LJ 51.

(2) The essence of a corporation consists in (1) lawful authority of incorporation, (2) the persons to be incorporated (3) a name by which the persons are incorporated, (4) a place and (5) words sufficient in law to show incorporation. AIR 1962 SC 458 (464) = 1962 Supp (1) SCR 156.

(3) Society registered under Societies Registration Act (1860) is not a corporation or quasi-corporation but an unincorporated society contemplated by List II, Entry 32. AIR 1962 Bom 12 (21) = 63 Bom LR 379 (DB).

(4) The enactment of Iron and Steel Companies Amalgamation Act, 1952, is

44. Incorporation, regulation and winding up of corporations, whether trading or not with objects not confined to one State, but not including universities.

[Government of India Act, 1935—Item 33].

Schedule 7, List 1, Entry 43 — Note 1 (contd.)

with regard to entries 43 and 44 of List II in view of its pith and substance. AIR 1953 Cal 695 (699).

(5) This entry while providing for incorporation, regulation, etc. of trading corporations, expressly excludes Co-operative Societies from its ambit. (1968) 34 Cut LT 745 = 22 STC 460 (DB).

(6) Non-trading companies within the old Part B States do not fall within either Entry 43 or 44 of List I. 1958 Ker LT 1178.

Banking Companies.

(1) Section 46-A of Banking Companies Act, 1949, is perfectly within the competence of Parliament under Entries 43, 45 and 46 of List I of Sch. VII. AIR 1962 Ker 267 (280) = 1961 Ker LJ 725.

(2) The power to legislate on the topic of legislation relating to banking carries with it also the power to legislate on an ancillary matter. AIR 1962 Ker 267 (280) = 1961 Ker LJ 725.

(3) Winding up of banking companies and jurisdiction and powers of all courts with respect to the same are in the Central List. AIR 1958 Mad 403 (409) = 71 Mad LW 291.

(4) Every law which in its operation might affect the property or interest of a bank would not come within items 43 and 45 of List I. AIR 1958 Mad 403 (409) = 71 Mad LW 291.

(5) Deputy Collector, cannot dispose of suit under Section 55, Madras Estates Lands Act against Banking Company in liquidation. AIR 1958 Mad 403 (405, 411) = 71 Mad LW 291.

(6) Mifeasance proceedings — Company Judge directing some of Directors of company to appear and give evidence — Appeal to Division Bench is maintainable. AIR 1964 Mys 75 (78) = (1963) 33 Com Cas 839 (DB).

Schedule 7, List 1, Entry 44 — Note 1

(1) It cannot be said that the subject matter of the Madras Electricity Supply Undertakings (Acquisition) Act (43 of 1949) was "Corporations". On the other hand it came within purview of "electricity" in the Concurrent List and was, therefore, not ultra vires the Madras Legislature. AIR 1951 Mad 979 (981, 984, 985) (DB).

(2) A law which attempts to regulate the affairs of a company by laying down certain special rules for its management and administration is fully covered by Entry 43. Consequently, the Sholapur Spinning and Weaving Company (Emergency Provisions) Act, 1950, was held

to be fully covered by this entry. AIR 1951 SC 41 (59, 60) = 1950 SCR 869 = ILR (1951) Hyd 461.

(3) Sections 52A to 52D which were added to the Insurance Act, 1938, by the Insurance (Amendment) Act, 1950, were not ultra vires of the Constitution. AIR 1952 Punj 9 (25, 26) = ILR (1952) Punj 11 (DB).

(4) The pith and substance of Iron and Steel Companies Amalgamation Act, 1952 was that it legislated with regard to matters relating to Entries 43 and 44 read with Entry 52 of the Union List and not relating to the matter which fell under Art. 31, cl. (2) and Entry 33 of the Union List or Entry 36 of the State List. AIR 1953 Cal 695 (699).

(5) Section 45-B of the Banking Companies Act, 1949, which fixes the territorial limits of the Ordinary Original Civil Jurisdiction of the High Court so as to be co-extensive with the territorial limits of the States, in relation to matters covered by the Act, is within the competence of Parliament in view of Entries 43 and 95 of the Union List. AIR 1958 Mad 279 (280) = ILR (1958) Mad 502.

(6) An action of a statutory corporation may be ultra vires its powers without being illegal. AIR 1961 SC 1107 (1113) = (1961) 2 SCR 295.

(7) Society registered under Societies Registration Act (1860) can be registered under Section 18 (1), Bombay Public Trusts Act, even if its objects are not confined to State of Maharashtra. AIR 1962 Bom 12 (21) = 63 Bom LR 379 (DB).

(8) The validity of the Bombay Public Trusts Act, 1950 cannot be challenged on the ground that it incidentally trenches on the field contemplated by Entry 44. AIR 1962 Bom 12 (21) = 63 Bom LR 379 (DB).

(9) Per Majority :— On registration under the Societies Registration Act, the old Board of the Tibbia College of Delhi did not become a corporation, in the sense of being incorporated within the meaning of Entry 44 of List I. AIR 1962 SC 458 (471) = 1962 Supp (1) SCR 156 **AIR 1968 Bom 91 (94) = 69 Bom LR 690 (DB).

(10) As the objects of the corporation set up by the Sir Currimbhoy Ebrahim Baronetcy Act (1913) was confined to one State only, the Sir Currimbhoy Ebrahim Baronetcy (Repeal and Distribution of Trust Properties) Act (Bom IX of 1960) winding up the corporation set up by the 1913 Act fell within the ambit of Item 32 in List II and not of Item

45. Banking.

[Government of India Act, 1935—Item 38].

46. Bills of exchange, cheques, promissory notes and other like instruments.

[Government of India Act, 1935 — Item 28].

47. Insurance.

[Government of India Act, 1935 — Item 37].

48. Stock exchanges and future markets.

49. Patents, inventions and designs; copyright; trade-marks and merchandise marks.

[Government of India Act, 1935 — Item 27].

50. Establishment of standards of weight and measure.

[Government of India Act, 1935 — Item 51].

Schedule 7, List 1, Entry 44 — Note 1 (contd.)

44 in List I. (1967) 69 Bom LR 326 = 1967 Mah LJ 694 (DB).

(11) The Tibbia College Act (5 of 1952) enacted by the Delhi State Legislature has confined the powers and duties of the board to its institutions in Delhi and hence the Act falls under Entry 32 of List II within the competence of the State Legislature. AIR 1962 SC 458 (471) = 1962 Supp (1) SCR 156.

(12) The objects of the Orissa Co-operative Societies Act (1962), being confined to one State only is not covered by this Entry. (1968) 34 Cut LT 745 = 22 STC 460 (DB).

(13) Provisions of Punjab Sikh Gurdwaras Act are within scope of Entry 44. AIR 1970 Punj 40 (60) = ILR (1968) 2 Punj 1 (FB).

Schedule 7, List 1, Entry 45 — Note 1

(1) The corresponding Item 38 of List 1 in the Government of India Act has been held to be limited to laws which affect the conduct of business of banks qua banks. Accordingly, Sections 30 and 36 of the Bengal Money-Lenders Act, 1940, could not be said to interfere with the 'conduct of banking business' in that item merely because the application of these provisions would greatly reduce the amount which a bank could recover in execution of decree obtained by it. AIR 1945 FC 7 (8) = ILR (1945) Kar (FC) 25 = 1944 FCR 370.

(2) Banking Companies Act (1949), Section 49-A — Parliament competent to enact measure under Entries 43, 45 and 46 of List I. AIR 1962 Ker 267 (280) = 1961 Ker LJ 725.

(3) The Indian Legislature has not purported to legislate in regard to the subject covered by item 18 of List II in enacting Section 45-B of the Banking Companies Act. AIR 1958 Mad 403 = (410) = 1962 (2) Cri LJ 490 = (1962) 2 Mad LJ 180.

(4) The contention that matters relating to winding up of companies are within the exclusive jurisdiction of Parliament covering under Entries 43 and 45 of List 1 of Sch. 7 of the Consti-

tution and the Mysore High Court Act being an enactment of the State Legislature under Entry 65 of List II S. 4 of that Act had no application to the matters relating to winding up of companies is not tenable. AIR 1964 Mys 75 (78) = (1963) 33 Com Cas 839 (DB).

Schedule 7, List 1, Entry 46 — Note 1

(1) For an instrument to acquire negotiability, it must be in a form capable of being sued upon by the holder of it pro tempore in his own name and it must be by custom of trade transferable like cash by delivery. AIR 1938 Sind 24 (27) = 32 Sind LR 640 ** AIR 1919 Cal 546 (548) = ILR 46 Cal 331.

(2) The instruments enumerated in this entry have been assigned to the Central Legislature, because, uniformity of practice as regards these instruments for the whole of India is necessary. See AIR 1941 FC 47 (55) = 1940 FCR 188 = ILR (1941) Kar (FC) 25.

(3) The expression "other like instruments" means "instruments of the same genus as cheques, bills of exchange and promissory notes." AIR 1944 Cal 196 (198) (SB).

(4) Money claim based on promissory note — Nyaya Panchayat has jurisdiction to try such a claim. 1968 All LJ 236 = 1968 All WR (HC) 211 (DB).

Schedule 7, List 1, Entry 48 — Note 1

(1) The Forward Contracts (Regulation) Act (1952) which is a legislation on Forward Contracts would be a legislation on Future Markets within the meaning of Entry 48 in List 1 of the Seventh Schedule. Though a law on forward contracts would also be a law with respect to trade and commerce coming under Entry 26 of List 2, Entry 48 in List 1 being a specific one must be excluded from the general Entry 26 in List 2. AIR 1963 SC 90 (93, 94, 95, 96) = (1963) 3 SCR 209. (AIR 1962 Cal 740 was correct under the Government of India Act (1935) but is no longer law in view of the change in the Constitution.) ** AIR 1959 Cal 89 (92) (DB). (Reversed on another point in AIR 1963 SC 90.)

51. Establishment of standards of quality for goods to be exported out of India or transported from one State to another.

52. Industries, the control of which by the Union is declared by Parliament by law to be expedient in the public interest.

[Government of India Act, 1935, Item 34.]

53. Regulation and development of oilfields and mineral oil resources, petroleum and petroleum products; other liquids and substances declared by Parliament by law to be dangerously inflammable.

[Government of India Act, 1935 — Items 32, 36].

Schedule 7, List 1, Entry 52 — Note 1

(1) The process of manufacture or production would be comprised in Entry 24 of List 2 except where the industry was one the control of which by the Union was declared by law by Parliament to be expedient in public interest, in which case, it would fall within Entry 52 of List 1. AIR 1956 SC 676 (695, 696) = 1956 SCR 393.

(2) The products of the industry would also be comprised in Entry 27 of the List 2, except where they were the products of the "controlled" industries when they would fall within Entry 33 of List 3. AIR 1956 SC 676 (696, 697) = 1956 SCR 393.

(3) The subject of Entry 52 is not the manufactured product, but the industry engaged in its manufacture. AIR 1957 All 159 (164) (DB).

(4) The assumption of control of an industry under this entry would not interfere with the powers of the State Legislature under Entry 56 of List 2 which empowers it to levy taxes on goods and passengers carried by road or on inland waterways. AIR 1955 Assam 249 (258) (SB).

(5) A tax on sugarcane entering the factory premises is not a law relating to the process of manufacture or production of sugar within the meaning of Entry 52. AIR 1957 All 159 (164, 165) (DB).

(6) Industries (Development and Regulation) Act (1951), Section 20. The expression 'industry' in Entry 52 of List 1 bears the same meaning as that in Entry 24 of List 2. The result is that the said expression in Entry 52 of List 1 does not take in a gas industry. AIR 1962 SC 1044 (1052) = (1962) Supp (3) SCR 1.

(7) The West Bengal Oriental Gas Company Act, 1960 is, within the legislative competence of the West Bengal Legislature and is validly made. AIR 1962 SC 1044 (1050, 1051, 1052) = (1962) Supp (3) SCR 1.

(8) The Rice Milling Industry (Regulation) Act is intra vires the Parliament and is relatable to Entry 52 in List 1. 1966 Ker LT 161 = 1966 Cri LJ 1541 (2) (Kerala).

(9) The Kerala Paddy (Restriction on Milling) Order 1967 issued by the

Kerala State Government as a delegate of the Central Government is an Act of the Central Government and therefore no question of any conflict between Parliament and State Legislature can arise. AIR 1969 Ker 154 (161) = 1968 Ker LT 652 (FB).

(10) The field covered by the declaration made by Section 2 of the Industries (Development and Regulation) Act is not the same as the field covered by Orissa Mining Areas Development Fund Act and cannot be challenged as a result of Entry 52 read with the former Act. AIR 1961 SC 459 (478) = (1961) 2 SCR 537.

(11) It cannot be said that the purpose of the Kerala Paddy (Restriction on Milling) Order issued by the Kerala State Government as a delegate of the Central Government is the same as the object of Rice Milling Industry (Regulations) Act and the former is therefore invalid. AIR 1969 Ker 154 (161) = 1968 Ker LT 652 (FB).

Schedule 7, List 1, Entry 53 — Note 1

(1) Entry 53 of Sch. 7, List 1 has no reference to the imposition of sales-tax on motor spirit. By enacting a law for imposing sales-tax on petroleum and petroleum goods, the State Legislature does not transgress on the domain allotted to the Centre. AIR 1959 Andh Pra 225 (229, 230) = (1959) 1 Andhra WR 331 (DB).

(2) Central Government's notification fixing rate of royalty, payable by all mining lease-holders to whom leases were granted before 25th October, 1949 — Does not affect power of State Government to grant remission in rate of royalty after the date of notification. AIR 1967 Madh Pra 184 (193) = 1967 MPLJ 202 (DB).

(3) The W. B. Fire Services Act comes within Item 6 in List II of Sch. 7. The Petroleum Act, 1934 can come under item 53 of List and the subject matter thereof is not identical with Items 5 and 6 in the State List. There is therefore no repugnancy between the two Acts. AIR 1960 Cal 219 (225).

(4) Entry No. 53 of List 1, Sch. 7 not only relates to petroleum but also relates to other liquids and substances declared by Parliament by law to be

54. Regulation of mines and minerals development to the extent to which such regulation and development under the control of the Union is declared by Parliament by law to be expedient in the public interest.

[Government of India Act, 1935 — Item 36].

Schedule 7, List 1, Entry 53 — Note 1 (contd.)

dangerously inflammable. The provisions of Entries 1, 5 and 6 in List 2 do not stand in conflict with Entry 53 in List 1 and therefore the question of resolving that conflict does not arise. (1965) 67 Bom LR 484 (487, 497) = ILR (1965) Bom 899 (DB).

Schedule 7, List 1, Entry 54 — Note 1

(1) The word 'regulation' would not ordinarily imply power to impose taxation, but under particular circumstances where funds are required for the implementation of the objects of an Act, it might include the power of raising such funds. AIR 1957 Cal 326 (329).

(2) The imposition of excise duty on coal raised and dispatched, under Section 8 (1) (a) of the Coal Mines (Conservation and Safety) Act, 1952, is valid under this entry read with Entry 84 of List 1. AIR 1957 Cal 326 (329).

(3) The power given by Entry 54 of List 1 with respect to coal mines is, however, only a power to regulate them by legislation and taxes of the kind imposed by Section 8 (1) (a), Coal Mines (Conservation and Safety) Act, 1952, cannot be supported by reference to the regulatory power and the tax imposed by Section 8 (1) (a) of the Coal Mines (Conservation and Safety) Act cannot be said to be authorised by Entry 54 of List 1. AIR 1959 Cal 222 (225) (DB).

(4) Where a duty is in the nature of a levy imposed as a contribution to the revenues of the country under Coal Mines (Conservation and Safety) Act, 1952 and not a licence or other fee intended to regulate coalmining, the law imposing it cannot be said to be legislation under item 54 of Union List but it is good legislation under Item 84 of the same List. AIR 1959 Cal 222 (231) (DB).

(5) Before Parliament can exercise power under this entry to enact laws with respect to regulation of mines and mineral development it must declare by law that it is expedient to do so in the public interest. AIR 1957 Cal 326 (328).

(6) The declaration by Parliament specified by Entry 54 must be declaration made by Parliament subsequent to the date when the Constitution came into force. AIR 1961 SC 459 (472) = (1961) 2 SCR 537.

(7) Assam Land and Revenue Regulation (1886) passed by the Governor-General-in-Council — Will be regarded as a Central Act — No ques-

tion of taking away power by State legislature by declaration by Parliament under List 1, Entry 54, Sch. VII of Constitution or by Central Legislature under Entry 36 of List I of Government of India Act, 1935, will arise. AIR 1966 Assam 107 (109) = ILR (1965) 17 Assam 347 (DB).

(8) Under Entry 23 of List 2 in the Seventh Schedule the States have also power to legislate with respect to regulation of mines and mineral development; but this power is subject to Entry 54 in List 1. AIR 1958 Raj 140 (142) (DB) ** AIR 1957 Cal 326 (329) ** AIR 1952 Mys 84 (85) = ILR (1952) Mys 278 = 1952 Cri L Jour 1348 (DB) ** AIR 1961 SC 459 (469) = (1961) 2 SCR 537 ** AIR 1968 Madh Pra 17 (18) = 1967 MPLJ 728 (DB).

(9) Where the Legislative competence of Parliament to enact a law is challenged on the ground that it encroaches on a field covered by the State List, the doctrine of pith and substance is the usual test applied. AIR 1963 Madh Pra 213 (215) = 1963 MPLJ 274 (DB).

(10) As to whether mineral includes salt, see the undermentioned case. AIR 1957 Raj 213 (215) = ILR (1956) 6 Raj 305 (DB).

(11) State Government has authority to impose royalty in respect of minor minerals. AIR 1965 Pat 491 (495, 496) = 1966 BLJR 325 (DB).

(12) Use of word 'mines' in conjunction with 'minerals' does not limit meaning of latter—Brick-earth is mineral and its inclusion in definition of 'minor minerals' is not ultra vires the Constitution, Seventh Schedule. AIR 1965 Pat 491 (496, 498, 499) = 1966 BLJR 325 (DB).

(13) Pursuant to entries 54, 55, 96 of List 1, Parliament can levy or collect fees which may be regarded as regulatory fees but for purpose of imposing tax resort should be had to other specific Entries like Entries 82 to 92-A of First List. AIR 1968 Mys 42 (45) = (1967) 2 Mys LJ 474 (DB).

(14) Rule 27 (b) of Mineral Concession Rules, 1960 in substance and effect provides for compensation for mining operations carried on over the surface area of land and hence is within the expression 'regulations of mines and mineral development' occurring in Entry 54, of List 1 of Sch. 7. AIR 1963 Madh Pra 213 (215) = 1963 MPLJ 274.

(15) The Assam Land and Revenue Regulation is essentially an Act re-

55. Regulation of labour and safety in mines and oilfields.
[Government of India Act, 1935 — Item 35].

56. Regulation and development of inter-State rivers and river valleys to the extent to which such regulation and development under the control of the Union is declared by Parliament by law to be expedient in the public interest.

*57. Fishing and fisheries beyond territorial waters.

[Government of India Act, 1935 — Item 23].

58. Manufacture, supply and distribution of salt by Urban agencies, regulation and control of manufacture, supply and distribution of salt by other agencies.

[Government of India Act, 1935 — Item 47].

59. Cultivation, manufacture, and sale for export, of opium.

[Government of India Act, 1935 — Item 31].

60. Sanctioning of cinematograph films for exhibition.

[Government of India Act, 1935, List III, Item 33].

JAMMU AND KASHMIR

Omit Entry 60.

Schedule 7, List 1, Entry 54 — Note 1 (contd.)

lating to land. The scope and field covered by Oil Fields (Regulation and Development) Act 53 of 1948 and the Mines and Minerals (Regulation and Development) Act 67 of 1957 passed by Central Government are entirely different from those of the Regulations and there can be no repugnancy between the two Acts. AIR 1966 Assam 107 (109) = ILR (1965) 17 Assam 347 (DB).

(16) Orissa Mining Areas Development Fund Act (27 of 1952) is superseded by Mines and Minerals (Regulation and Development) Act (1957). AIR 1964 SC 1284 (1293) = (1964) 4 SCR 461. (AIR 1962 Orissa 24, Affirmed.)

Schedule 7, List 1, Entry 55 — Note 1

(1) Pursuant to entries 54, 55, 96 of List 1 Parliament can levy or collect fees which may be regarded as regulatory. AIR 1968 Mys 42 (45) = (1967) 2 Mys LJ 474 (DB).

Schedule 7, List 1, Entry 56 — Note 1

(1) Item 17 of List II is wider in scope and includes what is contemplated in item 56 of List 1. A project which is essentially a project for purposes of preventing floods is clearly within the competence of the State Legislature and as such the executive action in notifying the same for acquisition and the contemplated project cannot be held to be unconstitutional under item 56 of List 1 and Art. 162. AIR 1956 Orissa 114 (118) = ILR (1956) Cut 443 (DB).

Schedule 7, List 1, Entry 57 — Note 1

(1) The Madras Estates (Abolition and Conversion into Ryotwari) Act (26 of 1948) is in substance a legislation in respect of land and land tenure covered by Entry 18 of the State List (Govern-

ment of India Act, 1935, Sch. VII, List 2, Item 21), and is not to any extent a legislation on fishing and fisheries in the seas. AIR 1954 Mad 291 (295, 297, 331) = ILR (1953) Mad 1175 (DB).

(2) With reference to right of fishery, the marginal belt must be regarded as part of the territory of the littoral state — Different views on the extent of territorial waters indicated. AIR 1954 Mad 291 (299) = ILR (1953) Mad 1175 (DB).

Schedule 7, List 1, Entry 58 — Note 1

(1) Imposition of octroi duty on salt under Section 61 (2), Punjab Municipal Act is not valid — Since Provincial Legislature had no authority to impose any tax on salt. Section 61 (2) of that Act could not authorise the Municipality to impose such duty. AIR 1942 FC 14 (16, 17) = 1942 FCR 31 = ILR (1944) Lah 373 = ILR (1942) Kar (FC) 34 (Sup).

(2) Marwar Land Revenue Act (40 of 1949), Section 231 — "Mineral" in Section 231 includes salt wherever produced. AIR 1957 Raj 213 (215) = 1956 Raj LW 514 (DB).

Schedule 7, List 1, Entry 59 — Note 1

(1) Notification under Hyderabad Opium and Intoxicating Drugs Act — G. O. Ms. No. 1376, Revenue dated 5th September, 1962 — Not ultra vires on ground of repugnancy to Drugs Act 1940. AIR 1964 Andh Pra 430 (432) = (1964) 1 Andh LT 285 (DB).

(2) Section 9 (a), Opium Act (1878), as amended by Madhya Bharat Act 15 of 1955 is not ultra vires. AIR 1961 Madh Pra 13 (14) = 1961 (1) Cri LJ 92 = 1961 MPLJ 1379. (Overruled on another point in AIR 1963 Madh Pra 337.)

Schedule 7, List 1, Entry 60 — Note 1

(1) The words 'entertainments' and 'amusements' in Entry 62 of List 2,

61. Industrial disputes concerning Union employees.

62. The institutions known at the commencement of this Constitution as the National Library, the Indian Museum, the Imperial War Museum, the Victoria Memorial and the Indian War Memorial, and any other like institution financed by the Government of India wholly or in part and declared by Parliament by law to be an institution of national importance.

[Government of India Act, 1935 — Item 11].

63. The institutions known at the commencement of this Constitution as the Benares Hindu University, the Aligarh Muslim University and the Delhi University, and any other institution declared by Parliament by law to be an institution of national importance.

[Government of India Act, 1935 — Item 13].

64. Institutions for scientific or technical education financed by the Government of India wholly or in part and declared by Parliament by law to be institutions of national importance.

65. Union agencies and institutions for—

- (a) professional, vocational or technical training, including the training of police officers; or
- (b) the promotion of special studies or research; or
- (c) scientific or technical assistance in the investigation or detection of crime.

[Government of India Act, 1935 — Item 12].

66. Co-ordination and determination of standards in institutions for higher education or research and scientific and technical institutions.

[Government of India Act, 1935 — Item 12].

Schedule 7, List 1, Entry 60 — Note 1 (contd.)

Sch. 7 are wide enough to include theatres, dramatic performances, cinemas, etc. In Entry 33 the word 'cinema' had to be specifically mentioned in order to avoid any conflict between it and Entry 60 in List 1. AIR 1959 SC 894 (896).

Schedule 7, List 1, Entry 63 — Note 1

(1) Items 63 to 66 of List 1, are carved out of the subject of education and in respect of these items the power to legislate is vested exclusively in the Parliament. AIR 1963 SC 703 (715) = (1963) Supp 1 SCR 112.

(2) Under Items 63 to 65 the power to legislate in respect of medium of instruction, having regard to the width of those items must be deemed to vest in the Union. AIR 1963 SC 703 (705) = (1963) Supp 1 SCR 112.

(3) If a subject of legislation is covered by items 63 to 66 of List 1 of Sch. 7 even if it otherwise falls within the larger field of "education including universities" power to legislate on that subject must lie with the Parliament. AIR 1963 SC 703 (715) = (1963) Supp 1 SCR 112.

Schedule 7, List 1, Entry 64 — Note 1

(1) Use of expression "subject to" in List 2, Entry 11 clearly indicates that legislation in respect of excluded matters cannot be undertaken by State

Legislature — Power to legislate with respect to medium of instruction — Must be deemed to vest in the Union. AIR 1963 SC 703 (715) = (1963) Supp 1 SCR 112. (AIR 1962 Guj 83 (FB), Reversed on another point.)

Schedule 7, List 1, Entry 65 — Note 1

(1) Use of expression "subject to" in List 2, Entry 11 clearly indicates that legislation in respect of excluded matters cannot be undertaken by State Legislature. Power to Legislate with respect to medium of instruction must be deemed to vest in the Union. AIR 1963 SC 703 (715) = (1963) Supp 1 SCR 112. (AIR 1962 Guj 88 (FB), Reversed on another point.)

Schedule 7, List 1, Entry 66 — Note 1

(1) Item 66, List 1 is a legislative head and in interpreting it, unless it is expressly or of necessity found conditioned by the words used therein, a narrow or restricted interpretation will not be put upon the generality of the words. AIR 1963 SC 703 (716) = (1963) Supp 1 SCR 112.

(2) The power conferred by item 66 is not conditioned by the existence of a state of emergency or unequal standards calling for the exercise of the power. AIR 1963 SC 703 (716) = (1963) Supp 1 SCR 112.

(3) Co-ordination in its normal connotation means harmonising or bring-

67. Ancient and historical monuments and records, and archaeological sites and remains, ^a[declared by or under law made by Parliament] to be of national importance.

[Government of India Act, 1935—Item 15].

[a] Substituted for the words “declared by Parliament by law” by the Constitution (Seventh Amendment) Act, 1956, Section 25 (1-11-1956).

JAMMU AND KASHMIR

In entry 67, omit the words ‘and records’.

OBJECTS AND REASONS

“Entry 67 of the Union List refers to ancient and historical monuments and records and archaeological sites and remains, declared by Parliament by law to be of national importance”. A large number of ancient monuments, archaeological sites, etc., have been declared to be of national importance by an Act of Parliament. It requires another Act of Parliament to make the slightest alteration, in, or in addition to, the Lists in the Act which seems to be an unduly cumbrous procedure. It is therefore proposed to amend the entry by substituting for the words ‘declared by Parliament by law’, the words ‘declared by or under law made by Parliament’. The same amendment is proposed to be made in the connected provisions. Entry 12 of the State List, Entry 40 of the Concurrent List and Article 49.”—Gaz. Ind., 1956, Pt. II, Section 2, Ext., p. 222.

68. The Survey of India, the Geological, Botanical, Zoological and Anthropological Surveys of India; Meteorological organisations.

[Government of India Act, 1935 — Item 14].

69. Census.

[Government of India Act, 1935 — Item 16.]

70. Union public services; all-India services; Union Public Service Commission.

[Government of India Act, 1935 — Item 8].

Schedule 7, List 1, Entry 66 — Note 1 (contd.)

ing into proper relation in which all things co-ordinated participate in a common pattern of action. The power to co-ordinate is not merely power to evaluate. It is a power to harmonise or secure relationship for concerted action. AIR 1963 SC 703 (716) = (1963) Supp 1 SCR 112.

(4) The validity of the State legislation on University education and as regards the education in technical and Scientific Institutions not falling within Entry 64 of List 1 would have to be judged having regard to whether it impinges on the field reserved for Union under Entry 66. AIR 1963 SC 703 (716) = (1963) Supp 1 SCR 112. (AIR 1962 Guj 88 (FB), Reversed on another point.)

(5) In so far as medium of instruction is a necessary incident of the power under item 66, List 1, it must be deemed to be included in that item and therefore excluded from item 11, List 2. AIR 1963 SC 703 (717) = (1963) Supp 1 SCR 112.

(6) If legislation relating to imposition of an exclusive medium of instruction in a regional language or in Hindi, is likely to result in lowering of the standards, that legislation would neces-

sarily fall within item 66 of List 1 and to that extent would be deemed to be excluded from the amplitude of the power conferred by item 11 of List II. AIR 1963 SC 703 (717) = (1963) Supp 1 SCR 112.

(7) Provisions of Gujarat University Act (50 of 1949), Section 4 (27) proviso (as amended by Act 4 of 1961) and Section 38-A are not ultra vires of State Legislature. AIR 1963 SC 703 (717) = (1963) Supp 1 SCR 112. (AIR 1962 Guj 88 (FB), Reversed.)

(8) It cannot be said that the interview test prescribed in the Order No. P. L. M/80/MMC/64, dated 29-6-1964 corrodes the power given to the Union under Entry 66 of List 1. AIR 1966 Mys 40 (47, 48) = ((1965) 2 Mys LJ 571 (DB).

(9) State Government has power to prescribe machinery and criteria for admission to Medical and Engineering colleges. AIR 1964 SC 1823 (1830) = (1964) 6 SCR 368.

Schedule 7, List 1, Entry 70 — Note 1

(1) The plenary power of the Legislature conferred by Entry 70 in List 1 would entitle the legislature to provide for any change or even for termination of service subject to Article 311

71. Union pensions, that is to say, pensions payable by the Government of India or out of the Consolidated Fund of India.

[Government of India Act, 1935 — Item 9].

72. Elections to Parliament, to the Legislatures of States and to the offices of President and Vice-President; the Election Commission.

[Government of India Act, 1935 — Item 40].

JAMMU AND KASHMIR

In its application to the State of Jammu and Kashmir, in Entry 72, the reference to the States shall be construed—

(a) in relation to appeals to the Supreme Court from any decision or order of the High Court of the State of Jammu and Kashmir made in an election petition whereby an election of either House of the Legislature has been called in question as including a reference to the State of Jammu and Kashmir;

(b) in relation to other matters as not including a reference to that State—
See Constitution (Application to Jammu and Kashmir) Order, 1954, para 2, sub-para (22)(a) (as substituted by C. O. 83).

73. Salaries and allowances of members of Parliament, the Chairman and Deputy Chairman of the Council of States and the Speaker and Deputy Speaker of the House of the People.

[Government of India Act, 1935 — Item 41].

74. Powers, privileges and immunities of each House of Parliament and of the members and the Committees of each House, enforcement of attendance of persons for giving evidence or producing documents before committees of Parliament or commissions appointed by Parliament.

[Government of India Act, 1935—Item 41.]

Schedule 7, List 1, Entry 70 — Note 1 (contd.)

of the Constitution. AIR 1960 Punj 284 (285, 286) = 62 Pun LR 268.

((2) Conflict between Central Act and a State Act on same subject — Corruption charges against All India Service personnel allotted to Jammu and Kashmir State have to be inquired under All India Services Act having been passed by the Union Parliament under Entry 70 read with Entry 94 of List 1, Schedule 7 and not J. and K. Act. AIR 1967 J and K 37 (41, 42) = 1967 Kash LJ 197 (FB).

(3) In determining the applicability of the competing Central and State enactments, the true nature and scope of the subject-matter covered by the enactments have to be looked into. AIR 1967 J & K 37 (42) = 1967 Kash LJ 197 (FB).

Schedule 7, List 1, Entry 72 — Note 1

(1) Parliament is competent under Article 327 read with this entry to make a law prescribing the authority and procedure for challenging an election to the State Legislature. AIR 1954 Madh B 111 (112) = ILR (1954) Madh B 440 (DB).

(2) The subject-matter of Sections 131 (1) (b) and 136 (1) of the Representation of the People Act, 1951, falls within the scope of Art. 327 and this entry and also Entry 93 of the Union List.

AIR 1954 Pat 356 (357) = 1954 Cri L Jour 1132.

(3) Section 126 of the Representation of the People Act provides necessary safeguards for peaceful elections, but in doing so it incidentally touches upon the field of public order which is within the exclusive jurisdiction of the State Legislature to legislate. But the encroachment is only incidental. AIR 1957 Pat 252 (255) = ILR 34 Pat 855 = 1957 Cri L Jour 648 (DB).

Schedule 7, List 1, Entry 74 — Note 1

(1) Clause (3) of Article 105 envisages express legislation on the questions of privileges and immunities and mere legislation on qualifications and disqualifications will not touch the question. Disqualification is a very different matter from any particular immunities claimed by members. If a member is not disqualified it only means that he remains a member and not that he can claim any particular immunity. AIR 1952 Cal 632 (635, 636) = ILR (1954) 1 Cal 272 = 1952 Cri L Jour 1454 ((SB) ** AIR 1951 Mad 269 (Pr. 4) = ILR (1951) Mad 135 (DB).

(2) The Representation of the People Acts, 1950 and 1951, do not deal with the question of privilege and they were not passed to give effect to Clause (3) of Art. 105. AIR 1952 Cal 632 (635) = ILR (1954) 1 Cal 272 = 1952 Cri L Jour 1454 (SB).

75. Emoluments, allowances, privileges, and rights in respect of leave of absence, of the President and Governors; salaries and allowances of the Ministers for the Union; the salaries, allowances, and rights in respect of leave of absence and other conditions of service of the Comptroller and Auditor-General.

[Government of India Act, 1935—Item 41.]

76. Audit of the accounts of the Union and of the States.

77. Constitution, organisation, jurisdiction and powers of the Supreme Court (including contempt of such Court), and the fees taken therein; persons entitled to practice before the Supreme Court.

[Government of India Act, 1935 — Item 53].

78. Constitution and organisation ^a[including vacations] of the High Courts except provisions as to officers and servants of High Courts; persons entitled to practise before the High Courts.

[a] Inserted and deemed always to have been so inserted, by the Constitution (Fifteenth Amendment) Act, 1963, Section 12.

Schedule 7, List 1, Entry 74 — Note 1 (contd.)

(3) A resolution of either House of Parliament does not amount to law. (1884) 12 QBD 271 (274) = 53 LJQB 209, *Bradlaugh v. Gossett*.

Schedule 7, List 1, Entry 77 — Note 1

(1) The power to legislate in regard to persons entitled to practise before Supreme Court and High Court is carved out of the general power relating to professions in Entry 26 in List III and is made the exclusive field for Parliament. AIR 1968 SC 888 (892) = (1968) 2 SCR 709.

(2) Legislative competence to enact law of contempt of Courts is beyond question in view of List 1, Entry 77 and List III, Entry 14 of Schedule 7 and there is nothing unconstitutional in the judicial determination by the Courts as to the meaning of the expression "contempt of Court". AIR 1969 Delhi 201 (206) = 1969 Cri LJ 884 (FB).

Schedule 7, List 1, Entry 78 — Note 1

(1) The constitution and organisation of the High Courts has been made a Central subject because (a) it was necessary to have uniformity in the organisation of all High Courts and this could only be effected by Parliament, and (b) the Constitution provides for extension of the jurisdiction of a High Court beyond the State where it has its principal seat and also for a common High Court in two States or two States and a Union territory and this can only be effected by Parliament. AIR 1957 Cal 534 (544).

(2) The setting up of the Calcutta Civil Court and vesting it with general jurisdiction, by the Calcutta Civil Court Act (21 of 1953) and taking away of the same jurisdiction from the Calcutta High Court did not affect the 'constitution and organisation' of the High Court and hence there was no

infringement of Entry 78. AIR 1957 Cal 534 (544).

(3) The subject-matter of Sec. 411-A, inserted by the Criminal Procedure (Amendment) Act, 1943, in the Criminal Procedure Code was held not to fall within the expression "constitution and organisation of all Courts" in Item I of List 2 of Schedule VII of the Government of India Act, 1935. AIR 1949 Mad 481 (487) = ILR (1949) Mad 739 = 50 Cri L Jour 684 (FB).

(4) The change in the number of Judges by whom a second appeal is to be decided cannot be regarded as affecting the constitution or organisation of the High Court. In this view, the amendment of Section 15 of the Mysore High Court Act (Mysore Act 35 of 1951), cannot be impeached as ultra vires. AIR 1952 Mys 75 (76) = ILR (1952) Mys 279.

(5) The Indian Bar Councils (U. P. Amendment) Act (24 of 1950) is a legislation with respect to 'persons entitled to practise before the High Courts' in Entry 78 and hence ultra vires the State Legislature. AIR 1954 All 728 (732) = ILR (1954) 2 All 191 = 1954 Cri L Jour 1485 (DB).

(6) The phrase "persons entitled to practise before the High Courts" obviously seeks to bring all persons practising the law in the High Courts in various forms and capacities under one comprehensive term. AIR 1952 Cal 178 (183) (SB). (Reversed on another point in AIR 1952 SC 369.)

(7) It cannot be said that the proviso to Section 8 (2) (b) was not within the legislative competence of Parliament. AIR 1958 Andh Pra 63 (65) = ILR (1957) Andh Pra 467 (SB).

(8) The rate of stamp duty on an application for enrolment as Advocates is not one of the matters provided for in Items 91 and 78 of List 1. AIR 1966 Mys 138 (140) = (1965) 2 Mys LJ 119 (DB).

^a[79. Extension of the jurisdiction of a High Court to, and exclusion of the jurisdiction of a High Court from, any Union territory.]

[a] Substituted for the original Entry 79 by the Constitution (Seventh Amendment) Act, 1956, Section 29 and Schedule [1-11-1956].

JAMMU AND KASHMIR

Omit Entry 179.

80. Extension of the powers and jurisdiction of members of a Police force belonging to any State to any area outside that State, but not so as to enable the Police of one State to exercise powers and jurisdiction in any area outside that State without the consent of the Government of the State in which such area is situated; extension of the powers and jurisdiction of members of a Police force belonging to any State to railway areas outside that State.

[Government of India Act, 1935—Item 39.]

81. Inter-State migration; inter-State quarantine.

[Government of India Act, 1935 — Item 50.]

JAMMU AND KASHMIR

In its application to the State of Jammu and Kashmir, in entry 81, the words "Inter-State migration", shall be omitted.

Schedule 7, List 1, Entry 78 — Note 1 (contd.)

(9) Code of Criminal Procedure (Madras Amendment) Act (34 of 1955) — Constitution has provision to make such laws as can be seen from the provisions of Articles 200 and 225 and Item 78 of List 1, Item 3 of List II and Items 1, 2 and 46 of List III of Schedule 7 of the Constitution. AIR 1959 Mad 261 (268) = 1959 Cri LJ 731 = (1958) 2 Mad LJ 123 (DB).

(10) Code of Criminal Procedure (Madras Amendment) Act (34 of 1955) — Not ultra vires the State Legislature. AIR 1959 Mad 261 (268) = 1959 Cri LJ 731 = (1958) 2 Mad LJ 123 (DB).

(11) Law regulating practice and procedure of High Court and also powers of Judges thereof sitting alone or in Division Benches is within the competence of State Legislature to enact — Kerala High Court Act (5 of 1959) is intra vires powers of State Legislature and is valid. AIR 1961 Ker 226 (232) = 1961 Ker LT 275 (DB).

(12) (Case before amendment of Item 78 in 1963) Subject-matter of Section 23-A of High Court judges (Conditions of Service) Act (28 of 1954) falls within Schedule 7, List 2, Entry 3 and not under Schedule 7, List 1, Entry 78. AIR 1961 Cal 545 (553) = 65 Cal WN 920 (DB).

(13) (Case before amendment of Items 78 in 1963) The periodic or annual control of vacations of State High Courts as institutions of justice by the President under Section 23-A of High Court Judges (Conditions of service) Act 1954 cannot be brought within either 'Constitution' or 'organisation of a State High Court. AIR 1961 Cal 545 (553) = 65 Cal WN 920 (SB).

Schedule 7, List 1, Entry 79 — Note 1

(1) The Mysore High Court (Extension of Jurisdiction to Coorg) Act, 1952 and the Calcutta High Court (Extension of Jurisdiction) Act, 1953, are instances of Acts passed by Parliament extending the jurisdiction of High Courts.

Schedule 7, List 1, Entry 80 — Note 1

(1) The Delhi Police Establishment is a "Police force belonging to any State" within the meaning of this Entry. AIR 1969 Delhi 330 (338, 339) (DB).

(2) Substitution of the words "in Delhi" for the words "for the State of Delhi" by the Delhi Special Police Establishment (Amendment) Act (26 of 1952) does not make any change in the Delhi Special Police Establishment Act, 1946, which conflicts with this Entry or with any other provision of the constitution. AIR 1969 Delhi 330 (339, 341) (DB). (AIR 1962 SC 145 and AIR 1954 SC 587, Distinguished.)

(3) Substitution of the words "Union Territories" for the words "Part C, States" in the Delhi Special Police Establishment Act (1946) by the Adaptation of Laws Order (3 of 1956) does not bring the Act into conflict with this Entry (as amended by the Constitution (7th Amendment) Act (1956)). AIR 1969 Delhi 330 (342) (DB).

(4) The expression 'belonging to' does not mean that the police force must be under the employment of a Provincial Government or of a Chief Commissioner as distinct from the Central Government. AIR 1969 Delhi 330 (338) (DB).

Schedule 7, List 1, Entry 81 — Note 1

(1) Any law made by Parliament under this entry cannot curtail the

82. Taxes on income other than agricultural income.

[Government of India Act, 1935, Item 54.]

Schedule 7, List 1, Entry 81 — Note 1 (contd.)

Fundamental Right of a citizen under Article 19 (1) (d) to move freely throughout the territory of India, beyond the limits prescribed by Article 19 (5). AIR 1950 SC 27 (35, 36, 95, 111) = 1950 SCR 88 = 51 Cri L Jour 1383.

(2) Section 7, Bombay Refugees Act (22 of 1948) is ultra vires the Provincial Legislature, inasmuch as the definition of 'refugees' in that Act embraces within its scope a person who has come into the Province from another Province, and to the extent to which it does so the Act falls within Item 50, List 1 of Schedule VII of the Government of India Act, 1935. AIR 1953 Bom 415 (417) = ILR (1953) Bom 836.

Schedule 7, List 1, Entry 82

1. Scope.— (1) The power to levy taxes on income has been parcelled out by the Constitution between the Union and the States, the former having authority under List I, Entry 82, to legislate with regard to 'taxes on income other than agricultural income' and the latter having authority under List II, Entry 46 with respect to taxes on agricultural income. AIR 1942 FC 8 (14) = 1942 FCR 1 = ILR (1942) Kar (FC) 1 Supp = ILR 21 Pat 521.

[See also AIR 1968 Ker 31 (32) = 1967 Ker LT 751 (DB).]

(2) 'Agricultural income' in List 1, Entry 82 and List 2, Entry 46 has the same meaning as contained in the definition given in Section 2 (1), Income-tax Act, 1922. AIR 1942 FC 8 (14) = 1942 FCR 1 = ILR (1942) Kar (FC) 1 Supp = ILR 21 Pat 521 ** AIR 1954 Cal 225 (231) (DB).

(3) Entries 82 to 92-A of List 1 enumerate various kinds of taxes which the Union is competent to legislate upon. AIR 1959 Andh Pra 398 (401) = (1959) 1 Andh WR 285 (DB).

(4) This entry does not indicate whose income may be taxed; no limitation is placed on the power of the Union Parliament as to the person, who should be taxed in respect of his income. AIR 1954 Mad 1120 (1123) = ILR (1955) Mad 702 (DB). (AIR 1952 Bom 261, Rel. on.)

(5) The expression "income" in Entry 82 of List 1 should be widely and liberally construed so as to enable a Legislature to provide, by law, for the prevention of evasion of income-tax. AIR 1965 SC 1862 (1865) = (1965) 3 SCR 1 ** AIR 1965 SC 1375 (1376) = (1965) 1 SCR 909 ** AIR 1962 SC 123 (125, 126) = (1962) 2 SCR 983 ** AIR 1961 SC 736 (743) = (1961) 1 SCR 482 ** AIR 1963 Mad 183 (185) = (1963) 48 ITR 756

(DB) ** (1962) 1 Mad LJ 155 (156) (DB).

(6) A provision of income-tax law which provides for the incidence of taxation not on the person whose income is assessed to tax but on another cannot be held to be ultra vires of the powers of Parliament under this entry. AIR 1957 Mad 133 (138) = ILR (1957) Mad 251 (DB) ** AIR 1956 Mad 387 (388) = ILR (1956) Mad 1154 (DB) ** AIR 1964 Andh Pra 342 (347) = (1964) 54 ITR 643 (DB).

(7) Provisions of Income-tax Act, Section 34 (1-B), (1-C) and (1-D) are matters which are necessarily ancillary to the matter of taxation and therefore are not beyond the legislative competence of the Parliament. AIR 1960 Assam 76 (83) = (1961) 41 ITR 80 (DB).

(8) The general conception as to the scope of income-tax underlying the legislative practice in the United Kingdom finds a place in the phrase 'taxes on income' in this entry. AIR 1948 PC 118 (120) = 75 Ind App 36 = 1948 FCR 1.

(9) The Central Legislature had power to levy a fee as a condition for preferring an appeal to the Appellate Tribunal under Section 33 (3), Income-tax Act, by virtue of Item 54 read with Item 59 of List 1, Schedule VII of the Government of India Act and as such Section 33 (3), Income-tax Act, was not ultra vires. AIR 1954 Mad 806 (808) = ILR (1954) Mad 1236 (DB) ** AIR 1960 Cal 619 (622) = 65 Cal WN 60 (DB).

(10) Articles 245 and 246 read with this entry empower Parliament to make laws with respect to taxes on income for the whole of the territory of India and no limitation or restriction is imposed in regard to retroactive legislation. AIR 1954 SC 158 (162) = 1954 SCR 541.

(11) Taxes on income other than agricultural income — Assessment of tax by Panchayat under Section 57 of West Bengal Panchayat Act on basis of income from trade or business carried on within its jurisdiction — Provisions are saved by Article 271 (1), Constitution of India. AIR 1964 Cal 590 (592) = 68 Cal WN 1132.

(12) Opium and Revenue Laws (Extension of Application) Act (1950), Sec. 3 — Travancore Taxation of Income (Investigation Commission) Act (14 of 1124) — Keeping in force by Parliament of Act 14 of 1124 by Act of 1950 not illegal. AIR 1962 Ker 38 (41) = 1961 Ker LT 558 (FB).

(13) (Per Hidayatullah J.) — Pith and substance of Chapter 22-A of Income-tax Act, 1961 belongs to topic of taxes on

Schedule 7, List 1, Entry 82 — Note 1 (contd.)

income. **AIR 1966 SC 619 (624) = (1966) 2 SCR 22.**

2. Income.— (1) The word 'income' in the Income-tax Act connotes a periodical return coming in with some sort of regularity from definite sources. The source must be one whose object is the production of a definite return, excluding anything in the nature of a mere windfall. **AIR 1932 PC 138 (140) = 59 Ind App 206 = ILR 59 Cal 1343.**

(2) The word 'income' in this Entry should be interpreted in its natural and grammatical meaning and should be given its widest connotation in view of the fact that it occurs in a legislative head conferring legislative power. **AIR 1955 SC 58 (62) = 1955 SCR 829** ** **AIR 1964 Andh Pra 342 (345) = (1964) 54 ITR 643 (DB).**

(3) The expression 'income' is wide enough to include capital gains. Hence the Income-tax and Excess Profits Tax (Amendment) Act, 1947, introducing a new head of income — capital gains — in Section 6 and inserting the new Section 12-B, is intra vires the powers of Central Legislature under this entry. **AIR 1955 SC 58 (62) = 1955 SCR 829** ** **AIR 1962 Punj 337 (343) = 64 Pun LR 504 (FB)** ** **AIR 1961 Mad 146 (151) = (1961) 1 Mad LJ 93 (DB)** ** **AIR 1960 Mad 96 (97) = (1960) 1 Mad LJ 58 (DB).**

(4) The word 'income' is wide enough to include within its scope income which has not actually accrued but which is supposed notionally to have accrued. **AIR 1954 SC 155 (157) = 1954 SCR 444.**

(5) Though the incidence of tax does not fall on the person to whom the income has accrued in the first instance but on some one else it is none-the-less an "income" within the purview of Entry 82. **AIR 1964 Andh Pra 342 (347) = (1964) 54 ITR 643 (DB).**

(6) J. and K. Immovable Property Tax Act, 1962 is within the legislative competence of the State and is not covered by Entry 82 of List 1. **AIR 1968 J and K 105 (107) = 1968 Kash LJ 144 (DB).**

(7) A tax on income is on that which is received: a tax on net wealth is on that which accumulates. Parliament in enacting Wealth Tax Act has not committed trespass on the State field of legislation in imposing a tax on net wealth, part of which may have sprung from agricultural income. **AIR 1962 Ker 110 (115) = 1961 Ker LT 905 (DB).**

(8) Madhya Pradesh Nagariya Sthavar Sampatikar Adhiniyam does not levy a tax on income of capital value of the assets but a tax on lands or buildings. **AIR 1967 Madh Pra 268 (271) = 1967 MPLJ 47 (DB).**

(9) Even if accumulated profits in the hands of a company are derived from agriculture, the money received by the shareholders would not retain that character. In other words, neither a dividend nor a deemed dividend paid out of agricultural income is itself an agricultural income. (1962) 1 Mad LJ 155-157.

3. Tax on income and tax on profession, trade, calling, etc.— (1) Where a tax is payable by any person practising a trade, calling or profession irrespective of whether he derives any income from it or not, will be a tax on trade, calling or profession and not a tax on income. Such a tax falls within Entry 60 of List 2 which is exclusively a State subject and no question of its invalidity can arise and recourse to Article 276 is not necessary for its validation. **AIR 1957 All 433 (436) (DB).** (**Overruled** on another point in **AIR 1969 All 40 (FB).**)

(2) The tax on the receipt of pension or on the income from investments which is referred to in the last part of Section 111 (1) of the Madras City Municipal Act is in truth and substance a tax on income. At the time the tax is levied the pensioner is in no employment but is only in receipt of income though it might be for past services, in an employment. **AIR 1964 SC 1172 (1178) = (1964) 4 SCR 265.**

(3) Property tax levied by Section 3, Punjab Urban Immovable Property Tax Act, 1940, falls in pith and substance, within List 2, Item 42 and is not a tax on income falling within List 1, Item 54, Government of India Act, 1935. **AIR 1949 FC 81 (88) = 1948 FCR 207.**

(4) Distinction between tax on income and tax on circumstances and property pointed out. **AIR 1948 All 382 (386) = ILR (1949) All 26 (FB)** ** **AIR 1969 All 40 (42) = 1968 All LJ 665 (FB).** (1961 All LJ 743 and 1955 All LJ 630 and **AIR 1957 All 433, Overruled.**)

(5) If a State tax, by whatever name it may be called, is based on income derived by the assessee from trade, calling or profession, it may be a tax on income falling within the exclusive jurisdiction of Parliament under this entry. **AIR 1957 All 433 (436) (DB).**

(6) A State law relating to taxes for the benefit of the State or of a municipality in respect of profession, trade, callings etc., falls within Item 60 of List II of Schedule 7 although it is to be realised on the basis of income. 1967 BLJR 135 (149) (DB).

(7) The U. P. Vriti, Vyapar, Ajivika Aur Sevayojan Kar Adhiniyam does not impose tax on income, but one on trades, callings, professions and em-

83. Duties of customs including export duties.

[Government of India Act, 1935, Item 44.]

84. Duties of excise on tobacco and other goods manufactured or produced in India except —

(a) alcoholic liquors for human consumption;

(b) Opium, Indian hemp and other narcotic drugs and narcotics, but including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry.

[Government of India Act, 1935, Item 45.]

Schedule 7, List 1, Entry 82 — Note 3 (contd.)

ployments. Hence it is within the Legislative competence of the U. P. Legislature under Entry 60 of List 2 of Schedule 7. AIR 1969 All 317 (321) = 1967 All LJ 999 (FB).

Schedule 7, List 1, Entry 83 — Note 1

(1) Customs duties are, in their essence, trading taxes and may be said to be more concerned with the commodity in respect of which the taxation is imposed than with the particular person from whom the tax is extracted. (1934) 103 LJPC 1 (6, 7) = 1934 App Cas 45. Attorney-General of British Columbia v. Kingcome Navigation Co.

(2) Export tax is normally collected on merchantable goods in course of transit in pursuance of commercial transactions. AIR 1930 PC 173 (175, 176).

(3) Whether an export tax is ultimately borne by the exporting seller at home or by the importing buyer abroad depends on the terms of the contract between the parties. AIR 1930 PC 173 (175, 176).

(4) A sales tax is a tax on transactions of sale. It is in no sense a tax on goods exported outside a territory. AIR 1954 Mad 1090 (1091) (DB).

(5) Entry 83 of List 1 is concerned only with customs and export duties and has nothing to do with taxes to be collected on goods imported into a local area. AIR 1960 Andh Pra 234 (241, 242) = ILR (1960) Andh Pra 42 (DB).

(6) Levy of customs duties (export or import) by Union on property of State — Levy not covered by exemption and can be validly imposed. AIR 1963 SC 1760 (1777) = (1964) 3 SCR 787.

Schedule 7, List 1 Entry 84

1. Scope.— (1) The Bengal Excise Act 1909 and the Rules and the Notifications thereunder even after the Constitution are covered by the State subjects in Schedule VII, List II, Entry 51. AIR 1958 Cal 203 (207) ** ILR (1956) 2 Cal 22.

(2) Customs duties are levied on goods going abroad or imported from abroad, while duties of excise on the

other hand, are levied on home-made goods or goods made in the taxing country and intended for home consumption. AIR 1955 Assam 249 (255) (SB) ** AIR 1955 Raj 114 (118, 119) = ILR (1955) 5 Raj 832 (DB).

(3) The words "manufactured or produced in India" are an integral part of the entry, and excise duties, though on goods, are connected with their manufacture or production. AIR 1955 Raj 114 (118, 119) = ILR (1955) 5 Raj 832 (DB).

(4) In construing the expression duty of excise as it occurs in Entry 84 of List 1 in Schedule VII of the Constitution the Court is not concerned so much with whether the tax is direct or indirect as upon the transaction or activity on which it is imposed. AIR 1962 SC 1006 (1011, 1013 to 1019, 1027, 1028) = 1962 Supp (2) SCR 1.

(5) The licence fee levied under Travancore Tobacco Act (1 of 1087) is not a duty levied upon a manufacturer or producer in respect of a commodity manufactured or produced. Therefore the levy cannot be said to be duty of excise coming within the ambit of Entry 84 of the Union List. AIR 1958 Ker 129 (133) = 1957 Ker LT 1184 (FB). (Reversed on another point in AIR 1962 SC 922.)

(6) The levy of duty upon consumption of electrical energy cannot be regarded as duty of excise falling within Entry 84 of List 1 in Schedule 7 of the Constitution. The Central Provinces and Berar Electricity Duty Act, 1949, does not fall under Entry 84, List 1 but under Entry 53, List 2. AIR 1963 SC 414 (419, 420, 421) = 1962 Supp (1) SCR 282.

(7) A Tax on the income derived from the cultivation of tobacco does not amount in substance and effect to a duty of excise within the ambit of Entry 84 of the Union List but amounts only to a tax on agricultural income within the meaning of Entry 46 of the State List. Hence the levy of an agricultural income-tax on the income derived from the cultivation of tobacco under the Agricultural Income-tax Act, 1950, is not beyond the powers of the State Legislature. AIR 1961 Ker 111 (112) = 1960 Ker LT 820 (DB).

Schedule 7, List 1, Entry 84 — Note 1 (contd.)

(8) The excise duty cannot be avoided on the ground that the goods were meant for the producer's own consumption. AIR 1957 Cal 326 (331, 332).

(9) The excise duties are to be charged from the manufacturer or producer in respect of the goods manufactured or produced. AIR 1955 Raj 114 (118, 119) = ILR (1955) 5 Raj 832 (DB).

(10) Merely because the imposition of excise duty may have the effect of exercising control on a certain trade, that would not take the matter out of the exclusive competence of Parliament. AIR 1955 Raj 114 (118, 119) = ILR (1955) 5 Raj 832 (DB).

(11) The excise duty is not a tax on the process of production or manufacture. It is no answer to a demand for excise duty to say that the excisable goods were produced prior to the enactment levying an excise duty. AIR 1952 Nag 139 (142) = ILR (1955) Nag 156 (DB) ** AIR 1963 Punj 549 (551) = 65 Pun LR 515 (DB).

(12) If the Legislature has the competence to impose an excise duty that competence can be exercised upon goods at any point of time from the time they are manufactured or produced till the time they are consumed. ILR (1955) Bom 336 (345) (DB).

(13) The words "duties of excise" are wide enough to admit of such a duty being charged from a manufacturer on goods at a stage even after their issue from their place of manufacture. AIR 1956 Pat 131 (132, 133) (DB) ** AIR 1955 Raj 114 (120) = ILR (1955) 5 Raj 832 (DB) ** AIR 1964 Punj 465 (468) = 66 Pun LR 947 ** 1962 (2) Cri LJ 407 (408) (All).

(14) Parliament has the power to levy excise duty with retrospective effect and where the Parliament has, by a process of legal fiction, related back the levy of duty to the stage of manufacture or production, the duty imposed retains its character of an excise duty. AIR 1957 All 84 (86) (DB) ** AIR 1956 Pat 131 (132) (DB) ** AIR 1952 Nag 139 (141, 142) = ILR (1952) Nag 156 (DB) ** AIR 1962 SC 1006 (1011, 1013 to 1019, 1027, 1028) = 1962 Supp 2 SCR 1.

(15) This entry does not conflict with Entry 52 in List 2 which refers to "taxes on the entry of goods into a local area for consumption, use or sale therein." AIR 1950 SC 11 (14) = 1950 SCR 15 ** AIR 1942 All 156 (168, 169) = ILR (1942) All 302 = 43 Cri L Jour 674 (2).

(16) Octroi duty on raw materials cannot always be taken to be included in excise duty. AIR 1957 All 159 (172) (DB).

(17) In the case of a sales tax the liability to pay taxes arises on the transaction of a sale, but in the case of an excise tax, the liability arises in respect of the manufacture or production of the commodity taxed. AIR 1958 SC 452 (459) ** AIR 1945 PC 98 (101) = 72 Ind App 91 = 1945 FCR 179 = ILR (1945) Kar (PC) 153 ** AIR 1942 FC 33 (35) = 1942 FCR 90 = ILR (1942) Kar (FC) 72 Sup ** AIR 1939 FC 1 (9, 11, 14) = 1939 FCR 18 = ILR (1939) Kar (FC) 6 Sup ** AIR 1962 SC 1006 (1011, 1013 to 1019, 1027, 1028) = 1962 Supp (2) SCR 1.

(18) A tax levied on the first sale of goods must in the nature of things be a tax on the sale by the manufacturer or producer; but it is levied upon him qua seller and not qua manufacturer or producer. AIR 1958 SC 452 (459) ** AIR 1942 FC 33 (35) = 1942 FCR 90 = ILR (1942) Kar (FC) 72 Sup ** AIR 1955 Assam 249 (255) (SB) ** AIR 1957 Mad 325 (329) = ILR (1957) Mad 493 (DB) ** AIR 1950 Pat 450 (453) = ILR 29 Pat 746 (DB).

(19) The tax on transportation of goods provided in Entry 56 of the State List is quite a different kind of impost in its nature from that of excise duty payable by the manufacturer or producer. AIR 1955 Assam 249 (255) (SB).

(20) It is true that under Entry 51 of List II which relates to imposition of excise duty, the power of the State Government to impose excise duty on medicinal and toilet preparations has been taken away; but that does not affect the power of the State Government to charge sales tax on such preparations which is independently given to them under Entry 54. 1961 MPLJ 1397 = (1962) 13 STC 64.

(21) Excise Acts of States imposing duties on medicinal and toilet preparations must be held to be repealed by the Medicinal and Toilet Preparations (Excise Duties) Act 1955 enacted by Parliament under Entry 84, List 1, Schedule 7. AIR 1963 SC 622 (625, 626) = (1963) 3 SCR 957. (Ayurvedic preparations held to be medicinal preparations within Section 2 (g) of Medicinal and Toilet Preparations (Excise Duties) Act (1955) — Excise duty levied on such preparations by State Government cannot continue after Central Act of 1955.)

(22) The Parliament has not the power to make legislation in regard to licences to be taken for the possession and sale of medicinal and toilet preparations containing alcohol. AIR 1962 Mys 192 (195, 196) = 40 Mys LJ 840 (DB).

(23) Central Excises and Salt Act (1944) is within legislative competence of Central Legislature under List 1 Entry 45 of the Government of India

85. Corporation Tax.

[Government of India Act, 1935, Item 46.]

86. Taxes on the capital value of the assets, exclusive of agricultural land, of individuals and companies; taxes on the capital of companies.

[Government of India Act, 1935, Item 55.]

Schedule 7, List 1, Entry 84 — Note 1 (contd.)

Act, 1935 — Incidental encroachment on Entry 27 or 29 of List II does not affect its validity. AIR 1960 SC 424 (429) = (1960) 2 SCR 362.

(24) Levy of excise duties by Union on property of State — Levy not covered by exemption and can be validly imposed. AIR 1963 SC 1760 (1777) = (1964) 3 SCR 787.

(25) A tax can be imposed by the State Legislature on an article of luxury. This is even though "in respect of and in relation to" the same article an excise duty may be imposed by the Central legislature under Entry 84, List 1, Schedule 7. AIR 1966 Ker 46 (51) = 1965 Ker LT 418. (Kerala Luxury Tax on Tobacco (Validation) Act, 1964 does not lack legislative competence.)

(26) Nature of cess imposed under Section 3 (2) of Produce Cess Act (1966) is a tax by way of excise duty and comes under Schedule 7, List 1, Entry 84. AIR 1969 Ker 176 (177, 178) = 1968 Ker LT 665 ** 1969 Ker LR 503 (504) (DB).

2. Goods.— (1) Article 366 (12) defines 'goods' as including all materials, commodities and articles, and coal comes within this definition. AIR 1957 Cal 326 (328).

(2) Levy of sales tax on incorporeal movable property is not ultra vires Article 366 (12). AIR 1969 Mad 234 (291) = (1968) 1 Mad LJ 480 (DB).

3. "Manufactured or produced".— (1) Coal is not said to be manufactured in a colliery as coke is. But it is produced. AIR 1957 Cal 326 (328).

(2) To speak of coal as produced in the sense of its being made a material of consumption by human skill and labour is entirely correct and has a sanction of approved usage. AIR 1959 Cal 222 (226) (DB). (1928 AC 358, Ref.)

Schedule 7, List 1, Entry 85 — Note 1

(1) A tax in order to be deemed a corporation tax must be payable by corporations alone. Mere fact that incidence of sales tax falls on corporation does not make tax corporation tax. AIR 1960 Bom 470 (475, 476) = 62 Bom LR 187. (C. P. and Berar Sales Tax Act is intra vires State Legislature — Mere fact that incidence of Sales tax falls on corporation does not make tax corporation tax.)

SCHEDULE 7, LIST 1, ENTRY 86 — SYNOPSIS

1. Entry 86, List I and Entry 49, List II.

2. 'Assets' — Meaning of.

3. 'Individual' — Meaning of.

1. Entry 86, List I and Entry 49, List II.— (1) There is a real and vital distinction between tax on lands and buildings on the basis of their capital value (List II, Entry 49) and tax on such capital value itself treating lands and buildings as an item of asset (List I, Entry 86). There is really no conflict and no overlapping of jurisdictions in the case of the two entries. AIR 1962 Ker 110 (113, 114, 115) = 1961 Ker LT 905 ** ILR (1969) 1 Ker 268 ** AIR 1968 Guj 124 (140) (DB) ** (1967) 11 Law Rep 40 (54) = (1968) 1 Mys LJ 524 (DB) ** AIR 1964 Orissa 128 (130, 131) = 30 Cut LT 299 (DB).

(2) Capital means excess of assets over liabilities as understood in accountancy practice. (Obiter.) (1967) 11 Law Rep 40 = (1968) 1 Mys LJ 524 (DB) ** AIR 1968 Guj 124 (140) (DB).

(3) Imposition of Wealth-tax on non-agricultural lands and buildings under Wealth Tax Act (1957) is constitutional as it is not directly a tax on land and buildings. AIR 1969 SC 59 (61, 62) = (1968) 2 SCJ 790. (Observation made in AIR 1960 All 136 held were obiter and did not correctly interpret Entry 86 of List 1.) ** AIR 1961 All 487 (497, 499, 500) = 1961 All LJ 408 (FB) ** AIR 1962 Ker 110 (113, 114, 115) = 1961 Ker LT 905.

[See also AIR 1969 Ker 69 (72) = 1968 Ker LJ 422].

(4) But such a result flows. There is no principle of public finance in support of the view that a tax on the capitalised value of assets can be levied only once. The location of Entry 86 in List I may be a mere accident of draftsmanship and too much importance should not be given to the collocation of the Entries. AIR 1964 Orissa 128 (132) = 30 Cut LT 299 (DB).

(5) Section 4 of the Wealth Tax Act has been enacted in exercise of the ancillary power of preventing evasion. Section is within the legislative competence of Parliament conferred by Entry 86. AIR 1964 Orissa 128 (133) = 30 Cut LT 299 (DB).

(6) Municipalities — M. P. Nagriya Sthavar Sampati Kar Adhiniyam (XIV

Schedule 7, List 1, Entry 86 — Note 1 (contd.)

of 1964) Section 4 levies not a tax on income or on capital value of the assets but tax on lands or buildings. It is therefore one falling under Entry 49 of List II and not under Entry 86, List 1. AIR 1967 Madh Pra 268 (271) = 1967 MPLJ 47 (DB).

(7) Madras Urban Land Tax Act (XXXIV of 1963), is validly enacted by State Legislature as subject falling within Entry 49 in List II in Seventh Schedule in Constitution and does not trench upon Entry 86 in List 1. (1966) 2 Mad LJ 172 = ILR (1966) 2 Mad 604 (DB).

(8) Gujarat Imposition of Taxes by Municipalities (Validation) Act 1963 is intra vires the State Legislature and does not trespass or purport to trespass upon the legislative field delineated by Entry 86. AIR 1968 Guj 124 (140) (DB).

(9) It was held that the Explanation to S. 75 of the Bombay Municipal Boroughs Act (18 of 1925) and Rule 350A framed by the Corporation were not ultra vires, as they did not fall within Item 55 of List 1 of the Government of India Act, 1935 (corresponding to the present entry) but under Item 42 of List 2 of the Government of India Act, 1935 (corresponding to Entry 49 of List 2 of the Constitution of India). It was held that the power to adopt the basis of the capital value of certain properties in levying tax could not be said to be excluded from Item 42 of List 2 of the Government of India Act, 1935, that the adoption of this method or basis did not alter the character of the tax and that it still continued to be a tax on land and could not be mistaken to be a tax on capital value of assets. AIR 1954 Bom 188 (191, 192, 193, 195, 202) = ILR (1954) Bom 41 (DB).

(10) Bihar and Orissa Municipal Act (VII of 1922), Section 82 (1) (ff) and Sch. 4 — Falls under Item 60 of List II and not under Item 86 of List 1 of Sch. 7. AIR 1962 Pat 465 (467) = 1962 BLJR 515 (DB).

(11) Law enabling Municipalities to levy tax imposed on buildings is covered by Entry 49 of List II and not by Entry 86 of List 1 — Andhra Pradesh Urban Areas Surcharge on Property Tax Act (13 of 1958), Section 3 — Act is validly enacted. AIR 1963 Andh Pra 379 (380) = (1963) 1 Andh WR 267 (DB).

(12) Acts relating to taxation on lands and buildings — Competency of State Legislature to enact — Madras Urban Land Tax Act 12 of 1966, is not beyond competence of State Legislature. AIR 1970 SC 169 (175) = (1969) 2 SCA 26.

2. 'Assets'. — Meaning of — (1) The word 'assets' in Entry 86 List 1 is not qualified by any limiting expression. On the other hand, by excluding agricultural lands only it is made absolutely clear that all other assets would come within the scope of Entry 86. AIR 1964 Orissa 128 (130, 131) = 30 Cut LT 299. (AIR 1960 All 138 Not foll.) ** AIR 1968 Guj 124 (140) (DB) ** AIR 1963 Mys 111 (111) = 1963 Mys LJ (Sup) 365 (DB).

[But see AIR 1960 All 136 (144, 145, 147) = 1959 All LJ 754 (FB). (Observations in this case in this respect held obiter and not correctly interpreting Entry 86, List 1 in AIR 1969 SC 59.)

(2) The expression 'assets' can also include a portion thereof. AIR 1968 Guj 124 (140) (DB) ** AIR 1952 Bom 261 (263) = 54 Bom LR 184.

(3) It is open to the Legislature to levy a capital tax under this entry in respect of only some of the assets or assess the tax on a value which is not the total value of the assets, after making certain deductions. AIR 1952 Bom 261 (263) = ILR (1953) Bom 446 (DB).

(4) Land used as an airfield cannot be termed agricultural land though originally it was agricultural land. AIR 1963 Mys 111 (112) = 1963 Mys LJ (Sup) 365 (DB).

(5) Test to determine whether it is agricultural or non-agricultural land — Capacity of land for being put to agricultural use is not determining factor — Plots situate in residential Town-planning Scheme area, lying uncultivated for many years, though assessed for agricultural purposes held not agricultural land. AIR 1965 Guj 259 (262) = (1965) 56 ITR 608 (DB).

(6) Words 'Agricultural Land' should be liberally interpreted. AIR 1969 Andh Pra 345 (355) (FB).

3. 'Individuals' — Meaning of. — (1) The expression 'individuals' cannot merely mean individual human beings but is wide enough to comprehend individuals forming a unit. AIR 1961 Andh Pra 355 (357, 358) = (1961) 1 Andh WR 272.

(2) The word 'individual', occurring in Entry 86 of List 1 of the Sch. 7 covers a Hindu undivided family which composes of several individuals. Hence, Section 3 of the Wealth Tax Act authorising the Wealth Tax Officers to assess the capital assets of Hindu undivided families is valid. AIR 1961 Andh Pra 355 (357, 358) = (1961) 1 Andh WR 272 (DB) ** AIR 1965 SC 1387 (1392) = (1965) 2 SCR 355 ** AIR 1964 Orissa 128 (132, 133) = 30 Cut LT 299 ** AIR 1962 Ker 110 (118, 119) = 1961 Ker LT 905 (DB) ** AIR 1960 Bom 191 (192) = 61 Bom LR 1433 (DB).

87. Estate duty in respect of property other than agricultural land.

88. Duties in respect of succession to property other than agricultural land.

[Government of India Act, 1935, Item 56.]

89. Terminal taxes on goods or passengers, carried by railway, sea or air; taxes on railway fares and freights.

90. Taxes other than stamp duties on transactions in stock exchanges and future markets.

Schedule 7, List 1, Entry 86 — Note 3 (contd.)

(3) A Mappila Marumakkatayam Tarwad is included in the term 'individual' occurring in S. 3 of Wealth Tax Act (1957) passed by Central Government. AIR 1966 Ker 77 (88) = 1965 Ker LT 1238 (FB).

(4) Income-tax and Excess Profits Tax Amendment Act (22 of 1947) was valid either as a whole if 'individuals and Companies' comprised all the categories of assessee or in any case to the extent that it applied to individuals and companies. AIR 1952 Bom 261 (264, 265) = ILR (1953) Bom 446 (DB).

Schedule 7, List 1, Entry 87 — Note 1

(1) There is a distinction between estate duty and duty in respect of succession. An estate tax is levied on the inheritance as a whole, and a succession duty or share tax is levied on the separate portions going to the different beneficiaries. The Estate Duty is a more productive and efficient source of revenue while Inheritance Tax may be said to be more equitable. AIR 1944 FC 73 (77, 78, 79) = 1944 FCR 317.

(2) Entries 86 & 87 of List 1 do not preclude the State Legislature from taxing capital value of land and buildings under Entry 49 of List II. AIR 1970 SC 169 (175) = (1969) 2 SCA 26.

Schedule 7, List 1, Entry 88 — Note 1

(1) There is a general presumption that the Legislature does not exceed its jurisdiction. Thus when the Legislative Assembly passed the Hindu Women's Rights to Property Act, 1937, it must be presumed that the word "Property" used in the Act must have been used as referring to property other than agricultural land, because the power to legislate in respect of succession to agricultural land was vested in the Provincial Legislature and not in the Central Legislature. AIR 1941 FC 72 (75) = 1941 FCR 12 = ILR (1941) Kar (FC) 148.

(2) Bengal Finance (Sales-tax) Act (VI of 1941) (as amended by Bengal Act XIX of 1954), Section 17 — Validity — Section not a law with respect to Entry 88 of Union List — Falls within purview of Entry 54 of State List — State competent to enact section. AIR 1963 Cal 578 (580) = 67 Cal WN 510 (DB).

(3) Entries 86 to 88 of List 1 do not exclude any power of the State Legislature to implement the principle embodied in Art. 39 (c). AIR 1970 SC 169 (175) = (1969) 2 SCA 26.

(4) For distinction between estate duty and duty on succession, See Notes under Entry 87 of List 1.

Schedule 7, List 1, Entry 89 — Note 1

(1) The terminal tax must have reference to some activity within the municipal area, i. e., the entry for the purpose of remaining within that area or commencement of journey from that area. AIR 1958 SC 341 (347) = 1958 SCR 1102. (AIR 1947 FC 14, Rel. on; AIR 1950 Nag 169 (FB), Reversed.)

(2) A terminal tax is not leviable by the Municipality on goods which are in transit and are only carried across the limits of the Municipality and are neither loaded nor unloaded within the Municipal area. AIR 1958 SC 341 (347, 349) = 1958 SCR 1102.

(3) While terminal taxes are leviable on goods imported or exported from the municipal limits denoting thereby that they were connected with the traffic of goods, Octroi is leviable in respect of goods brought into a municipal area for consumption or use or sale. AIR 1963 SC 906 (911) = (1963) Supp 2 SCR 216.

(4) Where tax is clearly imposed on goods which enter and leave the municipal limits and the tax has no relation to transport of goods as such, it cannot fall within Entry 52 List II. AIR 1967 Bom 413 (416) = 69 Bom LR 303 (DB).

(5) The tax under Entry 30 of List 1 is entirely different from a tax covered by Entry 86, List 1, Sch. 7. AIR 1967 Bom 413 (416) = 69 Bom LR 303 (DB).

(6) The expression "goods" includes incorporeal movable property. AIR 1969 Mad 284 (285) = (1968) 1 Mad LJ 480 (DB).

(7) Tax levied by Rajasthan Passengers and Goods Taxation Act (18 of 1959), Section 3 is tax on passengers and goods and not on income or on fares and freights — Not ultra vires. AIR 1961 SC 1480 (1484, 1485) = (1962) 1 SCR 517.

91. Rates of stamp duty in respect of bills of exchange, cheques, promissory notes, bills of lading, letters of credit, policies of insurance, transfer of shares, debentures, proxies and receipts.

[Government of India Act, 1935, Item 57.]

92. Taxes on the sale or purchase of newspapers and on advertisements published therein.

[Cf. Government of India Act, 1935, List II, Item 48.]

^a[92A. Taxes on the sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-State trade or commerce.]

[Cf. List II, Entry 54.]

[a] Inserted by the Constitution (Sixth Amendment) Act, 1956, Section 2 (a), [11-9-1956].

OBJECTS AND REASONS

See under Article 269.

93. Offences against laws with respect to any of the matters in this List.

Schedule 7, List 1, Entry 91 — Note 1

(1) The States have exclusive power to make laws in respect of rates of stamp duty on matters other than those enumerated in Entry 91 of List 1. AIR 1958 Andh Pra 63 (65) = ILR (1957) Andh Pra 467 (SB).

(2) Parliament has no power to make laws with respect to rates of stamp duty payable on an application for enrolment as an advocate which is not one of the matters enumerated in List 1, Entry 91. AIR 1958 Andh Pra 63 (65) = ILR (1957) Andh Pra 467 (SB) ** AIR 1966 Mys 138 (140) = (1965) 2 Mys LJ 119 (DB).

(3) Rajasthan Stamp Law (Adaptation) Act (VII of 1952), S. 6—Second proviso is not hit by Art. 14. AIR 1961 Raj 181 (181) = 1960 Raj LW 647.

Schedule 7, List 1, Entry 92-A — Note 1

(1) "Inter-State trade or commerce" is not confined to mean trade or commerce between the States as such between a seller-State and purchaser-State. It is inter-State trade where goods sold or purchased move from one State to another, though the trade is very often between individuals, firms, companies or corporations. AIR 1963 Cal 442 (450).

(2) The sale of a thing "in the course of inter-State Trade or Commerce" and the intra-State sale of a thing which is of special importance to inter-State Trade or Commerce are not identical transactions. AIR 1965 Cal 498 (505).

(3) The States retained their power to tax intra-State sales under Entry 54 of List II even after the introduction of Entry 92-A of List 1. AIR 1965 Cal 498 (505).

(4) Sales effected between 11th September 1956 and 4th January 1957 in which goods moved from outside into Mysore State were inter-State sales

understood in its ordinary natural sense unaided by any other statutory provision — State of Mysore had no power to tax such sales in view of Art. 269 (1) (g) read with Sch. VII, List 1, Item 92-A and List II, Item 54. AIR 1967 SC 585 (587) = (1963) 14 STC 416.

(5) The expression "goods" includes incorporeal movable property. AIR 1969 Mad 284 (285) = (1968) 1 Mad LJ 480.

(6) The sale of animate things will not fall within Entry 54 of List 2 or Entry 92-A of List 1. It would therefore fall within Entry 97 of List 1 and tax on such sales would be within the competence of Parliament. AIR 1960 Ker 360 (360) = 1960 Ker LT 538.

(7) Taxing authorities have power to select commodities for taxation — Discrimination to be shown before the act can be struck down. 1968 All LJ 802.

Schedule 7, List 1, Entry 93 — Note 1

(1) Parliament had full competence, by virtue of this entry to legislate with regard to election offences in the manner provided by S. 131 (1) (b) and S. 136 (1) of the Representation of the People Act 1951. AIR 1954 Pat 356 (357) = 1954 Cri LJ 1132.

(2) Legislation in respect of insurance and creation of new offences in respect of insurances comes exclusively within Parliament's legislative jurisdiction. AIR 1944 FC 25 (28) = 1944 FCR 143 = 46 Cri LJ 332.

(3) Under the provisions of S. 10 (2) of Suppression of Immoral Traffic in Women and Girls Act (1956) a person is detained in lieu of a term of imprisonment or imposition of fine. The Parliament can legislate in respect of this matter both under Art. 35 (i) and (ii) and also under Entry 93. AIR 1959 All 57 (66) = 1959 All WR (HC) 509. [Overruled on another point in AIR 1964 SC 416.]

94. Inquiries, surveys and statistics for the purpose of any of the matters in this List.

[Government of India Act, 1935, Item 43.]

95. Jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in this List; admiralty jurisdiction.

[Government of India Act, 1935, Items 21, 53.]

96. Fees in respect of any of the matters in this List, but not including fees taken in any Court.

[Government of India Act, 1935, Item 59.]

Schedule 7, List 1, Entry 94 — Note 1

(1) The words 'for the purpose of' indicate that the scope of the inquiry is not necessarily limited to the particular or specific matters enumerated in any of the entries in the list concerned but may extend to inquiries into collateral matters. AIR 1958 SC 538 (544, 545). (59 Bom LR 769, Reversed.)

(2) Corruption charges against an officer of All India Service allotted to the State of J & K have to be enquired into under the All India Services Act and not under the J & K Government Servants' Prevention of Corruption (Commission) Act since the former covers all the aspects of the officers of All India Services. AIR 1967 J & K 37 (42) = 1967 Kash LJ 197 (FB).

Schedule 7, List 1, Entry 95 — Note 1

(1) The effect of Entry 65 of List 2 and Entry 95 of List 1 is that while legislating with regard to the matters in their respective legislative lists, the two Legislatures are competent also to make provisions in the several Acts enacted by them, concerning the jurisdiction and powers of Courts in regard to the subject-matter of the Acts. AIR 1951 SC 69 (70, 71) = 1951 SCR 51.

[See also AIR 1961 Ker 226 (229) = 1961 Ker LT 275 (FB).]

(2) Entry 95, List 1 only enables jurisdiction and power to be given in respect of matters enumerated in List 1. AIR 1957 Cal 534 (543) = 61 Cal WN 630.

(3) Section 45-B of the Banking Companies Act, 1949, inserted by Act 52 of 1953, is within the plenary powers of Parliament under Art. 246 of the Constitution read with Entries 43 and 95 of List 1. AIR 1958 Mad 279 (280) = ILR (1958) Mad 502.

(4) Sections 45-A and 45-B were inserted in Banking Companies Act by the Amending Act 1950. The Legislature did not purport to legislate in regard to the subject covered by item 18 of List II. The Court deciding the claim of banking company may only incidentally have to decide other matters. This is why the phrase "with respect to" has been used in Entry 95 of List 1 and Entry 65 of List II. AIR 1958 Mad 403 (410) = 71 Mad LW 291.

(5) The word "powers" was added to the word "jurisdiction" in this entry and the corresponding entries in the other two lists in order to enable the Legislature to grant special powers to the Courts which are to deal with the subject-matter of any special legislation. AIR 1951 SC 69 (71) = 1951 SCR 51.

(6) A scrutiny of Entry 95 of List 1 and Entry 46 of List III would clearly show that the power to legislate conferred on the concerned legislatures is only in relation to the subjects which are assigned to the respective legislatures in those lists. These entries do not in any way derogate from the general powers given to the State Legislatures under Item 3 of List II. AIR 1959 Andh Pra 3 (6) = (1959) 1 Andh WR 161 (DB).

(7) The 95th entry does authorise legislation on jurisdiction and powers of Courts with respect to the constitution and organisation including vacations of the High Courts. Whatever else may be a law which Parliament may make in respect to that matter under the 95th entry, it is clear that within the field of that entry, there can be no power in Parliament to make a legislation on the jurisdiction which a High Court may exercise after its constitution and organisation for the administration of justice. AIR 1965 Mys 76 (82, 83) = (1965) 1 Mys LJ 158 (DB).

(8) Money claim based on promissory note — Nyaya Panchayat has jurisdiction to try such a claim. 1968 All LJ 236 = 1968 All WR (HC) 211 (DB).

Schedule 7, List 1, Entry 96 — Note 1

(1) This entry has to be read as an adjunct to every legislative power including the entries conferring the power to levy particular taxes. That indicates that the fees can be levied in the course of the levy or collection of the particular taxes. AIR 1958 Mad 158 (169) = ILR (1958) Mad 35 (DB) ** AIR 1965 SC 1107 (1122, 1123) = (1965) 2 SCR 477.

(2) Although under Entries 54 and 55 List I or Entries 23 and 24 of List III read with Entry 96, List I it may be open or competent to Parliament to

97. Any other matter not enumerated in List II or List III including any tax not mentioned in either of those Lists.

Schedule 7, List 1, Entry 96 — Note 1 (contd.)

levy or collect fees which may be regarded as regulatory fees, the power of imposing a tax is not comprehended within the said Entries, nor can the said power be exercised pursuant to the said Entries. AIR 1968 Mys 42 = (1967) 2 Mys LJ 474 (DB).

(3) Since the Income-tax Appellate Tribunal was not a Court, the Central Legislature had the power, under the Entries 59 and 54 of List I of Government of India Act, (corresponding to Items 32 and 96 of List 1 of the Constitution) to levy a fee as a condition for preferring an appeal to that body.) AIR 1954 Mad 806 (808, 809) = ILR (1954) Mad 1236 (DB).

(4) Section 4 and Schedule II, Art. 1 (e) as amended by Court-fees (U. P. Amendment) Act 10 of 1959 are within competence of U. P. Legislature as the Court-fee imposed by Amendment is not a tax but a fee. AIR 1960 All 462 (465) = 1960 All LJ 170 (FB).

(5) Andhra Court Fees Act falls in Entry 3, List II and is valid — It does not fall under Entry 96, List 1. AIR 1959 Andh Pra 271 (272) = (1959) 1 Andh WR 85 (DB).

(6) For the meaning of "fees", see under Article 265.

Schedule 7, List 1, Entry 97 — Note 1

(1) Resort to the residual power should be the very last refuge, and only when all the categories in the three lists are absolutely exhausted. AIR 1941 FC 47 (55) = 1940 FCR 188 = ILR (1941) Kar (FC) 25. (Case under Government of India Act 1935.) ** AIR 1962 Ker 97 (100) = 1961 Ker LT 859 (DB).

[See AIR 1966 Mysore 138 (139) = (1965) 2 Mys LJ 119 (DB).]

(2) Unless a subject matter falls exclusively within the competence of the State Legislature, Parliament would be competent to legislate with regard to a subject which would either fall in the concurrent list or if not specifically enumerated in the first list would undoubtedly fall in Entry 97, List I. AIR 1951 Bom 440 (447) = 53 Bom LR 621 (DB) ** AIR 1965 Punj 65 (66, 67, 68) = 1964 Cur LJ 412 (DB). (AIR 1962 Mys 269, Not Foll.) ** AIR 1963 Mad 419 (423) = (1963) 2 Mad LJ 192 (DB) ** AIR 1962 Ker 97 (103) = 1961 Ker LT 859 (DB).

[But see AIR 1962 Mys 269 (274, 275) = 1962 Mys LJ (Sup) 442 (DB).]

(3) Gift Tax Act, 1958, is not ultra vires of Parliament and is protected by Article 248 of Constitution read with Entry 97, List 1, Schedule 7. AIR 1967 All 19 (21) = 1966 All LJ 622 (DB).

(3-A) Expenditure Tax Act (1957) is not invalid for want of legislative competency — It falls within ambit of Entry 97. AIR 1970 Andh Pra 86 (91, 92) = ILR (1968) AP 279 (FB).

(4) The entries in List 3 of Schedule VII are to be given a broad and liberal interpretation and each item regarded as including ancillary matters. The State therefore has power to create offence against laws with respect to any of the matters covered by the Concurrent List and it cannot be said that such offences can only be created by Parliament under the residuary Entry 97 of List 1. AIR 1950 Pat 332 (339) = ILR 29 Pat 410 = 51 Cri L Jour 1251 (DB).

(5) Parliament had power to legislate with regard to the subject dealt with in the Administration of Evacuee Property Act, 1950, under the residuary legislative powers given to it by Entry 97 of List 1. AIR 1952 Punj 389 (390) (DB).

(6) Act by State Legislature invalid being beyond its competence — Cannot be validated by Parliament. AIR 1966 SC 416 (421) = (1966) 1 SCR 523 ** AIR 1965 All 420 (432) = 1965 All LJ 386 (FB).

(7) Sugarcane Cess (Validation) Act (1961), Sections 3 and 2 (b) being merely and simply an Act imposing taxation for union purposes the Parliament had the power to enact that legislation under Entry 97 of List 1. AIR 1964 Madh Pra 118 (123) = 1964 MPLJ 17 (DB).

(8) The contribution made under Section 70 of the Bihar Hindu Religious Trusts Act is in the nature of a fee and not in the nature of a tax and the State Legislature was competent to enact this provision. AIR 1954 Pat 266 (276) = ILR 32 Pat 1148 (DB).

(9) Parliament is competent by reason of the residuary entry in List 1 of Schedule VII, to bring to tax as part of the turnover, any amount, be it tax or designated by any other name. AIR 1962 Mad 290 (296) = (1962) 2 MLJ 302 (DB).

(10) Parliament is competent to incorporate Chapter 22-A relating to Annuity deposits in Income-tax Act by virtue of Entry 97 of List 1, Schedule 7. AIR 1966 SC 619 (622) = (1966) 2 SCR 22.

(11) The payment of Bonus Act, 1965, falls under the residuary powers contained in Item 97 of List 1 which must lend validity to the enactment. AIR 1967 SC 691 (717) = (1967) 1 SCR 15.

(12) Imposition of Wealth tax on Hindu undivided family is intra vires. AIR 1961 All 487 (490, 501) = 1961 All LJ 408 (FB).

JAMMU AND KASHMIR

For Entry 97, the following shall be substituted, namely:—

“97. Prevention of activities directed towards disclaiming, questioning or disrupting the sovereignty and territorial integrity of India or bringing about cession of a part of the territory of India from the Union or causing insult to the Indian National Flag, the Indian National Anthem and this Constitution.”

See the Constitution (Application to Jammu and Kashmir) Order, 1954, Para. 2, sub-para. (22) (a) (iii) as substituted by C. O. 85 (17-2-1969).

LIST II — STATE LIST.

1. Public order (but not including the use of naval, military or air forces or any other armed forces of the Union in aid of the civil power).

[Government of India Act, 1935, Item 1.]

Schedule 7, List 1, Entry 97 — Note 1 (contd.)

(13) Adjustment of boundaries between India and Foreign States is within the competence of Parliament under Entry 97, List I. AIR 1959 Cal 506 (507) = 63 Cal WN 485.

(14) Parliament is competent to enact law for an opinion poll in Goa, Daman and Diu. AIR 1967 Goa 79 (84).

(15) Sale of animals and birds in captivity will fall within List 1, Entry 97 and not under List II, Entry 54 or List I, Entry 92-A — Levy of tax on such sales is within competence of Parliament. AIR 1960 Ker 360 (360) = 1960 Ker LT 593.

(16) Even if it be held that Sections 2 (6-A) (e) and 12-B of Income Tax Act (1922) as amended by Finance Act (1955) impose tax not on the income but on loan and thus outside the ambit of Entry 82, List I the legislative authority could be derived therefor under Entry 97, List I. AIR 1961 Mad 146 (151) = (1961) 1 Mad LJ 93 (DB).

(17) It is obvious that Entry 97 in List I, Schedule 7 among other things includes tax not mentioned in either List II or III and the Parliament has not otherwise enacted. Therefore the Travancore Cochin State can claim the benefit of Articles 372 and 277 of Constitution and continue the tax imposed under Travancore Cochin General Tax Act. AIR 1964 SC 207 (217) = (1964) 4 SCR 280. (AIR 1962 Ker 72 (FB), Reversed.)

(18) Articles 245, 246 and 248 read with Schedule VII, List 1, Item 97, show that the residuary power of legislation is vested in Parliament, whether in the field of constitutional law or statutory law amendment. AIR 1967 SC 1643 (1658) = (1967) 2 SCR 762.

(19) Section 2-A, Industrial Disputes Act, is not ultra vires — Parliament

had power to enact it either under Entry 22 of Concurrent List or under Entry 97. AIR 1970 Delhi 60 (66) (DB) ** AIR 1970 Mad 82 (84) = 1970 Lab IC 203 = (1969) 2 Mad LJ 214.

Schedule 7, List 2 — General — Note 1

(1) Power conferred on legislature can be exercised both prospectively and retrospectively. AIR 1963 SC 1667 (1673) = (1964) 1 SCR 897.

(2) The Constitution recognises a clear distinction between a tax and a fee. In the lists I and II entries conferring taxation powers are separately enumerated after entries conferring general legislative powers. A fee may be levied even under an enactment relating to imposition of tax. AIR 1965 SC 1107 (1122, 1123) = (1965) 2 SCR 477.

(3) State Legislature is competent to enact law under the various provisions of the list. AIR 1967 SC 1512 (1519) = (1967) 1 SCR 548.

(4) The object of setting out various items and assigning them to separate lists is to make division of power as clear cut and as exhaustive as possible, though overlapping in the same list between various items and overlapping between items in different lists was inevitable to some extent. ILR (1965) Bom 899 (909), 910 = 67 Bom LR 484 (DB).

(5) Constitution makes a clear division of authority between the Centre and the States and each one is supreme in its own sphere. The question of repugnancy can arise only in respect of list III. 1968 Cri LJ 557 (559) (Cal) (DB).

(6) Article 246 has nothing to do with question of interpretation of the Union or State Entries. AIR 1968 Guj 124 (139) (DB).

(7) Entries in the Legislative Lists in Schedule VII should be given the widest scope of which their meaning is fairly capable and each general word should accordingly be held to extend to all

(NOTE.—Unless mentioned otherwise, the item numbers under this heading refer to the item numbers of List 2 of Schedule VII of the Government of India Act, 1935.)

JAMMU AND KASHMIR

The State List shall be omitted. See Constitution (Application to Jammu and Kashmir) Order, 1954, Para. 2, sub-para. (23) (b).

Schedule 7, List 2, General (contd.)

ancillary and subsidiary matters which can fairly and reasonably be comprehended in it. AIR 1969 Mys 23 (35) = (1968) 2 Mys LJ 78 (DB).

(8) Within its own sphere the powers of State Legislatures are as large and as complete as they are in a sovereign Parliament. So, a State Legislature can exercise that power as many times as it may consider necessary and can pass successive enactments by way of repeal, amendment of former enactments. (1967) 33 Cut LT 263 (319) = 9 Orissa JD 41 (DB).

Schedule 7, List 2, Entry 1 — Note 1

(1) The expression 'public order' in this entry is an expression of wide connotation and signifies that state of tranquillity prevailing among the members of a political society as a result of the internal regulations enforced by the Government which they have instituted. AIR 1950 SC 124 (127) = 1950 SCR 594 = 51 Cri LJ 1514 ** AIR 1955 All 193 (219) = ILR (1955) 1 All 355 = 1955 Cri LJ 623 (DB).

(2) Maintenance of public order within a State is primarily the concern of that State and subject to certain exceptions the State Legislature is given plenary power to legislate on all matters which relate to or are necessary for maintenance of public order. AIR 1950 FC 59 (63) = 1949 FCR 693 = ILR 29 Pat 185 = 51 Cri LJ 921.

(3) 'Public order' includes public safety in its relation to maintenance of public order, both of them being interdependent. AIR 1943 FC 75 (83) = 1944 FCR 1 = ILR (1943) Kar (FC) 103 = 45 Cri LJ 341 ** AIR 1949 Pat 369 (375) = ILR 28 Pat 476 = 50 Cri LJ 730 (FB) ** AIR 1953 Trav-Co 540 (540, 541) = 1953 Cri LJ 1786.

(4) Any law imposing reasonable restrictions on the Fundamental Right granted under Article 19 (1) (a) to (c) of the Constitution, in the interest of public order is expressly saved and such law cannot be said to be void on ground of violation of Fundamental Rights. AIR 1955 All 193 (217) = ILR (1955) 1 All 355 = 1955 Cri LJ 623 (DB).

(5) Section 3, U. P. Special Powers Act, 1932, is inconsistent with Article 19 (1) (a) of the Constitution and the restrictions imposed by it were not in the interest of public order. AIR 1952 All

193 (223) = ILR (1955) 1 All 355 = 1955 Cri LJ 623 (DB).

(6) If a law made by the State Legislature falls in pith and substance under this entry, it cannot be declared ultra vires merely because it incidentally trenches upon a subject assigned to the Union Parliament under List 1 of the Constitution. AIR 1948 Nag 199 (203) = ILR (1947) Nag 579 = 49 Cri LJ 230 (DB).

(7) If a law made by the Parliament falls in pith and substance under one of the subjects enumerated in the Union List it cannot be declared invalid merely because there is an incidental encroachment on the subject of public order under this Entry. AIR 1957 Pat 252 (255) = ILR 34 Pat 855 = 1957 Cri LJ 648 (DB).

(8) Parliament has power to legislate with respect to election offences by virtue of Article 327 read with Entries 72 and 93 in List I, even though such offences may relate to 'public order'. AIR 1954 Pat 356 (357) = 1954 Cri LJ 1132.

(9) The Bombay District Police Act deals with the question of public order. An order of externment passed under Section 46 (3) of the Act is not void under Art. 13 as it does not place an unreasonable restriction on the fundamental right under Article 19 (1) (d) and (e) of the Constitution. AIR 1950 Bom 374 (375) = ILR (1950) Bom 564 = 52 Cri LJ 1059 (FB).

(10) Section 9, Punjab Security of the State Act deals primarily with the question of public order and not with the question of contempt. The entire provisions of Section 9 fall within the ambit of Item 1 of List II and therefore there is nothing repugnant in this section to the Contempt of Courts Act, 1952. AIR 1956 Punj 169 (170, 171) = ILR (1956) Punj 1146 = 1956 Cri LJ 1015 (DB).

(11) Ajmer (Sound Amplifiers Control) Act (III of 1953), Section 2 is within the powers of Entry 6 and also conceivably within Entry 1 of the State List. AIR 1959 SC 544 (547) = 1959 Cri LJ 660 = (1959) Supp 1 SCR 904.

(12) The object of preventing the occurrence of fire and preventing of consequent danger to life and property evidently falls within entry No. I of List II. ILR (1965) Bom 899 (918) = 67 Bom LR 484 (DB).

(13) Under Entry 1 and Entry 2 subjects "Law and Order" and "Police"

2 Police, including railway and village police.

[Government of India Act, 1935, Item 3.]

3. Administration of Justice; constitution and organisation of all Courts, except the Supreme Court and the High Court; officers and servants of the High Court; procedure in rent and revenue Courts; fees taken in all Courts except the Supreme Court.

[Government of India Act, 1935, Items 1 and 2.]

Schedule 7, List 2, Entry 1 — Note 1 (contd.)

are specifically State subjects under List II yet, Police Act (1861) being an existing law within Article 372 still continues in force and any action taken by the Parliament or the Central Government under the Act will not be ultra vires. AIR 1958 Cal 365 (372).

(14) An insult to national honour like the kind mentioned in Section 5 of Madras Prevention of Insults to National Honour Act (14 of 1957) falls under "Public order" and hence State Government was competent to enact the statute under Entry 1 List II. AIR 1965 Mad 11 (13) = 1965 (1) Cri LJ 49 = (1964) 2 Mad LJ 530 (DB).

(15) Appointment of a Committee to inquire and investigate into the activities of Christian Missionaries was within the competence of State Government and falls within Entry 1 of List II. 1957 MPLJ (Nag) 1 (18) (DB).

Schedule 7, List 2, Entry 2 — Note 1

(1) The word "police" in its general sense connotes the department of the Government or the civil force charged with duty to maintain internal peace and order. AIR 1955 All 370 (372) = 1955 Cri LJ 901.

(2) Under this entry it is within the powers of the State Legislature to legislate with regard to police including its strength, its manner of recruitment and other incidental matters. AIR 1955 All 370 (372) = 1955 Cri LJ 901.

(3) The fact that 'police' is exclusively a State subject under this entry does not affect the Police Act of 1861, which as a 'law in force' has been saved by Article 372 (1). AIR 1957 Raj 28 (29) = ILR (1956) 6 Raj 636 (DB) ** AIR 1958 Cal 365 (372).

SCHEDULE 7, LIST 2, ENTRY 3 — SYNOPSIS

1. Scope.

2. Court.

3. Fees taken in Courts.

1. Scope.— (1) Administration of justice is a subject on which only the State Legislature can legislate. AIR 1951 SC 69 (70) = 1951 SCR 51.

(2) "Administration of justice" is a conception of the most general nature. The following words, "constitution and organisation of all Courts, except the Supreme Court and the High Court" are

not words of limitation but of explanation or illustration. AIR 1954 Pat 97 (99) (DB).

(3) The entry includes "administration of justice" and "constitution and organisation" of Courts but does not include their jurisdiction and powers. But, it has been held that the language of these expressions is of the widest amplitude and would include within its ambit legislative power in respect to jurisdiction and powers of Courts for the purpose of administration of justice and that this general power conferred by Entry 3 is not curtailed or limited by Entries 95, 65 and 46. AIR 1951 SC 69 (82, 85) = 1951 SCR 51 ** AIR 1949 Bom 197 (202) = ILR (1950) Bom 260 (DB).

(4) Since a State Legislature is competent under this entry to confer by legislation general jurisdiction and powers upon a Court, the mere fact that, while doing so, there is an incidental encroachment upon any Central subject will not make the law invalid. AIR 1951 SC 69 (85) = 1951 SCR 51 ** AIR 1957 Cal 534 (545) ** AIR 1949 Bom 197 (202) = ILR (1950) Bom 260 (DB).

(5) The expression "administration of justice" includes the power to try suits and proceedings of a criminal nature, as also the power of defining, enlarging, altering, amending and diminishing the jurisdiction of the Courts and defining their jurisdiction territorially and pecuniarily. AIR 1951 SC 69 (70) = 1951 SCR 51. (Per Fazl Ali J.) ** AIR 1959 Andh Pra 3 (6) = (1959) 1 Andh WR 161 (DB).

(6) Bombay City Civil Courts Act (40 of 1948) and the Calcutta City Civil Courts Act (21 of 1953) are intra vires of the Provincial Legislatures. AIR 1951 SC 69 (85) = 1951 SCR 51 ** AIR 1949 Bom 197 (202) = ILR (1950) Bom 260 (DB) ** AIR 1957 Cal 534 (543).

(7) Section 22 of the Rajasthan Premises (Control of Rent and Eviction) Act (17 of 1950), the amendment of Section 15 of the Mysore High Court Act by Act 35 of 1951, and the Travancore Cochin High Court (Amendment) Act (1 of 1952) are intra vires as they fell under this entry. AIR 1954 Raj 252 (256) = ILR (1954) 4 Raj 958 (DB) ** AIR 1952 Mys 75 (76) = ILR (1952) Mys 279 ** AIR 1953 Trav-Co 53 (54, 55) = ILR (1952) Trav-Co 605 (DB).

(8) Though the expression "administration of justice" is capable being under-

Schedule 7, List 2, Entry 3 — Note 1 (contd.)

stood in a very wide sense, it should not be understood as including a provision for appeal and that every case of conferment of a right of appeal would not amount to the "constitution and organisation of Courts". AIR 1949 Mad 481 (487) = ILR (1949) Mad 739 = 50 Cri LJ 684 (FB).

(9) The validity of the Punjab Gram Panchayat Act (4 of 1953) cannot be challenged on the ground that it has sanctioned the appointment of an elective judiciary, because the State Legislature has power under entries 3 and 5 of List 2 to pass such legislation. AIR 1957 Punj 149 (150) = ILR (1957) Punj 334 = 1957 Cri LJ 796 (DB).

(10) The expression "administration of justice" is wide enough to include in it not merely "administration of justice" through Courts properly so called, but "administrative justice" through the machinery of administrative tribunals. AIR 1954 Pat 97 (99) (DB).

(11) The legislature had powers under this entry to make a provision like Section 37 of Vindhya Pradesh Abolition of Jagirs and Land Reforms Act (11 of 1952). AIR 1960 SC 796 (800) = (1960) 3 SCR 106.

(12) The enlargement of the pecuniary jurisdiction of a Civil Court comes within the purview of the expression "administration of justice Courts" in Entry 3. AIR 1959 Andh Pra 3 (6) = (1959) 1 Andh WR 161 (DB).

(13) Entry 95 List I and Entry 46 List III do not in any manner derogate from the general powers given to the State Legislature under Entry 3. AIR 1959 Andh Pra 3 (6) = (1959) 1 Andh WR 161 (DB).

(14) The Parliament has no power to legislate with respect to vacation which matter falls under Entry 3. The power to regulate sittings includes the power to regulate the recess of the sittings, or the termination of the sittings. This power is exclusively with State Legislature under Entry 3. AIR 1961 Cal 545 (549, 553) = 65 Cal WN 920 (SB).

(15) Bengal Public Demands Recovery (Validation of Certificates and Notices) Act (11 of 1961) falls under Entries 3 and 45 of State List — Does not fall under Entry 43 of Concurrent list. AIR 1964 Cal 165 (172) = 1962 Cal LJ 210 (DB).

(16) Kerala State Legislature was fully competent to pass Kerala High Court Act (5 of 1959) by virtue of powers under Articles 225, 246 (3) read with Sch. VII, List II, Entry 3 and hence the Act is valid. AIR 1961 Ker 96 (97) = 1960 Ker LT 1091 (FB).

(17) So far as the High Courts are concerned, the topic of jurisdiction and powers in general is not separately mentioned in any of the entries. But ad-

ministration of justice as a distinct topic, finds a place in Entry 3 of List 2, even though this Entry excludes constitution and organisation of the High Court. The enactment of a law to regulate the practice and procedure in the High Court will fall within the residual power of the State Legislature. Provisions regulating the exercise of the jurisdiction of the High Court and the powers of the Judges thereof either sitting alone or in Division Courts have a direct bearing on the administration of justice. It will be within the competence of the State Legislature to enact a law governing those matters. AIR 1961 Ker 226 (230, 231, 232) = 1961 Ker LT 275 (FB).

(18) Where a surety bond entered into by a surety was not in accordance with form No. 42, Sch. V of Criminal P. C. as applied to Part B State and was to be forfeited, the bond could not be held to be void, as administration of justice was a subject of Entry 3 of List II and it was competent for the State Government to recover fine also. AIR 1954 Madh B 142 (143) = 1954 Cri LJ 1205 = Madh BLJ 1954 HCR 61.

(19) Code of Criminal Procedure (Madras Amendment) Act (Madras Act 34 of 1955) was within the legislative competence of the State Legislature in view of Entry 3. AIR 1959 Mad 261 (268) = 1959 Cri LJ 731 = (1958) 2 Mad LJ 123 (DB).

(20) Provisions of Sections 19 and 29 (2) (c) of Mysore Civil Courts Act (21 of 1964) are within the legislative competence of the State Legislature by virtue of Entry 3, List II. AIR 1965 Mys 76 (82) (DB).

(21) Rajasthan Civil Courts Laws (Extension) Act (2 of 1957) falls under List 2, Item 3 of Sch. 7 and not under List 3, Item 13 and does not conflict with Ajmer Courts Regulation (9 of 1926) — It is intra vires. ILR (1960) 10 Raj 1678 (DB).

(22) Section 12 (4) of Saurashtra Rent Control Act (22 of 1951) imposes upon tenants the obligation to deposit in Court such amount as may appear to the Court to be reasonably due as arrears and continue to pay future rent. The pith and substance of the Act is listed as Item 3 in State List. AIR 1956 Sau 58 (62) = 9 Sau LR 199 (DB).

(23) It is open to a State Legislature to define a "foreign judgment" and how it is to be enforced within its State subject to any legislation by the Parliament. AIR 1959 Punj 265 (269) = 61 Pun LR 418 (FB).

2. Court. — (1) The term "Court" has acquired the meaning of "a place where justice is administered." AIR 1951 SC 69 (88) = 1951 SCR 51 ** AIR 1956 Orissa 7 (10) = ILR (1955) Cut 529 (DB).

(2) It also applies to persons who exercise judicial functions under authority derived either immediately or mediately

4. Prisons, reformatories, Borstal institutions and other institutions of a like nature, and persons detained therein; arrangements with other States for the use of prisons and other institutions.

5. Local Government, that is to say, the constitution and powers of municipal corporations, improvement trusts, district boards, mining settlement authorities and other local authorities for the purpose of local self-government or village administration.

[Government of India Act, 1935, Item 13.]

Schedule 7, List 2, Entry 3 — Note 2 (contd.)

from the sovereign power. AIR 1950 SC 188 (195) = 1950 SCR 459 ** AIR 1956 Orissa 7 (10) = ILR (1955) Cut 529 (DB).

(3) The Constitution distinguishes between Courts and tribunals, and it is clear that in Entry 3, the word "Courts" cannot include all tribunals. AIR 1956 All 258 (265) = ILR (1956) 1 All 656 = 1956 Cri LJ 679 (DB).

(4) The test to determine whether a tribunal is a Court is whether it exercises sovereign judicial power of the State and whether it is a place where justice is judicially administered. AIR 1956 Orissa 7 (10, 11) = ILR (1955) Cut 529 (DB).

(5) There is power in the State Legislature under Entry 3 of List II to constitute the Sessions Court of Madras and to invest it with a part of the jurisdiction then existing in Original or Appellate side of the High Court. AIR 1959 Mad 261 (268) = 1959 Cri LJ 731 = (1958) 2 Mad LJ 123.

3. Fees taken in courts. — (1) The Mysore Legislature was fully competent under this entry to pass the Mysore Court Fees (Amendment) Act (9 of 1954). AIR 1954 Mys 161 (162) = ILR (1954) Mys 255 (DB).

(2) Andhra Legislature having power under this entry to enact the Andhra Court-fees and Suits Valuation Act (7 of 1956), the provision in that Act prescribing court-fee payable on a writ petition should prevail over the rule made by the High Court for the same purpose. AIR 1957 Andh Pra 123 (126) = ILR (1957) Andh Pra 229 (DB).

(3) The Assistant Collector or the Revenue Commissioner exercising powers under the Orissa Sales Tax Act (14 of 1947) is not a judicial tribunal functioning as a court, therefore, the State Legislature has no power under this entry to levy court-fees on petitions filed before him. AIR 1956 Orissa 7 (11) = ILR (1955) Cut 529 (DB).

(4) The levy imposed by the provisions of Section 4 and Sch. II, Article 1 (e) of Court-fee Act (1870) as amended by U. P. Act (10 of 1959) is a fee and not a tax and comes within the purview of Entry 3. AIR 1960 All 462 (463) = 1960 All LJ 170 (FB).

(5) The power has been specifically conferred on State Legislature by Entry 3, to make law in regard to fees taken in

all Courts except Supreme Court. AIR 1959 Andh Pra 271 (272) = (1959) 1 Andh WR 85 (DB).

(6) The Assam Sales-Tax Act was enacted under List II, Entry 48. So, no rule enacted under Section 52 (1) of the Act derives its legislative competence from Entry 3 of List II. AIR 1959 Assam 216 (220) = (1960) 11 STC 125 (DB).

(7) In order to avoid confusion and in order to avoid provision being made for fees taken in Court at two places — One specifically under Entry 3 and the other generally under Entry 66 — Fees taken in Court are specifically excepted from the general entry under Entry 66. AIR 1960 Bom 96 (99) = 61 Bom LR 996.

(8) Levy imposed under Bombay Court-Fees Act (36 of 1959), Sch. 1, Article 16 is neither tax nor fee in the strict sense — It is within legislative competence of the State under Sch. 7, List 2, Entry 3. AIR 1962 Bom 106 (113) = 63 Bom LR 834 (DB).

(9) Article 1 of Sch. 1 of the Madras Court-fees and Suits Valuation Act of 1955 and Rule 1 of Order 2 of the High Court Fees Rules, 1956, in so far as they set out for the levy of Court-fees in the High Court in the exercise of its original jurisdiction, are invalid and ultra vires as an impost in excess of the powers conferred on the State Legislature by Entry 3 of List II of the 7th Schedule to the Constitution of India. (1968) 1 Mad LJ 37 = 81 Mad LW 110 (DB). (AIR 1960 All 462 (FB) and AIR 1962 Bom 106, Dissented.)

Schedule 7, List 2, Entry 5 — Note 1

(1) The entry is very wide in its terms and legislation is permissible to the State Legislature with regard to any subject of local Government. AIR 1955 Bom 185 (187) (DB) ** AIR 1966 Bom 15 (18) = 67 Bom LR 286 (DB) ** AIR 1962 Manipur 28 (30).

(2) The mere fact that the Constitution has not provided for any reservation for women in Parliament or in State Legislatures cannot be used as an argument against competency of the State Legislature to make provision for reservation of seats for women in local bodies. AIR 1953 Bom 311 (312, 313) = ILR (1953) Bom 842 (DB).

(3) State Legislature has no power to confer upon a local authority the power-

Schedule 7, List 2, Entry 5 — Note 1 (contd.)

to tax, which power it itself does not possess. AIR 1955 Bom 185 (187) (DB).

(4) The fact that the State Legislature has authorised a local body to levy a tax within its power does not prevent the State Government from levying again a tax on the same subject-matter. AIR 1954 Bom 261 (265) = ILR (1954) Bom 647 (DB).

(5) The State Legislature is competent to confer upon the local authority the power to tax and its competency cannot be affected because the power that has been conferred is an unlimited power. AIR 1955 Bom 185 (187) (DB).

(6) The pith and substance of the Industrial Disputes Act, 1947, is industrial and labour disputes. The enactment trespasses upon or invades this entry so far as it applies to disputes between a municipality and its employees. But, the Act is not ultra vires the Central Legislature because it invades to a slight extent upon an entry in the State List. AIR 1950 Cal 457 (462) (DB).

(7) In enacting the U. P. Panchayat Raj Act (26 of 1947) constituting Panchayat Adalats, defining their powers, laying down the procedure and regulating the rules of evidence, the U. P. Legislature purported to act under the relevant entries of the Concurrent List. AIR 1954 All 655 (657) = 1954 Cri LJ 1399 (DB).

(8) The power conferred by this entry on the State Legislature necessarily carries with it all ancillary and incidental powers. The Rules framed by the State Government under Section 112 (2) (1) of the Madras Village Panchayats Act (10 of 1950), constituting the Election Commissioner to hear the election disputes are, therefore, intra vires and valid. AIR 1957 Andh Pra 393 (400, 403) ** 1955 Andh WR 754 = 1955 Andh LT 532.

(9) The State Legislature cannot authorise a Municipal body, a power higher than it itself possesses. Entry 5, List II cannot be understood in the light of Legislative practice and Legislative practice cannot prevail over limitation imposed upon the Legislature. AIR 1965 SC 1107 (1135, 1136) = (1965) 2 SCR 477.

(10) From a conjoint reading of Entries 5, 17 and 66 of List II it could be clear that U. P. State Legislature is competent, after coming into force of the Constitution, to enact a law with respect to fees in relation to water supply by a Municipality to its inhabitants. AIR 1961 All 583 (584) = 1961 All LJ 386.

(11-12) The contention cannot be accepted which in effect urges that since the word "constitution" in Entry 5, List 2 of Sch. 7 of the Constitution includes dissolution, the power of dissolution is a legislative function and incidental to the power to constitute, a similar construction should be given to that word in Section 3 (1) of the Andhra

Pradesh Panchayat Samithis and Zilla Parishads Act, 1959, as to confer a power on the Government to abolish Panchayat Samithis. AIR 1965 Andh Pra 40 (48) = (1965) 1 Andh WR 317 (DB).

(13) State Legislature can confer on a local body power to tax "Land" under Entry 5. The Legislature has this power under Entry 49. AIR 1959 Assam 221 (227) (SB).

(14) Entry 5, List II does not stand in conflict with Entry 53 in List I. (1965) 67 Bom LR 484 = ILR (1965) Bom 899 (DB).

(15) State Legislature is competent under Entry 5 to enact Ch. 14 of Maharashtra Zilla Parishads and Panchayat Samitis Act (5 of 1962). AIR 1967 Bom 482 (503) = 1968 Lab IC 368 = 69 Bom LR 218 (DB).

(16) Under Entry 5 the delegation to a Municipality or local body of a power to impose or levy a tax enumerated in List II for purposes of local self-government is permitted. AIR 1959 Cal 704 (734) (DB).

(17) The term "local authority" in Article 12 is to be understood as referring to the authorities mentioned in Entry 5 of List II. AIR 1962 Cal 10 (11) = 65 Cal WN 1172.

(18) Licence fee on purchasers of entrails and offals at slaughter house — No provision in Act or Bye-laws authorising its imposition — Corporation is statutory body and its powers to realise fees, charges and taxes have been defined and created by statute and unless there is clear provision in statute or in Bye-laws framed thereunder imposition of fee is unlawful. AIR 1967 Cal 174 (178).

(19) Under Entry 5, it is permissible for the State Legislature to create Janpad Sabhas, Municipalities and to authorise them to levy taxes which the Legislature could levy. AIR 1963 Madh Pra 74 (84) = 1963 MPLJ 92 (FB).

(20) The word "powers" used in Sch. 7, List 2, Entry 5 of the Constitution, which is unqualified, includes the powers of making laws and imposing taxes. When the Constitution enabled the Legislature of a State to make laws about the constitution and "powers" of local authorities for the purpose of local self-Government, it authorised the Legislature to confer on the local authorities, by such laws made for that purpose, limited powers of making laws and imposing taxes. AIR 1963 Madh Pra 74 (81, 82, 85) = 1963 MPLJ 92 (FB).

(21) It is not necessary to read Entry 5 in conjunction with Entry 49 of List 2 to interpret Entry 49. (1966) 2 Mad LJ 172 = ILR (1966) 2 Mad 604 (DB).

(22) Though the law enacted under Section 262-A of Madras District Municipalities Act (5 of 1920) and justified as coming within the purview of Entry 5, List II, any provision therein delegating

6. Public health and sanitation; hospitals and dispensaries.

[Government of India Act, 1935, Item 14].

7. Pilgrimages, other than pilgrimages to places outside India.

[Government of India Act, 1935, Item 15].

8. Intoxicating liquors, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors.

[Compare List I Entry 84 — Government of India Act, 1935, Item 31].

Schedule 7, List 2, Entry 5 — Note 1 (contd.)

to a local body the authority to levy a tax or a licence-fee must be related to one or the other of the topics in List II. AIR 1966 Mad 20 (21) = (1965) 2 Mad LJ 223 (DB).

(23) The Bombay Village Panchayats Act (6 of 1933) falls under List 2, Entry 5 of Sch. 7. AIR 1961 Mys 257 (259) = 1961 (2) Cri LJ 789 = 39 Mys LJ 638 (DB).

(24) Under Entry 5, the State Legislature can provide for other disqualifications other than those provided in Representation of the People Act (1950) subject to the provision of the Constitution. AIR 1968 Mys 198 (200) = 10 Law Rep 653.

(25) Validity of Sections 388 to 390 of Bihar and Orissa Municipal Act (7 of 1922), need not be tested for its validity with reference to Entry 5, as the Act has continued as a valid law. AIR 1954 Pat 346 (DB).

(26) The true nature and character of the Minimum Wages Act (1948) in making provision for minimum wages and machinery for the payment of the same is to bring that statute strictly and squarely within the ambit and scope of Entry 27, List III (Entry 24, List III, Sch. VII Constitution of India) only and merely because in one respect it shades into the field of Entry 13, List II (Entry 5, List II Sch. VII of Constitution) it cannot be held unconstitutional. (1963-64) 24 FJR 194 (197) (DB) (Punj).

(27) Entry 3 and Entry 5 of List 2 confer ample power on State Legislature to provide for administration of justice and constitution of local authorities. The mere fact that Punjab Gram Panchayat Act (4 of 1953) does not lay down the criteria for determining the qualification of the Panchas it would not contravene the Constitution. AIR 1957 Punj 149 (151) = 1957 Cri LJ 796 = 59 Pun LR 49.

(28) By virtue of Entry 5 read with Entry 11 of List II, the Punjab Legislature has power to pass laws in respect of taking over management and control of aided schools run by Local Authorities. AIR 1966 Punj 232 (238) = ILR (1966) 2 Punj 241 (DB).

(29) The definition of the term "the State" in Article 12 read with Entry 5 of List II clearly shows that Gram Pan-

chayats also are included in the expression "the State". AIR 1966 Raj 125 (127) = 1966 Cri LJ 584.

Schedule 7, List 2, Entry 6 — Note 1

(1) Ajmer (Sound Amplifiers Control) Act (3 of 1953) is within Entry 6. AIR 1959 SC 544 (547) = 1959 Cri LJ 660 = (1959) Supp (1) SCR 904.

(2) Entry 6, List II is not in conflict with Entry 53 in List I of Sch. VII. (1965) 67 Bom LR 484 (497) = ILR (1965) Bom 899 (DB).

(3) West Bengal Fire Services Act (18 of 1950) is not repugnant to provisions of Petroleum Act, 1934 — The Fire Services Act certainly comes within Entry 6 of List II, while the Petroleum Act falls under Entry 53 of List I. AIR 1960 Cal 219 (225).

(4) West Bengal Cattle Licensing Act (1 of 1959) and Rules framed thereunder in 1960 were framed with the object to improve public health, and were within powers under Entry 6. Neither the Act nor the Rules violate Art. 301 of Constitution. AIR 1964 Cal 409 (415) = 68 Cal WN 669.

SCHEDULE 7, LIST 2, ENTRY 8 — SYNOPSIS

1. Scope.

2. "Intoxicating liquors."

3. This Entry and Entry 41 of List I.

4. Duties on intoxicating liquors.

1. Scope. — (1) The power to legislate with respect to intoxicating liquors is expressed in wide terms and includes the power to prohibit intoxicating liquors throughout the State or in any specified part of the State. AIR 1951 SC 318 (321) = 1951 SCR 682 = 52 Cri LJ 1361 ** AIR 1942 FC 17 (19) = 1942 FCR 17 = ILR 21 Pat 587 = ILR (1942) Kar (FC) 21 = 43 Cri LJ 481 ** AIR 1950 Bom 221 (223) = ILR (1950) Bom 290 = 51 Cri LJ 1207 (DB) ** AIR 1951 Nag 58 (73) = ILR (1951) Nag 646 = 52 Cri LJ 1140 (FB).

(2) The words "that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors" explain or illustrate and do not amplify or limit the words "intoxicating liquors" immediately preceding them and cover the whole field of possible legislation on the subject. AIR 1942 FC 17 (20) = 1942 FCR 17 = ILR

Schedule 7, List 2, Entry 8 — Note 1 (contd.)

21 Pat 587 = ILR (1942) Kar (FC) 21 = 43 Cri LJ 481.

(3) Provisions of Section 129-A Bombay Prohibition Act (25 of 1949) are only ancillary to the legislative power of the State Legislature to make a law relating to matter under Entry 8. The ancillary provisions cannot be considered separately from the enactment and fall under the same head of Legislation. AIR 1964 Bom 253 (258) = 1964 (2) Cri LJ 523 = 66 Bom LR 230.

(4) Power to tax cannot be deduced as ancillary power from legislative entries. AIR 1969 Mys 23 (35) = (1968) 2 Mys LJ 78 (DB).

2. "Intoxicating liquors." — (1) The words "intoxicating liquors" cover not only those alcoholic liquids which are generally used for beverage purposes and produce intoxication, but also all liquids containing alcohol. AIR 1951 SC 318 (325) = 1951 SCR 682 = 52 Cri LJ 1361 ** AIR 1951 Nag 58 (73) = ILR (1951) Nag 646 = 52 Cri LJ 1140 (FB) ** AIR 1956 Bom 304 (309) (DB) ** AIR 1954 Mad 643 (645) (DB).

(2) The definition of liquor in Section 2 (24) of the Bombay Prohibition Act (29 of 1949) and in Section 3 (14) of the Punjab Excise Act (1 of 1914) does not contravene the provisions of the Constitution. AIR 1951 SC 318 (325) = 1951 SCR 682 = 52 Cri LJ 1361. (AIR 1951 Bom 210 (FB), Reversed.) ** AIR 1953 Punj 77 (78) = ILR (1953) Punj 618 = 1953 Cri LJ 549 (DB).

(3) The State Legislature is competent to make a law with respect to liquor even as broadly defined. AIR 1951 SC 318 (329) = 1951 SCR 682 = 52 Cri LJ 1361 ** AIR 1954 Mad 643 (645) (DB).

(4) The regulation in respect of liquors, other than consumable liquors, cannot exceed the legitimate purpose of assuring that non-beverages would not be consumed to produce intoxication but would be used in legitimate manner. AIR 1951 Nag 58 (73) = ILR (1951) Nag 646 = 52 Cri LJ 1140 (FB).

(5) The scheme of regulation introduced by the amended Bombay Prohibition Act, 1949, in so far as it relates to medicinal and toilet preparations which are fit for the use as intoxicating liquors is reasonable and it is reasonable in regard to preparations which are unfit for such use, with the result that the whole of that scheme is reasonable; and since it is reasonable, it leads to the further consequence that Sections 12 (c) and (d) and 13 (b) of the Act which were declared to be void in the unamended Act by the Supreme Court in AIR 1951 SC 318 are valid qua such preparations in the amended Act. AIR 1956 Bom 304 (318, 319) (DB).

(6) Provisions of the Madras Prohibition Act, 1937, except Section 23 (2), in

so far as they relate to medicinal preparations, are regulatory and reasonable in character. AIR 1954 Mad 643 (646) (DB).

(7) The Punjab Intoxicating Spirituous Preparations Import, Export, Transport, Possession and Sale Rules, 1952, were held not ultra vires the Constitution. AIR 1953 Punj 77 (80) = ILR (1953) Punj 618 = 1953 Cri LJ 549 (DB).

(8) The Assam Liquor Prohibition Act 1 of 1953, was within the legislative competence of the State Legislature. AIR 1961 Assam 16 (17) = ILR (1960) 12 Assam 396. (AIR 1951 SC 318, Foll.)

(9) Words "Intoxicating liquors" must include all preparations made from alcohol whether denatured or not — French Polish and Varnish fall within that expression. AIR 1964 Guj 59 (66, 67, 68) = (1963) 4 Guj LR 1033 (DB). (AIR 1951 Bom 210 (FB), Not foll.)

3. This Entry and Entry 41 of List 1.—

(1) The legislative powers given to Provinces under Item 31, List 2, Sch. VII of the Government of India Act, 1935 (corresponding to Entry 8, List 2, Sch. VII of the Constitution) were expressed in wide terms and there was nothing in Item 19 of List 1 to lead the Court to cut down the full meaning of the Provincial Entry by excluding foreign liquor from its purview. AIR 1950 FC 69 (71) = 1949 FCR 650 = 51 Cri LJ 1013.

(2) The Bombay Prohibition Act (25 of 1949), in so far as it purported to restrict possession, use and sale of foreign liquor, was not an encroachment on the field assigned to the Federal Legislature under Item 19, List 1, Schedule VII, Government of India Act, 1935. AIR 1951 SC 318 (322) = 1951 SCR 682 = 52 Cri LJ 1361.

(3) If the true nature and character of the legislation or its pith and substance is not import or export of intoxicating liquor but its sale and possession, etc., then such a legislation cannot be declared invalid. AIR 1951 SC 318 (323) = 1951 SCR 682 = 52 Cri LJ 1361 ** AIR 1950 FC 69 (71) = 1949 FCR 650 = 51 Cri LJ 1018 ** AIR 1951 Nag 58 (73) = ILR (1951) Nag 646 = 52 Cri LJ 1140 (FB) ** AIR 1950 Bom 221 (224) = ILR (1950) Bom 290 = 51 Cri LJ 1207 (DB) ** AIR 1941 Mad 621 (621) = ILR (1941) Mad 701 = 42 Cri LJ 672 (DB).

(4) It is true that Entry 8, in List 2, does not expressly mention imports, but it is well settled that entries in such list are enumerative and not exhaustive, and, therefore, legislation with regard to import of intoxicating liquor would be included within the purview of the entry. AIR 1964 Guj 59 (65) = (1963) 4 Guj LR 1033 (DB).

4. Duties on intoxicating liquors. —

(1) The duty on the spirit contents of medicinal preparations is in reality a

9. Relief of the disabled and unemployable.
[Government of India Act, 1935, Item 32.]
10. Burials and burial grounds; cremations and cremation grounds.
[Government of India Act, 1935, Item 16.]
11. Education including universities, subject to the provisions of Entries 63, 64, 65 and 66 of List I and Entry 25 of List III.
12. Libraries, museums and other similar institutions controlled or financed by the State; ancient and historical monuments and records other than those^a [declared by or under law made by Parliament] to be of national importance.
[a] Substituted for "declared by Parliament by law" by the Constitution (Seventh Amendment) Act, 1956, S. 27 (1-11-1956).

OBJECTS AND REASONS

See under List I, Entry 67.

Schedule 7, List 2, Entry 8 — Note 4 (contd.)

duty on intoxicating liquors which has always been within the competence of the State Legislature. The duty imposed on bulk gallon of potable medicinal preparations is clearly excise duty on medicinal preparations and is within the exclusive competence of the Union. The two duties are so dissimilar that it is not possible to treat the one as substantially identical with the other. AIR 1954 Mad 643 (649) (DB).

[See also AIR 1958 Cal 203 (207).]

Schedule 7, List 2, Entry 9 — Note 1

(1) Where the question arose whether the Bombay Refugees Act (22 of 1948), the pith and substance of which was the relief and rehabilitation of displaced persons, fell within the head "relief of the poor" in Item 32 of List 2 in the Government of India Act, 1935, it was held that though some of the refugees were poor, others were just evacuees, and it could not be said that the Act fell within the legislative head "relief of the poor." AIR 1953 Bom 415 (416, 417) = ILR (1953) Bom 836.

Schedule 7, List 2, Entry 11 — Note 1

(1) Per Majority:— Use of the expression "subject to" in Entry 11 of List II clearly indicates that legislation in respect of excluded matters cannot be undertaken by the State Legislature. Entry No. 11 List II and Entry 66 in List I must be harmoniously construed. The two entries undoubtedly overlap but to the extent of overlapping Entry 66 List I must prevail. AIR 1963 SC 703 (715) = (1963) 2 SCR 26. (AIR 1962 Guj 88 (FB), Reversed.)

(2) Per Majority:— State Government has power to prescribe machinery and criteria for admission of qualified students to Medical and Engineering Colleges run by Government and with consent of management to aided Colleges also. This power of State Government under Entry 11 will be good only so long

as it does not contravene other laws. AIR 1964 SC 1823 (1833) = (1964) 6 SCR 368.

(3) Subject-matter of Sections 16-A to 16-I added by U. P. Act 35 of 1958 to U. P. Intermediate Education Act (2 of 1921), falls within the scope of Entry 11 of List II. AIR 1966 SC 1307 (1310, 1311) = (1966) 3 SCR 328.

(4) The Constitution permits State Legislature to legislate on trusts and trustees, and such State Legislatures are constitutionally competent to pass a statute like the Jadavpur University Act, which comes under Entry 11 of List 2 and Entry 10 of List 3 and to modify an existing trust. AIR 1960 Cal 120 (123) = 63 Cal WN 914.

(5) Entries 11 and 14 do not authorise a State Legislature to enact a law that authorises Government to compulsorily transfer a Government servant from one department to another. 1969 Lab IC 730 (734) = (1968) 2 Mys LJ 479 (DB).

(6) Bihar High Schools (Control and Regulation of Administration) Act (13 of 1960) is a valid law by virtue of entry 11. 1965 BLJR 844 (848) = ILR 45 Pat 411 (DB).

(7) The power of State Legislature to promulgate State Legislation with regard to subject-matter of education under Entry 11 includes the ancillary and subsidiary power to validate doubtful executive action on the same subject. AIR 1961 Pat 274 (275) = 1961 BLJR 100.

(8) A State Legislature by virtue of Entry 11 read with Entry 5 has power to pass laws in respect of taking over of the management and control of aided schools run by Local authorities. AIR 1966 Punj 232 (238) = ILR (1966) 2 Punj 241 (DB).

(9) University of Rajasthan Act (46 of 1956) is a special Act made by the State Legislature in exercise of powers under Entry 11. 1968 Lab IC 1605 (1617) = 1969 Raj LW 47 (DB).

13. Communications, that is to say, roads, bridges, ferries, and other means of communication not specified in List I; municipal tramways, ropeways; inland waterways and traffic thereon subject to the provisions of List I and List III with regard to such waterways; vehicles other than mechanically propelled vehicles.

[Government of India, 1935, Item 18.]

14. Agriculture, including agricultural education and research, protection against pests and prevention of plant diseases.

[Government of India Act, 1935, Item 20.]

15. Preservation, protection and improvement of stock and prevention of animal diseases: veterinary training and practice.

[Government of India Act, 1935, Item 20.]

16. Pounds and prevention of cattle trespass.

[Government of India Act, 1935, Item 20.]

17. Water, that is to say, water supplies, irrigation and canals, drainage and embankments, water storage and water power subject to the provisions of Entry 56 of List I.

[Government of India Act, 1935, Item 19.]

Schedule 7, List 2, Entry 13 — Note 1

(1) Action of Calcutta Tramways Company Ltd. in fixing and charging fares to its passengers does not fall under Entry 13 of List II. AIR 1960 Cal 396 (399).

(2) Minimum Wages Act (1948) falls strictly and squarely within the ambit and scope of Entry 27 List III. Simply because in one respect it trenches into the field of Entry 13 of List II it does not become unconstitutional. (1963-64) 24 FJR 194 (197) (Punj) (DB).

Schedule 7, List 2, Entry 14 — Note 1

(1) Though actual tillage is not necessary to constitute agriculture there must be some expenditure of skill and labour upon the land itself and not merely on the growth of the land. AIR 1954 Cal 225 (233) (DB).

(2) The operations, other than the basic operations, such as tilling of the land, sowing of the seeds, planting etc., are as much agricultural operations as the basic operations themselves. AIR 1957 SC 768 (788) = 1958 SCR 101.

(3) Forestry operations carried on to help the regeneration and the fresh growth of trees in the denuded areas in forests come within the meaning of the word 'agriculture'. AIR 1957 SC 768 (790) = 1958 SCR 101 ** AIR 1954 Assam 113 (123) (SB).

(4) Having regard to the object of the Madras Commercial Crops Markets Act (20 of 1933) and its scheme it undoubtedly falls under Entry 14. AIR 1959 Andh Pra 398 (403) = (1959) 1 Andh WR 285 (DB).

(5) Being a tax by way of excise-duty, the Produce Cess Act (1966) cannot be related to Entry 14 of List II. The Act comes under Entry 84, List I Sch. VII. AIR 1969 Ker 176 (177) = 1968 Ker LT 665.

(6) Government's power to make law under Entries 14, 11 and 41 of List II, Sch. 7 is subject to provisions of Articles 311, 14 and 16. 1969 Lab IC 730 (734) = (1968) 2 Mys LJ 479 (DB).

Schedule 7, List 2, Entry 15 — Note 1

(1) It is in pursuance to the directive principles contained in Article 48 and in exercise of the powers conferred by Article 246 read with Entry 15 in List II of Sch. VII that the Legislatures of Bihar U. P. and M. P. have respectively enacted Bihar Act 2 of 1956, U. P. Act 1 of 1956 and C. P. and Berar Act 52 of 1949, as amended up to 1956. AIR 1958 SC 731 (736) = 1959 SCR 629.

Schedule 7, List 2, Entry 17 — Note 1

(1) The Sirhind Canal Rules framed by the Punjab Government were adopted and enacted as law for the Pepsu State by the State Legislature which was well within its power under this entry. AIR 1956 Pepsu 40 (47) (DB).

(2) U. P. Municipalities Act (2 of 1916), Section 123 (1) Clause (x) authorising the municipal board to impose a levy for the water supplied by it is covered by Entry 17 and Entry 5 read with Entry 66 of List II and hence the provision is valid. AIR 1961 All 583 (586) = 1961 All LJ 386.

(3) Levy under Section 97 (1) (b) of Hyderabad District Municipalities Act (18 of 1956) is a water tax on lands and buildings and comes under Entry 49 and not under Entry 17 of List II. AIR 1965 Andh Pra 91 (98) = (1964) 2 Andh WR 402.

(4) Entry 17 in List II is wider in scope and includes what is contemplated in Entry 56 of List I. Unless the Parliament declares the extent to which the regulation and development of inter-State rivers and river valleys are to be expedient in public interest, the State has full power with regard to all legislation

18. Land, that is to say, right in or over land, land tenures including the relation of landlord and tenant, and the collection of rents; transfer and alienation of agricultural land; land improvement and agricultural loans; colonization.

[Government of India Act, 1935, Item 21.]

Schedule 7, List 2, Entry 17 — Note 1 (contd.)

regarding water as contemplated by Entry 17 of List II. AIR 1956 Orissa 114 (118) = ILR (1956) Cut 443 (DB).

SCHEDULE 7, LIST 2, ENTRY 18 — SYNOPSIS

1. Scope.
2. "Land, that is to say and the collection of rents."
3. "Transfers and alienation of agricultural land."
4. State Acts falling under this Entry.
5. Acts covered by Entry 18 and some other Entry of List II.
6. Acts not covered by this Entry.
7. Powers of taxation.
8. Central Acts touching this Entry but valid.

1. **Scope.**— (1) This entry cannot be given such an enlarged meaning as to include and override the matters included in other entries. AIR 1953 Pat 14 (19, 22) = ILR 31 Pat 921 (FB).

(2) The legislative head under this entry has to be read as a legislative category or head comprising land and land tenures and all matters concerned therewith other than acquisition of land. AIR 1955 SC 504 (520) = (1955) 2 SCR 303 ** AIR 1954 SC 251 (253) = 1954 SCR 779 ** AIR 1952 SC 252 (283) = 1952 SCR 889, 1020, 1056 = ILR 31 Pat 565 ** AIR 1951 All 674 (679) = ILR (1952) 2 All 46 (FB) ** AIR 1951 Pat 91 (103) = ILR 30 Pat 454 (SB).

(3) Administration of evacuee property has been treated separately in Entry 41 of List 3. Therefore, legislative competence of Parliament to enact Administration of Evacuee Property Act, 1950 cannot be questioned on the ground that it includes provisions relating to the relation of landlord and tenant. AIR 1953 Sau 73 (75) (DB) ** AIR 1952 Pepsu 12 (14) = 3 Pepsu LR 465.

(4) This entry must be read as not covering regulation of house accommodation in cantonment area. AIR 1951 All 830 (831) (DB).

(5) The expression "regulation of house accommodation" as used in Entry 3 of List 1 cannot be construed so as to include the aspect of the relation of landlord and tenant contemplated by this entry. AIR 1956 Nag 268 (272) = ILR (1956) Nag 618 (DB). (Overruled on another point in AIR 1969 NSC 107.)

(6) The expression "including the control of rents" in Entry 3 of List I only means that the control of rents contemplated is in relation to the house accommodation

in cantonment area. AIR 1954 Bom 254 (255, 256) = ILR (1954) Bom 544 (DB).

(7) "Relationship between landlord and tenant" in Entry 18 List 2 is limited to the matters in respect of eviction from open lands and does not extend to house accommodation. AIR 1970 SC 228 (235) = (1969) 2 SCC 289. (AIR 1954 Bom 254 and AIR 1961 Pat 207, Overruled.)

(8) East Punjab Urban Rent Restriction Act (III of 1949), is a legislation about land and relation of landlord and tenant and the collection of rents, authorised under item 18 of State List. It has nothing to do with regulation of house accommodation in cantonment areas which is item 3 of Union List. (1960) 62 Punj LR 142 = ILR (1960) Punj 135 (DB).

(9) Interest of life tenant under the Bengal Settled Estates Act (Bengal Act 3 of 1904) is not an indivisible unit. In respect of a part of such estate in Bihar separate under the Bengal Act the Bihar legislature has power to legislate under this Entry. As such the validity of Bihar Land Reforms Act (30 of 1950) cannot be challenged on this ground. AIR 1959 Cal 767 (772) = ILR (1960) 2 Cal 556 (SB).

2. "Land, that is to say and the collection of rents."— (1) The particular and limited specification of 'agricultural land' in this entry would show that the word 'land' in this entry relates to land in general. AIR 1947 PC 72 (74) = 74 Ind App 12 = 1947 FCR 77 ** AIR 1954 Raj 252 (254, 255) = ILR (1954) 4 Raj 958 (DB).

(2) Land comprises both corporeal and incorporeal rights and interests. AIR 1942 FC 27 (31) = 1942 FCR 53 = ILR (1942) Lah 623 = ILR (1942) Kar (FC) 40.

(3) Land will include permanently settled land. AIR 1943 FC 9 (10) = (1943) 5 FCR 33 = ILR 22 Pat 428 = ILR (1943) Kar (FC) 17 (Supp).

(4) Land will include trees standing on land, and pasture. AIR 1941 Lah 177 (180) (FB). (Trees.) ** AIR 1947 PC 72 (75) = 74 Ind App 12 = 1947 FCR 77 ** (1968) 2 Andh WR 273 = ILR (1969) Andh Pra 129 (DB) ** AIR 1966 Cal 97 (98) = 69 Cal WN 833.

(5) The word 'land' is wide enough to include buildings standing on land. AIR 1952 All 703 (705) = ILR (1953) 1 All 970 (FB) ** AIR 1955 Nag 153 (156, 157) = ILR (1955) Nag 364 (DB) ** AIR 1954 Bom 204 (204, 205) = ILR (1954) Bom 434 (DB).

[See also (1962) 66 Cal WN 757.]

[But see AIR 1953 Pat 14 (19, 22) = ILR 31 Pat 921 (FB) ** AIR 1954 Raj 252 (255) = ILR (1954) 4 Raj 958 (DB).]

Schedule 7, List 2, Entry 18 — Note 2 (contd.)

(6) Mortgages form a type of transaction which may properly be regarded as sui generis incidental to land and included within this entry except in so far as they fall within Entries 6 and 7 of List 3. **AIR 1947 PC 72 (74) = 74 Ind App 12 = 1947 FCR 77.**

(7) Rights in land include general rights like full ownership or leasehold or all such rights. Rights over land would include easements or other collateral rights, whatever form they might take. **AIR 1947 PC 72 (74) = 74 Ind App 12 = 1947 FCR 77.** (Mortgage rights.) ** **AIR 1955 Pat 1 (15) = ILR 33 Pat 690 (SB).**

(8) The words which follow the expression "that is to say" are not words of limitation but of explanation or illustration, giving instances which may furnish a clue for particular matters. **AIR 1947 PC 72 (74) = 74 Ind App 12 = 1947 FCR 77.**

(9) The expression "rights in or over land" confers on the State Legislature wide powers to enact legislation to extinguish, restrict, transfer or convey the rights in land. **AIR 1957 Bom 252 (259, 260) (DB).**

(10) The words 'landlord and tenant' are used in this entry in their widest sense. **AIR 1952 Mad 203 (210, 211) (DB).**

(11) The words 'landlord and tenant' must be held to include an ex-landlord and ex-tenant. **AIR 1958 Mad 608 (615) = ILR (1958) Mad 932 (FB) ** AIR 1956 Nag 50 (52) = ILR (1956) Nag 264 (DB) ** AIR 1954 Mad 51 (62) = ILR (1953) Mad 1114 (DB).**

(12) The power to regulate the relations of landlords and tenants is granted to the Legislature under this entry in addition to the power granted to make laws with respect to contracts and transfer of property concerning agricultural land. **AIR 1958 Mad 608 (615) = ILR (1958) Mad 932 (FB) ** (1967) 33 Cut LT 263 = 9 Orissa JD 41 (DB) ** AIR 1966 Cal 97 (98) = 69 Cal WN 833 ** AIR 1959 Assam 147 (156) (DB).**

(13) The power to legislate with respect to land tenure must be held to include not merely the power to create new tenures but also to afford security to those coming on the land by reason of an existing tenure. **AIR 1956 Nag 50 (52) = ILR (1956) Nag 264 (DB).**

(14) The words 'land tenure' will include Jagir tenure. **AIR 1952 Hyd 163 (170) = ILR (1952) Hyd 595 (FB).**

(15) The power to legislate with respect to 'the collection of rents' includes the power to legislate with respect to the remission of rents as well as to their collection. **AIR 1941 FC 16 (25) = 1940 FCR 110 = ILR (1941) Kar (FC) 72 ** (1967) 1 Mad LJ 206 = 80 Mad LW 184 (DB).**

(16) The words 'collection of rent' are wide enough to include the recovery of rents. **AIR 1942 Cal 587 (591, 592) (DB).**

(17) The provision in a statute relating to reduction of rent would come under 'relation of landlord and tenant'. **AIR 1952 Mad 203 (210, 211) (DB).**

(18) The expression 'collection of rents' can also cover collection by agents on behalf of the landlord. **AIR 1952 Mad 203 (210, 211) (DB).**

(19) Reading together the entries in the three Lists, the word 'land' in this Entry should be given its full amplitude and the use of the words 'that is to say' in it does not justify a different construction. **AIR 1967 Mad 352 (358) = (1967) 1 Mad LJ 179 (DB).**

(20) Agrarian reforms to relieve concentration of agricultural lands, providing for acquisition of surplus land and its distribution to landless persons fall within this Entry. **AIR 1967 Mad 352 (358) = (1967) 1 Mad LJ 179 (DB).**

(21) Section 18 of the Punjab Security of Land Tenures Act (X of 1953) which has the effect of converting the tenant into the land-owner himself by virtue of the purchase, is also covered by this Entry. **AIR 1959 SC 519 (523) = 1959 Supp 1 SCR 748.** (**AIR 1941 FC 16, Rel. on.**)

(22) The provisions of the Punjab Security of Land Tenure Act deal with the landlord's rights in land in relation to his tenant, so as to modify the landlord's rights in land and correspondingly to expand the tenant's rights therein. **AIR 1959 SC 519 (522, 523) = (1959) Supp (1) SCR 748.**

(23) This Entry read along with Article 246 (3) has vested exclusive power in the State to make laws with respect to rights in or over land, land tenures including the relation of landlord and tenant. **AIR 1959 SC 519 (522, 523) = (1959) Supp 1 SCR 748.**

3. "Transfer and alienation of agricultural land."—(1) The expression 'agricultural land' must be taken to include lands which are used or are capable of being used for raising any valuable plants or trees or for any other purpose of husbandry. **AIR 1951 Orissa 11 (14) = ILR (1950) Cut 322 (DB) ** AIR 1944 Mad 401 (401, 402) = ILR (1945) Mad 61 (DB) ** ILR (1966) 2 Ker 567 = 1966 Ker LT 1149 (DB).**

(2) Pasture is sufficiently allied to agriculture generally and as such is within the general scope of an enactment dealing with agricultural land. **AIR 1947 PC 72 (75) = 74 Ind App 12 = 1947 FCR 77.**

(3) The expression 'agricultural land' does not include forest land or land used for planting trees for being used for fuel. **AIR 1944 Cal 421 (424, 425) (DB).**

Schedule 7, List 2, Entry 18 — Note 3 (contd.)

(4) 'Agricultural land' will also cover an interest in such land or rights in or over such land. AIR 1947 FC 17 (18, 19) = 1947 FCR 12 = ILR (1947) Kar (FC) 39 = ILR (1948) 1 Cal 9 ** AIR 1947 FC 12 (13) = 1946 FCR 135 = ILR (1947) Kar (FC) 28.

(5) It was held in the undermentioned case that 'transfer' would include a partition in a Hindu joint family. AIR 1956 Mad 642 (650) = ILR (1956) Mad 785 (DB).

4. State Acts falling under this Entry.—

(1) The following State Acts are covered by this Entry.

- (a) Orissa Private Lands of Rulers (Assessment of Rent) Act (13 of 1958). AIR 1961 Orissa 131 (132) = 26 Cut LT 652 (DB).
- (b) The Hyderabad Tenancy and Agriculturists Act (XXI of 1950). AIR 1964 Andh Pra 514 (517) = (1964) 1 Andh WR 319 (DB). (Overruled on another point in AIR 1967 Andh Pra 148 (FB).)
- (c) Orissa Private Lands of Rulers (Assessment of Rent) Act (13 of 1958), Section 2 (h). AIR 1964 SC 1195 (1199, 1200) = (1964) 6 SCR 301.
- (d) Provisions of Orissa Land Reforms (Amendment) Act (1965), Chap. III and Sections 33, 27 and 1. (1967) 33 Cut LT 263 = 9 Orissa JD 41.
- (e) The Punjab Security of Land Tenure Act (X of 1953) as amended by Act (XI of 1955). AIR 1959 SC 519 (524) = (1959) Supp (1) SCR 748.
- (f) Section 17, Bombay Tenancy and Agricultural Lands (Gujarat Amendment) Act, 1960. AIR 1966 Guj 183 (185) = (1965) 6 Guj LR 727 (DB).
- (g) Provisions of W. B. Non-Agricultural Tenancy Act (20 of 1949), Section 6 (2) (a). AIR 1966 Cal 97 (98) = 69 Cal WN 833.

(2) Bombay Tenancy and Agri. Lands (Amendment) Act was, broadly stated, a legislation in regard to the rights in and over land or categories specifically referred to in this Entry. It is valid. AIR 1959 SC 459 (463, 472, 473) = (1959) Supp (1) SCR 489 = 61 Bom LR 811.

(3) The Legislature was competent under Entry 18 of List II, to enact Section 8 of the Ajmer Abolition of Intermediaries and Land Reforms Act (3 of 1955), even with retrospective effect. AIR 1959 SC 475 (477) = (1959) Supp (1) SCR 489.

(4) Vindhya Pradesh Abolition of Jagirs and Land Reforms Act (1952), Sections 22, 7 (1) — Section 22 is constitutional and not colourable piece of legislation. AIR 1960 SC 796 (799, 800) = (1960) 3 SCR 106.

(5) (U. P.) Rampur Thekadari and Pattedari Abolition Act, 1953 (10 of 1954),

Section 2 (6) — Act is within legislative competence of U. P. Legislature under this Entry — It abolishes leases granted by Ruler of erstwhile Rampur State to Thekedars and Pattedars. AIR 1959 SC 909 (914).

(6) Assam Land and Revenue Regulation (1886) may fall under Entry 18 of List II and not Entry 23 of List II of the Constitution, as in pith and substance it is an Act relating to land. AIR 1966 Assam 107 (109) (DB).

(7) Section 5-A held to be a part of the whole Act viz. Estates Acquisition Act, 1953 (W. B. 1 of 1954) which is a measure of reforms of land tenure. Therefore enactment of Section 5-A is covered by Entry 18. ILR (1966) 1 Cal 495 (586) (DB).

(8) The pith and substance of Bihar Land Reforms Act (30 of 1950) (as amended by Bihar Act 20 of 1954) is with reference to land and acquisition of land. (1955) ILR 34 Pat 57 (DB).

(9) The Andhra Pradesh Buildings (Lease, Rent and Eviction) Control Act, 1950 is essentially and mainly a legislation relating to the relations between landlords and tenants of buildings in the matter of lease, rent and eviction alone. (1968) 2 Andh WR 273 = ILR (1969) Andh Pra 129 (DB).

(10) The various aspects deal with in Bombay Town Planning Act 1954 (27 of 1955) as amended by Gujarat Act (52 of 1963), Section 1 can be considered to deal with land and the State Legislature is competent to enact the measure under this Entry. AIR 1967 SC 1373 (1381) = (1967) 3 SCR 65.

(11) Madras Buildings (Lease and Rent Control) Act (18 of 1960), Section 1 is valid — Subject is covered by this Entry. AIR 1967 Mad 57 (61) = (1966) 2 Mad LJ 68 (FB).

(12) Madras Estates Land (Reduction of Rent) Act (Madras 30 of 1947) as amended, Section 3 is enacted under Item 21 of List II of Sch. 7 of Government of India Act 1935 (corresponding to Entry 18 of List II) dealing with land. AIR 1962 SC 1687 (1690) = (1963) 1 SCR 778.

(13) The Bombay Land Tenure Abolition Laws (Amendment) Act 1958 was held to be within competence of the legislature under this entry. AIR 1962 SC 821 (842) = 1962 Supp (2) SCR 411.

(14) Punjab Consolidation of Land Proceedings (Validation) Act, 1957 deals with three classes of properties. The State Legislature was competent to enact the Act. No provision of the Act goes beyond the legislative competence of that body under this Entry. AIR 1959 Punj 8 (11, 12, 13) = 60 Punj LR 461 (FB). (Overruled on another point in AIR 1959 SC 519.)

(15) The legislative competence of the Bihar legislature to introduce the second proviso to Section 10 (2) of Bihar Land

Schedule 7, List 2, Entry 18 — Note 4 (contd.)

Reforms Act (30 of 1950) can be found in Entry 18 of List II. AIR 1968 Pat 50 (57) (DB).

(16) E. P. Evacuees (Administration of Property) Act (14 of 1947) — Administration of Evacuee Property (Chief Commissioners' Provinces) Ordinance (12 of 1949) — Enactments are valid as regards property in the nature of land but are invalid so far as property other than land is concerned. AIR 1960 Punj 341 (345, 346) = 62 Punj LR 475 (FB).

5. Acts covered by Entry 18 and some other Entry of List II.— (1) Acts covered by Entries 18 and 45.

(a) Bombay Merged Territories and Miscellaneous Alienations Abolition Act (22 of 1955) — Act falls within Article 31-A of Constitution. AIR 1966 Guj 149 (156) (DB).

(b) Bombay Saranjam, Jahagirs and other Inams of Political Nature Resumption Rules, 1952. (1963) 2 Mys LJ 164 (FB).

(c) The Madras Inam Estates (Abolition and Conversion into Ryotwari) Act (26 of 1963). (1967) 1 Mad LJ 206 = 80 Mad LW 184 (DB).

(d) Punjab Resumption of Jagirs Act (39 of 1957), Section 2 (5) — As inserted by Amendment Act of 1959 — Amendment is intra vires. AIR 1962 SC 1305 (1313) = (1962) Supp 3 SCR 346.

(2) Assam Fixation of Ceiling on Land Holdings Act (1 of 1957) — The State Legislature had legislative authority to enact the law under Entry 18 of List II and Entry 42 of List III read with Articles 245 and 246. AIR 1959 Assam 147 (152) (DB).

(3) Kerala Agrarian Relations Act (5 of 1961) has been passed under item 18 of List II and item 42 of List III — Act is not a colourable piece of legislation on the ground of being a device to take money from land-owners. AIR 1962 SC 723 (727, 728, 729) = 1962 Supp (1) SCR 829.

(4) M. B. Muafi and Inam Tenants and Sub-tenants Protection Act (32 of 1954), Section 4. Entry 65 of List II read with Entry 18 of List II gives the State Legislature exclusive powers to create and determine powers and jurisdiction of Courts in respect of land. AIR 1957 Madh B 63 (63) = 1957 Jab LJ (Madh B) 50.

(5) The Bengal Tenancy Act (8 of 1885), governs land, the landlord and the tenant which is covered by Entry 18 of List II. Section 49-J incidentally trenches upon the law of registration but is not constitutionally invalid. AIR 1968 Pat 198 (200) = 1968 BLJR 19 (DB).

(6) Madras Land Reforms (Fixation of Ceiling on Land) Act is within the legislative competence under List 2, Entry 18 and List 3, Entry 42 — (Madras Land Reforms (Fixation of Ceiling on Land)

Act (58 of 1961), S. 1). AIR 1967 Mad 352 (359) = (1967) 1 Mad LJ 179 (DB).

6. Acts not covered by this Entry.— (1) The United Khasi-Jaintia Hill District (Transfer of Land) Act 1953 is ultra vires of the District Council. AIR 1968 Assam 43 (47) (DB).

(2) Bombay Land Tenures Abolition (Recovery of Records) Act (50 of 1953) dealing with land records would not fall within scope of Entry 18, but fall within scope of Entry 45 of List II. AIR 1962 Guj 18 (19) = (1961) 2 Guj LR 594.

7. Powers of taxation.— (1) Entry 18 of List II does not take away the powers of the Parliament to pass an enactment imposing tax in respect of land. AIR 1960 Andh Pra 115 (116, 117) = (1960) 1 Andh WR 153 (DB).

(2) Taxation on land on which forest stands is permissible and legal under Entry 49 — Entry 49 and Entry 18 deal with entirely different subjects. AIR 1961 SC 552 (564) = (1961) 3 SCR 77.

(3) Gift Tax Act (1958), S. 1 — Tax on gifts of agricultural land is fully within Entry 97 of List 1, read with Article 248 and is not covered by Entries 18 and 47 of List 2 — Act held valid. AIR 1963 Mad 419 (422, 423) = (1963) 2 Mad LJ 192 (DB) ** AIR 1962 Ker 97 (103) = 1961 Ker LT 859 (DB).

(4) Surcharge is part of land revenue — Land Revenue can be increased by State Legislature though not by Government during settlement. Madras Land Revenue Surcharge Act (19 of 1954) and Madras Land Revenue (Additional Surcharge) Act (30 of 1955) are valid. AIR 1960 Mad 543 (546, 547) = (1959) 2 Mad LJ 344.

(5) Power to legislate with respect to transfer of agricultural land — Does not include power to levy tax in respect of such transfer. AIR 1962 Ker 97 (102, 103) = 1961 Ker LT 859 (DB).

8. Central Acts touching this Entry but valid.— (1) Hindu Succession Act (1956), Section 14 — Rights of Hindu female over land — Section trenches on Entry 18 of State List — But being legislation under Entry 5 of List III is valid. AIR 1960 Punj 666 (669) = 62 Pun LR 655 (FB).

(2) Provisions of Section 14 of Hindu Succession Act, 1956 apply to agricultural lands as the matter is covered by Entry 5 of List III. AIR 1964 All 165 (166, 167).

(3) Tax on gift of agricultural land — State legislature not competent to make laws for levy of tax on transfer and alienations of agricultural land — Gift Tax Act (1958) held not ultra vires powers of Parliament. AIR 1965 Punj 65 (66) = 1964 Cur LJ 412 (DB).

(4) Conflict between 'existing Indian Law' (viz. Land Improvement Loans Act, 1883 and Agriculturists Loans Act 1884) which is within exclusive field of State under Entry 18 of List II and Central Act (Displaced Persons Compensation and

19. Forests.

[Government of India Act, 1935, Item 22.]

20. Protection of wild animals and birds.

[Government of India Act, 1935, Item 25.]

21. Fisheries.

22. Courts of wards subject to the provisions of Entry 34 of List I; encumbered and attached estates.

23. Regulation of mines and mineral development subject to the provisions of List I with respect to regulation and development under the control of the Union.

[Government of India Act, 1935, Item 23.]

Schedule 2, List 2, Entry 18 — Note 8 (contd.)

Rehabilitation) Act 1954, Section 30 covered by Item 27 of List III) — Central Act prevails. AIR 1961 Punj 34 (41, 42) = 62 Punj LR 795 (FB).

(5) Mineral Concession Rules (1960) are covered by List 1, Entry 54 and not by List 2, Entry 18. AIR 1963 Madh Pra 213 (215) = 1963 MPLJ 274 (DB).

(6) The Indian Legislature has not purported to legislate in regard to the subject covered by item 18 of List II in enacting Section 45-B of the Banking Companies Act (1949) as amended in 1950. AIR 1958 Mad 403 (410) = 71 Mad LW 291.

(7) The legislative powers of the Parliament in Entry 32 of List I cannot be taken as abridged by the legislative powers under Entry 18 in List II. In this approach, the Public Premises (Eviction of Unauthorised Occupants) Act 1958 is applicable to agricultural land of the Union with the Military authorities. (1967) 69 Punj LR 76 = ILR (1967) 1 Punj 869 (DB).

Schedule 7, List 2, Entry 19 — Note 1

(1) Natural forests where growth is entirely spontaneous and there is not employment of human labour and skill would be covered by this entry. AIR 1954 Assam 113 (125, 126) (SB).

(2) There is some overlapping so far as the Entries 14 and 19 are concerned. The term 'agriculture' is very wide and it includes even 'forestry.' AIR 1957 SC 768 (773) = 1958 SCR 101 ** AIR 1954 Assam 113 (116) (SB).

(3) There is no danger of any conflict between Entries 14 and 19 as both of them fall in the same list and the State Legislature has exclusive powers to make laws in respect of them. AIR 1954 Assam 113 (126) (SB).

(4) It cannot be said that because 'forest' is covered by the expression 'agriculture,' this entry is redundant. AIR 1954 Assam 113 (126) (SB).

(5) There may be some overlapping between this entry and Entry 18 in the

sense that a forest must necessarily be on land but the list itself clearly recognises that forests are something distinct from land. AIR 1953 Pat 65 (70) (DB).

(6) Entry 46 of List 2 would comprise within its scope even the income from forestry operations when it falls within the definition of 'agricultural income' as given in Article 366, Clause (1). AIR 1957 SC 768 (772) = 1958 SCR 101.

(7) Power to legislate with respect to forests includes a power to legislate with respect not only to afforestation but also to disafforestation. AIR 1941 FC 16 (25) = 1940 FCR 110 = ILR (1941) Kar (FC) 72.

(8) This entry and Entry 49 deal with entirely different subjects. While tax on forest cannot be imposed, tax on land on which forest stands is permissible. AIR 1961 SC 552 (564) = (1961) 3 SCR 77. (Per Sarkar J.) ** AIR 1963 Ker 31 (42) = 1962 Ker LT 826.

Schedule 7, List 2, Entry 21 — Note 1

(1) This entry read with Entry 57, List 1, makes it clear that the States have the competence to legislate generally on fisheries and fishing in the territorial waters. AIR 1954 Mad 291 (301) = ILR (1953) Mad 1175 (DB).

(2) "Fisheries" include not only the regulation of fishing but also its prohibition in particular places or at particular times. AIR 1941 FC 16 (25) = ILR (1941) Kar (FC) 72 = 1940 FCR 110.

Schedule 7, List 2, Entry 22 — Note 1

(1) C. P. Court of Wards Act (24 of 1899) was covered by Entry 22 of List II. AIR 1961 Madh Pra 197 (198) = 1961 MPLJ 164 (DB).

Schedule 7, List 2, Entry 23

1. Regulation of mines and mineral development. — (1) It is competent for the State Legislature to enact laws for mining and mineral development under this entry but it is subject to the laws of the Union about the same under En-

24. Industries subject to the provisions of ^a[Entries 7 and 52] of List I.

[Government of India Act, 1935, Item 29.]

[a] Substituted for "Entry 52" by the Constitution (Seventh Amendment) Act, 1956, S. 28 (1-11-1956).

OBJECTS AND REASONS

"Although the Union List has two entries 7 and 52 relating to industries, the latter alone is referred to in Entry 24 of List II. The omission of the Entry 7 of List I appears to be due to an oversight and is sought to be rectified."—S. O. R.

Schedule 7, List 2, Entry 23 — Note 1 (contd.)

try 54 of the Union List. AIR 1952 Mys 84 (85) = ILR (1952) Mys 278 = 1952 Cri LJ 1348 (DB).

(2) To the extent that there is no such declaration, as is contemplated by Entry 54, List I "regulation of mines and mineral development" belongs to the State List under Entry 23. AIR 1959 Cal 222 (225) (DB) ** AIR 1961 SC 459 (469) ** AIR 1968 Madh Pra 17 (18) = 1967 MPLJ 728 (DB).

(3) The Orissa Mining Areas Development Fund Act (27 of 1952) is superseded by the Mines and Minerals (Regulation and Development) Act 1957. AIR 1964 SC 1284 (1292) = (1964) 4 SCR 461. (AIR 1962 Orissa 24, Affirmed.)

(4) Notice of demand made on 1-8-1960 under Orissa Act 27 of 1952 for fees accruing prior to 1-6-1958 is valid and amount can be recovered notwithstanding disappearance of Orissa Act. AIR 1964 SC 1284 (1295) = (1964) 4 SCR 461. (AIR 1962 Orissa 24, Reversed.)

(5) The State Legislature was competent in 1952 to legislate on the subject in view of the express power under Entry 23 of List II and pass the Orissa Mining Areas Development Fund Act (27 of 1952). AIR 1962 Orissa 24 (28) = 28 Cut LT 66 (DB). (Reversed on another point in AIR 1964 SC 1284.)

(6) Bombay Municipal Corporation Act (3 of 1888) fairly and squarely falls within Entries Nos. 1, 5, 6 and 23 of List II. (1965) 67 Bom LR 484 = ILR (1965) Bom 899 (DB).

(7) Assam Land and Revenue Regulation (1886) may fall under Entry 18 of List II and not Entry 23 of List II of the Constitution. AIR 1966 Assam 107 (109) = ILR (1965) 17 Assam 347 (DB).

(8) Orissa Mining Areas Development Fund Act (27 of 1952), Section 4 — Cess levied under is neither a tax nor a duty of excise but is a fee. AIR 1961 SC 459 (467, 468) = (1961) 2 SCR 537.

(9) Orissa Mining Areas Development Fund Act (27 of 1952) — Subject-matter of Act falls under List 2, Entries 23 and 66 of Sch. 7 — Validity not impaired by List 1, Entries 52 and 54 read with Central Act 65 of 1951 and Central Act 53 of 1948 respectively. AIR 1961 SC 459 (478) = (1961) 2 SCR 537.

2. Minor minerals.— (1) Brick earth is mineral and its inclusion in definition of 'minor minerals' is not ultra vires the Constitution, Seventh Schedule. AIR 1965 Pat 491 (499) = 1966 BLJR 325 (DB).

(2) The Rajasthan Minor Mineral Concession Rules, 1955, were and are within the legislative competence of the State. AIR 1958 Raj 140 (142) (DB).

(3) State Government has the power to impose royalty in respect of minor minerals. AIR 1965 Pat 491 (496) = 1966 BLJR 325 (DB).

(4) Demand of dead rent or royalty in respect of leases granted prior to date of commencement of Bihar Mineral Rules 1964 from October 64 was legal and justified as under this Entry. AIR 1968 Pat 50 (57, 58, 59) (DB).

Schedule 7, List 2, Entry 24 — Note 1

(1) Dhosis (Additional Excise Duty) Act, 1953, was within the legislative competence of Parliament under Entry 84 of the List 1 read with Article 369. Merely because the imposition of such a duty may have the effect of exercising control on a certain trade would not take the matter out of exclusive competence of the Union Government. AIR 1955 Raj 114 (119) = ILR (1955) 5 Raj 832 (DB).

(2) 'Industry' in its wide sense would be capable of comprising three different aspects: (1) raw materials which are an integral part of industrial process, (2) the process of manufacture or production, and (3) the distribution of the products of an industry. The second aspect would come under List 1, Entry 52 and List 2, Entry 24. AIR 1956 SC 676 (695, 696) = 1956 SCR 393.

(3) Central Excises and Salt Act (1944), Sections 6, 8 — Act is within legislative competence of Central Legislature under List 1, Item 45 of the Government of India Act, 1935 — Incidental encroachment on Item 27 or 29 of List 2 (of Government of India Act 1935) does not affect its validity. AIR 1960 SC 424 (429) = (1960) 2 SCR 362.

(4) The expression 'industry' in Entry 52 of List I bears the same meaning as that in Entry 24 of List II. W. B. Oriental Gas Company Act, 1960 is valid. AIR 1962 SC 1044 (1052) = (1962) Supp 3 SCR 1. (AIR 1961 Cal 267, Affirmed.)

25. Gas and gas-works.

[Government of India Act, 1935, Item 26.]

26. Trade and commerce within the State subject to the provisions of Entry 33 of List III.

[Government of India Act, 1935, Item 27.]

27. Production, supply and distribution of goods subject to the provisions of Entry 33 of List III.

[Government of India Act, 1935, Item 29.]

Schedule 7, List 2, Entry 25 — Note 1

(1) Gas and gas works are within exclusive field allotted to States under Entry 25 of List II. W. B. Oriental Gas Company Act, 1960 is constitutionally valid. AIR 1962 SC 1044 (1052) = (1962) Supp 3 SCR 1. (AIR 1961 Cal 267, Affirmed.)

Schedule 7, List 2, Entry 26 — Note 1

(1) An Act which in pith and substance relates to the subject-matter of this entry is within the competence of the State Legislature to enact. AIR 1955 SC 182 (188) ** AIR 1953 Cal 458 (460) (SB).

(2) Under this entry the State Legislature can regulate the hours, place, date and the manner of sale of any particular commodity or commodities. It can prohibit sales of particular commodities on particular days or make a provision to the same effect in a different manner. AIR 1951 SC 315 (315) = 1951 SCR 671 = 52 Cri LJ 1237.

(3) Regulation for controlling production and distribution — Provision placing embargo on export outside province is within the ambit and scope of the regulation. AIR 1953 SC 83 (86) = 1953 SCR 319 = ILR (1953) Punj 639 = 1953 Cri LJ 525.

(4) The State Legislature has power to make laws to regulate the movement of goods inside the State itself by the issue of permits. AIR 1952 Orissa 260 (266) = 1952 Cri LJ 1354 (DB).

(5) The Bombay Price Competitions Control and Tax Act (54 of 1948) is a law with respect to betting and gambling under Entry 34 of this list and therefore no question of its invalidity on the ground of over-stepping the limits of this entry can arise. AIR 1957 SC 699 (710, 721, 722) = 1957 SCR 874. (AIR 1956 Bom 1, Reversed.)

(6) Activities commonly known as "hoarding" and "black-marketing in food and cloth," even assuming they are activities which can properly fall under Entry 26 or 27 of List II only, are not excluded from the ambit of the words "supplies and services" in either Entry 3 List 3 or Section 3 of the Preventive Detention Act, 1950. AIR 1951 Pat 47 (51, 52) = ILR 30 Pat 630 = 52 Cri LJ 406 (DB).

(7) Central Excises and Salt Act (1944), Sections 6, 8 — Act is within legislative competence of Central Legislature under List I, Item 45 of the Government of India Act, 1935 — Incidental encroachment on Item 27 or 29 of List 2 does not affect its validity. AIR 1960 SC 424 (429) = (1960) 2 SCR 362.

(8) Provisions of Hyderabad General Sales Tax Act (14 of 1940), Sections 11 (2), 20 (c), not covered by Entry 54 of List II nor justified as ancillary provision. Entry 26 of List II also not applicable. The provisions are ultra vires the State Legislature. AIR 1964 SC 922 (924, 925) = (1964) 6 SCR 867. (AIR 1960 Andh Pra 395 (DB), Reversed; AIR 1963 Mad 111, Overruled.)

(9) Andhra Pradesh General Sales Tax Act (VI of 1957), S. 5 (c) (as amended by Act XVI of 1963) held ultra vires of the Constitution being in pari materia with Section 11 (2) of the Hyderabad General Sales Tax Act 1950. (1968) 22 STC 222 (Andh Pra).

(9a) Section 8-A (4) of U. P. Sales Tax Act (1948) is ultra vires. AIR 1968 All 193 (195, 196).

(10) This Entry, which invests the States with exclusive authority to legislate in respect of trade and commerce within the State does not derogate from the authority conferred by Entry 21 of List III. AIR 1960 SC 1073 (1078) = (1960) 3 SCR 742.

(11) Ajmer Shops and Commercial Establishment Act (4 of 1956) — Sections 11 and 12 of the Act fell both within Item 24 of List III and Item 26 of List II. AIR 1959 Raj 257 (258, 259) = 1959 Raj LW 247 (DB).

(12) Though a law in Forward Contracts would also be a law with respect to trade and commerce coming under Entry 26 in List II, Entry 48 in List I being a specific one must be excluded from the general Entry 26 in List II. Thus the Forward Contracts (Regulation) Act (1952) falls under Entry 48 in List I or Entry 7 of List III and is valid. AIR 1963 SC 90 (94, 95) = (1963) 3 SCR 209 ** AIR 1964 Ker 92 (96) = 1963 Ker LT 958 (DB).

Schedule 7, List 2, Entry 27 — Note 1

(1) This entry confers on the State Legislature power to restrict the move-

28. Markets and fairs.

[Government of India Act, 1935, Item 27.]

29. Weights and measures except establishment of standards.

[Government of India Act, 1935, Item 30.]

30. Money-lending and money-lenders; relief of agricultural indebtedness.

[Government of India Act, 1935, Item 27.]

Schedule 7, List 2, Entry 27 — Note 1 (contd.)

ment of goods within the State by issue of permits. AIR 1952 Orissa 260 (266) = 1952 Cri LJ 1354 (DB).

(2) The State Legislature can fix prices for goods. AIR 1946 Cal 197 (204) = ILR (1947) 2 Cal 95 (DB).

(3) The State Legislature can lay an embargo on export out of the State in order to effectively control the production and distribution of goods for the purpose of maintaining or increasing their supply within the State itself. AIR 1953 SC 83 (86) = ILR (1953) Punj 639 = 1953 SCR 319 = 1953 Cri LJ 525.

(4) A law which enables orders to be made for regulating the distribution of articles by requiring them to be sold to specified persons and to provide for incidental matters and entering and searching premises and for the issue of licences is a law relating to distribution of goods. AIR 1946 Cal 197 (203) = ILR (1947) 2 Cal 95 (DB).

(5) Cloth is an article and therefore 'goods' within the meaning of the definition in Article 366 (12) and a law can be made with respect to its distribution. AIR 1946 Cal 197 (203) = ILR (1947) 2 Cal 95 (DB).

(6) Sugarcane being 'goods' fell directly under this entry and within the exclusive jurisdiction of the State Legislature when it passed the U. P. Sugarcane (Regulation of Supply and Purchase) Act, 24 of 1953. AIR 1956 SC 676 (691) = 1956 SCR 393.

(7) Central Excises and Salt Act (1944), Sections 6, 8 — Act is within legislative competence of Central Legislature under List 1, Item 45 of the Government of India Act, 1935 — Incidental encroachment on Item 27 or 29 of List 2 does not affect its validity. AIR 1960 SC 424 (429) = (1960) 2 SCR 362.

(8) The pith and substance of the Forward Contracts (Regulation) Act, 1952 is to regulate 'future market' which comes under Item 48 of List I. It incidentally affects 'supply and distribution of goods' covered by Entry 27 of List II. Act is valid. AIR 1959 Cal 89 (91, 92) (DB). (Reversed on another point in AIR 1963 SC 90.)

Schedule 7, List 2, Entry 28 — Note 1

(1) Central Excises and Salt Act (1944), Sections 6, 8 — Act is within legislative competence of Central Legislature under List 1 Item 45 of the Govern-

ment of India Act, 1935 — Incidental encroachment on Item 27 or 29 of List 2 of the Government of India Act does not affect its validity. AIR 1960 SC 424 (429) = (1960) 2 SCR 362.

(2) The State Legislature has been given power to legislate on markets under this Entry. AIR 1958 Assam 156 (159) (DB).

(3) The power to regulate mines and minerals development belongs to the State Legislature. AIR 1968 Madh Pra 17 (18) = 1967 MPLJ 728 (DB).

(4) Punjab State Legislature is competent to enact Punjab Cattle Fairs (Regulation) Act (6 of 1968) by virtue of Entry 28 of List 2 of 7th Schedule. AIR 1969 SC 1100 (1103). (AIR 1968 Punj 391, Overruled.)

(5) Merely because a building can be used for any purpose including that of market, a legislation regulating mainly relations between landlords and tenants does not ipso facto become legislation on markets. ILR (1969) Andh Pra 129 = (1968) 2 Andh WR 273 (281) (DB).

Schedule 7, List 2, Entry 29 — Note 1

(1) The object of Madras Commercial Crops Market Act (20 of 1933) — Provisions of Act come within purview of Entry 29 of List II. AIR 1959 Andh Pra 398 (403) = (1959) 1 Andh WR 285.

Schedule 7, List 2, Entry 30 — Note 1

(1) Where an Act passed by a State Legislature deals, in pith and substance, with money-lending and money-lenders, the fact that it incidentally invades the Union field with regard to promissory notes does not make it ultra vires the State's Legislative competence. AIR 1947 PC 60 (63, 64, 65) = 74 Ind App 23 = 1947 FCR 28 ** AIR 1952 Pat 39 (40) = ILR 30 Pat 1075 (DB).

(2) The pith and substance of the Madras Agriculturists' Relief Act (4 of 1938) cannot be said to be legislation with respect to negotiable instruments or promissory notes. AIR 1941 FC 47 (51) = ILR (1941) Kar (FC) 25 = 1940 FCR 188.

(3) Subject-matter of Section 9. Evacuee Interest (Separation) Act 1951, falls within the ambit of Entries 18 and 30 of State list and is valid. AIR 1954 Punj 261 (263) = ILR (1955) Punj 509 (DB).

(4) Central Excises and Salt Act (1944), Sections 6, 8 are within legislative competence of Central Legislature under

31. Inns and inn-keepers.

[Government of India Act, 1935, Item 28.]

32. Incorporation, regulation and winding up of corporations, other than those specified in List I, and universities; unincorporated trading, literary, scientific, religious and other societies and associations; co-operative societies.

33. Theatres and dramatic performances; cinemas subject to the provisions of Entry 60 of List I; sports, entertainments and amusements.

[Government of India Act, 1935, Item 35.]

Schedule 7, List 2, Entry 30 — Note 1 (contd.)

List I Item 45 of the Government of India Act, 1935 — Incidental encroachment on Item 27 or 29 of List 2 does not affect its validity. AIR 1960 SC 424 (429) = (1960) 2 SCR 362.

(5) The pith and substance of Bombay Agricultural Debtors Relief Act (28 of 1939), Section 52 is to relieve the agricultural debtors from their indebtedness. This is covered by Entry 30 of List II. AIR 1961 Mys 259 (262, 263).

(6) If, in pith and substance, the provisions of Foodgrains Dealers Licencing Order (1966) made under Essential Commodities Act (1955) are to be treated as made for supply and distribution of food stuffs they cannot be said to be unconstitutional merely because there is incidental encroachment on right of a money lender. AIR 1968 Pat 346 (350) = ILR 47 Pat 409 (DB).

(7) Kerala Agriculturists Debt Relief Act (31 of 1958) is constitutionally valid as relief of agricultural indebtedness is covered by List 2, Entry 30. 1961 Ker LJ 504 (DB).

Schedule 7, List 2, Entry 32 — Note 1

(1) It is not necessary that there must be a voluntary society of individuals united together by mutual agreement for common purposes before a corporation could come into existence. Section 113, U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), establishing a Gaon Samaj as a body corporate cannot therefore be challenged on this ground. AIR 1951 All 674 (698) = ILR (1952) 2 All 46 (FB).

(2) Tibbia College Act (Delhi Act 5 of 1952), Section 1 falls under Entry 32 of List 2 and is within competence of State Legislature. AIR 1962 SC 458 (471) = 1962 Supp (1) SCR 156.

(3) Madras Commercial Crops Market Act (20 of 1933) comes within the purview of Entry 32, List II. AIR 1959 Andh Pra 398 (403) = (1959) 1 Andh WR 285 (DB).

(4) Bombay Public Trusts Act (29 of 1950) — Act is intra vires of State Legislature — Society registered under Societies Registration Act (1860) — Not a corporation or quasi-corporation but an unincorporated society contemplated by List 2, Entry 32. AIR 1962 Bom 12 (21) = 63

Bom LR 379 (DB) ** AIR 1968 Bom 91 (94) = 69 Bom LR 690 (DB).

(5) The State Legislature is competent to make provision like Section 9 of the Orissa Co-operative Societies Act, 1951 under this Entry. (1968) 34 Cut LT 745 = 22 STC 460 (DB).

(6) Legislation with regard to non-trading company in Part B State which falls under Entry 32 of List II, is within the exclusive jurisdiction of the State. 1958 Ker LT 1178.

(7) The old Cochin Companies Act (Cochin Act XII of 1122) is unaffected either by the Central Act 3 of 1951 or Central Act 1 of 1956 (both Companies Acts), so far as non-trading companies are concerned. 1958 Ker LT 1178.

Schedule 7, List 2, Entry 33 — Note 1

(1) The entertainments and amusements contemplated by this entry are not the subjective entertainments or amusements which a person may receive by solving a cross-word puzzle or by indulging in any other mental or intellectual pleasure. The entertainment or amusement contemplated is something objective outside the person amused or entertained. AIR 1956 Bom 1 (11) = ILR (1955) Bom 680 (DB).

(2) The Madras Entertainment Tax (Andhra Amendment) Act, 1955, S. 4-A is not ultra vires the power of provincial Legislature. AIR 1959 Andh Pra 461 (463) = (1959) 1 Andh WR 347 (DB).

(3) The word 'Cinemas' is mentioned in Entry 33. The word 'Amusement' includes Cinemas. Tax on Cinema Shows is covered by List 2, Entry 62 and is valid. Mysore Cinematograph Show Tax Act (16 of 1951), Section 3. AIR 1959 SC 894 (896). ** AIR 1959 Andh Pra 461 (463) = (1959) 1 Andh WR 347.

(4) Held on facts, reasons for or basis of Theatre Tax imposed by Allahabad Nagar Mahapalika is not possession of particular profession or calling but giving of one or more shows or exhibitions and the tax is covered by entries 33 and 62 of this list — Therefore, it is not hit by Article 276. 1969 All LJ 295.

(5) Imposition of theatre tax by Allahabad Nagar Mahapalika — Graduation of tax in accordance with value of cinema building is based on rational and intelligible grounds. 1969 All LJ 295.

34. Betting and gambling.

[Government of India Act, 1935, Item 36.]

35. Works, lands and buildings vested in or in the possession of the State.

[Government of India Act, 1935, Item 8.]

36. [Omitted by the Constitution (Seventh Amendment) Act, 1956, S. 26 (1-11-1956).]

Schedule 7, List 2, Entry 34 — Note 1

(1) Gambling would include any activity or undertaking whose determination is controlled or influenced by chance or accident and which undertaking is undertaken or activity entered into with consciousness of risk. AIR 1956 Bom 1 (6) = ILR (1955) Bom 680 (DB).

(2) A lottery has been described as a scheme for distributing prizes by lot or chance and constitutes gambling. AIR 1956 Bom 1 (6) = ILR (1955) Bom 680 (DB).

(3) A prize competition, success wherein does not depend to a substantial degree upon the exercise of skill, is of a gambling nature. AIR 1957 SC 699 (710) = 1957 SCR 874 ** AIR 1959 Cal 141 (145) = 1959 Cri LJ 307.

(4) The West Bengal Prize Competition Act (32 of 1957) and rules framed thereunder came within purview of this entry and were perfectly valid. AIR 1959 Cal 141 (145) = 1959 Cri LJ 307.

(5) Resolutions by State Legislatures surrendering control and regulation of prize competitions to the Parliament — Power to tax betting and gambling cannot be said to have been surrendered to Parliament. AIR 1962 SC 594 (599) = (1962) 3 SCR 230.

(6) The subject of betting and gambling in Entry 34 of List II and the taxes on betting and gambling as given in Entry 62 of List II have to be read separately as separate powers. AIR 1962 SC 594 (599) = (1962) 3 SCR 230.

Schedule 7, List 2, Entry 35 — Note 1

(1) The word 'building' is a word of different meanings in different contexts. It may include a railway embankment though in ordinary language this would not be spoken of as building. AIR 1951 Cal 294 (295, 296) = ILR (1951) 2 Cal 93 (DB).

(2) A building need not be a completed structure; it is sufficient that it should be a connected and entire structure. AIR 1951 Cal 294 (296) = ILR (1951) 2 Cal 93 (DB).

(3) Maharashtra State Agricultural Lands (Ceiling on Holdings) Act (27 of 1961 as amended by Act, 13 of 1962), Section 28 — Section 28 falls under Entry 35, List 2 of 7th Schedule to Constitution and is valid. AIR 1968 SC 1395 (1401) = 1968 Lab IC 1525 = (1968) 3 SCR 712 = 71 Bom LR 141.

(4) Bihar Land Reforms Act (30 of 1950). The pith and substance of the Act

falls within item 35 of List II. AIR 1953 Pat 337 (337, 338) = 1953 BLJR 35 (DB).

SCHEDULE 7, LIST 2, ENTRY 36

Note:— The cases dealt under this Entry relate to this entry and Entry 42 in List 3 as they stood before passing of the Constitution (7th Amendment) Act 1956. Entry 33 of List 1 and Entry 36 of List 2 have been deleted and Entry 42 of List 3 has been replaced by a revised Entry by that Act.

SYNOPSIS

1. State Acts covered by this Entry.

2. Entry 36 of List 2 and Entry 42 of List 3.

3. Public purposes.

4. Acts not covered by Entry 36.

1. State Acts covered by this Entry.—

(1) Item 36 provides both for acquisition and requisition of property. AIR 1953 Mad 252 (256) = (1952) 2 Mad LJ 761 ** AIR 1952 SC 252 (283) = 1952 SCR 889 ** AIR 1954 Hyd 121 (123) = ILR (1954) Hyd 143 (DB).

(2) The words 'acquisition of property,' in Entry 36 must be understood in their natural sense of the act of acquiring property, without importing into the phrase an obligation to pay compensation or a condition as to existence of a public purpose. AIR 1969 SC 453 (459) = (1969) 1 SCJ 854 ** AIR 1955 Bom 28 (34) = 56 Bom LR 1062 (DB).

(3) This Entry makes no mention in whom the property should vest after it has been acquired. AIR 1959 SC 475 (479) = 1959 Supp 1 SCR 478.

(4) As the estates were acquired under the Ajmer Abolition of Intermediaries and Land Reforms Act (6 of 1955) for the purposes of the State of Ajmer the Act would be within the competence of the Ajmer Legislature. AIR 1959 SC 475 (479) = 1959 Supp 1 SCR 478.

(5) The State Government will be competent to acquire land in the State for rehabilitating persons from East Pakistan. AIR 1961 All 520 (521).

(6) The pith and substance of the Bihar Land Reforms Act (50 of 1950) (as amended by Bihar Act 20 of 1954) is with reference to lands and acquisition of land. (1955) ILR 34 Pat 57 (DB).

(7) Validity of Andhra Electricity Supply Undertakings (Acquisition) Act (15 of 1954) cannot be questioned as the acquisition made by the Act is not for the purposes of the Union and falls within

Schedule 7, List 2, Entry 36 — Note 1 (contd.)

the sweep of Entry 36, List II. AIR 1959 Andh Pra 328 (329) = (1961) 1 Andh WR 266 (DB).

(8) Bihar Land Reforms (Amendment) Act (16 of 1959), Section 1 providing for acquisition of right to hold melas on Bakasht lands was within competence of State Legislature. AIR 1961 SC 1649 (1654) = (1962) 2 SCR 382.

(9) The State Legislature is competent to enact legislation for the acquisition or requisition of property for the object of providing office accommodation for the National Cadet Corps. AIR 1957 Pat 109 (111) = 1957 BLJR 562 (DB).

(10) Bihar Land Reforms Act (30 of 1950) — Pith and substance of Act falls within item 36 of the State list and the Act would be constitutionally valid though it incidentally trenches on matters reserved for Union Legislature. AIR 1957 Pat 270 (274, 275) = 1957 BLJR 165 (DB).

(11) State Legislature has power to acquire trust properties. AIR 1952 SC 252 (278) = 1952 SCR 889.

(12) The pith and substance of the Bihar Land Reforms Act (30 of 1950) is transference of ownership of estates to the State Government and falls within ambit of Entry 36 of List II and is valid. AIR 1952 SC 252 (270) = 1952 SCR 889

(13) A law made under Entry 36 of List 2 can authorise acquisition of choses in action like arrears of rent from tenants. The arrears are covered by the term property. AIR 1952 SC 252 (254) = 1952 SCR 889.

(14) Bihar Land Reforms Act (30 of 1950), except as regards Section 4 (b) and Section 23 (f), Madhya Pradesh Abolition of Proprietary Rights (Estates Mahals, Alienated Lands) Act (1 of 1951) and Uttar Pradesh Zamindari Abolition and Land Reforms Act (1 of 1951) were held to be valid. AIR 1952 SC 252 (316) = 1952 SCR 889.

(15) The Assam Management of Estates Act (17 of 1949) is intra vires of the Assam Legislature. AIR 1953 Assam 84 (87, 89) (DB).

(16) Act of State Legislature in exercise of power under Schedule 7 List 2 Item 9 of the Government of India Act 1935 is not subject to Article 19 (1) (f). AIR 1953 Assam 84 (88) (DB).

(17) The word "acquisition" in Entry 36 means and implies the acquiring of the entire title of the expropriated owner whatever the nature or extent of that title might be. Under the Constitution of India, taking possession of a right or rights short of the entire title to property is regarded as 'requisition'. Hence, the necessity for the addition of the word 'requisition' in Item 36, List 2 of Sch. 7 in the Constitution of India. AIR 1953 Assam 84 (86, 87) (DB).

(18) It is not correct to say that apart from Entry 36 of List II, there is no power in the State to legislate with regard to deprivation of property. AIR 1953 Cal 695 (698).

2. Entry 36 of List 2 and Entry 42 of List 3.— (1) The limitations as to public purpose and payment of compensation cannot be read by implication into Entry 36 of List II alone or in conjunction with Entry 42 of List III. AIR 1952 SC 252 (264, 271) = 1952 SCR 889 ** (1967) 1 Mad LJ 206 = 80 Mad LW 184 (DB) ** AIR 1955 Bom 28 (34) = 56 Bom LR 1062 (DB).

(2) The State Legislature is competent to legislate for acquisition or requisition of land not only for 'State purposes' but also for 'other public purpose' within meaning of item 42 of List III. AIR 1957 Pat 109 (111) = 1957 BLJR 562 (DB).

(3) The argument that on the basis of Entry 36 in List II and Entry 42 in List III the State Legislature had no power to make a law for acquisition of property without fulfilling the condition of public purpose did not hold good after deletion of those entries by the Constitution (7th Amendment) Act. AIR 1961 SC 1649 (1652, 1653) = (1962) 2 SCR 382.

(4) Entry 36 in List II and Entry 42 in List III are merely heads of legislation and are neither inter-dependent nor complementary to each other. AIR 1969 SC 453 (460) = (1969) 1 SCJ 854 ** AIR 1952 SC 252 (271, 272) = 1952 SCR 889 ** AIR 1955 Sau 80 (84) = 8 Sau LR 70 (DB).

(5) The Madhya Pradesh Abolition of Proprietary Rights Act 1951, is covered by this Entry and Entry 42 of List III. ILR (1953) Nag 1 (FB).

(6) If there was a Central Act dealing with compensation then the State Law, in conflict with it, may become bad as Item 36 in List II was subject to Item 42 of List III. (1959) 63 Cal WN 751.

(7) The only limitation placed upon the State Legislature under List II, Entry 36 is that it cannot legislate with regard to acquisition or requisitioning of property for purposes which are for the purposes of the Union. The legislative competence of the State Legislature under List II, Entry 36 is not controlled by Entry 42 in List III. AIR 1952 Bom 16 (25, 26) = 53 Bom LR 837 (DB). (Reversed on another point in AIR 1955 SC 41.)

(8) Acquisition by the State under item 36 in list II was not necessarily connected with item 42 in List III. (1959) 63 Cal WN 751.

3. Public purpose:— (1) The requisition of a house for housing a Government servant is a public purpose. AIR 1953 Mad 252 (256) = (1952) 2 Mad LJ 761.

(2) Land acquired for the purpose of the Union or of a State must necessarily be for a public purpose. All State purposes

37. Elections to the Legislature of the State subject to the provisions of any law made by Parliament.

[Government of India Act, 1935, Item 11.]

38. Salaries and allowances of members of the Legislature of the State, of the Speaker and Deputy Speaker of the Legislative Assembly and, if there is a Legislative Council, of the Chairman and Deputy Chairman thereof.

[Government of India Act, 1935, Item 12.]

39. Powers, privileges and immunities of the Legislative Assembly and of the members and the committees thereof, and, if there is a Legislative Council, of that Council and of the members and the committees thereof; enforcement of attendance of persons for giving evidence or producing documents before committees of the Legislature of the State.

[Government of India Act, 1935, Item 12.]

40. Salaries and allowances of Ministers for the State.

[Government of India Act, 1935, Item 12.]

41. State public services; State Public Service Commission.

[Government of India Act, 1935, Item 6.]

Schedule 7, List 2, Entry 36 — Note 3 (contd.)

must be public purposes. ILR (1953) Nag 1 (FB).

(3) East Punjab Requisitioning of Immoveable Property (Temporary Powers) Act (48 of 1948) (as amended in 1951) by the (Punjab Requisitioning of Immoveable Property (Amendment and Validation) Act (2 of 1951), is not ultra vires. AIR 1953 Him Pra 5 (6).

(4) The Madhya Pradesh Abolition of Proprietary Rights Act, 1951 is not invalid on the ground that it does not acquire the malguzari estates for a public purpose. ILR (1953) Nag 1 (FB).

(5) The legislature can make a law empowering the authorised officer to requisition the property of a person for a public purpose if the law provides for compensation. AIR 1953 Mad 252 (256) = (1952) 2 Mad LJ 761.

(6) Effect of Article 31 (2) and Items 33 of List I, 36 of List II and 42 of List III is that neither the Central Legislature nor the State Legislature have any power to legislate in respect of compulsory acquisition for private purposes. AIR 1952 Cal 554 (555, 556) (DB).

4. Acts not covered by Entry 36.— (1) Since the Iron and Steel Industry has been brought under the control of the Union Government, the Iron and Steel Companies Amalgamation Act (79 of 1952), does not relate to matters which fall under Entry 33 of List I or 36 of List II or Article 31 (2). AIR 1953 Cal 695 (699).

(2) Mining Leases (Modification of Terms) Rules, 1956 — Validity of Rules must be judged with reference to Mines and Minerals (Regulation and Development) Act (1957), in view of S. 29 of the Act and not under Entry 36, List II. AIR 1967 SC 887 (892) = (1967) 1 SCR 707.

Schedule 7, List 2, Entry 37 — Note 1

(1) The words "subject to the provisions of any law made by Parliament" occurring in this entry only mean that the Parliamentary statute would have preference over a State law in case of repugnancy and that whenever a law is made by the State Legislature in exercise of its legislative powers under this entry, that law will be subject to the provisions of a Parliamentary statute. The Representation of the People Act, 1951, is such a Parliamentary statute. AIR 1954 Madh B 111 (112) = ILR (1954) Madh B 440 (DB).

SCHEDULE 7, LIST 2, ENTRY 41 — SYNOPSIS

1. Powers Re: State Public Services.

2. Integration of Services.

3. Integration of Services among new States.

1. Powers Re : State Public Services.—

(1) By virtue of Article 372, until Parliament has made a law under Article 16 (3) the existing laws continue to be in force and are not hit by Article 16 (3). AIR 1955 Orissa 113 (115) = ILR (1955) Cut 510 (DB). (Orissa Administrative Service and the Orissa Subordinate Administrative Service (Recruitment) Rules, 1950, Rule 5 — Does not violate the Fundamental Rights guaranteed by the Constitution in Article 16.)

(2) Prescribing a language qualification is not covered by Article 16 (2) and such a qualification may be laid down by the rules made under Article 309, or continued in force under Article 372. AIR 1955 Orissa 113 (115) = ILR (1955) Cut 510 (DB).

(3) There is nothing in terms of Article 309, Proviso, which abridges power of executive to act without a law under Article 162 in respect of State Public

Schedule 7, List 2, Entry 41 — Note 1 (contd.)

Services. AIR 1966 SC 1942 (1944) = (1966) 3 SCR 682 ** AIR 1969 Mys 186 (191) = 1969 Lab IC 681 = (1968) 2 Mys LJ 419 (DB).

(4) The State Government, in view of Article 162 and Entry 41 of List II read with Article 309, has power to equate one or more posts in the State services as well as the power to fix seniority amongst its officials. AIR 1966 Mys 95 (97) = (1965) 2 Mys LJ 200 (DB).

(5) The legislature of a State, having exclusive powers under Article 246 to make laws with respect to public services of that State, has ordinarily also power to legislate on all matters incidental and ancillary to such services. AIR 1961 Mys 210 (214, 215) = 39 Mys LJ 425 (DB).

(6) State Legislature is competent under Entries 41 and 5 in List 2 to enact Chapter 14 of Maharashtra Zilla Parishads and Panchayat Samitis Act (5 of 1962) relating to 'provisions as to services' — It is entitled to authorise the Government to constitute services for each Zilla Parishad. Zilla Parishads are obliged to accept allotted Government servants on terms not disadvantageous to such allotted servants. AIR 1967 Bom 482 (503) = 1968 Lab IC 368 = 69 Bom LR 218 (DB).

(7) Articles 245 and 246 of the Constitution read with Entry 41 of the State list authorise legislation both for creation and abolition of posts subject to restraints and limitations imposed by the Constitution. AIR 1964 Mys 84 (106) = (1964) 1 Mys LJ 50 (DB).

(8) Rule 3, Mysore State Civil Services (General Recruitment) Rules, 1957, no bar for making appointments under State's executive power, without framing of statutory rules. AIR 1966 SC 1942 (1945) = (1966) 3 SCR 682.

(9) The State Government has executive power in respect of "State Public Services." AIR 1966 SC 1942 (1944) = (1966) 3 SCR 682 ** 1968 Lab IC 1605 (1617) = 1969 Raj LW 47 (DB).

(10) Rajasthan Medical Services (Collegiate Branch) Rules (1962) (as amended on 22-8-1966) made under proviso to Article 309, therefore, do not transgress the field covered by the University of Rajasthan Act (46 of 1956). 1968 Lab IC 1605 (1617) = 1969 Raj LW 47 (DB).

(11) The Governor is competent to make rules regulating the recruitment to the posts and the conditions of service of persons appointed to Rajasthan Medical Services "Collegiate Branch". 1968 Lab IC 1605 (1617) = 1969 Raj LW 47 (DB).

(12) Mysore Public Works Engineering Department Services (Recruitment) Rules, 1960 (as amended on 23-8-1961) though assumed void so far they were made to operate retrospectively, appointments of Assistant Engineers made by Mysore Government Notification No. P. W. 10 SAG 59, D/- 31-10-1961, considered validly made in exercise of executive power under Article 162. AIR 1966 SC 1942 (1944) = (1966) 3 SCR 682.

(13) Article 309 is subject to the other provisions of the Constitution. The Parliament has power by a law referred to under Article 4 to vest in the Central Government power which might ordinarily form an element of executive powers of the State so as to bring about diminution of that power. (1967) 2 Mys LJ 544 = 12 Law Rep 487 (DB).

(14) Government's power to make law under Entries 41, 11 and 14 of List II, Schedule 7 of Constitution of India is subject to provisions of Articles 311, 14 and 16 of the Constitution. 1969 Lab IC 730 (734) = (1968) 2 Mys LJ 479 (DB).

(15) Mysore University of Agricultural Science Act (22 of 1963), Sec. 7 (5) is unconstitutional. The legislature had no competence to substitute for the Government servants working in the institutions referred to in Section 7 (4) a new master or to terminate their services in civil posts. 1969 Lab IC 730 (737, 738) = (1968) 2 Mys LJ 479 (DB).

(16) A rule regulating promotion is a condition of service. When there is provision for promotion any variation of the rules regulating promotion will amount to a variation of the condition of service. (1967) 2 Mys LJ 544 = 12 Law Rep 487 (DB).

2. Integration of services.— (1) The executive power of the State Government normally includes the power to make an integration of its services as per Article 162 and Entry 41 in List II. AIR 1961 Mys 210 (215) = 39 Mys LJ 425 (DB) ** AIR 1965 Guj 23 (35) = ILR (1963) Guj 1204 (FB).

(2) Section 115 (5) of the States Reorganisation Act, 1956, does not imply that the 'power' of the State Government in connection with the integration of services is thereby wholly taken away or that the same is wholly and solely conferred on the Central Government. AIR 1965 Guj 23 (37, 38) = ILR (1963) Guj 1204 (FB).

[See also AIR 1969 Punj 34 (40) = ILR (1968) 1 Punj 204.]

[But see AIR 1961 Mys 210 (218) = 39 Mys LJ 425 (DB).]

3. Integration of services among new States.— (1) Inter-state seniority list of new State Government servants is to be prepared only by Central Govern-

42. State pensions, that is to say, pensions payable by the State or out of the Consolidated Fund of the State.

[Government of India Act, 1935, Item 7.]

43. Public debt of the State.

[Government of India Act, 1935, Item 5.]

44. Treasure trove.

[Government of India Act, 1935, Item 21.]

Schedule 7, List 2, Entry 41 — Note 3 (contd.)

ment and not by State Government — State Government can prepare a provisional list — States Reorganisation Act (1956), Section 115 (5). AIR 1966 Mys 95 (97, 98) = (1965) 2 Mys LJ 200 (DB).

(2) Provisions of Section 115 (5) of the States Reorganisation Act, 1956 would be fully satisfied if power of the State under Article 162 is made subject to any directions which the Central Government may give to the State Government in connection with the integration of services. AIR 1965 Guj 23 (35) = ILR (1963) Guj 1204 (FB).

(3) The State Government had the right and authority to frame the Punjab Service Integration Rules, 1957 in exercise of the powers conferred on it by the proviso to Article 309 and to equate the two units of the services in question in exercise of its executive power under Art. 162 read with Entry 41 of List II subject to the control and direction of the Central Government. AIR 1969 Punj 34 (41, 42) = ILR (1968) 1 Punj 204.

(4) Integration of services on reorganisation of States — Central Government taking help of State Government in the matter was held to be valid — States Reorganisation Act (1956), Section 115 (5). AIR 1968 SC 850 (856, 857) = (1968) 2 SCR 186. (AIR 1964 Madh Pra 307, Reversed.)

(5) Questions whether the power of integration is exclusively conferred upon the Central Government under Sec. 115 of the States Reorganisation Act (1956) and whether the power of the State Government in the matters of integration under Article 162 read with Entry 41, List II remains unaffected except to the extent that the State Government must carry out the directions of the Central Government were left open. AIR 1968 SC 850 (854, 855) = (1968) 2 SCR 186.

(6) The power given to the Central Government to ensure fair and equitable treatment continues to be available until the last of the official allotted to the new State retires. (1967) 2 Mys LJ 544 = 12 Law Rep 487 (DB).

(7) Seniority list prepared by the State Government would continue to be

valid and enforceable till the Central Government prepares a seniority list under Section 115 (5) of the States Reorganisation Act, 1956 unless the same is revised according to law by the State Government. AIR 1966 Mys 95 (98) = (1965) 2 Mys LJ 200 (DB).

(8) Appointment of official by transfer from one Department to another is no part of process of integration — Transfer is not dependent on completion of integration by Central Government — Mysore Government Servants (Seniority) Rules (1957), Rule 6. AIR 1968 Mys 73 (81) = (1968) 2 Mys LJ 299 (DB).

(9) The decision regarding integration, relates back to the 'Appointed Day' under the Act. The exclusive power of the State vested by the Constitution under Entry 41 of List II of Schedule VII on the subject of 'State Public Services' has been curtailed only to the limited extent of the power of integration conferred by the Parliament under Sec. 115 (5) on the Central Government. AIR 1968 Mys 73 (81) = (1968) 2 Mys LJ 299 (DB).

(10) Preparation of inter-State Seniority Lists by the Central Government, constitutes part of the function of division and integration of services vested in the Central Government by virtue of Section 115 (5). AIR 1968 Mys 73 (80) = (1968) 2 Mys LJ 299 (DB).

Schedule 7, List 2, Entry 42 — Note 1

(1) A State law made under this entry which deprives a person of his property without payment of compensation would be hit by Article 31 of the Constitution and would be unconstitutional. AIR 1955 Hyd 44 (48) = ILR (1955) Hyd 269 (DB). (Hyderabad (Abolition of Cash Grants) Act (33 of 1952), Section 3 (1) — Abolitions of rusums under Section 3 is invalid as infringing Art. 31.)

(2) The power of the State Legislature to enact a law under this entry cannot be fettered or limited by any obligation which had been undertaken by the State. Therefore, the Pensions Act, 1871, which was validly brought into force in the State of Saurashtra from 15-3-1950, by virtue of this entry cannot be impugned only because it is in violation of any clause in the covenant. AIR 1956 Sau 119 (120) (DB).

45. Land revenue, including the assessment and collection of revenue, the maintenance of land records, survey for revenue purposes and records of rights, and alienation of revenues.

[Government of India Act, 1935, Item 39.]

SCHEDULE 7, LIST 2, ENTRY 45 SYNOPSIS

1. "Land revenue."

2. Scope.

2-A. "Maintenance of land records."

3. This entry and Article 31 (1) and (2).

4. Acts falling under this entry — Instances.

1. "Land revenue."— (1) The definition of land revenue given in Section 2 of the Bengal Land Revenue Sales Act (11 of 1859) and Sec. 1 of the Bengal Land Revenue Sales Act (7 of 1868) include "malikana." (1904) 31 Cal 256 (258) = 31 Ind App 52 (PC).

(2) The expression as defined in the Bombay Revenue Jurisdiction Act (10 of 1876) was held not to include the duties leviable on the manufacture of spirits or the taxes on the tapping of toddy trees. (1885) 9 Bom 462 (466, 467) (FB). (Per Birdwood J.)

(2-A) Cess customarily levied as public revenue due to Government referred to in Section 12 of the T. C. Land Tax Act (15 of 1955) is land revenue under Entry 45. AIR 1963 Ker 31 (42) = 1962 Ker LT 826.

(3) There is now a general consensus of opinion that land-revenue should be regarded as a tax and not a rent. Any chunk or slice cut off from profits of an individual is a tax. All bits of income or profits taken by the State in the exercise of its sovereign powers are in reality taxes, no matter under what name they appear. AIR 1956 Assam 33 (43) (SB). (Per Ram Labhaya, J.) AIR 1960 Andh Pra 461 (464) = 1960 Andh LT 251 (DB). (Expression "revenue assessment" connotes tax.)

(4) The expression "land revenue" in Entry 45 means a share in the produce of land. Given that meaning it only empowers the State to charge a share in computed money value of the produce of land. The entire entry deals with the characteristic of this tax. (1967) 1 Andh WR 399 = (1965) 2 Andh LT 297. (Andhra Pra. Land Revenue (Additional Assessment and Cess Revision) Act (22 of 1962) (as amended by A. P. Act 23 of 1962) — No indication in Acts that additional assessment is share of produce of land — Sections 3 to 5 of Act 22 of 1962 also unconstitutional as offending Articles 14 and 19 (1) (f).)

2. Scope.— (1) This entry empowers the State Government to legislate in regard to land revenue, acting directly in the matter and enacting in respect of all

or some existing assessments that the same should be increased as from a specified date to a specified amount. AIR 1944 FC 62 (65) = 1944 FCR 284 = ILR (1944) Nag 614 = ILR (1944) Kar (FC) 165.

(2) No grant, whether with or without consideration, can affect the legislative power of the State, nor can any legislative Act bind the same or the succeeding Legislatures. AIR 1956 Assam 33 (38, 47) (SB) ** AIR 1960 Madh Pra 372 (374) = 1960 MPLJ 906 (DB). (C. P. and Berar Revocation of Land Revenue Exemptions Act (37 of 1948) is valid.)

[See 1960 Ker LJ 112. (Imposition of land tax on Edavagai lands under T. C. Land Tax Act (15 of 1955).]

(3) The State has a sovereign right to impose land revenue on the proprietors who are full and absolute owners of their lands and this revenue is a part of a statutory liability. AIR 1956 Assam 33 (44) (SB). (Per Ram Labhaya J.)

(4) Legislation on resumption of Jagirs is one relating to lands and land revenue and falls under Entries 18 and 45 of List II. AIR 1962 SC 1305 (1313) = (1962) Supp 3 SCR 346. (Punjab Resumption of Jagirs Act (39 of 1957).) ** (1963) 2 Mys LJ 164 (FB). (Bombay Merged Territories and Areas Jagirs Abolition Act (1953).) ** AIR 1966 Guj 149 (157) (DB). (Bombay Merged Territories and Miscellaneous Alienations Act (22 of 1955).)

(5) The power to legislate on a subject includes power to repeal, modify or amend any previous law on the subject. AIR 1960 Madh Pra 372 (374) = 1960 MPLJ 906 (DB). (C. P. and Berar Revocation of Land Revenue Exemptions Act (37 of 1948).) ** AIR 1962 SC 1305 (1313) = (1962) Supp 3 SCR 346. (Punjab Resumption of Jagirs Act (39 of 1957) — Amendment of, by Amending Act of 1959 — Amendment held intra vires.)

(6) Taxes on lands and buildings — Interpretation of Statute imposing tax on lands only — Falls under Entry 49 and not under Entry 45. AIR 1970 SC 169 (176, 177) = (1969) 2 SCA 26.

2-A. "Maintenance of land records."

(1) It would be within the scope of Entry 45 to enact the law relating to records showing how the lands have been dealt with in the past; what are the rights and liabilities pertaining to these lands, how the records are to be maintained and preserved, where they should be kept and in whose custody they should be lodged. The expression "maintenance of land records" would mean not only the act of maintaining

46. Taxes on agricultural income.

[Government of India Act, 1935, Item 41.]

Schedule 7, List 2, Entry 45 — Note 2-A (contd.)

them but all things incidental to the keeping and maintenance of such land records. AIR 1962 Guj 18 (19) = (1961) 2 Guj LR 594.

3. This entry and Article 31 (1) and (2).— (1) The mere increase of an assessment for land-revenue does not involve any acquisition of the land or any right in or over immovable property. In such a case there is no transference to the State Government or any other person of any land or rights in or over immovable property, which remain in the same possession or ownership as immediately before the increase of the assessment. AIR 1944 FC 62 (65) = 1944 FCR 284 = ILR (1944) Nag 614 = ILR (1944) Kar (FC) 165. (C. P. Land Revenue of Estates Act 1 of 1939 is not ultra vires.) ** AIR 1960 Andh Pra 461 (464) = 1960 Andh LT 251 (DB). (Andhra Inams (Assessment) Act (17 of 1955) — No contravention of Articles 19 (1) (f) and 31 (2).)

(2) The right to enjoy land free from land revenue is not property in the eye of law. There can therefore be no acquisition of the right to enjoy landed property free of land-revenue and no question of paying compensation arises when the land is assessed to land-revenue. AIR 1956 Assam 33 (36, 38, 45, 48) (SB). (Assam Assessment of Revenue Free Waste Land Grants Act (24 of 1948) not hit by Article 31 (2) or Article 19 (1) (f). ILR (1953) 5 Assam 200, Affirmed.) ** AIR 1960 Madh Pra 372 (375) = 1960 MPLJ 906 (DB). (C. P. and Berar Revocation of Land Revenue Exemptions Act (37 of 1948) not hit by Article 31 (2).)

4. Acts falling under this entry — Instances.— (1) The following are some other instances of Acts falling within this entry :

- (a) Kerala Plantations (Additional Tax) Act (17 of 1960). AIR 1964 Ker 141 (142, 143) = 1964 Ker LT 47.
- (b) Bombay Land Tenures Abolition (Recovery of Records) Act (50 of 1953). AIR 1962 Guj 18 (20) = (1961) 2 Guj LR 594. (Act does not fall under item 18).
- (c) Bengal Public Demands Recovery Act (1913). AIR 1964 Cal 165 (172) = 1962 Cal LJ 210 (DB). (Act is covered by Entries 3 and 45.)
- (d) Bengal Public Demands Recovery (Validation of Certificates and Notices) Act (11 of 1961). AIR 1964 Cal 165 (172) = 1962 Cal LJ 210 (DB). (Act is with respect to matters enumerated in Entries 3 and 45).

- (e) Saurashtra Local Development Fund Act (26 of 1956). AIR 1959 Bom 43 (47) = 60 Bom LR 1191. (Assessment levied upon person because of grant of occupancy certificate to him would fall under Entry 45).

Schedule 7, List 2, Entry 46 — Note 1

(1) This entry and Entry 82 of List 1 are complementary to each other. AIR 1942 FC 8 (14) = 1942 FCR 1 = 21 Pat 521 = ILR (1942) Kar (FC) 1 Sup.

(1-A) Taxation is considered as a distinct matter for the purpose of legislative competence and the power to tax cannot be deduced from a general legislative entry as an ancillary power. AIR 1969 Mys 23 (35) = (1968) 2 Mys LJ 78 (DB).

(2) The imposition of agricultural income-tax by the Bihar Agricultural Income Tax Act (7 of 1938) on income derived from permanently settled estates does not in any manner whittle down or derogate from the assurances given to the zamindars and landholders by the Bengal Permanent Settlement Regulation (1 of 1793). The reason is that the two pieces of legislation do not deal with the same subject-matter. AIR 1942 FC 8 (13, 14) = 1942 FCR 1 = 21 Pat 521 = ILR (1942) Kar (FC) 1 Sup **AIR 1930 PC 209 (214) = 57 Ind App 228 = 58 Cal 430. (AIR 1925 Cal 598, Affirmed.)

(3) For the meaning of the term 'agricultural income,' the Courts have got to look to the terms of the definition in S. 2 (1), Income-tax Act, 1922, and construe the same regardless of any other considerations. AIR 1957 SC 768 (773) = 1958 SCR 101. (AIR 1954 Cal 225 (231), Affirmed.) ** AIR 1964 SC 572 (574) = (1963) Supp 1 SCR 836. (Kerala Agricultural Income Tax Act (1950), Definition is in conformity with that in Income-tax Act — Explanation added to Section 5 of Act by Amending Act 9 of 1961 is not ultra vires.) ** AIR 1962 Ker 110 (115) = 1961 Ker LT 905 (DB) **AIR 1958 Cal 585 (591).

(3-A) The income derived from the sale of tea grown and manufactured by the seller is not solely derived from agriculture. It is partly derived from land by agricultural operations and partly from business. The power of State Legislature to make law in respect of taxes on agricultural income arising from tea plantations is limited to legislating with respect to agricultural income determined in accordance with Rule 24 of the Income-tax Rules (1922). Explanation added to definition of "agricultural income" in Section 2

47. Duties in respect of succession to agricultural land.

[Government of India Act, 1935, Item 43.]

48. Estate Duty in respect of agricultural land.

[Government of India Act, 1935, Item 43-A (as inserted by the India (Estate Duty) Act, 1945 (8 and 9 Geo. VI, C. 7).]

49. Taxes on lands and buildings.

[Government of India Act, 1935, Item 42.]

Schedule 7, List 2, Entry 46 — Note 1 (contd.)

of Kerala Agricultural Income-tax Act (22 of 1950) in substance adopts what has been provided in Rule 24. AIR 1963 SC 760 (764, 765) = (1963) Supp 1 SCR 823. (Explanation 2 to Section 5 of Kerala Act should be so construed as to make it harmonious with explanation to sub-cl. (2) of Cl. (a) of Section 2).

(4) Taxes on agricultural income would comprise within their scope even income from forestry operations provided it falls within the definition of agricultural income in Section 2 (1). Income-tax Act, 1922. AIR 1957 SC 768 (772) = 1958 SCR 101. (Affirming on appeal AIR 1954 Cal 225).

(5) A State Legislature is entitled to impose a tax on some categories of agricultural income and not impose it on others. AIR 1942 FC 8 (10) = 1942 FCR 1 = 21 Pat 521 = ILR (1942) Kar (FC) 1 Sup.

(6) A State law relating to agricultural income-tax cannot be held to be invalid merely because the definition of 'agricultural income' in that Act is narrower than the one given in the Income-tax Act, 1922. AIR 1942 FC 8 (10) = 1942 FCR 1 = 21 Pat 521 = ILR (1942) Kar (FC) 1 Sup.

(7) The Bengal Agricultural Income-tax Act (4 of 1944) does not increase the jurisdiction of the Legislature which it does not possess. It does not provide for assessment of an income which is not agricultural income. AIR 1958 Cal 585 (591).

(8) The levy of agricultural income-tax on the income derived from the cultivation of tobacco under the T. C. Agricultural Income-tax Act (22 of 1950) is not beyond the powers of the State Legislature. AIR 1961 Ker 111 (112) = 1960 Ker LT 820 (DB).

(9) Section 65 (4) of the Madras Agricultural Income-tax Act (5 of 1955) is not beyond the Legislative competence of the State, provision is also not unconstitutional on ground of being repugnant to Art. 19 (1) (f). AIR 1964 Mad 556 (559) = 77 Mad LW 422 (DB).

(10) Parliament has committed no trespass whatever on the State field of legislation in imposing a tax on net wealth under Wealth Tax Act (1957), part of which may have sprung from

agricultural income. AIR 1962 Ker 110 (115) = 1961 Ker LT 905 (DB).

Schedule 7, List 2, Entry 47 — Note 1

(1) The words "devolution" or "succession" imply passing of property to another on death of a person and cannot apply to transfers inter vivos. Tax on gifts of agricultural land sought to be levied by the Gift Tax Act (1958) does not come within the ambit of either Entry 18 or Entry 47. AIR 1962 Ker 97 (104) = 1961 Ker LT 859 (DB) ** AIR 1963 Mad 419 (423) = (1963) 2 Mad LJ 192 (DB) ** AIR 1960 Andh Pra 115 (119) = (1960) 1 Andh WR 153 (DB).

Schedule 7, List 2, Entry 48 — Note 1

(1) The expression "agricultural land" has not been defined either in the Estate Duty Act (1953) or in the Constitution. "Agricultural land" is a land on which a prudent owner will under take any of the processes of farming in its widest sense. The fact that a particular area is being used for agriculture may indicate that the land is agricultural in character. But the current user is by no means conclusive. 1966 Ker LT 1149 = ILR (1966) 2 Ker 567 (DB).

(2) There is no warrant for the assumption that entries 86, 88 of List 1 and Entry 48 of List II form a special group embodying any particular scheme. AIR 1970 SC 169 (175) = (1969) 2 SCA 26.

SCHEDULE 7, LIST 2, ENTRY 49 SYNOPSIS

1. Tax on land.
2. Basis of Tax.
3. Entries 49, List 2 and Entry 86, List 1 — Distinction.

1. Tax on Land.— (1) In order to see under what entry a particular tax falls, Courts must examine the essential features of the tax and consider the pith and substance of the legislation. AIR 1949 FC 81 (86) = 1948 FCR 207 ** AIR 1940 Bom 65 (70) = ILR (1940) Bom 58 (FB) ** AIR 1954 Bom 188 (191, 192) = ILR (1954) Bom 41 (DB).

(2) It is not the name of the tax but its real nature which determines into what category the tax falls. AIR 1948 All 382 (386, 389) = ILR (1949) All 26 (FB).

(2a) Taxes on lands and buildings — Scope of entries — Statute imposing tax on lands only — Falls under Entry 49

Schedule 7, List 2, Entry 49 — Note 1 (contd.)

and not under Entry 45. **AIR 1970 SC 169 (177) = (1969) 2 SCA 26.**

(3) A tax on property is confined to immovable property and clearly falls within the jurisdiction of the State Legislature by virtue of item 49, List II U. P. Town Areas Act (2 of 1914) is within the competence of State Legislature. **AIR 1969 All 40 (42) = 1968 All LJ 665 (FB).**

(4) The word 'lands' in Entry 49 of List 2 is wide enough to include all lands whether agricultural or not, and it would be plainly unreasonable to assume that it includes non-agricultural lands but does not include agricultural lands. **AIR 1962 SC 1563 (1568) = (1963) 1 SCR 220** ** **AIR 1964 Mad 556 (560) = 77 Mad LW 422 (DB)** ** **AIR 1960 Andh Pra 115 (118) = (1960) 1 Andh WR 153 (DB).**

(5) Land in entry 49 includes land on which forest stands — Taxation on land on which forest stands is permissible and legal under Entry 49 — Entry 49 and entry 18 deal with entirely different subjects. **AIR 1961 SC 552 (564) = (1961) 3 SCR 77** ** **AIR 1963 Ker 31 (42) = 1962 Ker LT 826.**

(6) Imposition under Section 62, Assam Local Self Government Act of tax on land used as market is tax on land though its incidence which falls upon land depends upon the use of land as a market and is within competence of State legislature. **AIR 1965 SC 1561 (1563) = (1965) 3 SCR 47** ** **AIR 1959 Assam 221 (226) (SB).**

(7) If the State Legislature had power to levy a tax only on land and buildings the same could not be levied on machinery contained in or situate on the building even though the machinery was there for the use of the building for a particular purpose. Therefore, Rule 7 (2) of the rules framed under the Bom. Act LIX of 1949 was beyond the legislative competence of the State. **AIR 1967 SC 1801 (1814) = (1967) 2 SCR 679.**

(8) Whether tax on lands and buildings has acquired the special meaning as tax on buildings for local purposes imposed by local authorities only (Quaere). **AIR 1966 Ker 14 (16).**

(9) It cannot be contended that property tax be levied on lands and buildings from which owners derive gains and profits only. **AIR 1963 Punj 354 (357) = 65 Pun LR 197 (DB).**

(10) Section 128 (1) (x) of the U. P. Municipalities Act makes it clear that a water-tax is imposed on buildings or lands or both. The fact that water-tax under the Municipalities Act is in reality a tax on land and buildings finds further support from the provisions of Cl. (a) of Section 129 of the Act. The State Government has power under

Entry 49 in List 2 of Sch. VII to the Constitution of India to make laws in respect of such tax. **AIR 1962 All 83 (86) = 1961 All LJ 976 (DB).**

(11) As agricultural lands are included in entry 49 of List 2, the validity of the U. P. Large Holdings Tax Act would be beyond challenge, as in substance and in fact, it imposes a tax on land holding and as such, is within the competence of the State Legislature. **AIR 1962 SC 1563 (1569) = (1963) 1 SCR 220.**

(12) Power to tax lands and buildings — Cannot be used arbitrarily and in a manner inconsistent with fundamental rights. **AIR 1969 SC 378 (379) = 1968 Ker LT 649.** (Kerala Buildings Tax Act (19 of 1961), Section 4 is ultra vires.)

(13) A tax on lands and buildings is distinctly different from a tax on gift of lands and buildings with the result that legislation in respect of the latter cannot fall under Entry 49, List 2. **AIR 1967 All 19 (23) = 1966 All LJ 622 (DB).** (**AIR 1960 Andh Pra 115**, **AIR 1965 Punj 65**, **AIR 1962 Ker 97**, **AIR 1963 Mad 419 Rel. on.**) ** **AIR 1965 Punj 65 (67, 68) = (1964) 54 ITR 632 (DB)** ** **AIR 1960 Andh Pra 115 (117) = (1960) 1 Andh WR 153 (DB).**

[But see **AIR 1962 Mys 269 (275) = 1962 Mys LJ (Sup) 442 (DB).** (**AIR 1960 Andh Pra 115**, Dissented from.)]

(14) 'A' taking agricultural land on lease and giving it for cultivation to various tenants and was thus working as contractor — Punjab District Board levying Professional Tax on 'A' for this — Held the tax could not be regarded as a tax in respect of any property within the meaning of Section 30 (b) of the Punjab District Boards Act. It was essentially a tax on profession, trade or calling. (1959) 61 Pun LR 309 (313).

(15) Fee under Section 284 of Indian Railways Act, 1890 cannot be considered as tax on land under Entry 49, List 2 of Sch. 7 of Constitution of India. **1967 Ker LT 848 = 1967 Mad LJ (Cri) 799 (DB).**

(16) Travancore Cochin Land Tax Act (15 of 1955), Sections 11 and 12 — Levy referred to in Section 12 is under Entry 45 of List 2 of the Seventh Schedule to Constitution and not under Entry 49. **AIR 1963 Ker 31 (42) = 1962 Ker LT 826.**

(17) There are no words to suggest that a tax on land and buildings is to be levied only for the purpose of local Government. **AIR 1967 Madh Pra 268 (271) = 1967 MPLJ 47 (DB).**

(18) Not worded to suggest that tax must be paid only by occupier or by both. **AIR 1967 Madh Pra 268 (275) = 1967 MPLJ 47 (DB).**

(19) The tax under this entry may be levied either on the owner or the occu-

Schedule 7, List 2, Entry 49 — Note 1 (contd.)

pier of the land and building. **AIR 1949 FC 81 (84) = 1948 FCR 207.** (Case under Government of India Act, 1935, Sch. VII List 2, Entry 42.)

(20) If the tax contemplated under Entry 49 could be levied either on the occupier or the owner the number of buildings owned by the owner cannot be taken into account in charging the tax. **AIR 1965 Mys 170 (206) = (1964) 2 Mys LJ 470.**

(21) See the undermentioned cases where tax was held to be on land. **AIR 1965 SC 177 (182) = (1964) 6 SCR 666.** (Madras District Boards Act (1920).) ** (1969) 1 Andh WR 505. (Andhra Irrigation (Levy of Betterment Contribution) Act 1955.) ** (1969) 1 Mad LJ 44 = **ILR (1968) 3 Mad 127.** (Madras District Municipalities Act (5 of 1928).) ** (1966) 2 Mad LJ 172 = **ILR (1966) 2 Mad 604 (DB).** (Madras Urban Land Tax Act 34 of 1963.) ** **AIR 1970 SC 169 (176) = (1969) 2 SCA 26.** (Madras Urban Land Tax Act (12 of 1966) is entirely within the ambit of Entry 49.) ** **1965 All LJ 201 = 1965 All WR (HC) 35.** (U. P. Nagar Kshetra Bhumi Aur Bhawan Kar Adhinyam (12 of 1962).) ** **AIR 1965 Andh Pra 91 (95) = (1964) 2 Andh WR 402 (DB).** (Hyderabad District Municipalities Act (18 of 1956), Sections 97 (1) (b); 101 and 230 (2) — Levy of general water-tax under Section 97 (1) (b) is a tax on lands and buildings.) ** **1964 All WR (HC) 583.** (Uttar Pradesh (Nagar Kshetra) Bhumi Aur Bhawan Kar Adhinyam, (U. P. Act 12 of 1962).) ** **AIR 1963 Andh Pra 379 (380) = (1963) 1 Andh WR 267 (DB)** ** **AIR 1963 Punj 354 (359) = 65 Pun LR 197 (DB).** (Punjab Urban Immovable Property Tax Act (17 of 1940).) ** **AIR 1960 Andh Pra 461 (464) = 1960 Andh LT 251.** (Andhra Inams (Assessment) Act (17 of 1955).) ** **AIR 1959 Bom 43 (46) = 60 Bom LR 1191.** (Saurashtra Local Development Fund Act (26 of 1956), Section 4.)

2. Basis of Tax.— (1) Validity under Items 49 and 60 of List 2 of Constitution. State cannot legislate in respect of tax on sources other than those mentioned therein — But U. P. Act 10 of 1922 which was valid under Government of India Act, is valid under the Constitution by virtue of Article 277 and Item 82 of Union List — Sections 108 and 44 are not void. **1955 All WR (HC) 520 (523) = 1955 All LJ 630 (DB).**

(2) This entry which confers power on the State Legislature to levy tax introduces no terms of limitation and does not provide for any particular manner in which the tax should be levied. **AIR**

1954 Bom 188 (191) = ILR (1954) Bom 41 (DB). (Case under Entry 42, List 2, Government of India Act, 1935).

(3) A tax on land may be based on the annual value of the land and would still be a tax on land and would not be beyond the competence of the State Legislature. **AIR 1965 SC 1561 (1562) = (1965) 3 SCR 47 ** AIR 1960 All 136 (149) = 1959 All LJ 754 (FB) ** AIR 1966 Ker 14 (17).**

(4) There is nothing in Entry 49 which indicates that the tax is limited only to the rateable values i.e. annual letting values of lands and buildings — Under the entry tax can be levied on a variety of bases — The extent of lands, floor areas, number of storeys etc. **AIR 1968 Guj 124 (140) (DB).**

(5) Where on a plain reading of a section it can be gathered that the tax which it levies is a tax on lands and buildings the fact that either the annual value or its market value is taken as the basis for calculation of the tax cannot make any difference to the essential character of the tax itself. **(1967) 11 Law Rep 40 (54) = (1968) 1 Mys LJ 524 (DB).**

(6) The unit of taxation under Section 4, Mysore Buildings Tax Act (4 of 1963) is building and is levied on the basis of total floorage of all buildings owned by an assessee in the same rating area. The tax levied is a tax on buildings and the State Legislature had full competence to enact the same. **AIR 1965 Mys 170 (178) = (1964) 2 Mys LJ 470 (DB).**

(7) The use to which the land is put can be taken into account in imposing a tax on it within the meaning of Entry 49, List 2. **AIR 1965 SC 1561 (1562) = (1965) 3 SCR 47.**

(8) The power of a Municipal Corporation to levy a tax on open land is similar in extent to the power of the local Legislature. **AIR 1954 Bom 188 (191) = ILR (1954) Bom 41 (DB).**

(9) The yard-stick for computation of rates and taxes imposed by municipalities and other public bodies is primarily based upon the value of the property which the assessee has within the jurisdiction of the public body concerned. **AIR 1964 Cal 590 (592) = 68 Cal WN 1132.**

(10) It is open to a Municipal Corporation to take into account the value of the land as such without reference to encumbrances and levy rate on the value of land so determined. Municipal tax is not concerned with real economic value of land but to find out its market-value from its real capital value in the economic sense. **AIR 1954 Bom 188 (191) = ILR (1954) Bom 41 (DB).**

(11) Annual letting value can be adopted as an artificial standard for determining, for purpose of income-tax,

50. Taxes on mineral rights subject to any limitations imposed by Parliament by law relating to mineral development.

[Government of India Act, 1935, Item 44.]

Schedule 7, List 2, Entry 49 — Note 2 (contd.)

the income derived from lands and buildings or for measuring the capital value of the assets for imposition of a tax on capital income. But from this it does not follow that every tax imposed in relation to annual letting value of lands and buildings is a tax on income or on the capital value of the assets. AIR 1967 Madh Pra 268 (271) = 1967 MPLJ 47 (DB) ** AIR 1968 J and K 105 (109) = 1968 Kash LJ 144 (DB).

(12) Entry 49 of the State List has imposed constitutional limitations on the legislative power of the State to impose tax on buildings except on the normal basis of the annual value based on the rent at which the building may reasonably be expected to be let, or any other reasonable standard of apportionment of tax burden, and such tax could be levied only for the exclusive utilisation of the local Governments (Municipalities). AIR 1965 Mys 170 (206) = (1964) 2 Mys LJ 470 (DB).

(13) Imposition of tax on lands and buildings on basis of percentage of their capital value — State legislature is competent — Gujarat Imposition of Taxes by Municipalities (Validation) Act 1963 (2 of 1964) is validly enacted. AIR 1970 SC 192 (196) = (1969) 2 SCC 283.

3. Entry 49, List 2 and Entry 86, List 1 — Distinction.— (1) For the purpose of levying a tax under Entry 49, List 2 State Legislature may adopt for determining the incidence of tax the annual or the capital value of the lands and buildings. But that will not make the field of legislation under Entry 49, List 2 and Entry 86, List 1 overlapping. AIR 1969 SC 59 (61) = (1968) 2 SCJ 790.

(2) A construction of the two entries does not reveal a conflict in the legislative fields. The fields appear to be separate and well-defined. If lands and buildings are totally unburdened, then, they may have to bear the burden of a tax, not only under entry 86, but also under entry 49. But, the fact that such a thing can happen cannot change the real character or nature of the tax under one or the other entry. AIR 1968 Guj 124 (141) (DB).

(3) To allocate the legislative power to impose a tax on capital value of lands and buildings treating them as assets entirely to the Entry 86, List 1 is not to rob Entry 49, List 2 of its contents. The field is still open under Entry 49 for legislation for other taxes on lands and buildings. There is therefore no conflict and no overlapping of juris-

diction in the case of Entry 86, List 1 and Entry 49, List 2. AIR 1962 Ker 110 (114) = 1961 Ker LT 905 (DB) ** ILR (1960) 1 Ker 268. (Kerala Municipalities Act (XIV of 1961), S. 99 (3) is not ultra vires powers of State Legislature.)

(4) The pith and substance of Entry 49, List 2 and Entry 86, List 1 are fundamentally different. Entry 86 deals with capitalised value of assets whereas Entry 49, List 2 is not directly concerned with the capitalised value of lands and buildings though in a particular piece of legislation the capital value may be taken as a basis for levying tax. AIR 1964 Orissa 123 (131) = 30 Cut LT 299 (DB).

(5) Tax on lands and buildings under Entry 49, List 2 is not the same as, but quite different and distinct from, the tax on capital value of the assets referred to in Entry 86 of List 1. The former is imposed directly on lands and buildings which are the object of taxation whereas in the case of the latter what is taxed is not the asset but the capital value of the assets of an individual as a company. (1967) 11 Law Rep 46 (54) = (1968) 1 Mys LJ 524 (DB) ** AIR 1969 SC 59 (61) = (1968) 2 SCJ 790 ** AIR 1962 Ker 110 (114) = 1961 Ker LT 905 (DB).

(6) Levy of tax on capital value of non-agricultural lands and buildings — Parliament can legislate therefore under List 1, Entry 86 — Imposition of Wealth tax on non-agricultural lands and buildings under Wealth Tax Act (1957) is constitutional — Not conflicting with entry 49 of List 2. AIR 1969 SC 59 (62) = (1968) 2 SCJ 790. (Observations made in AIR 1960 All 136 held were obiter and did not correctly interpret Entry 86 of List 1.) ** AIR 1963 Mys 111 (111) = (1963) Mys LJ (Supp) 365 (DB) ** AIR 1962 Ker 110 (113) = 1961 Ker LT 905 (DB).

Schedule 7, List 2, Entry 50 — Note 1

(1) Land cess imposed under provisions of Sections 78 and 79, Madras District Boards Act is in truth a 'tax on lands' within Entry 49 and not a tax on minerals within Entry 50. In a very remote sense it has relationship to mining as also to the mineral won from the mine under a contract by which royalty is payable on the quantity of mineral extracted. But that does not stamp it as a tax on either the extraction of the mineral or on the mineral rights. AIR 1965 SC 177 (181) = (1964) 6 SCR 666. (Sections 78 and 79 do not stand repealed after passing of Central Act (53 of 1948) or Central Act (67 of 1957) — There is no question of overlapping between the two.)

51. Duties of excise on the following goods manufactured or produced in the State and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India :—

(a) alcoholic liquors for human consumption;

(b) opium, Indian hemp and other narcotic drugs and narcotics; but not including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry.

[Government of India Act, 1935, Item 40.]

Schedule 7, List 2, Entry 51 — Note 1

(1) Excise tax and sales tax are two different taxes which under Entries 51 and 54 of List 2 the State Legislature is empowered to levy and there is no prohibition against the imposition, at one and the same time, of an excise tax and a sales tax. AIR 1951 All 858 (858) = ILR (1952) 1 All 867 (DB). (AIR 1939 FC 1, Foll.)

(2) One of the essential characteristics of an excise duty is uniformity of incidence. Secondly, the duty must be closely related to production or manufacture of goods. It does not matter if the levy is made not at the moment of production or manufacture but at a later stage. Thirdly, if a levy is made for the privilege of selling an excisable article and the excisable article has already borne the duty and the duty has been paid, there must be clear terms in the charging section to indicate that what is being levied for the purpose of privilege of sale is in fact a duty of excise. AIR 1967 SC 1512 (1521) = (1967) 1 SCR 548 ** 1967 Cur LJ 460 = ILR (1967) 2 Punj 757 (DB).

(3) Shop rent for exclusive privilege of selling toddy or arrack from certain shops is not excise duty — Levy of health cess on shop rent under Mysore Health Cess Act (28 of 1962) does not fall within Item 1 of Sch. A of the Act or within Entry 51 of List 2 of Sch. VII — State of Mysore had no authority to levy or collect the same. AIR 1967 SC 1512 (1522, 1523) = (1967) 1 SCR 548 (Per Majority (Hidayatullah J. Contra); (1966) 1 Mys LJ 554, Reversed.)

(4) As chloral hydrate is a narcotic drug or a narcotic within the meaning of Entry 51 and is an intoxicating drug and narcotic substance within Section 2 (1) (iv) of A. P. (Telangana Area) Intoxicating Drugs Act (4 of 1333 F) (as amended by Hyderabad Act 22 of 1953), it could be notified under the amended Act and the A. P. (Telangana Area) Chloral Hydrate (Chloral) Rules (1962) which provide for the manufacture of chloral hydrate under a licence and for payment of excise duty on such manufacture could be validly framed. AIR 1966 SC 713 (717) = (1966) 2 SCR 110.

(5) The introduction of the Dangerous Drugs Act (1930) in the Part B State

of Hyderabad in 1950 did not result in complete effacement of the Andhra Pradesh (Telangana Area) Intoxicating Drugs Act (4 of 1333F). It remained alive even so far as opium, charas, bhang and ganja were concerned for the purpose of collection of duties of excise thereon. It also remained alive with respect to other substances which could be notified as intoxicating drugs under 1333F Act. AIR 1966 SC 713 (717) = (1966) 2 SCR 110.

(6) The Drugs Act (1940) which controls the manufacture, sale and distribution of drugs has nothing to do with duties of excise and with their imposition on narcotics and narcotic drugs. The fact that the Drugs Act was introduced in the Part B State of Hyderabad in 1951 would not, therefore, affect in any way that part of Andhra Pradesh (Telangana Area) Intoxicating Drugs Act (4 of 1333F) which dealt with collection of duties of excise and provided for licences in respect of any drugs which are narcotics or narcotic drugs. The 1333-F Act thus continued in existence and could be amended by Hyderabad Act 22 of 1953. AIR 1966 SC 713 (717) = (1966) 2 SCR 110.

(7) The excise duty, if any, imposed before the Constitution came into force by the Provincial Government on medicinal preparations containing alcohol is saved by Art. 277 of the Constitution and Section 29-A of the Bengal Excise Act (5 of 1909) as amended by the West Bengal Adaptation of Existing Laws Order. Accordingly, if any duty on medicinal preparations was lawfully leviable by the West Bengal Government before the Constitution came into force, it will continue to be leviable and any evasion of such duty will be punishable under the provisions of the Bengal Excise Act. ILR (1956) 2 Cal 22.

(8) The Bengal Excise Act (5 of 1909) and the Rules thereunder do not deal with international trade or inter-State trade. The Act and the Rules and the notifications thereunder even after the Constitution are covered by the State subjects in Sch. 7, List 2, Entries 8 and 51. AIR 1958 Cal 203 (207) = 62 Cal WN 278.

(9) The duty under the Punjab Excise Act (S. 3 (6-b)) is, under the Constitution confined to alcoholic liquors for human consumption under Entry 51. Denatured

52. Taxes on the entry of goods into a local area for consumption, use or sale therein.

[Government of India Act, 1935, Item 49.]

Schedule 7, List 2, Entry 51 — Note 1 (contd.)

spirit indisputably does not fall in this category and cannot constitutionally be subject to excise duty. (1967) 19 STC 389 = ILR (1967) 1 Punj 525 (DB).

(10) (Majority view, Hidayatullah J. dissenting)—The expression "countervailing duties" means a duty levied with a view to equalise the burden on alcoholic liquors imported from outside the State and the burden placed by excise duties on alcoholic liquors manufactured or produced in the State. It means that countervailing duties can only be levied if similar goods are actually produced or manufactured in the State on which excise duties are being levied. **AIR 1966 SC 1686 (1690) = (1966) 1 SCR 865.**

(11) Notification issued in 1937 under S. 27, Bihar and Orissa Excise Act (2 of 1915) imposing countervailing duty on foreign liquor imported into State — Later notification in 1961, enhancing the duty—**Held**, existence of countervailing duty was made dependent upon manufacture of foreign liquor in State — But the Act and previous notification being 'existing law' were saved by Arts. 305 and 372 and notification was valid — Later notification was not 'existing law' and must be struck down as invalid as it violated Arts. 301 and 304. **AIR 1966 SC 1686 (1690, 1691) = (1966) 1 SCR 865.** (Per Majority (Hidayatullah J. dissenting); ILR (1963) Cut 93 partly **Reversed**).

(12) Since the levy imposed by Rule 36 (23A) of the Punjab Liquor Licence Rules and condition No. 8 of the conditions of the licence is in respect of sale and not production of country liquor the same must be struck down as being ultra vires entry 51. 1967 Cur LJ 460 = ILR (1967) 2 Punj 757 (DB).

(13) In so far as incorporeal movable property is concerned, there might be difficulties in levying the appropriate tax under the entry, but that cannot control the definition of "goods" in Art. 366 (12). The word "goods" in that article has not been defined in an exhaustive manner so as to exclude incorporeal movable property. **AIR 1969 Mad 284 (291) = (1968) 1 Mad LJ 480 (DB).**

Schedule 7, List 2, Entry 52 — Note 1

(1) A State law imposing octroi duty on entry of goods in a municipal area in the public interest would be valid under Article 304 read with this entry. **AIR 1954 Raj 260 (262) = ILR (1954) 4 Rai 417 (DB).**

(2) The existence or non-existence of a provision or system of refunds is not an essential criterion of the tax under

this entry. **AIR 1947 FC 14 (17) = 1947 FCR 17 = ILR (1947) Kar (FC) 43.**

(3) Although the term 'octroi' is not used in the Constitution, the tax itself, which goes by that name, is covered by entry 52. **AIR 1967 Andh Pra 363 (365) = (1967) 1 Andh LT 4.** (Hyderabad District Municipalities Act (18 of 1956), Section 96 — Octroi tax under — Not restrictive of freedom of trade.)

(4) Entry 52 differs from Entry 54 in many respects. Under Entry 52 tax can be imposed on the entry of goods not only for sale, but also for consumption and use; while under Entry 54 only on sale or purchase. Entry 54 is not restricted to local areas. It can be imposed for areas or units similarly placed. (1969) All LJ 218 ** **AIR 1953 Mad 116 (127) = (1952) 2 Mad LJ 614 (DB).**

(5) The aim and object of entries 41 and 42 of List 1 is altogether different from that of Entry 52 of List 2. Taxation was intended to be included in those items which deal with general subjects. **AIR 1960 Andh Pra 234 (242) = ILR (1960) 1 Andh Pra 42 (DB).** (Hyderabad Municipal Corporation Act (2 of 1956) — Levy of octroi duty Act held within competence of State Legislature.)

(6) Octroi duty comes under List 2, Item 52 and is unconcerned with List 1, Item 83. **AIR 1960 Andh Pra 234 (241) = ILR (1960) 1 Andh Pra 42 (DB).**

(7) Under Section 11 of Madras Commercial Crops Markets Act (20 of 1933), the market committee is empowered to levy fees on the notified commercial crop or crops brought and sold in the notified area at such rates as it may determine and ordinarily they are to be paid by the purchaser of the commercial crop concerned. It is not, therefore, a tax on the entry of goods into a local area, within the meaning of Entry 52. **AIR 1959 Andh Pra 398 (401) = (1959) 1 Andh WR 285 (DB).**

(8) The levy of tax on refunds of octroi upon exportation of imported goods is illegal after 15-2-1950 when the Bombay Provincial Municipal Corporation Act (59 of 1949) came into force. Section 127 of the Act does not authorise the corporation to impose tax on refunds of octroi duty paid. Nor is it a tax which the State Legislature has power under the Constitution to impose. **AIR 1965 SC 555 (558) = (1964) 8 SCR 178.** (62 Bom LR 71, **Affirmed**.)

(9) A mere custom unrelated to anything else by which a village community makes collections in respect of goods brought for the sale within its limits or goods taken out of its limits for sale outside cannot be said to be valid. **AIR**

Schedule 7, List 2, Entry 52 — Note 1 (contd.)

1968 Mad 271 (274) = (1968) 1 Mad LJ 417. (Levy of tax by Panchayat under Section 58, Madras Village Panchayat Act (10 of 1950) on basis of custom -- Not valid.)

(10) Article 276 has no effect on Entry 52. AIR 1962 SC 562 (565) = (1961) 3 SCR 707.

(10-A) Section 126 of Calicut City Municipal Act is not ultra vires of the entry. AIR 1970 SC 264 (266) = (1969) 2 SCWR 206.

"Goods"

(11) In so far as incorporeal movable property is concerned, there might be difficulties in levying the appropriate tax under the entry but that cannot control the definition of "goods" in Article 366 (12). The word "goods" in that article is not defined in an exhaustive manner so as to exclude incorporeal movable property. AIR 1969 Mad 284 (291) = (1968) 1 Mad LJ 480 (DB).

Terminal tax and octroi tax

(12) The essential features of an octroi tax under this entry are (a) the entry of goods into a definite local area and (b) the goods should enter for the purposes of consumption, use or sale therein. But there is no limitation on the manner by which goods may be imported into a local area. AIR 1958 SC 341 (349, 350) ** AIR 1947 FC 14 (16) = 1947 FCR 17 = ILR (1947) Kar (FC) 43.

(13) The terminal tax and octroi tax are so distinct that they may be imposed simultaneously on the same goods. AIR 1958 SC 341 (349, 350) ** AIR 1947 FC 14 (16) = 1947 FCR 17 = ILR (1947) Kar (FC) 43.

(14) Terminal tax and octroi tax cannot be imposed on goods in transit which are only carried across the limits of a local area. AIR 1958 SC 341 (349, 350).

(15) Octroi and terminal taxes were different taxes though they resembled in one respect, namely, that they were leviable in respect of goods brought into a local area. While terminal taxes were leviable on goods 'imported or exported' from the Municipal limits denoting thereby that they were connected with traffic of goods, octroi were leviable in respect of goods brought into a Municipal area for consumption or use or sale. AIR 1963 SC 906 (910) = (1963) Supp (2) SCR 216 ** AIR 1967 Bom 413 (416) = 69 Bom LR 303 (DB).

Excise duty and octroi tax

(16) In the case of octroi duty or tax the levy is because the goods enter a particular area and in the case of excise duty the tax is on the manufacture of goods. AIR 1950 SC 11 (14) = 1950 SCR 15 ** AIR 1957 All 159 (172) (DB).

(17) The imposition of cess under Section 29(2), U. P. Sugar Factories Control Act (1 of 1938) (Since repealed) on the entry of sugarcane in a local area was a tax falling under this entry and not an excise duty and was valid. AIR 1942 All 156 (169) = 43 Cr L Jour 674 (2) = 1942 All LJ 112. (Overruled on another point in AIR 1961 SC 652.)

Local area

(18) Majority view (Ayyangar J. contra): The proper meaning to be attached to the words "local area" in Entry 52 (when the area is a part of the State imposing the law) is an area administered by a local body like a municipality, a district board, a local board, a union board or the like. The premises of a factory is not a local area. AIR 1961 SC 652 (658, 662) = (1961) 3 SCR 242. (U. P. Sugarcane Cess Act (22 of 1956), Section 3 — Section not within entry and is ultra vires — AIR 1942 All 156. Overruled; Writ Petn. No. 327 of 1956 D/- 29-10-1956 (All), Reversed.)

"Consumption, use or sale".

(19) The coupling of three words "consumption", "use" and "sale" connotes that the underlying common idea was that either the title of the owner is transferred to another or the thing or commodity ceases to exist in its original form. The onus that octroi is leviable upon the entry of wool brought by a person to his dyeing factory lies upon the notified area committee. The question has to be decided on evidence whether by the process of dyeing a new commodity is brought into existence. The question is one of fact and largely depends upon the intention of the person importing wool and his dealings therewith. AIR 1969 NSC 37 = 1969 Cur LJ 458.

(20) The goods must be regarded as having been brought in for purposes of consumption when a person brings them either for his own use or consumption, or to put them in the way of others in the area, who are to use and consume. In this process the act of sale is merely the means for putting the goods in the way of use or consumption. So, even though the word 'sale' was not used in Section 73 (1) (iv) of the Bombay Municipal Boroughs Act (18 of 1925) (as it stood before amendment by Bombay Act 35 of 1954), the sale by a person did not save him from liability to tax if he brought the goods into the local area for consumption or use. AIR 1963 SC 906 (912) = (1963) Supp 2 SCR 216.

(21) Word 'use' in the context of octroi does not only mean 'using up' or consumption. AIR 1969 Guj 344 (348) (DB).

53. Taxes on the consumption or sale of electricity.

[Government of India Act, 1935, Item 48B.]

^a[54. Taxes on the sale or purchase of goods other than newspapers, subject to the provisions of Entry 92A of List I.]

[a] Substituted for the original Entry 54 by the Constitution (Sixth Amendment) Act, 1956, S. 2 (11-9-1956).

OBJECTS AND REASONS

See under Art. 269.

Schedule 7, List 2, Entry 53 — Note 1

(1) The word "consumption" should be 'interpreted' in a broad way. A producer consuming electrical energy generated by him is also a consumer, that is to say, he is a person who consumes electrical energy supplied by himself. Such a person is liable to pay duty under Section 3, C. P. and Berar Electricity Duty Act (10 of 1949) (as amended by M. P. Act 7 of 1956). Such duty cannot be regarded as duty of excise falling within Entry 84 of List I. **AIR 1963 SC 414 (416) = 1962 Supp (1) SCR 282.** (AIR 1959 Madh Pra 365, Affirmed.)

(2) The entry confers powers on State Legislature to make laws for imposition of taxes on consumption or sale of electricity—But the laws will be operative in the territory of that State only — Punjab Electricity (Duty) Act (1958), Section 3 — Operation of Punjab Act cannot be extended to the territory of Himachal Pradesh — Mere fact that petitioners are employees of Punjab State Electricity Board is insufficient for establishing territorial nexus as levy is not pertaining to the connection of employment — Levy and collection of electricity duty, under Section 3 of Punjab Act on the petitioners, in Himachal Pradesh, being violative of Article 265, is illegal. **AIR 1966 Him Pra 59 (61).**

(3) The separate mention in Items 53 and 54 of List 2 cannot by itself justify a conclusion that the Constitution intended to draw any distinction between electricity and goods. **AIR 1970 Cal 75 (77) = 73 Cal WN 701.**

SCHEDULE 7, LIST 2, ENTRY 54 SYNOPSIS

1. Taxes on the sale or purchase of goods.
2. Excise duty and sales tax.
3. Provisions incidental to levy of sales tax.
4. Enactments held constitutional.
5. Enactments held unconstitutional.

1. Taxes on the sale or purchase of goods.— (1) This entry authorises the imposition of a tax only when there is a complete sale involving transfer of title and not when there is a mere agreement to sell. **AIR 1958 SC 909 (912) = 1959 SCR 427 ** AIR 1958 SC 682 (685) =**

1959 SCR 445 ** AIR 1958 SC 560 (577) = 1959 SCR 379 ** AIR 1953 SC 274 (276) = 1953 SCR 677 = 1953 Cri L Jour 1105 ** AIR 1958 SC 452 (458) = 1958 SCR 1355 = 37 Pat 27 ** AIR 1954 SC 459 (460, 461, 462) = 1955 SCR 243 = ILR (1955) 1 All 346 ** AIR 1958 Assam 169 (170) (FB) ** AIR 1968 SC 599 (602, 603) = (1968) 1 SCR 705.

(2) Entries must be given widest possible interpretation — Legislature is competent to enact provisions to check evasion of tax. **AIR 1968 SC 59 (64) = (1968) 1 SCR 148.**

(3) Explanation to Section 2 (12) of the Assam Sales Tax Act (14 of 1947) is within legislative competence. The Act only taxes completed sale, the Explanation only locates the sale and does not enlarge the meaning of the word 'sale', so as to tax transactions which are mere agreements to sell and not sales. **AIR 1960 Assam 116 (119) (DB).**

(4) Expression 'taxes on sales or purchase of goods' must be interpreted in broad sense. **AIR 1967 Mys 25 (28) = (1965) 1 Mys LJ 65 (DB).**

(5) Item 54 authorises the imposition of taxes on the sale and purchase of goods. (1955) 59 Cal WN 872 (876).

(6) The sales tax is a levy on the price of the goods and such a levy should not be made unless the stage has been reached when the seller can recover the price under the contract. **AIR 1954 SC 459 (460, 461, 462) = 1955 SCR 243 = ILR (1955) 1 All 346.**

(7) Having regard to the definition of 'sale', 'goods' and 'sale price' in the C. P. and Berar Sales Tax Act, the consideration is a part and parcel of sale of goods. In fact, the definition of turnover read in the light of the above definition shows that what is taxed is the amount of the sale price or part of sale price in respect of the sale or supply of goods and therefore the consideration is inseparably a part of the transaction which is sought to be taxed. **AIR 1960 Bom 470 (476) = 62 Bom LR 187 (DB).**

(8) Definition of sale cannot be enlarged so as to include within it forward contracts. **AIR 1954 SC 459 (460, 461, 462) = 1955 SCR 243 = ILR (1955) 1 All 346.**

(9) The definition of the term 'sale' in Section 2 (h) of the U. P. Sales Tax Act

Schedule 7, List 2, Entry 54 — Note 1 (contd.)

(15 of 1948) is ultra vires of the Provincial Legislature in so far as it includes transfer of property in goods for "other valuable consideration" also within its purview. AIR 1964 All 284 (287) = 1967 All LJ 506 = 19 STC 400 (DB).

(10) What under Entry No. 54 the State Legislature can tax are transactions which are in substance sales. It cannot by extending definition of sale include transactions which are not sales. (1965) 67 Bom LR 138 (163) = ILR (1965) Bom 458 (DB).

(11) The supply of goods, by a co-operative society to its members amounts to sale of goods within Section 2 (g) of Orissa Sales Tax Act (14 of 1947) and the society being a 'dealer' as defined in the Act is liable to be assessed to sales tax. (1968) 34 Cut LT 745 (758) = 22 STC 460 (DB).

(12) The expression 'taxes on the sale of goods' is very general and means taxes upon the event of sale of proceeds thereof, taken individually or collectively. It cannot be confined to a turnover tax on the gross sale proceeds only. AIR 1939 FC 1 (27) = 1939 FCR 18 = ILR (1939) Kar (FC) 6 ** AIR 1957 Andh Pra 297 (298) (DB) ** AIR 1952 Nag 378 (383) = ILR (1953) Nag 332 (DB).

(13) Expression 'sale of goods' in Entry 54 has same meaning as in Sale of Goods Act — Hire-purchase agreement is not 'sale' — Legislation by State legislature making agreement or transaction in which property does not pass from seller to buyer, a sale, is beyond legislative competence. AIR 1965 SC 1082 (1089) = (1965) 2 SCR 112. (AIR 1958 Mad 561, Reversed.)

(14) Consumption by owner of goods in which he deals is not a sale within the meaning of Sale of Goods Act and therefore it is not 'sale of goods' within the meaning of Entry 54. AIR 1964 SC 1037 (1039) = (1964) 1 SCR 481.

(15) Goods include 'standing trees' agreed to be severed before sale — Section 2 (d) of U. P. Sales Tax Act held valid. ILR (1964) 2 All 506.

(16) In a building contract which is entire and indivisible there is no sale of goods, and it is not within the competence of the State Legislature under this entry to impose a tax on the supply of materials used in such contract treating it as a sale. AIR 1958 SC 909 (912) = 1959 SCR 427 ** AIR 1958 SC 560 (577) = 1959 SCR 379 ** AIR 1958 Assam 169 (170) (FB) ** AIR 1957 Cal 283 (292, 293) ** AIR 1956 Hyd 79 (86, 87) = ILR (1956) Hyd 162 (DB).

(17) There might be contracts which might consist of two distinct agreements, one for the sale of materials and another for work and labour, and in such a case, it would be competent to the State to

impose tax on the sale of materials even construing that word in its narrow sense. AIR 1958 SC 909 (912) = 1959 SCR 427 ** AIR 1958 Assam 169 (170, 171) (FB).

(18) The sales-tax is a tax on a transaction of sale and not a tax on trade and the fact that the incidence of the tax is laid on the purchaser does not render it other than a tax upon a transaction of sale. AIR 1957 Andh Pra 297 (298) (DB) ** AIR 1957 Assam 61 (63, 64) (DB) ** AIR 1957 Mad 301 (304) (DB).

(19) It is not an essential feature of a tax on the sale of goods that the burden thereof must be capable of being passed on to the consumer. AIR 1958 SC 452 (462, 463) = 1958 SCR 1355 = 37 Pat 27 ** AIR 1958 All 478 (481) (FB) ** AIR 1957 All 475 (481) (FB) ** AIR 1958 All 478 (481) = 1958 All LJ 228 (FB).

(20) A sales tax can be imposed with retrospective effect. AIR 1958 SC 452 (462, 463) = 1958 SCR 1355 = 37 Pat 57 ** AIR 1957 All 475 (481) (FB) ** AIR 1961 SC 1534 (1538, 1539, 1540, 1541) = (1962) 2 SCR 1 ** AIR 1958 Andh Pra 558 (562) = (1958) 2 Andh WR 100 (DB).

(21) Where a registered dealer collects a certain amount by way of tax from the purchaser vis-a-vis the dealer, it is in reality a part of the price which the purchaser has to pay for purchasing the goods and a tax on such payment is within the ambit of this entry. AIR 1956 Mad 298 (300) = ILR (1956) Mad 1123 (DB).

(22) The amended definition of dealer under Section 2 (c) Bihar Sales Tax Act (19 of 1947) (Amended by Bihar Finance Act 1950) means any person who sells or supplies any goods in connection with his business. Any casual sale of another kind will not make the seller a 'dealer'. 1966 BLJR 438 (442) = 21 STC 454 (DB).

(23-24) This entry does not entitle the State Legislature to tax a broker who may have assisted at a sale but has not sold the goods either as principal or agent. AIR 1957 Nag 61 (62) (DB).

(25) A law which is in pith and substance a law imposing taxation on sale of goods cannot be held to be invalid if it incidentally trenches upon Entry 7 in the Concurrent List. AIR 1953 Pat 87 (91) = 32 Pat 19 (DB).

(26) If an Act is within the purview of this entry, then no question of repugnancy under Article 254, on the ground that the definition of 'sale' in the Act is in conflict with the definition in the sale of goods Act, can arise. AIR 1958 SC 560 (575) = 1959 SCR 379.

(27) Where the levy is really a sales tax it is not invalid merely because it is labelled as 'fee'. AIR 1954 Mad 621 (634) (DB).

(28) The right to tax sales is given to the States under this entry and, there-

Schedule 7, List 2, Entry 54 — Note 1 (contd.)

fore, the Centre cannot prevent them from taxing sales that are otherwise taxable either by a Central Act or by rules made under it. **AIR 1958 SC 1002 (1004).**

(29) Mysore Sales Tax Act (25 of 1957) (as amended by Acts 9 and 31 of 1958), Section 8 (2), Schedule V, Item 31-B—Inclusion of Item 31-B in Schedule V taking out sugar-candy from category of sugar by Mysore Sales Tax Amendment Act 31 of 1958 is valid — Still, sugar-candy is exempt from sales tax under Section 8 (2). (1963) Mys LJ 118 = (1963) 14 STC 214 (DB).

(30) The Madras General Sales Tax Act (9 of 1939) falls squarely within Item 54 of List II. Section 16-A of the Act is within the competence of the legislature. **AIR 1958 Mad 544 (551, 552) = 1958 Cri LJ 1413 = (1958) 2 Mad LJ 243 (FB).** (AIR 1937 Mad 291; AIR 1947 Mad 321; AIR 1947 Mad 397 and AIR 1954 Mad 833, Overruled.)

(31) Assuming animals and birds in captivity are not moveable property and therefore not goods within Section 366 (12) of the Constitution — Sale of them will not fall within Entry 54 but within Entry 97 of List I. **AIR 1960 Ker 360 (360) = 1960 Ker LT 538.**

(32) Sales effected between 11th September 1956 and 4th January, 1957 in which goods moved from outside into Mysore State were inter-State sales as understood in its ordinary natural sense unaided by any other statutory provision — State of Mysore had no power to tax such sales in view of Article 269 (1) (g) read with Schedule 7, List I, Item 92-A and List II, Item 54. **AIR 1967 SC 585 (587) = (1963) 14 STC 416.**

(33) Sales Tax — Taxing authorities have power to select commodities for taxation — Discrimination to be shown before the Act can be struck down. **1968 All LJ 802 (DB).**

(34) As tax on sale of goods is a matter entirely within Entry 54 of the State List the amendment made in the definition of the word 'dealer' in Section 2 (c) of Bihar Sales Tax Act (19 of 1947) by the Bihar Finance Act (17 of 1950) did not require the assent of the President. **AIR 1962 SC 660 (663) = 1962 Supp (1) SCR 498.**

(35) Imposition of interest on arrears of sales tax — Validity — Though Schedule VII, List II, Entry 54 of Constitution does not refer to interest, power to charge interest on arrears is incidental to power to impose sales tax. **1968 All LJ 970 = 23 STC 423 (DB).**

(36) Sale of iron and steel products in pursuance of orders of controller — Transactions constitute sale — Levy of Sales Tax on such sales not outside

powers of State Legislature. **AIR 1968 SC 478 (480, 483, 484, 485) = (1968) 1 SCR 479.**

(37) Sale to be assessed must be sale of goods as contemplated by Sale of Goods Act, 1930 — Assessee company manufacturing and distributing iron and steel products — Production and distribution regulated and controlled under Iron and Steel (Control of Production and Distribution) Order, 1941 — Sales by assessee not voluntary — Assessee held not liable to pay sales tax. (1964) 68 Cal WN 998 (1006).

(38) Validity — Tax imposed under the U. P. Sugar-cane (Purchase) Tax Act comes under Entry No. 54, List II of Schedule VII of Constitution — Act was within competence of State Legislature and is valid. **1969 All LJ 218.**

(39) The authority to levy sales tax on motor spirit is given to the States by this entry and enacting a law for imposing sales tax on petroleum and petroleum goods the State legislature does not transgress on the domain allotted to the Centre. **AIR 1959 Andh Pra 225 (230) = (1959) 1 Andh WR 331 (DB).**

(40) Impost under Section 11 of Madras Commercial Crops Markets Act (20 of 1933) is not a tax falling under Entries 52, 54 and 60 of List 2 of the Constitution. **AIR 1959 Andh Pra 398 (401) = (1959) 1 Andh WR 285 (DB).**

(41) Transaction lacking element of transfer of property — Legislature incompetent to make it 'sale' by deeming clause in taxing statute. **AIR 1968 SC 838 (840, 841) = (1968) 2 SCR 421.**

(42) Bihar sales tax (Definition of Turnover and Validation of Assessment) Act (13 of 1958) is a legislation which falls within Entry 54. The tax imposed is a tax on sale of goods and the identity or character of the tax is not changed. **AIR 1959 Pat 551 (554) = (1959) 10 STC 110 (DB).**

(43) Inter-State sale — The provision of Article 286 (1) (a) is only in the way of restriction or fetter on the legislative power of taxation — The affirmative grant of power is contained in Article 246 (3) and in Entry 54. **AIR 1957 Pat 288 (292) = 1957 BLJR 631 (DB).**

(44) Orissa Sales Tax Act (14 of 1947) — Newspaper exempted from sales tax — Monthly Law Journal publishing verbatim decisions of Courts is not a newspaper — Registration of journal as newspaper or purposes of Post Office Act and Press and Registration of Books Act does not make it a newspaper. **AIR 1960 Orissa 221 (223) = 26 Cut LT 446 (DB).**

(45) Cotton fabrics declared goods of special importance — Imposition of sales-tax under Section 5 (1) of Bengal Act 8 of 1941, in excess of 2 per cent. laid down in Section 15 of Central Act, was ultra vires, till the time the former sec-

Schedule 7, List 2, Entry 54 — Note 1 (contd.)

tion was amended to conform with latter section. AIR 1965 Cal 203 (206).

(46) Surcharge contemplated by Act is really enhancement of sales-tax in certain circumstances and is tax on aggregate of sales effected by dealer during year — Same is justified by Entry 54 — Same cannot be construed as tax on sale tax itself. 1966 Ker LT 809 (811) = 1966 Ker LJ 958.

(47) Transaction between hotelier and resident customer — Hotelier making consolidated charge for residence, services and supply of food — No rebate allowed if food is not taken — Held, on facts that transaction was indivisible contract of multiple service and did not involve any sale of food — Authorities not empowered to split up composite contract so as to make out an agreement of sale, where non-existed — Such splitting up is beyond Entry 54. AIR 1966 Punj 449 (457, 458) = 68 Pun LR 319.

(48) A taxing statute covered by Item 54 cannot be challenged on the grounds of its contravening rules of estoppel or of contracts or being contrary to an earlier undertaking of another Act. AIR 1961 Ker 36 (38) = 1960 Ker LT 1037 (DB).

(49) Co-operative Society supplying refreshments to members for price — Property in refreshments with society — Transaction amounts to sale — Turnover is taxable. AIR 1968 SC 838 (841). (AIR 1964 Mad 63, Overruled.)

(50) The effect of the Explanation to Article 286 (1) is to remove the limitation imposed by Articles 245 and 286 (1) on the power of a State to enact extra-territorial legislation and permit the State to levy sales-tax on an extra-State sale, provided goods thereunder are delivered within State. AIR 1953 Mad 116 (127) = (1952) 2 Mad LJ 614 (DB).

(51) Section 17 of Bengal Finance (Sales Tax) Act (6 of 1941) as amended by Bengal Act (14 of 1954) is not a law with respect to Entry 88 of Union list — It falls within purview of Entry 54 State List — State competent to enact section. AIR 1963 Cal 578 (580) = 67 Cal WN 510 (DB).

(52) It is not correct to draw any distinction between the normal power of legislation by Parliament with respect to matters in the Union list and the power conferred by the opening words of Article 286 (2). Both are legislative powers. Hence Parliament in enacting Sales Tax Validation Act (1956) did not transgress power conferred by Article 286 (2). AIR 1957 Mad 368 (371, 372) = (1967) 2 Mad LJ 167 (DB).

(53) Word 'goods' includes electricity. AIR 1970 Cal 75 (77) = 73 Cal WN 701.

2. Excise duty and sales tax. — (1) In the case of a sales-tax the liability to pay taxes arises on the transaction of a sale, but in the case of an excise duty the liability arises in respect of the manufacture or production of the commodity taxed. AIR 1958 SC 452 (459) = 1958 SCR 1355 = 37 Pat 27 ** AIR 1945 PC 98 (101) = 72 Ind App 91 = ILR (1945) Kar (PC) 153 = 1945 FCR 179.

(2) A tax levied on the first sale of goods must in the nature of things be a tax on the sale by the manufacturer or producer. It is levied upon him qua seller and not qua manufacturer or producer. AIR 1958 SC 452 (459) = 1958 SCR 1355 = 37 Pat 27 ** AIR 1945 PC 98 (101) = 72 Ind App 91 = 1945 FCR 179 = ILR (1945) Kar (PC) 153 Sup ** AIR 1957 Mad 325 (329) = ILR (1957) Mad 493 (DB).

(3) Excise duty on tobacco — Recovery from person storing tobacco in his licensed warehouse is valid. 1962 (2) Cri LJ 407 (408) (All).

(4) 'Litre fee' imposed under Act 5 of 1901 on sale of country beer in bar, though named as fee, is special tax falling under Entry 54 — Act V of 1901 is not repealed by Act XXV of 1957 and litre fee is not inconsistent with tax imposed on first sale of country beer under Act 25 of 1957. (1966) 2 Mys LJ 190 (198) = 7 Law Rep 447 (DB).

(5) It cannot be held that by the imposition of an additional excise duty on tobacco, Act 58 of 1957 took away the power of the States under Entry 54 to levy sales tax on the intra-State sale of tobacco. AIR 1965 Cal 498 (506).

(6) No tax could be levied on the declared goods such as tobacco under Bengal Act of 1941 until Section 5 (1) of that Act was amended with effect from 28-10-59 so as to incorporate the ceiling of two per cent as required by the Central Sales Tax Act read with Act 58 of 1957. AIR 1965 Cal 498 (504).

(7) Sale of goods — Works contract — Materials used need not get transformed — Contract for pressing and packing cotton — Packing is integral part of pressing — Sale of packing material cannot be implied — Packing materials used not liable for sales tax. AIR 1970 Raj 1 (11) = 1969 Raj LW 350 (DB).

3. Provisions incidental to levy of sales-tax — (1) The power to levy a tax extends to the enactment of all incidental provisions for ensuring the collection or preventing the evasion of the tax. AIR 1958 Mad 158 (169) = ILR (1958) Mad 35 (DB).

(2) The provisional assessment levied is merely a machinery employed for securing to the State the tax due and

Schedule 7, List 2, Entry 54 — Note 3 (contd.)

payable to it and cannot be termed a tax on an anticipated sale. AIR 1957 Mad 325 (330) = ILR (1957) Mad 493 (DB).

(3) The power to validate illegal assessments made by executive authorities is incidental to the power to levy the tax. AIR 1956 Mad 298 (300) = ILR (1956) Mad 1123 (DB).

(4) Legislature can prescribe what acts or conduct would be regarded as offences in relation to taxes on the sale or purchase of goods. AIR 1958 Mad 544 (551) = ILR (1958) Mad 750 = 1958 Cri L Jour 1413 (FB). (Section 16-A, Madras General Sales Tax Act (9 of 1939) held was within competence of Legislature.)

(5) Power to confiscate goods under Section 42 (3) of Madras General Sales Tax Act (1 of 1959) is not ancillary or incidental to power to check evasion of tax on sale or purchase of goods. AIR 1970 Mad 25 (27) = (1969) 2 Mad LJ 144 (DB). (1968-2 Mad LJ 112, **Reversed**.)

(6) Provisions for confiscation under Section 28 (6) of Andhra Pradesh General Sales Tax Act (6 of 1957) are not ultra vires of the State Legislature. (1967) 2 Andh WR 71 = 19 STC 506.

4. Enactments held constitutional.—

(1) Orissa Sales Tax Act (1947) as amended by Act (28 of 1958), Section 14-A — Amendment is not beyond legislative competence nor does it contravene Article 19 (1) (f) of the Constitution. AIR 1961 SC 1438 (1439, 1440) = (1962) 1 SCR 549.

(2) Section 14, Orissa Sales Tax Act (14 of 1947) was not ultra vires. AIR 1962 SC 1320 (1322) = (1962) Supp (1) SCR 242.

(3) Madras General Sales (Definition of Turnover and Validation of Assessments) Act (17 of 1954), Sections 2 and 3 — Act is not constitutionally invalid. AIR 1962 SC 1037 (1043) = (1962) 2 SCR 570.

(4) Imposition of Sales Tax on goods — Provisions of sections inserted by Andhra Pradesh General Sales Tax (Amendment) Act (16 of 1963) and R. 45 (A) are not ultra vires the powers of State Legislature. (1968) 21 STC 291 (Andh Pra) (DB).

(5) A. P. General Sales Tax Act (6 of 1957), Section 2 (1) (n), Expl. III — Not ultra vires of powers of State Legislature. AIR 1968 SC 784 (787) = (1968) 2 SCR 476.

(6) Bihar Sales Tax Act (9 of 1959), Section 20-A — Dealer has no right to challenge validity of Section 20-A of Bihar Sales Tax Act (9 of 1959) on ground of violation of Article 19 (1) (f) of the Constitution — Section 20-A is valid and intra vires the State legisla-

ture. AIR 1966 Pat 54 (59) = 1965 BLJR 431 (DB).

(7) Section 52 (1) of Assam Sales Tax Act (17 of 1947) is not invalid. AIR 1959 Assam 216 (219) = (1960) 11 STC 125 (DB).

(8) Amendment of Court-fees Act (1870) by addition of Article 11 (c) in Schedule II has no effect of repealing Rule 74, Assam Sales Tax Rules (1947) by implication. AIR 1959 Assam 216 (220) = (1960) 11 STC 125 (DB).

(9) Imposition of Sales-Tax under Section 19 of Mysore Sales Tax Act (25 of 1957) on sale of arrack and special liquor by Government to licensee is valid. (1965) 6 LR 641.

(10) T. C. Sales Tax Act (1125), Sections 2 (j); 2 (k) and Rules 7 (1) (k) and 20 (2) — Do not contravene Article 303 (1). AIR 1955 Trav-Co 126 (129) = 1955 Ker LT 95 (DB).

(11) The power conferred upon State Government under Section 3-D of U. P. Sales Tax Act (15 of 1948), to select the goods to be subjected to purchase tax and the rates at which they are to be taxed does not amount to unconstitutional delegation of legislative power — Section does not infringe Article 14. (1966) 18 STC 204 (All).

(12) Constitution of India, Schedule 7, List 2, Entry 54 does contemplate that State Legislature is competent to enact law imposing tax on department of State Government — Section 2 (c) of U. P. Sales Tax Act held valid. ILR (1964) 2 All 506.

(13) Scope — Section 11 (1) of Madras Com. Crops Market Act (1913) as amended in 1955 is not colourable legislation and is valid. AIR 1960 Mad 160 (163) = (1960) 1 Mad LJ 298.

(14) Levy of Sales Tax on incorporeal moveable property like copyright is not ultra vires Article 366 (12) — Section 2 (j) and (n) of Madras General Sales Tax Act (1 of 1959) is constitutional. AIR 1969 Mad 284 (291) = (1968) 1 Mad LJ 480 (DB).

5. Enactments held unconstitutional.—

(1) Hyderabad General Sales Tax Act (14 of 1940), Sections 11 (2), 20 (c) — Provides for recovery of amounts collected as tax though not eligible as tax under the Act — Provision not covered by Entry 54 nor justified as ancillary provision — Section 11 (2) and Section 20 (c) held ultra vires the State Legislature. AIR 1964 SC 922 (923 to 925) = (1964) 6 SCR 867. (AIR 1960 Andh Pra 395, **Reversed**; AIR 1963 Mad 116, **Overruled**.)

(2) Section 8-A (4) of the U. P. Sales Tax Act, 1948, is ultra vires. AIR 1968 All 193 (195, 196).

(3) Bombay Sales Tax Act (5 of 1946), Section 12-A (4) is violative of Article 19 (1) (f) of the Constitution and is void.

55. Taxes on advertisements other than advertisements published in the newspapers.

56. Taxes on goods and passengers carried by road or on inland waterways.
[Government of India Act, 1935, Item 52.]

Schedule 7, List 2, Entry 54 — Note 5 (contd.)

AIR 1968 SC 445 (448) = (1968) 1 SCR 735.

(4) Liability of dealer to pay illegal collection of tax to Government — Section 5 (c) of Andhra Pradesh General Sales Tax Act (6 of 1957) as amended by Act (16 of 1963) is ultra vires the State Legislature. (1968) 22 STC 222 (Andh Pra).

(5) Explanation 1 to Section 2 (n) of M. P. General Sales Tax Act (2 of 1959) is ultra vires as it attempts to enlarge the definition of 'sale' by bringing within its scope hire-purchase transactions. AIR 1964 Madh Pra 242 (246) = 1967 MPLJ 799 (DB).

(6) Amendment in 1964 of Section 18 (3) of Mysore Sales Tax Act (25 of 1957) converting into tax what is not a really tax, is unconstitutional. AIR 1965 Mys 120 (121) = (1965) 16 STC 450 (DB).

(7) Section 22, Mysore Sales Tax Act (46 of 1948) is not ultra vires of Article 14 of Constitution. AIR 1958 Mys 143 (147) = 1958 Cri LJ 1327 = 1958 Kant LJ 1 (DB).

(8) Explanation (1) to Section 2 (g) of the W. B. Sales Tax Act (as extended to Delhi) is unconstitutional inasmuch as it seeks to bring within the meaning of the word 'sale' hire purchase agreements with an option to purchase to the hirer, which are not sales within the word as used in Entry 48 of List 2, Government of India Act, 1935. AIR 1956 Punj 177 (181) = 58 Pun LR 399 (DB).

(9) Section 26 (3), Bombay Sales Tax Act (3 of 1953) is ultra vires the State Legislature in so far as it purported to tax allotment of goods of a firm amongst partners on dissolution. AIR 1965 Guj 60 (69) = (1965) 16 STC 329 (DB).

Schedule 7, List 2, Entry 55 — Note 1

(1) Section 126, Kerala Municipalities Act (14 of 1961) which authorises the Municipality to levy tax on advertisements is perfectly valid. AIR 1965 Ker 237 (238) = 1965 Ker LT 288.

**SCHEDULE 7, LIST 2, ENTRY 56
SYNOPSIS**

1. Scope.
2. Taxes on goods and passengers.
3. "Carried."
4. "Roads or inland waterways."

1. Scope. — (1) This entry and Entry 89 of the Union List distribute the field of taxation between the Union and the States with respect to taxes on goods and passengers carried by the different modes of transport. AIR 1955 Assam 249 (262) (SB).

(2) The words of this entry have to be given their full effect and have to be construed in a natural and liberal sense. But at the same time they have not to be so construed as to destroy the very significance of the context in which they appear. AIR 1955 Assam 249 (256) (SB).

2. Taxes on goods and passengers. —

(1) The term "goods" would mean trade goods or goods of a commercial character and would not include in its ambit luggage and personal effects. AIR 1955 Assam 249 (260) (SB).

(2) The entry is an enabling one and empowers the Legislature to tax goods and passengers either individually or collectively. The use of the word "and" between the two objects does not mean that the tax cannot be levied on one to the exclusion of the other. AIR 1955 Assam 249 (256) (SB).

(3) The nature or the quality of the tax would not depend on what measure is adopted for fixing the amount payable in each case — It may be the distance travelled or the weight as the measure for purposes of taxation. AIR 1955 Assam 249 (273) (SB).

(4) The fact that the tax is to be measured in proportion to the fares and freight realised does not alter the nature of the tax upon the goods and passengers or affect its intrinsic character. AIR 1952 Pat 359 (364) = 31 Pat 493 (SB) **AIR 1945 PC 98 (101) = 72 Ind App 91 = ILR (1945) Kar (PC) 153 = 1945 FCR 179.

(5) The mere fact that the State has decided to charge a heavy tax when it easily could have charged a lighter one would not detract from the validity of the tax. AIR 1954 Punj 264 (267) = ILR (1955) Punj 58 (DB).

(6) Taxation under this entry is of the indirect variety. It ultimately falls on the consumer. The tax can be collected through the carrier or the producer and the manufacturer. AIR 1955 Assam 249 (262) (SB).

(7) The tax levied by the Assam Taxation (On Goods Carried by Roads or Inland Waterways) Act (13 of 1954) is a tax on the transportation of goods and not in the nature of excise duty. There is, therefore, no encroachment on Entry 84 of List 1 and the Act is not ultra vires on that ground. AIR 1955 Assam 249 (255) (SB).

(8) Where the pith and substance of the Assam Act 10 of 1961 is the levy of a tax on tea which is carried in the State of Assam, the right to levy such a

Schedule 7, List 2, Entry 56 — Note 2 (contd.)

tax cannot be said to have been taken away merely by the fact that a Tea Act had been passed by the Central Legislature which is referable to the relevant Entry in List 1 of Schedule 7. The power to levy a tax which has been conferred on the State Legislature by Entry 56 cannot, therefore, be said to be controlled by the Tea Act in question. There is, therefore, no substance in the argument that the State Legislature has no power to levy a tax on tea which is carried over a part of the area of the State of Assam, because one of the objects taxed under the Assam Act has been covered by the Central Tea Act of 1953. **AIR 1964 SC 925 (943) = (1964) 5 SCR 975.**

(9) A tax on motor vehicles entering or leaving the limits of a municipality is not a tax on passengers carried by road within the meaning of this entry though the amount of the tax is to be calculated with reference to the number of passengers. **AIR 1958 All 430 (431) (DB).**

(10) Power of Municipality to levy toll tax is limited to cases covered by Section 128 (1) (vii), U. P. Municipalities Act (2 of 1916) — Municipality cannot levy toll tax on passengers under its delegated authority either under Section 128 (1) (vii) or (xiv). **1968 All WR (HC) 438 = 1968 All Cri R 275.**

(11) Power to levy toll on vehicles limited by Section 128 (1) (vii) and cannot be extended by resort to residuary clause (Section 128 (1) (xiv)). **AIR 1966 SC 1502 (1506) = (1966) 2 SCR 891.**

(12) Instances of Acts falling under this entry, are:

(a) Asam Taxation (On Goods Carried by Roads or Inland Waterways) Act, 13 of 1954. **AIR 1955 Assam 249 (258) (SB).**

(b) Part III of the Bihar Finance Act, 17 of 1950. **AIR 1952 Pat 359 (364) = 31 Pat 493 (SB).**

(c) Punjab Passengers and Goods Taxation Act, 16 of 1952. **57 Pun LR 304 (306) (DB).**

(d) Madras Motor Vehicles (Taxation of Passengers and Goods) Act (XVI of 1952). **AIR 1954 Mad 569 (572) = ILR (1954) Mad 867 (DB).**

(e) Punjab Passengers and Goods Taxation Act (16 of 1952). **AIR 1954 Punj 264 (267) = ILR (1955) Punj 58 (DB).**

(f) Punjab District Boards Act (20 of 1883). **AIR 1962 Punj 350 (353) = 64 Pun LR 342 (FB).**

(g) Bihar Taxation on Passengers and Goods (Carried by Public Service Motor Vehicles) Act (Bihar Act 17 of 1961), S. 3. **AIR 1963 SC 1667 (1674, 1675) = (1964) 1 SCR 897.** [Act is retrospective.]

(h) Kerala Motor Vehicles (Taxation on Passengers and Goods) Act (25 of 1963) is within the competence of State Legislature. **AIR 1969 Ker 130 (136) = ILR (1968) 2 Ker 153 (DB).**

(i) Rajasthan Passengers and Goods Taxation Act (18 of 1959) — Tax levied by Act is tax on passengers and goods and not on income or on fares and freights — It is not ultra vires. **AIR 1961 SC 1480 (1484, 1485) = (1962) 1 SCR 517.**

(j) Mysore Motor Vehicles (Taxation on Passengers and Goods) Act (10 of 1961). **AIR 1963 Mys 49 (58) = 1963 Mys LJ (Sup) 31 (DB).**

(13) The nature of the tax as defined by the entry is wholly different and the mere imposition of such tax does not amount to interference with the freedom of trade and commerce given by Art. 301 of the Constitution. **AIR 1955 Assam 249 (253, 254) (SB).**

(14) Power given to Legislature to levy taxes on goods and passengers — It is competent for Legislature to devise machinery for recovery of said taxes. **AIR 1963 SC 1667 (1672, 1673) = (1964) 1 SCR 897.**

(15) Terminal tax on export and import of articles under Section 66 (1) (o) of C. P. and Berar Municipalities Act (2 of 1922) — Tax did not fall within this entry. **AIR 1967 Bom 413 (415, 416) = 69 Bom LR 303 (DB).**

(16) Andhra Pradesh Motor Vehicles (Taxation on Passengers and Goods) (Amendment and Validation) Act (34 of 1961), Section 8 — Section 8 is not beyond competence of State Legislature as it validates only the Act which was declared invalid on ground of violation of constitutional provisions and not on ground of lack of legislative competence. **ILR (1964) Andh Pra 1338 (DB).**

3. "Carried". — (1) All that the entry requires is that the goods should be carried by road or inland waterways. It makes no mention of the agency through which goods are carried. **AIR 1955 Assam 249 (260) (SB).**

(2) Goods carried in State only for short distance — Does not render tax under Section 3 Assam Taxation (on Goods Carried by Roads or on Inland Waterways) Act (10 of 1961) invalid on ground of extra territoriality. **AIR 1964 SC 925 (942) = (1964) 5 SCR 975.**

(3) Carried — Meaning of — Goods carried not joining mass of goods — Tax levied under Assam Act 10 of 1961 held not invalid. **AIR 1964 SC 925 (942, 943) = (1964) 5 SCR 975.**

4. "Roads or inland waterways". — (1) The word "roads" refers to public roads as used for traffic, both vehicular and pedestrian, as of right and inland waterways must evidently refer to water-

57. Taxes on vehicles, whether mechanically propelled or not, suitable for use of roads, including tramcars subject to the provisions of Entry 35 of List III.

[Government of India Act, 1935, Item 48A.]

58. Taxes on animals and boats.

[Government of India Act, 1935, Item 47.]

59. Tolls.

[Government of India Act, 1935, Item 53.]

Schedule 7, List 2, Entry 56 — Note 4 (contd.)

ways which are used for navigation by public boats or crafts. AIR 1955 Assam 249 (256) (SB).

Schedule 7, List 2, Entry 57 — Note 1

(1) An Act which in no way interferes with the freedom of trade, commerce and intercourse within the State and which is only a fiscal measure falling under this entry does not require for its validity and Presidential sanction under the Proviso to cl. (b) of Art. 304. AIR 1958 Ker 52 (53) = 1958 Cri L Jour 380 (DB). (T. C. Vehicles Taxation Act (14 or 190).)

(2) Assam Motor Vehicles Taxation (Amendment) Acts (XV of 1963) and (XII of 1966) are not unconstitutional under Art. 254 (2). AIR 1967 SC 1575 (1577) = (1967) 3 SCR 611. (ILR (1966) 18 Assam 494 (DB), **Reversed.**)

(3) Motor Vehicles Rules (1940), Rule 160-C — Validity of Rule 160-C, Madras Motor Vehicles Rules (1940) under Section 5 Madras Motor Vehicles Taxation Act (3 of 1931) — Does not encroach upon field of State Legislature. AIR 1956 Andh Pra 129 (139) = 1956 Andh WR 142 (DB).

(4) M. P. Motor Vehicles Taxation (Amendment) Act (15 of 1965) falls under Entry 57 of List 2 and not Entry 35, List 3 and is not ultra vires for want of assent of the President. AIR 1966 Madh Pra 131 (133) = 1966 MPLJ 229 (DB).

(5) Travancore-Cochin Vehicles Taxation Act (14 of 1950) is not a legislation dealing with respect to trade or commerce but enacted by virtue of powers conferred on State Legislature under Entry 57. AIR 1958 Ker 398 (398, 399) = 1958 Ker LT 631 (DB) ** AIR 1960 Ker 58 (63) = 1959 Ker LT 829 (DB). (Act not hit by proviso to Art. 304.)

Schedule 7, List 2, Entry 59 — Note 1

(1) A toll is a payment taken in return for some benefit and it is not necessary to collect it at the very moment when the person from whom it is collected commences to enjoy the benefit. It can be collected even when the person is about to leave after enjoying the benefit. The only limitation that lies on the power to collect tolls is that they cannot be collected twice

for the same benefit. Therefore where a municipality imposes toll tax on motor vehicles entering or leaving the municipal limits with passengers the levy cannot be condemned on the ground that it was ultra vires the powers of the municipality to collect tolls from vehicles going out of municipal limits. AIR 1958 All 430 (432) (DB).

(2) Consideration for imposition — Specific advantage from every toll levied not necessary — Factory connected with main railway line by its own side line for carrying materials — Enjoyment of amenities provided by Municipality is sufficient consideration — Imposition of tolls on wagons held valid under Section 128, U. P. Municipalities Act (2 of 1916). AIR 1962 All 25 (42) = 1960 All LJ 651 (DB).

(3) Continuance in force of existing laws — Cantonments Act (1924), S. 60 — Section was a law in force at the time of commencement of Constitution and is saved by Article 372 — Power to impose tolls given to State Legislature under Item 59, List 2, Sch. VII of Constitution — Mere fact that Central Legislature cannot now impose tolls cannot have the effect of depriving Cantonment Boards of the power to impose tolls which had been conferred by valid enactment. AIR 1967 All 15 (19).

(4) Entries 59 and 66 give power to State Legislature to legislate on tolls and fees respectively and hence it cannot be said there is no legislative competence to enact Section 140 of the Assam Municipal Act (1 of 1923). AIR 1958 Assam 156 (159) (DB).

(5) Toll imposed by Municipal Committee on vehicles entering its Municipal limits under Sec. 61 (2), Punjab Municipal Act (8 of 1911) covered by the term "toll" — "Stand tax" already being charged for parking vehicles at stand — No double taxation — Toll being on vehicles and not on goods, no infringement of Art. 301 — Toll imposed not unconstitutional. AIR 1964 Punj 506 (507, 508) = 66 Punj LR 934.

(6) Hardwar Municipality — Imposition of toll on motor vehicles, tongas and rickshaws entering or leaving municipal limits at four annas per passenger — No power in Board to levy toll on vehicle leaving municipal limits — Power to levy toll limited by Section 128 (1) (vii) cannot be extended by

60. Taxes on professions, trades, callings and employments.

[Government of India Act, 1935 — Item 46.]

Schedule 7, List 2, Entry 59 — Note 1 (contd.)

resort to residuary clause (xiv).
AIR 1966 SC 1502 (1506) = (1966) 2 SCR 891 ** 1968 All WR (HC) 438.

(7) No conflict between List 1. Entry 23 and List 2. Entry 59. **AIR 1969 J & K 113 (116) (FB).**

**SCHEDULE 7, LIST 2, ENTRY 60
 SYNOPSIS**

1. Scope of the entry.**2. Acts falling or not falling within this Entry.**

1. Scope of the entry. — (1) An obvious distinction exists between a tax on trades, callings or professions and a tax on income arising from a trade, calling or profession. A tax, by whatever name it may be known, if it is based on the income derived from a trade, calling or profession, can be questioned on the ground that it being an income tax could not be imposed by the State Government. It is to save such a tax that Art. 276 appears to have been enacted. **AIR 1957 All 433 (436) (DB).**

(2) There is nothing unconstitutional in the requirement of the taking out of a licence for a trade, for the requirement is only a mechanism or device for the collection of the tax and is not consequently hit by Art. 19 (1) (g). **AIR 1957 Pat 386 (389) = 36 Pat 973 (DB).**

(3) A tax on the trade of husking, milling or grinding of grains is a tax falling under this entry. **AIR 1949 Nag 190 (192) = ILR (1949) Nag 87 (DB).**

(4) Tax on receipt of pension — Not a tax on employment. **AIR 1964 SC 1172 (1178) = (1964) 6 SCR 962.**

(5) List 1. Item 84 deals with taxes on goods manufactured or produced and List 2. Item 60 deals with the carrying on trade i. e. an activity in the nature of buying and selling and the Finance Act (1951) in its pith and substance relates to duty on goods manufactured or produced and has no relationship with item 60. **AIR 1962 SC 1006 (1028) = 1962 Supp (2) SCR 1.**

(6) Test to determine whether tax is tax on 'calling' or tax on 'entertainments' is to ascertain incidence of tax — Theatre tax on cinema show is not hit by Art. 276 (2) — It is a tax on entertainment. **AIR 1955 Sau 90 (91) = 8 Sau LR 120 (DB).**

(7) The object of Item 60, List 2 of Sch. 7 of the Constitution, from which the power to levy the tax in question by the Municipality is derived, is to enable the State Legislature to tax persons, who are carrying on any professions, trades, callings and employments. Those four words overlap one another and have been used by way of abundant caution

in order to make these provisions broad-based and comprehensive. None of those words has any particular technical meaning and even if they had any definitive significance the object of putting them altogether is to ensure that no particular category of persons is being eliminated. **AIR 1960 Punj 669 (671, 672) = 62 Punj LR 816 (DB).**

(8) Levy under Entry 60 far in excess of amount specified in Art. 276 (2) — Levy to be struck down. **AIR 1965 Ker 8 (10) = 1964 Ker LT 189.**

(9) License fee for storing jute imposed by resolution of Municipality under Section 370 (1) (xii) of Bengal Municipal Act (15 of 1932) — Imposition held beyond competence of municipality. (1955) 59 Cal WN 872.

(10) Section 30 (b), Punjab District Boards Act (20 of 1883), has reference to taxation on property itself as such, and does not debar the imposition of tax on profession, trade, calling or employment which fall under a separate item in State List Schedule to the Constitution. (1959) 61 Pun LR 309.

(11) U. P. District Boards Act (10 of 1922), Sections 108, 114 — Tax on circumstances and property is tax on income and not on financial status — Items 49 and 60 of List 2 of Constitution — State cannot legislate in respect of tax on sources other than those mentioned therein — But U. P. Act 10 of 1922 which was valid under Government of India Act, is valid under the Constitution by virtue of Art. 277 and Item 82 of Union List — Sections 108 and 44 are not void. 1955 All LJ 630 = 1955 All WR (HC) 520.

(12) Liability to pay professional tax under Punjab Professions, Trades, Callings and Employments Taxation Act (7 of 1956) — Situs of trade, business, calling or profession has to be considered — Where no business is carried on by a dealer at a certain place, mere delivery of goods from godown situated there cannot be equated to doing business at that place. **AIR 1968 Punj 289 (291) = ILR (1967) 2 Punj 772 (DB).**

(13) Khandwa Municipality imposing tax on trade of ginning and pressing cotton in excess of Rs. 50 — Tax held to be illegal — Khandwa Municipality (Validation of Tax) Act, 16 of 1941, providing that tax in question shall be deemed to have been validly recoverable by the Municipal committee, Khandwa, in respect of the period from 21-11-22 to 31-3-38, held not repugnant to Section 142A, Government of India Act. **AIR 1956 Nag 167 (173) = ILR (1956) Nag 83 (DB).** (Case under Section 142A, Government of India Act, 1935.

61. Capitation taxes.

[Government of India Act, 1935, Item 45.]

62. Taxes on luxuries, including taxes on entertainments, amusements, betting and gambling.

Schedule 7, List 2, Entry 60 — Note 1 (contd.)

corresponding to Art. 276 of Constitution.)

2. Acts falling or not falling within the this Entry. —

The following Acts fall within this entry:

(1) U. P. Town Areas Act (2 of 1914). AIR 1957 All 433 (436) (DB).

(2) Cantonments Act (2 of 1924), S. 60. AIR 1959 SC 582 (584, 585) = (1959) Supp (2) SCR 63 = 61 Bom LR 950.

(3) Bombay Municipal Boroughs Act (18 of 1925), Section 79 (1) (xiv). AIR 1966 Bom 15 (17, 18) = 67 Bom LR 286 (DB).

(4) U. P. Act 21 of 1965. AIR 1969 All 317 (321, 329) = 1967 All LJ 999 (FB).

(5) U. P. District Boards Act (10 of 1922), Sections 174 and 91 (K). AIR 1961 SC 356 (360) = 1961 (2) SCR 81.

(6) Punjab Municipal Act (3 of 1911) (as applied to Himachal Pradesh). AIR 1959 Him Pra 17 (20).

(7) Gwalior Municipal Act (Smt. 1993). AIR 1953 Madh B 145 (146) = ILR (1952) Madh B 301 (DB).

(8) West Bengal Panchayat Act (1957), Section 57 (1) — West Bengal Panchayat Rules (1958), Rules 110 and 111—Assessment of tax by Panchayat on basis of income from trade or business carried on within its jurisdiction — Provisions, although relate to tax on income, are saved by Art. 276 (1), Constitution of India. AIR 1964 Cal 590 (592) = 68 Cal WN 1132.

(9) U. P. Town Areas Act (2 of 1914), Section 14 (1) (f). AIR 1969 All 40 (42) = 1968 All LJ 665 (FB).

(10) Patna Municipal Corporation Act (13 of 1952), S. 177 (1). 1967 BLJR 135 (DB).

(11) Provision of Section 82 (1) (ff), Bihar and Orissa Municipal Act (7 of 1922) falls within Item 60 of List 2 of Seventh Schedule of Constitution — State legislature is competent to legislate. 1965 BLJR 886 (DB) ** AIR 1962 Pat 465 (467) = 1962 BLJR 515 (DB).

The following Acts do not fall within this Entry:

(12) The base of the levy under the Travancore Tobacco Act (1 of 1087), S. 31 is neither an occupation nor its income derived therefrom but the commodity concerned namely the tobacco stocked by the licensee — It is not a tax on occupation falling under Entry 60 but is covered by Entry 62. AIR 1958 Ker 129 (134) = ILR (1958) Ker 148 (FB).

(13) The provisions of Section 4-A, Madras Entertainment Tax Act (10 of 1939). AIR 1959 Andh Pra 461 (465) = (1959) 1 Andh WR 347 (DB).

(14) Mysore Village Panchayats and Local Boards Act (10 of 1959), S. 73 (4) (1). AIR 1967 Mys 150 (152) = (1966) 1 Mys LJ 12 (DB).

(15) Punjab Professions, Trades, Callings and Employments Taxation Act (1956 as amended by Act 10 of 1962) Ss. 2 (b), 3 and 5 — Assessment of professional tax relating to income from trade outside State of Punjab held illegal. (1966) 68 Pun LR 695 = 1966 Cur LJ 578 (DB).

(16) Kerala Profession Tax (Validation and Reassessment) Act, 1958 is invalid. AIR 1962 Ker 185 (190) = 1961 Ker LJ 971 (DB).

(17) Tax on advertisement levied under Section 126, Kerala Municipalities Act (14 of 1961) is not tax on profession or calling. AIR 1965 Ker 237 (239) = 1965 Ker LT 288.

(18) Punjab Entertainment Tax (Cinematograph Shows) Act. AIR 1956 Punj 203 (204) = 58 Punj LR 226 (DB).

(19) Bombay Lotteries and Prize Competitions Control and Tax Act (1948), S. 12A (as amended by Bom. Act 30 of 1952)—Tax imposed under Section 12-A does not amount to tax on business — Tax imposed is on betting and gambling and is valid under Entry 62. AIR 1957 SC 699 (711). (AIR 1956 Bom 1 (DB), Reversed.)

(20) Theatre tax imposed by Allaha-bad Nagar Mahapalika — Reasons for or basis of impugned tax is not possession of particular profession or calling but giving of one or more shows or exhibitions and the tax is more properly referable to entries other than No. 60 of List 2 — It is covered by Entries 33 and 62 of this List — Therefore, it is not hit by Art. 276. 1969 All LJ 295.

(21) Madras Commercial Crops Markets Act (20 of 1933), S. 11. AIR 1959 Andh Pra 393 (401) = (1959) 1 Andh WR 285 (DB).

**SCHEDULE 7, LIST 2, ENTRY 62
SYNOPSIS****1. Luxuries.****2. Entertainments and amusements.****3. Betting and gambling.****4. Quantum of tax.****1. Luxuries. —** (1) This Entry contemplates a tax on certain articles or goods constituting luxuries and not legislation controlling an activity which may not be a necessary activity but may be unnecessary and in that sense a luxury.

Schedule 7, List 2, Entry 62 — Note 1 (contd.)

AIR 1956 Bom 1 (11) = ILR (1955) Bom 680 (DB). (Reversed on another point in AIR 1957 SC 699.)

(2) Tobacco has invariably been considered an article of luxury throughout the world. The levy of an annual fee for a licence under the rules framed in 1951 under Section 31 of the Travancore Tobacco Act (1 of 1957) is, therefore, a luxury tax coming under this entry. AIR 1958 Ker 129 (134) = ILR (1958) Ker 148 (FB).

(3) Kerala Luxury Tax on Tobacco (Validation) Act (9 of 1964) is not a colourable exercise of power — Imposition falls under Item 62 in List 2, Sch. 7 of the Constitution. AIR 1966 Ker 46 (53) = 1965 Ker LT 418.

(4) Private individual conducting stall on railway platform under licence from railway authorities. S. 135 (1) (i) of Indian Railways Act, 1890 does not confer immunity on him from payment of licence fee under Section 284, Kerala Municipalities Act (14 of 1961) — Fee under Section 284 cannot be considered as tax on land under Entry 49, List 2 of Sch. 7 of Constitution of India — Activity for which licence has to be taken under Section 284 is not for storing or selling luxury articles alone and hence licence fee thereunder is not a tax on luxuries under entry 62, List 2 of Sch. 7 of Constitution of India. 1967 Ker LT 348 = 1967 Mad LJ (Cri) 799 (DB).

2. Entertainments and amusements. —

(1) Although it may be said that a person who solves a cross-word puzzle is amusing or entertaining himself, this is not the amusement or entertainment contemplated by this entry. AIR 1956 Bom 1 (11) = ILR (1955) Bom 680 (DB).

(2) The word "entertainments" is used in the plural, which means that the word is used as a common noun and not as an abstract noun and as a common noun it must necessarily mean, in the case of cinema, a show, in the case of drama, a performance and in the case of cricket, a match. AIR 1954 Bom 261 (264) = ILR (1954) Bom 647 (DB).

(3) The levy of entertainment tax on cinema shows is a tax on entertainment which falls under this entry and not under Entry 60 of List 2 and can be collected from the cinema exhibitor. AIR 1956 Punj 203 (204) (DB). (AIR 1953 Madh B 145, Dissented from.) **AIR 1955 Sau 90 (91) (DB). (AIR 1953 Madh B 145, Dissented from.) **AIR 1954 Bom 261 (265) = ILR (1954) Bom 647 (DB) **AIR 1959 SC 894 (895, 896) **AIR 1967 Mys 150 (152) (DB).

[But see AIR 1953 Madh B 145 (146, 147) = ILR (1952) Madh B 301 (DB).]

(4) If in substance an entertainment tax is a tax upon a show or performance, it makes no difference whether it

is levied from the person who obtains admission to the entertainment or from the person who gives it, it being always permissible for a person from whom the charge is levied to pass on the duty to a person who obtains admission. AIR 1954 Bom 261 (263, 264) = ILR (1954) Bom 647 (DB).

(5) The tax is not a tax on "calling" within the meaning of Entry 60 of List 2. AIR 1955 Sau 90 (91) (DB) **AIR 1959 SC 894 (895, 896).

(6) The fact that each exhibition is separately taxed, or that the tax, being payable in advance, is refundable if the show is not held, also goes to show clearly the nature of the tax, namely, that it is a tax on entertainment and not on profession, trade or calling. AIR 1956 Punj 203 (204) (DB) **AIR 1955 Sau 90 (91) (DB).

(7) The provisions of Section 4-A, Madras Entertainments Tax Act (10 of 1939), fall within the contents of Entry 62 and hence it is within the legislative competence of the State Legislature and is not ultra vires. AIR 1959 Andh Pra 461 (467) = (1959) 1 Andh WR 347 (DB).

(8) A tax levied by a Cantonment Board on the lessee of a Cinema theatre on each show of the film exhibited by him is a valid tax. In the Province of Bombay, Cantonment Boards had the same powers under Section 60 Cantonments Act (2 of 1924) as a borough municipality under Section 73, Bombay Municipal Boroughs Act (18 of 1925). AIR 1959 SC 582 (584, 585) = (1959) Supp (2) SCR 63.

(9) Theatre tax imposed by Allahabad Nagar Mahapalika—Reasons for or basis of impugned tax is not possession of particular profession or calling but giving of one or more shows or exhibitions and the tax is more properly referable to entries other than No. 60 of List II — It is covered by Entries 33 and 62 of this list — Therefore, it is not hit by Art. 276. 1969 All LJ 295.

3. Betting and gambling. — (1) Tax on gambling is an indirect tax which is demanded from the promoter in the expectation and with the intention that he shall indemnify himself at the expense of the gamblers who sent entrance fees to him. AIR 1957 SC 699 (710, 711) = 1957 SCR 874.

(2) Where it is held that the impugned Act is on the topic of betting and gambling under Entry 34 of List 2, the tax imposed by such statute would be a tax on betting and gambling under this entry. Thus, the Bombay Lotteries and Prize Competitions Control and Tax Act (54 of 1948), as amended by Bombay Act, 30 of 1952, being a law with respect to betting and gambling under Entry 34, the taxing provisions of Section 12A of the Act must be held to impose a tax on betting and gambling.

63. Rates of stamp duty in respect of documents other than those specified in the provisions of List I with regard to rates of stamp duty.

[Government of India Act, 1935, Item 51.]

64. Offences against laws with respect to any of the matters in this List.

[Government of India Act, 1935, Item 37.]

65. Jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in this List.

[Government of India Act, 1935, Item 2.]

Schedule 7, List 2, Entry 62 — Note 3 (contd.)

under this entry, it cannot be held to impose a tax on trade under Entry 60 of List 2. **AIR 1957 SC 699 (710) = 1957 SCR 874.** (AIR 1956 Bom 1 (DB), Reversed.)

(3) Resolutions by State Legislatures as required by Art. 252 surrendering control and regulation of prize competitions to the Parliament — Power to tax betting and gambling under Entry 62 cannot be said to have been surrendered to Parliament. **AIR 1962 SC 594 (599) = (1962) 3 SCR 230.**

(4) The words 'forward contract' as defined in the Act do not set out all the elements which are necessary to render a contract a wagering contract and so the impugned legislation to tax forward contracts as defined does not come within Entry 62 and is beyond the legislative competence of the State Legislature. The notification made under the rules promulgated under the Act and the Rules are also void. The Legislature did not contemplate wagering contracts at all in defining "forward contract" in the way it did.

Assuming that the definition of forward contract in Section 2 is wide enough to include wagering contracts, the portion of the Act which would then be valid is not severable from the portion which would remain invalid and the whole Act must be held to be invalid. **AIR 1961 SC 268 (269, 270, 271, 272) = (1961) 1 SCR 668.**

4. Quantum of tax. — (1) There is no constitutional limit to the quantum of tax which can be imposed by law made under this entry. **AIR 1957 SC 699 (711) = 1957 SCR 874.**

Schedule 7, List 2, Entry 63 — Note 1

(1) Parliament has no power to make laws in respect of rates of stamp duty payable on an application for enrolment as an advocate inasmuch as it is not one of the matters provided for in that List. **AIR 1958 Andh Pra 63 (65) = ILR (1957) Andh Pra 467 (SB).**

(2) The proviso to Section 8 (2) (b), Bar Councils Act, 1926, is not ultra vires the legislative competence of Parliament because the pith and substance of the legislation was to prescribe a machinery for constituting Bar Council for enrolment of advocates and

for taking proceedings for professional misconduct against them (see List 1, Entry 78) and the payment of stamp duty on the application for enrolment as provided in the proviso was only incidental to the main object. **AIR 1958 Andh Pra 63 (65) = ILR (1957) Andh Pra 467 (SB).** (It was provided that the applicant for enrolment should pay the stamp duty payable under the Stamp Act — Held valid.)

(3) State Legislature was competent to enact Art. 17 of Mysore Stamp Act (34 of 1957) (as amended by Mysore Stamp (Amendment) Act, 1962) prescribing stamp duty on enrolment as advocate. **AIR 1966 Mys 133 (140) = (1965) 2 Mys LJ 119 (DB).**

Schedule 7, List 2, Entry 64 — Note 1

(1) The Madras General Sales-tax Act falls squarely within Item 54 of List 2. It follows that the State Legislature under Item 64 could prescribe what acts or conduct would be regarded as offences in relation to taxes on the sale or purchase of goods. **AIR 1958 Mad 544 (551) = ILR (1958) Mad 750 = 1958 Cri L Jour 1413 (FB).**

(2) Section 5 of Prevention of Insults to National Honour Act (14 of 1957) is within the competence of State Legislature under the head 'Criminal Law' in List 3, Item 1 of Constitution. (1966) 2 Mad LJ 194 = 79 Mad LW 542 (DB).

(3) Mysore Sales Tax Act (1948), S. 22 is not ultra vires Art. 14 of Constitution or Criminal P. C. **AIR 1958 Mys 143 (147) = 1958 Knt LJ 1 = 1958 Cri LJ 1327 (DB).**

(4) Madras Motor Vehicles Rules (1940), Rule 160-C — Does not encroach upon field of State Legislature — (Madras Motor Vehicles Taxation Act (3 of 1931), S. 5). **AIR 1956 Andh Pra 129 (139) = 1956 Andh WR 142 (DB).**

SCHEDULE 7, LIST 2, ENTRY 65

1. Scope. — (1) This entry confers on the State Legislature power, when dealing with particular subjects within its exclusive legislative field, to make laws in respect to the jurisdiction and powers of Courts that will be competent to hear causes relating to those subjects; in other words, this is a power of creating a special jurisdiction only as opposed to general jurisdiction conferred by Entry

Schedule 7, List 2, Entry 65 — Note 1 (contd.)

3 of this List. AIR 1951 SC 69 (85) = 1951 SCR 51.

(2) The words used in the entry are no doubt words of wide import, but the generality of those words is restricted and controlled by the words "with respect to any matters in this list" occurring at the end of the entry. AIR 1949 Mad 481 (487) = ILR (1949) Mad 739 = 50 Cri L Jour 684 (FB). (Subject-matter of Criminal Procedure Amendment Act, 1943, held did not fall under Entry 2, List 2, Government of India Act.) ** AIR 1943 All 26 (31) = ILR (1943) All 238 = 44 Cri L Jour 216 (FB).

(3) "Criminal law, including all matters in the Indian Penal Code" being a matter enumerated in Entry 1 of the Concurrent List, the power to make laws dealing with jurisdiction and powers of Courts as regards that matter is not within the exclusive competence of the State Legislature. AIR 1943 All 26 (31) = ILR (1943) All 238 = 44 Cri L Jour 216 (FB).

(4) Under this entry, it is within the competence of the State Legislature to take away the jurisdiction of the Court. AIR 1952 Pat 166 (172, 173) = 30 Pat 1085 (DB).

(5) State Legislature can affect the jurisdiction and power of the High Court with respect to questions relating to tenancy legislation. AIR 1949 Bom 42 (45) = ILR (1949) Bom 398 (DB).

(6) State Legislature has no power to reverse the decisions of any Court, because such a power, in its nature, is essentially judicial and has not been conferred on the Legislature by the Constitution, either expressly or impliedly. AIR 1952 Pat 166 (173) = 30 Pat 1085 (DB). (S. 3, Barahiya Tal Lands (Declaration of Possession), Act (26 of 1950), which in effect reversed the decisions of the courts was held to be void and ultra vires the State Legislature.)

(7) This entry empowers the State Legislature to remove, by legislation, any doubts as to the validity of decrees passed by Courts where such doubts are caused by the failure of the State Government to observe a legal formality. The Bihar (Munsiff's Proceedings) Validation Act (7 of 1945) is a legislation of this type. AIR 1952 Pat 282 (282) = 30 Pat 1119 (DB).

(8) The State Legislature was competent to constitute the Calcutta City Civil Court under the Calcutta City Civil Court Act (21 of 1953) and to vest it with general jurisdiction, since that matter came specifically within Entry 3 of List 2 or Entry 3 read with this entry. AIR 1957 Cal 534 (544).

(9) Entry 3 of List II read with this entry can cover Section 15 (3) of the Mysore Chief Court Act (1 of 1884)

which provided for a reference to a Full Bench by a single Judge of the Chief Court. AIR 1955 Mys 65 (74) = ILR (1955) Mys 43 (FB).

(10) When the legislature of a State has the competence to make a law pertaining to taxes on sales or purchases it has also the competence to provide punishments in that law for the non-compliance or contravention of the provisions of that law and may also for the purpose of the enforcement of that law vest jurisdiction in Courts. AIR 1958 Mys 143 (146) = 1958 Cri LJ 1357 = 1958 Knt LJ 1 (DB).

(11) Mysore High Court Act, Section 15 (as amended by Act 35 of 1951) — Amendment to procedure for disposal of second appeals — Amendment is 'intra vires' the State Legislature. AIR 1952 Mys 75 (76) = ILR (1952) Mys 279.

(12) Money claim based on promissory note—Nyaya Panchayat has jurisdiction to try such a claim under Section 64 (a), U. P. Panchayat Raj Act (1947). 1968 All LJ 236 = 1968 All WR (HC) 211 (DB).

(13) Companies Act (1913), Ss. 202, 235 — Misfeasance proceedings — Company Judge directing some of Directors of company to appear and give evidence — Appeal to Division Bench is maintainable under Section 202 of the Companies Act, 1913 read with Sec. 4 of the Mysore High Court Act, 1961. AIR 1964 Mys 75 (78) = (1963) 33 Com Cas 839 (DB).

(14) Sections 19 and 29 (2)(c) of the Mysore Civil Courts Act, 1964 are not susceptible to the denouncement that they were enacted without the requisite legislative competence — They are perfectly valid provisions. AIR 1965 Mys 76 (84) (DB).

2. This entry and Entry 18. — (1) This entry is sufficient to give express powers to the States to create and determine the powers and jurisdiction of Courts in respect of land, as a matter ancillary to the subject of Entry 18. AIR 1947 PC 72 (74) = 74 Ind App 12 = 1947 FCR 77 = ILR (1947) Kar (PC) 151. (Case under Government of India Act, Sch. VII, List 2, Items 2 and 21.) ** AIR 1955 Pat 1 (15) = 33 Pat 690 (SB) ** AIR 1957 Madh B 63 (63) (DB).

(2) The words of this entry and Entry 18 are comprehensive enough to include the remedial as well as the procedural provisions concerned with reliefs in respect of the several rights and remedies enumerated in Entry 18. AIR 1955 Pat 1 (15) = 33 Pat 690 (SB). (Bihar Land Encroachment Act, 31 of 1950 is within the competence of the State Legislature.) ** AIR 1946 Cal 48 (49) (DB).

(3) The two entries together cover any restriction that may be imposed on the jurisdiction and powers of Courts,

66. Fees in respect of any of the matters in this List, but not including fees taken in any court.

[Government of India Act, 1935, Item 54.]

Schedule 7, List 2, Entry 65 — Note 2 (contd.)

with respect to land, land tenures, relation of landlord and tenant, and collection of rents. AIR 1941 FC 16 (32) = 1940 FCR 110 = ILR (1941) Kar (FC) 72. (AIR 1940 All 272 (FB), Reversed.)

(4) Section 168A of the Bengal Tenancy Act (8 of 1885) is clearly a piece of legislation covered by the words of Entry 18 or by the words of this entry if the section were regarded as a procedural section. AIR 1947 FC 19 (21) = 1947 FCR 1 = ILR (1948) 1 Cal 1 = ILR (1947) Kar (FC) 31 **AIR 1942 Cal 587 (591) (DB) ** AIR 1942 Cal 470 (472) = ILR (1942) 2 Cal 325 (DB).

(5) Section 163A of the Bihar Tenancy Act (8 of 1885) comes within this entry. AIR 1944 Pat 54 (58) = 23 Pat 61 (FB). (Obiter.)

(6) In view of the subjects enumerated in these entries, Entries 6 and 7 of the Concurrent List cannot be held to prohibit a piece of legislation like the Mysore Tenancy Act (13 of 1952). ILR (1955) Mys 360 (363) (DB).

(7) A suit under Madras Estates Land Act (1 of 1948) for issue of pattas against a Banking Company against which liquidation proceedings are in progress in the High Court is not triable by the Deputy Collector by virtue of Ss. 45-A, 45-B and 45-C of the Banking Companies Act (as amended) read with Banking Companies (Amendment) Act, 1950, S. 11. AIR 1958 Mad 403 (405, 411) = 71 Mad LW 291

**SCHEDULE 7, LIST 2, ENTRY 66
SYNOPSIS**

1. Fees and taxes.

2. Scope of the entry.

3. Illustrations.

1. Fees and taxes. — (1) Debenture trust deed — Properties of value of Rs. 2.50 crores — Registration fee demanded held was not fee but was tax — Notification was ultra vires. AIR 1964 Punj 492 (496, 497) = ILR (1964) 2 Punj 681 (DB).

(2) The phrase 'fees taken in all Courts' in entry 3 includes those impositions which can properly be described as 'Court-fees' and the word 'fees' in entry 66 will not include such Court-fees. AIR 1960 All 462 (463) = 1960 All LJ 170 (FB).

(3) As there is no question of rendering any service to the Mulgirasia who has been made liable to pay cess, such cess cannot be called a fee falling within Entry 66 of List 2. AIR 1959 Bom 43 (46) = 60 Bom LR 1191 (DB).

(4) Bombay Court-fees Act (36 of 1959), Sch. 1, Art. 16 — Levy imposed

is neither tax nor fee in the strict sense — It is within legislative competence of the State under Sch. 7, List 2, Entry 3. AIR 1962 Bom 106 (113, 114) = 63 Bom LR 834 (DB).

(5) Orissa Mining Areas Development Fund Act (27 of 1952), Sec. 4 — Cess levied under is neither a tax nor a duty of excise but is a fee. AIR 1961 SC 459 (469) = (1961) 2 SCR 537.

(6) From a conjoint reading of Entries 5, 17 and 66 of List 2 it would be clear that the State legislature is competent after the coming into force of the Constitution to enact a law with respect to fees in relation to water supply by a municipality to its inhabitants. AIR 1961 All 583 (586) = 1961 All LJ 386.

(7) See also Note 4 under Art. 265.

2. Scope of the entry. — (1) This entry gives power to the State Legislature to levy fees in most general terms in all matters which are within their legislative field. AIR 1942 All 156 (166) = ILR (1942) All 302 = 43 Cri L Jour 674 (2). (Case under Item 54, List II, Government of India Act, 1935.)

(2) Fees including those for licenses are leviable in the course of the levy or collection of taxes. AIR 1958 Mad 158 (169) = ILR (1958) Mad 35 (DB).

(3) The "fees" in this entry can only mean fees other than court-fees, as the latter has already been provided for in Entry 3 of List 2. AIR 1954 Mys 161 (162) = ILR (1954) Mys 255 (DB).

(4) In order to avoid confusion and in order to avoid provision being made for fees taken in Courts at two places — One specifically under Entry 3 and the other generally under Entry 66 — Fees taken in Courts are specifically excepted from the general entry being Entry 66 because the same had already been provided for specifically under Entry 3. AIR 1960 Bom 96 (99) = 61 Bom LR 996.

(5) When any levy is being justified under Item 66 of List 2 or Item 47 of List 3 as a fee it should be shown that it is for some service rendered by the State or by the Municipality to the particular person concerned and that its incidence is such as to meet the expense of the service rendered more or less. There can be no fee under Item 66 which is for the purposes of local Government because that would not be fee strictly so called but a tax which is not provided, anywhere in List 2. AIR 1960 Raj 135 (136, 137, 138) = 1958 Raj LW 159 (FB).

(6) When entries 96 of List 1 or 66 of List II speak of any of the matters in

LIST III CONCURRENT LIST

1. Criminal law, including all matters included in the Indian Penal Code at the commencement of this Constitution but excluding offences against laws with respect to any of the matters specified in List I or List II and excluding the use of naval, military or air forces or any other armed forces of the Union in aid of the civil power.

[NOTE.—Unless mentioned otherwise, the item number under this heading refers to the item number of List III of Schedule VII of the Government of India Act, 1935.]

JAMMU AND KASHMIR

For Entry 1, the following entry shall be substituted, namely:—

“1. Criminal law (excluding offences against laws with respect to any of the matters specified in List I and excluding the use of naval, military or air forces or any other armed forces of the Union in aid of the civil power) in so far as such criminal law relates to offences against laws with respect to any of the matters specified in this List.”

—See the Constitution (Application to J. and K.) Order, 1954, Para. 2, sub-para. (22) (c) (as substituted by C. O. 69 and C. O. 70).

Schedule VII, List 2, Entry 66 — Note 2 (contd.)

List 3, they necessarily include also the entries relating to taxation. In other words, a fee may be levied even under an enactment relating to the imposition of tax. AIR 1965 SC 1107 (1123) = (1965) 2 SCR 477.

3. Illustrations. — (1) The contribution levied under Section 49 of the Orissa Hindu Religious Endowments Act (4 of 1939) was held to be a fee and not a tax and Section 49 was not ultra vires the Provincial Legislature. AIR 1954 SC 400 (403) = 1954 SCR 1046 = ILR (1954) Cut 334. (AIR 1950 Orissa 47, Affirmed.)

(2) Section 76 (1) of the Madras Hindu Religious and Charitable Endowments Act (19 of 1951) imposed a tax and not a fee and was therefore void as being beyond the legislative competence of the Madras Legislature. AIR 1954 SC 282 (297) = 1954 SCR 1005. (AIR 1952 Mad 613, Affirmed.)

(3) Bye-law No. 6 framed by the District Board of Saharanpur under Section 174 (2) (k) of the U. P. District Boards Act (10 of 1922) imposing a licence fee for working of factories was held ultra vires the District Board, since the amount of licence fee was fixed not merely for meeting the expenses of the bye-laws but with a view to enhance the general revenue of the District Board. AIR 1954 All 675 (680).

(4) Cess imposed under Section 29 of the U. P. Sugar Factories Control Act (1 of 1938) was treated as a fee under the corresponding Item 54 of List 2 of the Government of India Act, 1935. AIR 1942 All 156 (169) = ILR (1942) All 302 = 43 Cri L Jour 674 (2).

(5) Entries 59 and 66 of List II give power to legislate on tolls and fees respectively. Hence it cannot be said that

there is no legislative competence to enact Section 140 of the Assam Municipal Act (1 of 1923). AIR 1958 Assam 156 (159) (DB).

(6) Bengal Municipal Act (15 of 1932), Section 370 (1) (xii) — Licence fee — Imposition to be characterised as fee, must not be raised for general revenue — Licence fee for storing jute imposed by resolution of Municipality — Imposition held beyond competence of municipality. (1955) 59 Cal WN 872.

(7) The fares charged by the Calcutta Tramways Company Ltd., cannot be called ‘fees’ chargeable by the State Government in terms of Item 66. The power to fix the rate of fares is based on legislative sanction. AIR 1960 Cal 396 (399).

Schedule 7, List 3, Entry 1 — Note 1

(1) The power under this entry extends to the creation of new offences by legislation. AIR 1939 FC 58 (62) = 40 Cri LJ 403 = 1939 FCR 124 = ILR (1939) Kar (FC) 98 ** AIR 1931 PC 94 (99) = 32 Cri LJ 899.

(2) Legislature can for the purpose of effecting desirable social reforms pass laws making acts, which came in the way of the success of such reforms, offences and punishable. AIR 1949 Bom 168 (169, 170) = ILR (1949) Bom 25 = 50 Cri LJ 635 (DB). (Removal of social disabilities of Harijans.) ** AIR 1953 Bom 183 (187). (Prevention of practice of excommunication.)

(3) The Legislature where it is competent to create new offences is also competent to provide for the destination of the fines imposed and realized in respect of those offences. AIR 1939 FC 58 (62) = 40 Cri LJ 403 = ILR (1939) Kar (FC) 98 = 1939 FCR 124.

(4) A State Legislature has no power to legislate to make an offence of an act committed outside its territory. AIR

2. Criminal procedure, including all matters included in the Code of Criminal Procedure at the commencement of this Constitution.

[Government of India Act, 1935, Item 2.]

JAMMU AND KASHMIR

Omit Entry 2—See the Constitution (Application to Jammu and Kashmir) Order, 1954, Para. 2, sub-para. (22) (c) (iii) (as substituted by C. O. 72 and amended by C. O. 74).

Schedule VII, List 3, Entry 1 — Note 1 (contd.)

1958 Bom 68 (72) = ILR (1957) Bom 380 = 1958 Cri LJ 161 (FB).

(5) If a law made by the State Legislature is entirely covered by an entry in the State List the creation of offences under that law and the making of provision in that law for governing other ancillary matters would also fall within the same list under Entry 64 thereof. In such a case it is not necessary for the State Legislature to act under Entry 1 of the Concurrent List to enact those provisions. AIR 1950 FC 59 (64) = 1949 FCR 693 = 29 Pat 185 = 51 Cri LJ 921 ** AIR 1954 Mad 993 (996) = ILR (1955) Mad 887 = 1954 Cri LJ 1521 (DB) ** AIR 1954 All 655 (657) = 1954 Cri LJ 1399 (DB).

(6) The Constitution has given the appropriate legislature, whether Parliament or the State Legislature, power to derogate from the existing jurisdiction of High Court as can be seen from Articles 200, 225, and Item 78, List I, Item 3, List II and Items 1, 2 and 46 of List III, Sch. 7. Law like Code of Criminal Procedure (Madras Amendment) Act (Madras Act 34 of 1955) transferring cases pending before Presidency Magistrate to Sessions Judge can therefore be passed by the State Legislature without amending the Constitution. AIR 1959 Mad 261 (268) = 1959 Cri LJ 731 = (1958) 2 Mad LJ 123 (DB).

(7) The head of power under the 'criminal law' in List III includes all matters included in the Indian Penal Code at the commencement of the Constitution some of which are offences against public tranquillity and affecting public safety. Burning copy of Constitution may affect public safety. Madras Prevention of Insult to National Honour Act 15 of 1957 therefore falls under Entry 1 of List III and is valid. AIR 1965 Mad 11 (14) = 1965 (1) Cri LJ 49 = (1964) 2 Mad LJ 530 ** (1966) 2 Mad LJ 194 = 79 Mad LW 542.

Schedule 7, List 3, Entry 2 — Note 1

(1) It is reasonable to assume that the framers of the Constitution intended to convey by the words "Criminal procedure" all that was being commonly treated as part of criminal procedure in the legislative enactments of the Indian Legislatures before the date of the Constitution. AIR 1949 Mad 481 (485) = ILR (1949) Mad 739 = 50 Cri LJ 684 (FB).

(2) The word "including" has been used in the entry as a word of enlargement and not as a word of restriction. AIR

1949 Mad 481 (486) = ILR (1949) Mad 739 = 50 Cri LJ 684 (FB).

(3) Under this entry not only matters which strictly related to procedure but also those matters which although are not matters of procedure were included in the Criminal Procedure Code when the Constitution came into force would be concurrent legislative subjects. AIR 1949 Mad 307 (312) = ILR (1949) Mad 377 = 50 Cri LJ 405 (SB). (Provisions relating to appeals and "directions of the nature of habeas corpus.") ** (1950) 54 Cal WN 753 (755) (DB). (Legislation relating to jurisdiction of Courts.)

(4) Parliament can introduce an amendment to the Criminal Procedure Code by including a suitable provision in any of the Acts it may pass. AIR 1954 Mad 704 (705) = 1954 Cri LJ 1126.

(5) The word 'matters' in the entry is of wider import than the word 'provisions' and hence it cannot be said that while an amendment of an existing provision would be valid the introduction of a new provision is ultra vires the powers of Parliament. AIR 1949 Mad 481 (486) = ILR (1949) Mad 739 = 50 Cri LJ 684 (FB).

(6) The expression 'criminal procedure' in Entry 2, List III, Sch. 7 includes investigation of offences. Bombay Prohibition Act 25 of 1949 was reserved for consideration of the President and has received his assent. Sections 129-A and 129-B of the Act will therefore prevail in the State of Bombay by virtue of Article 254 (2) of Constitution to the extent of inconsistency with the Code but no more. AIR 1963 SC 1531 (1541) = 1963 (2) Cri LJ 418 = (1964) 1 SCR 926.

(7) The Constitution has given the appropriate legislature, whether Parliament or the State Legislature, power to derogate from the existing jurisdiction of the High Court as can be seen from Articles 200, 225 and Item 78 of List I, Item 3 of List II and Items 1, 2 and 46 of List III, Sch. 7. Law like Code of Criminal Procedure (Madras Amendment) Act (Madras Act 34 of 1955) derogating from powers of High Court can therefore be passed by State legislature without amending the Constitution. AIR 1959 Mad 261 (268) = 1959 Cri LJ 731 = (1958) 2 Mad LJ 123 (DB).

(8) No provision in the Civil Procedure or Criminal Procedure Code gives a party to a litigation any right to question the language used by the Court and hence no party can challenge in petition under Article 226 the notification issued under Section 3 (2) of the Madhya Pradesh

3. Preventive detention for reasons connected with the security of a State, the maintenance of public order, or the maintenance of supplies and services essential to the community; persons subjected to such detention.

JAMMU AND KASHMIR

Omit Entry 3—See the Constitution (Application to Jammu and Kashmir) Order, 1954, Para 2, sub-para. (22) (c) (iii) (as amended by C. Os. 72 and 74).

Schedule VII, List 3, Entry 2 — Note 1 (contd.)

Official Languages Act. AIR 1959 Madh Pra 208 (212) = 1959 MPLJ 478 (DB).

(9) Bombay Village Panchayats Act falls under Sch. 7, List 2, Entry 5 and not under List 3, Entry 2 — Article 254 is not attracted. That Article applies only where the Acts fall under List III and there is a repugnancy between Central and State Acts. AIR 1961 Mys 257 (259) = 1961 (2) Cri LJ 789 = 39 Mys LJ 638 (DB).

SCHEDULE 7, LIST 3, ENTRY 3 SYNOPSIS

1. Scope.
2. "For reasons connected with."
3. Security of a State.
4. Maintenance of public order.
5. "Maintenance of supplies and services essential to the community."

1. **Scope.** — (1) It is necessary that the activities which are sought to be prevented by the detention of an individual under a preventive detention law passed under Entry 3 of List 3, must have relation to matters enumerated therein. AIR 1950 FC 67 (68, 69) = 1949 FCR 657 = 51 Cri LJ 1011.

(2) Under List III, Entry 3 Parliament is empowered to enact a law of preventive detention (a) for reasons connected with the security of State, (b) for reasons connected with the maintenance of public order, or (c) for reasons connected with the maintenance of supplies and services essential to the community. AIR 1950 SC 27 (42) = 1951 Cri LJ 1383 = 1950 SCR 88.

(3) There is no authoritative definition of preventive detention in Indian Law. The word preventive is used in contradistinction to the word punitive. AIR 1950 SC 27 (91) = 1951 Cri LJ 1383 = 1950 SCR 88.

(4) A State must exercise due care and attention in framing laws such as preventive detention lest it may be accused of bad faith on account of any hasty or ill-advised move taken in that direction. AIR 1950 Pat 332 (345) = 51 Cri LJ 1251 = ILR 29 Pat 410.

(5) Provision of Section 3 (1) (b) of Preventive Detention Act is not ultra vires the Central Legislature. AIR 1969 Delhi 45 (53) = 1969 Cri LJ 186 (FB).

2. **"For reasons connected with."** — (1) The connection contemplated by the expression 'for reasons connected with' is real and proximate, not far-fetched or problematic. AIR 1950 FC 67 (68, 69) = 1949 FCR 657 = 51 Cri LJ 1011.

3. **Security of a State.** — (1) The Constitution requires a line to be drawn between those serious and aggravated forms of public disorder which are calculated to endanger the security of the State and the relatively minor breaches of the peace of a purely local significance. AIR 1950 SC 124 (128) = 1950 SCR 594 = 51 Cri LJ 1514 ** AIR 1955 Raj 6 (9) = ILR (1954) 4 Raj 51 = 1955 Cri LJ 95 (DB).

4. **Maintenance of public order.** — (1) The expression 'public order' is of wide connotation and signifies that state of tranquillity prevailing among the members of a political society as a result of the internal regulations enforced by the Government which they have instituted. AIR 1950 SC 124 (127) = 1950 SCR 594 = 51 Cri LJ 1514.

(2) The disturbance of communal harmony no doubt amounts to a disturbance of public order. AIR 1949 All 120 (2) (123) = 50 Cri LJ 131.

(3) The taking of measures to check activities of bad characters would come under the expression 'maintenance of public order'. AIR 1951 All 718 (724) = ILR (1951) 2 All 745 = 52 Cri LJ 1251 (DB).

(4) The affiliation to a party which is alleged to be spreading its doctrine of violence may, in certain circumstances, lead to an inference that the person concerned is likely to act in a manner prejudicial to the public safety, order or tranquillity. AIR 1950 FC 129 (131) = 1949 FCR 827 = 51 Cri LJ 1480.

(5) The act of committing thefts in running goods trains is not an act prejudicial to the maintenance of public order or public safety. AIR 1949 Pat 299 (300) = 50 Cri LJ 575 (DB).

(6) The detention of a person alleged to have published and distributed pamphlets attacking the character and integrity of a Chief Justice who was accused of gross partiality and communal bias, was held illegal as there was no rational connection between the acts alleged and the maintenance of law and order. AIR 1954 SC 276 (277) = 1954 Cri LJ 735.

5. **"Maintenance of supplies and services essential to the community."** — (1) Where with regard to an essential commodity there is a system of controls on which the maintenance of supplies and services depends, evasion of the control orders will prejudicially affect the maintenance or upkeep of the supplies and services essential to the community. AIR 1952 Pat 185 (188) = 31 Pat 97 = 1952 Cri LJ 493 (FB).

(2) It has been held that the word 'and' between the words 'supplies' and

4. Removal from one State to another State of prisoners, accused persons and persons subjected to preventive detention for reasons specified in Entry 3 of this List.

[Government of India Act, 1935, Item 3.]

5. Marriage and divorce; infants and minors; adoption; wills, intestacy and succession; joint family and partition; all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law.

[Government of India Act, 1935, Items 6, 7.]

JAMMU AND KASHMIR

Omit Entry 5—See the Constitution (Application to Jammu and Kashmir) Order, 1954, Para 2, sub-para. (22) (c) (iii) (as amended by C. Os. 72 and 74).

Schedule VII, List 3, Entry 3 — Note 5 (contd.)

'services' occurring in a similar expression used in Section 3 (1) (a) (iii), Preventive Detention Act, 1950, should be read in a disjunctive sense. AIR 1951 Pat 47 (51) = 30 Pat 630 = 52 Cri L Jour 406 (DB).

(3) Any activity, e.g., black-marketing or hoarding, which directly interferes with or threatens the maintenance of such primary necessities of life as food or cloth will directly affect the maintenance of supply and service essential to the community. AIR 1951 Pat 47 (51) = 30 Pat 630 = 52 Cri L Jour 406 (DB).

(4) The act of adulteration of food stuffs is not covered by the expression 'maintenance of supplies and services essential to the community'. AIR 1951 Pat 134 (136) = 30 Pat 716 = 52 Cri LJ 1175 (FB).

Schedule 7, List 3, Entry 5 — Note 1

(1) The word "succession" in this entry includes the subject of devolution by survivorship, of property. AIR 1941 FC 72 (79) = 1941 FCR 12 = ILR (1941) Kar (FC) 148.

(2) For the meaning of the words "succession", "inheritance" and "devolution" see the following case. AIR 1941 FC 72 (78, 79) = 1941 FCR 12 = ILR (1941) Kar (FC) 148.

(3) From the present entry the words "save as regards agricultural land" which were found in Item 7 of List 2 in the Government of India Act, are omitted. In view of this change the Hindu Succession Act, 1956, would apply to agricultural lands also. AIR 1957 Orissa 1 (4) = ILR (1956) Cut 599 (DB) ** AIR 1960 Punj 462 (463).

(4) Before Constitution Central Government had no power to affect the devolution of agricultural land within Governor's provinces. Hindu Women's Rights to Property Act therefore did not apply to devolution of agricultural land. After Constitution Parliament has power under Entry 5, List III, Sch. 7 to legislate in the matters of wills, intestacy and succession in respect of agricultural land. But unless fresh legislation is made in that respect the old law could not govern the devolution or succession to agricul-

tural land. AIR 1965 Punj 254 (256) = 65 Pun LR 1103 ** AIR 1968 Cal 83 (85) = 71 Cal WN 321 (DB).

(5) Hindu Succession Act (1956), Section 14 — Providing enlarged right over land to Hindu female entrenches on Entry 18 of State List — But being legislation under Entry 5 of List 3 is valid. AIR 1960 Punj 666 (668, 669) = 62 Pun LR 655 (FB).

(6) If the subject matter is marriage, the State Legislature can only legislate with regard to that marriage which is contracted within the limits of the State. If it legislates with regard to marriages contracted beyond those limits, there is no territorial nexus between the State and the marriages to confer jurisdiction, although the parties to such marriages are domiciled in that State. AIR 1958 Bom 68 (71, 72, 74) = ILR (1957) Bom 880 = 1958 Cri LJ 161 (FB). (S. 4 (b) of Bombay Act 25 of 1946 held ultra vires.)

(7) Under this entry the State Legislature is empowered to make laws regarding marriage, succession, etc. But these laws, in order to be valid, must not offend against the Fundamental Rights guaranteed to the citizens by the Constitution. AIR 1953 SC 91 (93, 94) = 1953 SCR 404 = ILR (1953) Hyd 98. (Hyderabad Wali-ud-Daula Succession (Decision of Disputes) Act infringed Article 14.) ** AIR 1952 Mad 193 (195, 196) = ILR (1953) Mad 78 = 1952 Cri LJ 434 (DB). (Madras Hindu (Bigamy Prevention and Divorce) Act (6 of 1949) does not offend Articles 15 and 25.)

(8) Power of State Legislature to make laws respecting intestacy and succession extends to make laws respecting succession to agricultural lands. AIR 1966 Madh Pra 11 (13) = 1965 MPLJ 150 (DB).

(9) Item 5, List III read with Item 46 shows that the Parliament as also the Legislature of the State specified in Part A and Part B of the first schedule has power to make laws with regard to jurisdiction and powers of High Courts in respect of intestacy and succession and therefore the Succession Act of 1925 made applicable to the State of Mysore on 1-4-1951 could and did confer on High Court the jurisdiction in respect of

6. Transfer of property other than agricultural land; registration of deeds and documents.

[Government of India Act, 1935, Item 8.]

JAMMU AND KASHMIR

Omit Entry 6—See Constitution (Application to Jammu and Kashmir) Order, 1954, Para 2, sub-para (22) (c) (iii) (as amended by C. Os. 72 and 74).

7. Contracts, including partnership, agency, contracts of carriage, and other special forms of contracts, but not including contracts relating to agricultural land.

[Government of India Act, 1935, Item 10.]

JAMMU AND KASHMIR

Omit Entry 7—See Constitution (Application to Jammu and Kashmir) Order, 1954, Para 2, sub-para. (22) (c) (iii) (as amended by C. Os. 72 and 74).

Schedule VII, List 3, Entry 5 — Note 1 (contd.)

intestacy and succession. AIR 1959 Mys 83 (85) = 36 Mys LJ 208 (FB).

(10) Madras Aliyasanthana (Mysore Amendment) Act, 1962 relates to partition and succession, which are matters falling within Entry 5 of List III of Sch. VII. The Act having received the assent of the President it is a law enacted by a competent legislature and is intra vires the legislative power of the legislature concerned. AIR 1968 Mys 216 (223) = (1968) 1 Mys LJ 599 (DB).

Schedule 7, List 3, Entry 6 — Note 1

(1) The Mysore Tenancy Act (13 of 1952) is within the legislative competence of the State Legislature under Entries 18 and 65 of List II and the enumeration of subject in List III Entries 6 and 7 does not prohibit this piece of legislation. ILR (1955) Mys 360 (363, 364) (DB) ** (1955) 33 Mys LJ 158 (162) = ILR (1955) Mys 360.

(2) Bihar Buildings (Lease, Rent and Eviction) Control Act (3 of 1947), S. 11 — State Legislature's power to create jurisdiction and office of House Controller could be based on the implied power of the State Legislature under Entries 6, 7 and 13 of the Concurrent List. AIR 1954 Pat 97 (99) (DB).

(3) The subject-matter of Rajasthan Premises (Control of Rent and Eviction) Act, 1950, comes under Items 6, 7 and 13 of List III and not Item 18 of List II in Sch. VII. AIR 1954 Raj 252 (255) = ILR (1954) 4 Raj 958 (DB).

(4) Kerala Agriculturists Debt Relief Act (31 of 1958), Section 11-A — Deals with agricultural indebtedness. Even if the pith and substance of the matter were a contract of sale of goods the State legislature would be competent to pass it under Entries 6 and 7 of List III. AIR 1965 Ker 39 (42) = 1964 Ker LT 94 (FB).

(5) Hindu Succession Act (1956), Section 14 applies to agricultural lands and falls within Entry 5, List III. Its application to agricultural land cannot be excluded by invoking the provisions of Entry 6 of List III, Sch. 7. AIR 1964 All 165 (166).

(6) State legislature is competent to amend the Section 69 of the Registra-

tion Act in view of Entry No. 6 of concurrent list. AIR 1969 Andh Pra 134 (135).

(7) United Khasi-Jaintia Hills District (Transfer of Land) Act is ultra vires of District Council. AIR 1968 Assam 43 (46, 47) (DB).

(8) Object and scope of Act — Determination of subject-matter of a legislation — Interpretation of legislative entry — Doctrine of pith and substance — Merely because a building can be used for any purpose including that of market, a legislation regulating mainly relations between landlords and tenants does not ipso facto become legislation on markets — Word 'market' — Meaning of. ILR (1969) Andh Pra 129 = (1968) 2 Andh WR 273 (DB).

Schedule 7, List 3, Entry 7 — Note 1

(See also under Entry 6 of this List.)

(1) A contract between a landlord and a tenant for payment of rent in respect of agricultural land, irrespective of the form in which it might be clothed, is a contract relating to agricultural land and is excluded from the scope of this entry. AIR 1943 FC 9 (10, 11) = 22 Pat 428 = 1943 FCR 33 = ILR (1943) Kar (PC) 17 Sup.

(2) Where a State law is, in pith and substance, covered by some entry in the State List but only touches a subject in the Concurrent List incidentally, no question of repugnancy under Article 254 of the Constitution would arise. AIR 1952 Cal 740 (749) (SB) ** AIR 1953 Pat 87 (91) = 32 Pat 19 (DB).

(3) Bihar Sales Tax Act is a law imposing taxation on sale of goods and is not a law with respect to sale of goods and falls within Item 84, List II. Article 254 has no application though incidentally it may trench to a certain extent upon Items 7 and 8 in List III. AIR 1953 Pat 87 (91) = 1953 BLJR 48 (DB). (Reversed on another point in AIR 1955 SC 661.)

(4) The determination of the water rate under Section 78, Bengal Irrigation Act, is not a matter of contract between the parties: it is an exercise of statutory power, and, therefore, no question of repugnancy between Section 78 and the provisions of the Contract Act arises. AIR 1956 Pat 482 (488) (DB).

8. Actionable wrongs.

[Government of India Act, 1935, Item 14.]

JAMMU AND KASHMIR

Omit Entry 8—See the Constitution (Application to Jammu and Kashmir) Order, 1954, Para 2, sub-para. (22) (c) (iii) (as amended by C. Os. 72 and 74).

9. Bankruptcy and insolvency.

[Government of India Act, 1935, Item 12.]

JAMMU AND KASHMIR

Omit Entry 9—See the Constitution (Application to Jammu and Kashmir) Order, 1954, Para 2, sub-para. (22) (c) (iii) (as amended by C. Os. 72 and 74).

10. Trust and Trustees.

[Government of India Act, 1935, Item 12.]

JAMMU AND KASHMIR

Omit Entry 10—See the Constitution (Application to Jammu and Kashmir) Order, 1954, Para 2, sub-para. (22) (c) (iii) (as amended by C. Os. 72 and 74).

Schedule VII, List 3, Entry 7 — Note 1 (contd.)

(5) Punjab Forward Contracts Tax Act (7 of 1951) does not fall within Entry 7 of List III of Sch. 7 nor under Entry 62, List II and is ultra vires of State Legislature. AIR 1961 SC 268 (270) = (1961) 1 SCR 668.

(6) Kerala Agriculturist Debt Relief Act (1958), Section 11-A deals with agricultural indebtedness. Even if the pith and substance of the matter were contract of sale of goods State Legislature would be competent to pass it under Entries 6 and 7, List III. AIR 1965 Ker 39 (42) = 1964 Ker LT 94 (FB).

(7) Madhya Pradesh Tendu Patta (Vyapar Viniyaman) Nivamavali Sanshodhan Adhyadesh (1965) (Ordinance No. 3 of 1965), S. 3 only inserts a new sub-rule in Rule 7 which deals with disposal of Tendu leaves which have already become the property of the State Government — It does not deal with any subject mentioned in Entries 7, 21 and 42, List III. The Ordinance is valid. AIR 1966 Madh Pra 110 (114) = 1965 MPLJ 994 (DB).

(8) In Item 7 of List III the concurrent List does not affect the validity of Mysore Tenancy Act (13 of 1952). It is within the competence of the State legislature. (1955) 33 Mys LJ 158 (162) = ILR (1955) Mys 360.

(9) Forward Contracts (Regulation) Act (1952) — Falls under specific Entry 48 of List 1 and not under general Entry 26 of List 2 nor Entry 7 of List 3 which cannot prevail against specific entry. AIR 1963 SC 90 (96) = (1963) 3 SCR 209 ** AIR 1959 Cal 89 (92) (DB). (Reversed on another point in AIR 1963 SC 90. Even if the Act comes under Entry 7 List III it will be intra vires Parliament.)

(10) Bihar Shops and Establishments Act, 1953 (8 of 1954), Section 26 (2) — Provision held not repugnant to existing law relating to contract of service and therefore not void — Contract Act (1872), Section 27. AIR 1958 Pat 442 (444) = 1958 BLJR 223.

(11) 'Contracts' in the entry would include quasi-contracts. See AIR 1962 Bom 12 (20) = 63 Bom LR 379 (DB). (Analogy not correct for interpreting 'corporations' in Entry 44 of List 1, so as to include quasi-Corporations or societies similar to corporations.)

Schedule 7, List 3, Entry 8 — Note 1

(1) Bihar Sales Tax Act is not a law in respect to sale of goods but is a law imposing taxation on sale of goods and falls entirely within Item 54, List II — Art. 254 has no application though it may incidentally trench to a certain extent upon items 7 and 8 in List III. AIR 1953 Pat 87 (91) = 1953 BLJR 48 (DB). (Reversed on another point in AIR 1955 SC 661.)

Schedule 7, List 3, Entry 9 — Note 1

(1) In a general sense, insolvency means inability to meet one's debts or obligations; in a technical sense, it means the condition or standard of inability to meet debts or obligations, upon the occurrence of which the statutory law enables a creditor to intervene, with the assistance of a Court, to stop individual action by creditors and to secure administration of the debtor's assets in the general interest of creditors; the law also generally allows the debtor to apply for the same administration. The justification for such proceeding by a creditor generally consists in an act of bankruptcy by the debtor. AIR 1937 PC 95 (98).

(2) If some of the provisions are merely ancillary to the general Act relating to bankruptcy and insolvency, the ancillary matters must be regarded as being within the domain of bankruptcy and insolvency. AIR 1943 PC 76 (83).

Schedule 7, List 3, Entry 10 — Note 1

(1) Under Entry 10 List III the existence of a trust alone gives the power to legislate upon trusts. It cannot be combined with Entry 28 List III to say that religious institutions shall be regarded as public trusts for purpose of exercising control over it by legislation. AIR 1958 Madh Pra 362 (365) = 1958 MPLJ 611 (DB).

(2) Section 58 of the Bihar Wakfs Act (8 of 1948) is not ultra vires the powers

11. Administrators-general and official trustees.

[Government of India Act, 1935, Item 12.]

12. Evidence and oaths; recognition of laws, public acts and records, and judicial proceedings.

[Government of India Act, 1935, Item 5.]

JAMMU AND KASHMIR

Omit Entry 12—See the Constitution (Application to Jammu and Kashmir) Order, 1954, Para 2, sub-para. (22) (c) (iii) (as amended by C. Os. 72 and 74).

13. Civil procedure, including all matters included in the Code of Civil Procedure at the commencement of this Constitution, limitation and arbitration.

JAMMU AND KASHMIR

Omit Entry 13—See the Constitution (Application to Jammu and Kashmir) Order, 1954, Para 2, sub-para. (22) (c) (iii) (as amended by C. Os. 72 and 74).

Schedule VII, List 3, Entry 10 — Note 1 (contd.)

of Bihar Legislature as it was competent to legislate with respect to trust and trustee within the State of Bihar. AIR 1955 Pat 470 (471) = 1955 Cri LJ 1616.

(3) The Bihar Land Reforms Act (30 of 1950) has been held to be constitutionally valid as the pith and substance of the Act falls within List 2 Entry 35 and not under Entries 10 and 28 of List 3. AIR 1953 Pat 337 (338) = 32 Pat 66 (DB).

(4) State Legislature is competent to pass Jadavpur University Act which comes under Entry 11 of List II and Entry 10 of List III and to modify an existing Trust. AIR 1960 Cal 120 (123) = 63 Cal WN 914.

(5) Bombay Public Trusts Act (29 of 1950) applies to a society though it is registered under Societies Registration Act. It is intended to regulate the administration of public, religious and charitable trusts within Entries 10 and 28 of List III and the validity of the Act cannot be challenged on the ground that it incidentally trenches on the field contemplated by Entry 44 List II. AIR 1962 Bom 12 (21) = 63 Bom LR 379 (DB).

(6) Per Mudholkar J. — Delhi Legislature was competent to make a law dissolving a charitable trust and transferring its rights etc. to another institution. Entries 10 and 28 of List III permit making of such law. Delhi Tibbia College Act assented to by the President cannot be called in question on the ground of repugnancy with existing law or a law made by Parliament. AIR 1962 SC 458 (478) = 1962 Supp (1) SCR 156.

(7) U. P. Intermediate Education Act (2 of 1921), Sections 16-A to 16-I — Added by U. P. Act 35 of 1958 — Subject-matter of Legislation falls within List II, Entry 11. It cannot be said that Act relates to charities or charitable institutions or to trusts or trustees, because it incidentally trenches upon or affects a charitable institution and for that reason beyond competence of State legislature — Act is intra vires. AIR 1966 SC 1307 (1310, 1311) = (1966) 3 SCR 328.

(8) Sir Currimbhoy Ebrahim Baronetcy Act IV of 1913 passed by Central Govern-

ment and the Sir Currimbhoy Ebrahim Baronetcy (Repeal and Distribution of Trust Properties) Act, 1959 fall under Entry 10 of List III and the repealing Act was within the competence of Bombay State Legislature and is not ultra vires. (1967) 69 Bom LR 326 (366, 367) = 1967 Mah LJ 694 (DB).

Schedule 7, List 3, Entry 12 — Note 1

(1) It is open to a State legislature to define "foreign judgments" and how they are to be enforced within the State subject to any legislation by Parliament — Items 12 and 13 of List III give powers to the State similar to those given to Parliament by Article 261 (2). AIR 1959 Punj 265 (270) = 61 Punj LR 418 (FB).

(2) It has been held that the U. P. Panchayat Raj Act (26 of 1947) is a valid existing law enacted by virtue of entries in Lists 2 and 3 including the present entry. AIR 1954 All 655 (657) = 1954 Cri LJ 1399 (DB).

Schedule 7, List 3, Entry 13 — Note 1

(1) Words "civil procedure" in this entry are used in a general sense as the procedure applicable to litigation generally; they do not include a special law of procedure which is applicable only to litigation regarding a special matter. AIR 1942 Cal 587 (590) (DB). (Bengal Tenancy Act 8 of 1885, when it deals with procedure does not deal with civil procedure generally.)

(2) The words "civil procedure" must be held to exclude matters relating to jurisdiction and powers of Courts, since special provision is made for these matters elsewhere in the lists. AIR 1939 Cal 628 (635) (DB).

(3) The provisions of the Civil Procedure Code itself are of course specifically included in this entry. But there is no warrant for including in the entry any provisions which are not in the Code and which do not appertain to "civil procedure". AIR 1939 Cal 628 (635) (DB) ** AIR 1939 Pat 90 (95) = 17 Pat 714 (DB).

(4) The amendment of Section 15 of the Mysore High Court Act by Act 35 of 1951 providing for second appeals in which the value of subject-matter is not

14. Contempt of Court, but not including contempt of the Supreme Court.
JAMMU AND KASHMIR

Omit Entry 14 — See Constitution (Application to J. and K.) Order, 1954, Para. 2, sub-para. (22) (c) (iii) (as amended by C. O. 80).

15. Vagrancy; nomadic and migratory tribes.

[Government of India Act, 1935 — Item 23.]

JAMMU AND KASHMIR

Omit Entry 15 — See Constitution (Application to J. and K.) Order, 1954, Para. 2, sub-para. (22) (c) (iii) (as amended by C. O. 80).

16. Lunacy and mental deficiency, including places for the reception or treatment of lunatics and mental deficient.

[Government of India Act, 1935 — Item 18.]

Schedule 7, List 3, Entry 13 — Note 1 (contd.)

(300) = 1961 All LJ 996 (DB). (AIR 1961 All 320, Overruled.)

more than Rs. 3000 being decided by a Judge sitting alone, is intra vires the State Legislature. The words of the entry are capable of being applied to procedure for disposal of second appeals. AIR 1952 Mys 75 (76) = ILR (1952) Mys 279.

(10) The subject-matter of Rent Control Acts has been held to fall under Entries 6, 7 and 13 of List 3 and not under Entry 18 of List 2. AIR 1954 Pat 97 (99) (DB). (Bihar Buildings (Lease, Rent and Eviction) Control Act, 3 of 1947.) ** AIR 1954 Raj 252 (255) = ILR (1954) 4 Raj 958 (DB.) (Rajasthan Premises (Control of Rent and Eviction) Act (XVII of 1950).)

(11) In the following case it was assumed that the Bengal Non-agricultural Tenancy (Temporary Provisions) Act (9 of 1940) was a legislation in respect of "civil procedure". AIR 1945 FC 1 (1, 2) = 1944 FCR 351 = ILR (1945) 2 Cal 295 = ILR (1945) Kar (FC) 1.

(12) The Travancore-Cochin Holdings (Stay of Execution Proceedings) Act (8 of 1950) does not relate to "civil procedure" and, therefore, does not come within the Concurrent List. AIR 1953 Trav-Co 327 (334) = ILR (1952) Trav-Co 670 (DB).

(13) Since Entry 65 of the State List read with Entry 18 of the same list gives the State Legislature exclusive power to create and determine powers and jurisdiction of Courts in respect of land, there is no necessity of invoking the concurrent power relating to Civil Procedure Code under this entry. AIR 1957 Madh B 63 (63). (M. B. Muafi and Inam Tenants and Subtenants Protection Act (32 of 1954), Section 4 — Validity — Provision held not repugnant to Civil P. C.)

(14) It has been held that the Barahiya Tal Lands (Declaration of Possession) Act (26 of 1950), passed by the Bihar Legislature is not a law, either in form or in substance, with respect to arbitration. AIR 1952 Pat 166 (170) = 30 Pat 1085 (DB).

Schedule 7, List 3, Entry 14 — Note 1

(1) Section 9, Punjab Security of the State Act (12 of 1953) was not repugnant to Contempt of Courts Act, 1952. The Punjab Act in pith and substance dealt with public order and not with contempt. The entire provisions of Section 9 fell within List 2, Entry 1. AIR 1956 Punj 169 (169-172) = ILR (1956) Punj 1146 = 1956 Cri LJ 1015 (DB).

(2) Law of contempt of Courts is not beyond the competence of legislature,

(6) The State Legislature can legislate in respect of the procedure to be followed in the High Court as to the filing and disposal of appeals, etc., under this entry or under Entry 3 of the State List. AIR 1953 Trav-Co 53 (55) = ILR (1952) Trav-Co 605 (DB).

(7) Article 261 (2) empowers only the Parliament to determine the manner in which judicial proceedings whether of the Union or of the State are to be proved and are to be made effective, while items 12 and 13 of the concurrent list give similar power to the States. It is open to a State Legislature to define foreign judgments and how they are to be enforced within the State subject to any legislation by the Parliament. AIR 1959 Punj 265 (269) = 61 Pun LR 418 (FB).

(8) Civil Procedure Code is item 13 of the Concurrent List. It is open to Bihar legislature to amend the Code of Civil Procedure, while legislating in respect of religious endowment and religious institutions in Bihar and the President's assent having been received to the Act, Bihar law shall prevail in that State under Article 254 (2). AIR 1959 SC 1073 (1080) = (1959) Supp (2) SCR 624.

(9) By virtue of Schedule 7 List III Entry 13 read with proviso to Art. 254 the Parliament was fully competent to enact Central Act 66 of 1956 even though its effect was to amend, vary or repeal the State Act of 1954. AIR 1962 All 299

17. Prevention of cruelty to animals.

[Government of India Act, 1935 — Item 22.]

JAMMU AND KASHMIR

Omit Entry 17 — Constitution (Application to J. and K.) Order 1954, Para. 2, sub-para. (22) (c) (iii) (as amended by C. O. 80).

18. Adulteration of foodstuffs and other goods.

[Government of India Act, 1935 — List II, Item 30.]

19. Drugs and poisons, subject to the provisions of Entry 59 of List I with respect to opium.

[Government of India Act, 1935 — Item 19.]

20. Economic and social planning.

JAMMU AND KASHMIR

Omit Entry 20 — Constitution (Application to J. and K.) Order, 1954, Para. 2, sub-para. (22) (c) (iii) (as amended by C. O. 80).

21. Commercial and industrial monopolies, combines and trusts.

JAMMU AND KASHMIR

Omit Entry 21 — Constitution (Application to J. and K.) Order, 1954, Para. 2, sub-para. (22) (c) (iii) (as amended by C. O. 80).

See the Monopolies and Restrictive Trade Practices Act, 1969 (54 of 1969).

22. Trade unions; industrial and labour disputes.

[Government of India Act, 1935 — Item 29.]

Schedule 7, List 3, Entry 14 — Note 1 (contd.)

Central or State. AIR 1969 Delhi 201 (206) = 1969 Cri LJ 884 (FB).

Schedule 7, List 3, Entry 19 — Note 1

(1) Madras Prohibition Act so far as it pertains to Ganja — Is not repugnant to any provisions of Constitution — Ganja being narcotic drug State Legislature is competent to make laws on that subject under entry 19 of Concurrent List. 1955 Andh LT (Cri) 205.

(2) Extension of Central Acts 2 of 1930 and 23 of 1940 to Hyderabad State did not completely efface Hyderabad Act of 1333F. It remained alive so far as it dealt with collection of duties of excise and provided for licences for narcotic drugs. AIR 1966 SC 713 (717) = (1966) 2 SCR 110 ** AIR 1964 Andh Pra 430 (432) = (1964) 1 Andh LT 285 (DB).

(3) The provision for punishment of a person who possesses opium without licence has nothing to do with cultivation or manufacture or sale for export and as such comes under general entry 19 List III and not under Entry 59 List I. The Madhya Bharat Opium Act 15 of 1955 amending the provisions of Indian Opium Act in regard to matters not falling under Entry 59 List I is valid as it was assented to by the President. AIR 1961 Madh Pra 13 (14) = 1961 (1) Cri LJ 92 = 1961 MPLJ 119. (Overruled on another point in AIR 1963 M. P. 337.)

Schedule 7, List 3, Entry 20 — Note 1

(1) Bombay Town Planning Act falls within Entry 18 of List II and also Entry 20 of List III and is within the competency of State legislature. AIR 1967 SC 1373 (1381-82) = (1967) 3 SCR 65.

Schedule 7, List 3, Entry 21 — Note 1

(1) The expression "commercial and industrial" monopolies is wide enough to

include grant or creation of monopolies to the State and citizens as well as control of monopolies. AIR 1960 SC 1073 (1078) = (1960) 3 SCR 742.

(2) Entry 26 of List II Schedule 7 does not derogate from the authority conferred by Entry 21 of List III concurrently on the Parliament and the State Legislature to grant or create by law commercial monopolies. AIR 1960 SC 1073 (1078) = (1960) 3 SCR 742.

(3) Motor Vehicles Act (1939) (as amended by Act 100 of 1956), Chap. IV-A. could competently be enacted by the the Parliament under Entry 21 read with Entry 35 of List III. It is therefore intra vires of Parliament. AIR 1961 SC 82 (86) = (1961) 1 SCR 642.

(4) Madhya Pradesh Tendu Patta (Vyapar Viniyaman) Niyamavali Sanshodhan Adhyadesh (1965), (Ordinance No. 3 of 1965) Section 3 only introduces new sub-rule in rule 7 which deals with the disposal of Tendu leaves which have already become property of the State. The new sub-rule (7-a) does not pertain to contracts, partnership etc. falling under items 7, 21 and 42 of List III. AIR 1966 Madh Pra 110 (114) = 1965 MPLJ 994 (DB).

Schedule 7, List 3, Entry 22 — Note 1

(1) No question of repugnancy with the Contract Act arises in interpreting the definition of 'Industrial Dispute' in Section 2 (k) of the Industrial Disputes Act, 1947. Once a particular dispute is found to fall under the definition, the jurisdiction to decide the same rests with the Tribunal under the Act. AIR 1949 FC 111 (113, 120) = 1949 FCR 321 = ILR (1949) Bom 686.

(2) The definition of "industry" in Section 2 (i) of the Industrial Disputes Act

23. Social security and social insurance; employment and unemployment.
[Government of India Act, 1935 — Item 28.]

24. Welfare of labour including conditions of work, provident funds, employers' liability, workmen's compensation, invalidity and old age pensions and maternity benefits.^a

[Government of India Act, 1935 — Item 27.]

[a] See the Maternity Benefit Act, 53 of 1961 which is now enforced in almost all the States.

Schedule 7, List 3, Entry 22 — Note 1 (contd.)

is covered by Entry 22 and Entry 24 of List 3. It is thus within the legislative competence of the Central Legislature. A wrong application of the definition to cases which are not strictly covered by it cannot vitiate the definition. AIR 1957 SC 329 (339) = 1957 SCR 335 = ILR (1957) Punj 989.

(3) The entry should not be given a narrow construction. AIR 1957 SC 329 (339) = 1957 SCR 335 = ILR (1957) Punj 989. (Includes all ancillary matters.)

(4) In the ordinary or non-technical sense, industry or business means an undertaking where capital and labour co-operate with each other for producing wealth in the shape of goods, machines, tools etc., and for making profits. But the limited concept of what an industry meant in early times must now yield place to an enormously wider concept so as to take in various and varied forms of industry, so that disputes arising in connection with them might be settled quickly without much dislocation and disorganisation of the needs of the society. AIR 1953 SC 58 (60) = 1953 SCR 302.

(5) The Industrial Disputes Act applies to disputes between the Municipalities and their employees in branches of work that can be regarded as analogous to the carrying on of trade or business. It is within the competence of a tribunal under the Act to reinstate dismissed Municipal employees. This power, though trenches upon the powers of the Chairman under Municipal Acts, this invasion of the provincial field of legislation does not render the Industrial Disputes Act of the Central Legislature invalid. AIR 1953 SC 58 (59) = 1953 SCR 302. (AIR 1950 Cal 457, Affirmed.)

(6) The Industrial Disputes (Madras Amendment) Act (12 of 1947) is intra vires the Madras Legislature, being covered by Items 27 and 29 of the Concurrent List of the Government of India Act 1935. AIR 1951 Mad 191 (199) = 52 Cri LJ 744 (DB).

(7) Rajasthan Industrial Tribunal (Constitution and Proceedings) Validating Act (1959) — Act because of Entry 22 List III is within the competence of the State Legislature and having received the assent of the President must by virtue of Article 254 (2) prevail in the State of Rajasthan. AIR 1964 SC 444 (448) = (1964) 5 SCR 1 ** AIR 1963 Raj 22 (24) = 1962 Raj LW 669.

(8) Chapter VA incorporated in the Industrial Disputes Act in 1953 and C. P. and Berar Industrial Disputes Settlement Act do not deal with the same matter. No question of repugnancy between the Central Act and the State Act can therefore arise and both will be in force in C. P. and Berar. AIR 1963 Bom 189 (193) = 65 Bom LR 91 (DB).

(9) Power of Parliament to make law fixing minimum bonus — Flows from jurisdiction over industrial and labour disputes. AIR 1967 SC 691 (717) = (1967) 1 SCR 15.

(10) Section 2-A, Industrial Disputes Act, is not ultra vires — Parliament had power to enact it either under Entry 22 of concurrent List or Entry 97 of Union List. AIR 1970 Delhi 60 (66) ** AIR 1970 Mad 82 (84) = 1970 Lab IC 203 = (1969) 2 Mad LJ 214.

Schedule 7, List 3, Entry 23 — Note 1

(1) Pursuant to Entries 54, 55, 96 of List I and Entries 23 and 24 Parliament can levy or collect fees which may be regarded as regulatory fees only. AIR 1968 Mys 42 (45) = (1967) 2 Mys LJ 474 (DB).

(2) Provision relating to payment of bonus to all persons including persons other than workmen is within the ambit of Entries 23 and 24 of List III Sch. 7. AIR 1968 Ker 143 (145) = 1968 Lab IC 647 = 1967 Ker LT 735 (DB).

(3) Bihar Shops and Establishments Act, 1953 (8 of 1954), Section 26 (2) — Provisions are not repugnant to existing law relating to contract of service. The Act received the assent of the President and is covered by Entries 23 and 24 of List III. The Act, therefore, is not void. AIR 1958 Pat 442 (444) = 1958 BLJR 223.

(4) The provisions of Iron Ore Mines Labour Welfare Cess Act (1961), which impose certain obligations on Mine owners are clearly relatable to such topics as social security. Welfare of labour maternity benefit etc. covered by Entries 23 and 24 of List III. AIR 1968 Mys 42 (45) = (1967) 2 Mys LJ 474 (DB).

Schedule 7, List 3, Entry 24 — Note 1

(1) Entry 24 List III Schedule 7 is not restricted to shops or establishments where labour is employed but applies also to shops or establishments which are run by the owners and their families. AIR 1951 SC 315 (316) = 52 Cri LJ 1237 = 1951 SCR 671.

(2) The subject-matter of Section 7 (1) of the Punjab Trade Employees Act (10 of 1940) as amended in 1943 is cover-

25. Vocational and technical training of labour.

26. Legal, medical and other professions.

[Government of India Act, 1935 — Item 16.]

Schedule 7, List 3, Entry 24 — Note 1 (contd.)

ed by List 2, Item 27 and also List 3, Item 27 of the Government of India Act (1935). AIR 1951 SC 315 (316) = 1951 SCR 671 = 52 Cri LJ 1237 ** AIR 1951 SC 315 (316) = 52 Cri LJ 1237 = 1951 SCR 671.

(3) The definition of the term "industry" in Section 2 (j) of the Industrial Disputes Act, 1947, was held to be justified under List 3, Item 27 of the Government of India Act, 1935, even if the same was not covered by Item 29 of that list. AIR 1957 SC 329 (339) = 1957 SCR 335 = ILR (1957) Punj 989.

(4) The provisions of Iron Ore Mines Labour Welfare Cess Act (1961) which impose certain obligations on mine owners are clearly relatable to such topics as social security, welfare of labour, maternity benefit etc. covered by Entries 23 and 24 of List III. AIR 1968 Mys 42 (45) = (1967) 2 Mys LJ 474 (DB).

(5) M. P. Minimum Wages Fixation Act (16 of 1952), Pre. and Section 3 is an independent enactment fixing minimum rates of wages for Employment Act is not a piece of colourable legislation — Legislature was competent to enact it under Entry 24, List III. AIR 1964 Madh Pra 45 (51) = 1964 MPLJ 43 (DB).

(6) Minimum Wages (Madhya Pradesh Amendment and Validation) Act (23 of 1961) is a legislation with respect to matters enumerated in List III, Entry 24. AIR 1962 Madh Pra 342 (345) = 1962 MPLJ 849 (DB).

(7) U. P. Shops and Commercial Establishments Act (22 of 1947) is not ultra vires the State legislature under Entry 27 List III of Government of India Act (1935). The U. P. legislature was competent to have passed this Act. In the present Constitution there is nothing which makes it ultra vires. AIR 1961 All 79 (82) = 1961 (1) Cri LJ 199 = 1960 All LJ 429.

(8) Payment of Wages Act (1936), Section 6 (as amended), making provision for compulsory saving of a part of a bonus payable to an industrial worker should be deemed to be a piece of legislation covered by the words 'welfare of labour' and falls within Entry 24 of List 3 in Schedule 7 of the Constitution and is intra vires. AIR 1964 Punj 513 (514) = (1965) 1 Lab LJ 656 (DB).

(9) Minimum Wages Act 1948 (2 of 1948) making provision for minimum wages and for machinery for payment of the same comes within item 24, List III (item 27 List III of Government of India Act 1935) and merely because in one respect it shades into the field of Entry 5 of List II, it cannot be held to be uncon-

stitutional. (1963-64) 24 FJR 194 (197) (Punj) (DB).

(10) Bombay Labour Welfare Fund Act (40 of 1953) provides for taking over of unpaid accumulations which are regarded by legislature as abandoned property and such taking over is directed for providing for the Fund constituted for the carrying out of various measures and activities for welfare of labour and their dependants. It is within competency of State Legislature under Entry 24, List III. (1966) 7 Guj LR 156 (177) = (1966) 1 Lab LJ 124 (DB).

(11) Power of Parliament to make a law such as Payment of Bonus Act, 1965 fixing minimum bonus payable to workers flows from jurisdiction of Parliament over welfare of labour including conditions of work and wages. AIR 1967 SC 691 (701) = (1969) 1 SCR 15.

(12) Bihar Shops and Establishments Act, 1953 (8 of 1954), Section 26 (2) — Provision held not repugnant to existing law relating to contract of service — The Act received the assent of President and is covered by Entries 23 and 24 of List III and is therefore valid. AIR 1958 Pat 442 (444) = 1958 BLJR 223.

Schedule 7, List 3, Entry 25 — Note 1

(1) The extensive power vested in the Provincial Legislatures to legislate with respect to higher, scientific and technical education and vocational and technical training of labour under the government of India Act is under the Constitution controlled by the five items in List I and List III mentioned in item 11 of List II. Use of the expression "subject to" in item 11 of List II Schedule 7 clearly indicates that the legislation in respect of excluded matters cannot be undertaken by the State legislatures. AIR 1963 SC 703 (715) = (1963) Supp 1 SCR 112.

Schedule 7, List 3, Entry 26 — Note 1

(1) The general power under this entry must be read subject to the power of the Union under Entry 78 of List I and a legislation with respect to advocates must be held to come under Entry 78 of List I regardless of whether it comes under this entry or not. Thus, the Indian Bar Councils (U. P. Amendment) Act (24 of 1950) being a legislation falling under List I, Entry 78, is ultra vires the U. P. Legislature. AIR 1954 All 728 (732, 734) = ILR (1954) 2 All 191 = 1954 Cri LJ 1485 (DB).

(2) Barring those entitled to practice in Supreme Court and the High Courts, power to legislate with respect to the rest of practitioners would still seem to be retained under Entry 26 of List III. AIR 1968 SC 888 (892) = (1968) 2 SCR 709.

27. Relief and rehabilitation of persons displaced from their original place of residence by reason of the setting up of the Dominions of India and Pakistan.

JAMMU AND KASHMIR

Omit Entry 27 — See Constitution (Application to J. and K.) Order, 1954, Para. 2, sub-para. (22) (c) (iii) (as amended by C. O. 72).

28. Charities and charitable institutions, charitable and religious endowments and religious institutions.

[Government of India Act, 1935 — List II, Item 34.]

JAMMU AND KASHMIR

Omit Entry 28 — See Constitution (Application to J. and K.) Order, 1954, Para. 2, sub-para. (22) (c) (iii) (as amended by C. O. 72).

Schedule 7, List 3, Entry 27 — Note 1

(1) Under this Entry the Parliament as well as the State Legislatures have power to legislate for rehabilitation of refugees from foreign countries and such legislation cannot be impugned on the ground that it is an extra territorial legislation. AIR 1952 Cal 679 (682).

(2) The acquisition of land for settlement of refugees as provided in the West Bengal Land Development and Planning Act (21 of 1948) is acquisition for a public purpose and is within the competence of the Provincial Legislature under the Government of India Act, 1935, List 2, Item 9. AIR 1952 Cal 679 (682) ** AIR 1951 Cal 97 (99) ** AIR 1966 Cal 429 (430).

(3) Acquisition of land for rehabilitation of persons displaced from East Pakistan falls under Entry 27 of List III. AIR 1961 All 520 (521).

(4) The pith and substance of the Displaced Persons (Compensation and Rehabilitation) Act 1954 deals with relief and rehabilitation and is a valid Central Act falling under Entry 27, List 3, Sch. 7. AIR 1961 Punj 34 (41) = 62 Pun LR 795 (FB).

(5) Punjab Consolidation of Land Proceedings (Validation) Act (6 of 1957) is within the competence of State Legislature to pass the Act. Act so far as it concerns the property which has ceased to be evacuee property having been acquired by Displaced Persons (Compensation and Rehabilitation) Act, 1954 would fall under Entry 18 of List 2 — Even if legislation in relation to that kind of property is not covered by Entry 18 of List 2 it would still fall under Items 27 and 41 of List 3. AIR 1959 Punj 8 (12) = 60 Pun LR 461 (FB). (Overruled on another point in AIR 1959 SC 519.)

Schedule 7, List 3, Entry 28 — Note 1

(1) Though the words 'religious institutions' were not present at the end of Item 34 in List 2 of Sch. VII of the Government of India Act, 1935, it was held that the power to legislate with respect to religious institutions was included in that item. AIR 1947 FC 1 (5) = 1946 FCR 67 = ILR (1946) Kar (FC) 27. (Madras Temple Entry Authorisation and Indemnity Act, 22 of 1939.) ** AIR 1950 Orissa 47 (52) = ILR (1949) 1 Cut 656 (DB). (Section 49 of the Orissa Hindu

Religious Endowments Act, 4 of 1939, not ultra vires.)

(2) The word 'charities' in this entry is an appropriate generic term of wide scope and meaning and a power to legislate in respect of 'charities' will include a power to legislate in respect of all matters connected with religious charities and religious institutions. AIR 1947 FC 1 (5, 6) = 1946 FCR 67 = ILR (1946) Kar (FC) 27 ** AIR 1950 Orissa 47 (48) = ILR (1949) 1 Cut 656 (DB).

(3) The additional phrases 'charitable institutions' and 'charitable endowments' in this entry are only illustrative of the directions which the power to legislate in respect of charities may, amongst others, take. AIR 1947 FC 1 (5, 6) = 1946 FCR 67 = ILR (1946) Kar (FC) 27.

(4) Madras Hindu Religious Endowments Act (Madras Act 19 of 1951), (as amended by Madras Act 27 of 1954). Sections 52 (1) (f), 55, 76 (1) and (2), 80, 81 and 82 as in force in Madras area of the State of Mysore and in their application to Maths are intra vires. It has rectified the defects that existed in the section before. AIR 1963 SC 966 (971, 972) = (1963) Supp 2 SCR 302.

(5) Madras Hindu Religious and Charitable Endowments Act (19 of 1951), (as amended by Andhra Act 13 of 1955), Section 76 (1) contribution levied under Section 76 (1) is a fee and not a tax is intra vires. AIR 1961 Andh Pra 216 (218) = (1960) 2 Andh WR 347 (FB). (W. P. No. 58 of 1953 (Andh) and W. A. No. 68 of 1956 (Andhra), Overruled.)

(6) State legislature is competent to legislate both for public and private religious endowments under Item 28 List III but in the case of private religious endowments there may be a proprietary interest in the beneficiaries and the legislature cannot take away that interest and thereby contravene Article 19 (1) (f) or Article 31 (2). AIR 1959 Orissa 17 (19) = ILR (1958) Cut 404 (DB).

(7) Bihar Legislature has power to legislate in respect of charities, charitable institutions, charitable and religious endowments and religious institutions situate in the State of Bihar are in so legislating it has power to affect trust property which may be outside Bihar

29. Prevention of the extension from one State to another of infectious or contagious diseases or pests affecting men, animals or plants.

[Government of India Act, 1935 — Item 30.]

JAMMU AND KASHMIR

Omit Entry 29 — See Constitution (Application to J. and K.) Order, 1954, Para. 2, sub-para. (22) (c) (iii) (as amended by C. O. 72).

30. Vital statistics including registration of births and deaths.^a

[Government of India Act, 1935 — List II, Item 14.]

[a] Now see the Registration of Births and Deaths Act 18 of 1969.

JAMMU AND KASHMIR

For Entry 30, the following entry shall be substituted, namely :—

“30. Vital statistics in so far as they relate to births and deaths including registration of births and deaths.”

—See Constitution (Application to Jammu and Kashmir) Order, 1954, Para 2, sub-para (22) (b) (ii) (a) (inserted and amended by C. O. 70 and C. O. 74).

31. Ports other than those declared by or under law made by Parliament or existing law to be major ports.

[Government of India Act, 1935 — List II, Item 18.]

JAMMU AND KASHMIR

Omit Entry 31 — See Constitution (Application to J. and K.) Order, 1954, Para. 2, sub-para. (22) (c) (iii) (as amended by C. O. 72).

32. Shipping and navigation on inland waterways as regards mechanically propelled vessels, and the rule of the road on such waterways, and the carriage of passengers and goods on inland waterways subject to the provisions of List I with respect to national waterways.

[Government of India Act, 1935 — Item 32.]

JAMMU AND KASHMIR

Omit Entry 32 — See Constitution (Application to J. and K.) Order, 1954, Para. 2, sub-para. (22) (c) (iii) (as amended by C. O. 72).

^a[33. Trade and commerce in, and the production, supply and distribution of,—

(a) the products of any industry where the control of such industry by the Union is declared by Parliament by law to be expedient in the public

Schedule 7, List 3, Entry 28 — Note 1 (contd.)

but which appertains to the trust situate in Bihar. AIR 1959 SC 1002 (1010) = 1959 Supp (2) SCR 601.

(8) Per Mudholkar J. — Delhi Legislature had competence to make Tibbia College Act (5 of 1952) dissolving a charitable trust and transferring its property, right etc. to another institution, and entries 10 and 28 of List III permit making a law of this kind. AIR 1962 SC 458 (478) = 1962 Supp (1) SCR 156.

(9) Subject-matter of U. P. Intermediate Education Act (2 of 1921), Sections 16-A to 16-I, added by U. P. Act 35 of 1958, falls within List II, Entry 11 — Act is intra vires and because it incidentally trenches upon or affects a charitable institution or powers of trustees of the institution it cannot on that account be beyond legislative competence. AIR 1966 SC 1307 (1310) = (1966) 3 SCR 328.

(10) Under Entry 10, List III the existence of a trust alone gives the power to legislate upon trusts. It cannot be combined with Entry 28, List III to say that religious institutions shall be regarded as public trust for purpose of exercising

control over it by legislation. AIR 1958 Madh Pra 362 (365) = 1958 MPLJ 611 (DB).

(11) Bombay Public Trusts Act (29 of 1950), Sections 2 (13) and 18 (1) is intra vires of State Legislature falling under Entries 10 and 28 of List III. AIR 1962 Bom 12 (21) = 63 Bom LR 379 (DB).

(12) The State Legislature has power to levy a fee under the Constitution of India, Seventh Schedule, List III, Entry 28 read with S. 47. The Legislature is, therefore, competent to levy a fee for rendering services in connection with the maintenance, supervision and control over the religious institutions and it is competent to levy the fee retrospectively. AIR 1963 SC 966 (971, 972) = (1963) Supp (2) SCR 216.

Schedule 7, List 3, Entry 33 — Note 1

(1) Since raw materials used are not the products of the industry, their production, distribution and supply, however, will not be covered by clause (a) of this entry. The regulation of production, supply and distribution of sugarcane used as raw material in the controlled sugar industry would not, therefore, be covered by this entry as it stood before the amendment but fell under Entry 27

- interest, and imported goods of the same kind as such products;
- (b) foodstuffs, including edible oilseeds and oils;
 - (c) cattle fodder, including oilcakes and other concentrates;
 - (d) raw cotton, whether ginned or unginned, and cotton seed; and
 - (e) raw jute.]

[a] Substituted for the old Entry 33 by the Constitution (Third Amendment) Act, 1954, S. 2 (22-2-1955).

34. Price control.

35. Mechanically propelled vehicles including the principles on which taxes on such vehicles are to be levied.

[Government of India Act, 1935 — Item 20.]

36. Factories.

Schedule 7, List 3, Entry 33 — Note 1 (contd.)

of the State List and therefore, the U. P. Sugarcane (Regulation of Supply and Purchase) Act (24 of 1953) was fully intra vires of the U. P. Legislature. **AIR 1956 SC 676 (690) = 1956 SCR 393.**

(2) After the amendment by the addition of Cl. (b) to the entry it was possible for Parliament also to legislate in relation to sugarcane but that in no way affected the legislative competence of the State Legislatures to legislate on the same subject-matter. **AIR 1956 SC 676 (690, 691) = 1956 SCR 393.**

(3) The effect of the amendment was only to enlarge the scope of the entry but not to affect the legislative competence of Parliament and State Legislatures. **AIR 1956 SC 676 (690) = 1956 SCR 393.**

(4) The Essential Commodities Act, 1955, was enacted by Parliament in exercise of its concurrent jurisdiction under this entry and not in exercise of its jurisdiction under Entry 52 of List 1. **AIR 1956 SC 676 (695) = 1956 SCR 393** ** **AIR 1969 Ker 154 (161) = 1968 Ker LT 652 (FB) ** AIR 1969 Pat 8 (9) (DB).**

(5) Entry is wide enough to include supply and distribution of foodstuff and their storage for all classes of persons including paddy lender—Hence the provisions of the Foodgrains Dealers Licensing Order passed under the Essential Commodities Act (1955), must be held to relate in pith and substance to Entry 33, List III. **AIR 1968 Pat 346 (351) = ILR 47 Pat 409 (DB).**

(6) The production, distribution and supply of wheat and wheat products would fall within Clause (b) of Item 33 List III, Sch. 7 and the validity of the Defence of India Rules especially R. 35 (5) defining wheat and wheat products as essential commodities cannot be questioned as unconstitutional. **AIR 1964 Cal 279 (283) = 1964 (1) Cri LJ 662 (DB).**

(7) Law relating to control of sugarcane — Parliament is competent to enact law by virtue of Entry 33 of List III — Power conferred on Government under Section 3 of Essential Commodities Act and Sugarcane (Control) Order (1955), cannot be challenged as invalid. **AIR 1970 SC 267 (269) = (1969) 2 SCC 34.**

Schedule 7, List 3, Entry 34 — Note 1

(1) There was no item in the Government of India Act, 1935, corresponding to this entry. Item 29, List 2, Sch. VII to the Government of India Act, 1935, referred, inter alia, to distribution of goods and it was held that fixation of price was involved in regulating the distribution of articles. **AIR 1946 Cal 197 (204) = ILR (1947) 2 Cal 95 (DB).**

(2) Madras Essential Articles Control and Requisitioning (Temporary Powers) Act (29 of 1949) (As Amended by Andhra Act 1 of 1955), Section 3 is applicable to Government when it distributes the electrical energy produced or generated by it. Consequently it is empowered to control the price of electrical energy despite the fact that it is the only purveyor of the energy to the consumers. **AIR 1959 Andh Pra 538 (543) = (1959) 2 Andh WR 156 (DB).**

Schedule 7, List 3, Entry 35 — Note 1

(1) Entry 21 covers grant of monopolies — Powers under Entry 21 not restricted by Entry 26 in State List — Ch. IV-A of Motor Vehicles Act — Held validly enacted by Parliament. **AIR 1960 SC 1073 (1078) = (1960) 3 SCR 742 ** AIR 1961 SC 82 (86) = (1961) 1 SCR 642.**

(2) Assam Motor Vehicles Taxation (Amendment) Act (15 of 1963) and (12 of 1966) do not fall within Entry 35 of List III but are solely concerned with taxes on vehicles within the meaning of Entry 57, List II. They thus do not come in conflict with the Motor Vehicles Taxation Act (9 of 1936) and there is no scope for application of Article 254 (2) of the Constitution. **AIR 1967 SC 1575 (1576, 1577) = (1967) 3 SCR 611. (ILR (1966) 18 Assam 494, Reversed.)**

(3) Madras Motor Vehicles Rules (1940), Rule 160-C — Does not encroach upon field of State Legislature — The mere fact that a permit-holder may be compelled to pay his tax under Madras Motor Vehicles Taxation Act in time cannot make the rule any the less a rule made for the control of the plying of Motor Vehicles within the Item 35 of List III. **AIR 1956 Andhra 129 (139) = 1956 Andh WR 142 (DB).**

(4) M. P. Motor Vehicles Taxation (Amendment) Act (15 of 1965) as it deals

[Government of India Act, 1935 — Item 26.]

37. Boilers.

[Government of India Act, 1935 — Item 21.]

JAMMU AND KASHMIR

Omit Entry 37 — See Constitution (Application to J. and K.) Order, 1954, Para. 2, sub-para. (22) (c) (iii) (as amended by C. O. 72).

38. Electricity.

[Government of Act, 1935 — Item 31.]

JAMMU AND KASHMIR

Omit Entry 38 — See Constitution (Application to J. and K.) Order 1954, Para. 2, sub-para. (22) (c) (iii) (as amended by C. O. 72).

39. Newspapers, books and printing presses.

[Government of India Act, 1935 — Item 17.]

40. Archaeological sites and remains other than those ^a[declared by or under law made by Parliament] to be of national importance.

[Government of India Act, 1935 — List I Item 15].

[a] Substituted for the words 'declared by Parliament by law' by the Constitution (Seventh Amendment) Act, 1956, S. 27 (1-11-1956).

JAMMU AND KASHMIR

Omit Entry 40 — See Constitution (Application to J. and K.) Order, 1954, Para. 2, sub-para. (22) (c) (iii) (as amended by C. O. 72).

OBJECTS AND REASONS

See under List I, Entry 67.

41. Custody, management and disposal of property (including agricultural land) declared by law to be evacuee property.

JAMMU AND KASHMIR

Omit Entry 41 — See Constitution (Application to J. and K.) Order, 1954, Para. 2, sub-para. (22) (c) (iii) (as amended by C. O. 72).

Schedule 7, List 3, Entry 35 — Note 1 (contd.)

with the question of taxes on vehicles and not with the matter of the principles on which taxes on mechanically propelled vehicles are to be levied, falls under Entry 57 of List II and not under Entry 35, List III and is not ultra vires for want of assent of the President. AIR 1966 Madh Pra 131 (133) = 1966 MPLJ 229 (DB).

Schedule 7, List 3, Entry 36 — Note 1

(1) The Legislature can insert a taxing clause in the legislation under this entry in order to recoup itself for any expenditure incurred in carrying out the scheme embodied in it. AIR 1942 All 156 (166, 167) = ILR (1942) All 302 = 43 Cri LJ 674 (2).

(2) The fee levied under Section 6, Factories Act (1948), is not a tax but a fee meant for meeting the expenses of supervision, which became necessary in view of the various regulatory provisions of the Act. Resort to Entry 97 of List I is not necessary for justifying the provisions of Section 6. The section can be justified under this entry itself. AIR 1954 Raj 178 (181) = ILR (1954) 4 Raj 982 (DB).

Schedule 7, List 3, Entry 38 — Note 1

(1) The Madras Electricity Supply Undertaking (Acquisition) Act (43 of 1949) passed by the Madras Legislature was in pith and substance an Act to pro-

vide for the acquisition of electrical undertakings and could not be justified as a legislation coming under this entry. AIR 1954 SC 251 (252) = 1954 SCR 779. (AIR 1951 Mad 979, Reversed.)

(2) Electricity is a concurrent subject and hence Bombay Legislature is competent to provide for levy of surcharge so long as the relevant provisions do not conflict with any provision in the Central Act (Electricity Act) — No conflict in Clause 12 of Schedule in Electricity Act (1910) and Sections 3 and 4 of Bombay Electricity Surcharge Act — Notification issued by Chief Commissioner of Ajmer levying surcharge is not ultra vires the provisions of Electricity Act. AIR 1969 SC 227 (234) = (1969) 1 SCJ 355. (First Appeal No. 67 of 1956 D/- 22-9-1964, Reversed.)

Schedule 7, List 3, Entry 39 — Note 1

(1) The Press (Objectionable Matters) Act, 1951, passed by Parliament deals with "newspapers, books and printing presses" mainly and substantially and, therefore, falls under this entry. The Act also incidentally deals with "public order" which is a State subject, but such trespass is a very minor and incidental trespass which will not render the Act unconstitutional. AIR 1954 Bom 508 (511) = ILR (1954) Bom 1245 = 1954 Cri LJ 1549 (DB).

Schedule 7, List 3, Entry 41 — Note 1

(1) Administration of evacuee property has been recognised as a special class

^a[42. Acquisition and requisitioning of property.]

[a] Substituted for the original entry by the Constitution (Seventh Amendment) Act, 1956, S. 26 (1-11-1956).

OBJECTS AND REASONS

With respect to the amendment by substitution of this entry it is stated in S. O. R. : "The existence of three entries in the legislative lists (33 of List I, 36 of List II and 42 of List III) relating to the essentially single subject of acquisition and requisitioning of property by the Government gives rise to unnecessary technical difficulties in legislation. In order to avoid these difficulties and simplify the constitutional position, it is proposed to omit the entries in the Union and State Lists and replace the entry in the Concurrent List by a comprehensive entry covering the whole subject."—Gaz. of Ind., 1956, Extra., Pt. II, Sec. 2, page 222.

JAMMU AND KASHMIR

Omit Entry 42 — See Constitution (Application to J. and K.) Order, 1954, Para. 2, sub-para. (22) (c) (iii).

Schedule 7, List 3, Entry 41 — Note 1 (contd.)

of legislation and it has been treated as such by the Constitution, namely, in Article 31 (5) (b) (iii) and in this entry. AIR 1953 Sau 73 (75) (DB).

(2) If by the Administration of Evacuee Property Act, 1950, the Legislature has not only legislated with regard to the custody, management and disposal of evacuee property, but it has also by that very piece of legislation declared what property is evacuee property, it was acting within its legislative competence. AIR 1951 Bom 440 (446, 447) = ILR (1952) Bom 378 (DB) ** AIR 1952 Punj 389 (390) (DB).

(3) Though some of the matters to which Section 12 of the Administration of Evacuee Property Act relates might come within the ambit of Entry 18 of List 2, the precise entry under which the matter dealt with in Section 12 falls is this entry. AIR 1952 Pepsu 12 (14) = 3 Pepsu LR 465.

(4) Section 10 (a) (iii) of the Evacuee Interest (Separation) Act, 1951, which allows non-evacuee property to be sold cannot be held to be ultra vires the Parliament, because even if non-evacuee property is affected, it is affected incidentally and the Act does not in pith and substance deal with non-evacuee property. AIR 1957 All 561 (573) (DB).

(5) Question of administering evacuee property cannot involve judicial determination of complicated question of title between ex-evacuee and Custodian — The words "custody, management and disposal" in Entry 41 of List III do not indicate conferment of any such power, as only a civil Court can have. AIR 1958 Punj 384 (385) = 60 Pun LR 307.

(6) The term "management" in this entry includes all ancillary questions of taking possession of evacuee property, etc. AIR 1953 Sau 73 (75) (DB).

(7) The expression "disposal" appearing in this entry is wide enough to cover the extinguishment of a mortgage. AIR 1954 Punj 261 (263) = ILR (1955) Punj Punj 509 (DB).

(8) A law concerning the property of an evacuee cannot be made under this entry, for it empowers a law to be made in respect of property which has been declared by law to be evacuee property. AIR 1954 Punj 261 (263) = ILR (1955) Punj 509 (DB).

(9) List 3 refers to "property declared by law to be evacuee property" and not to "property belonging to an evacuee". Property declared to be evacuee property under S. 7, Administration of Evacuee Property Act is covered by this entry and such property does not cease to be within ambit of Entry 41, merely because the evacuee to whom it belonged at the date of the declaration or vesting has later on died or ceased to be an evacuee. Hence Section 43 of the Act is not ultra vires the Constitution. AIR 1963 All 101 (104).

(10) E. P. Evacuees (Administration of Property) Act (14 of 1947) and Administration of Evacuee Property (Chief Commissioners' Provinces) Ordinance (12 of 1949) are valid as regards property in the nature of land but are invalid so far as property other than land is concerned. AIR 1960 Punj 341 (345) = 62 Pun LR 475 (FB).

(11) Punjab Consolidation of Land Proceedings (Validation) Act (6 of 1957), Sections 3 and 4 are within the competence of State Legislature — Even if it is not covered by Entry 18, List II it would fall under Item 27 and Item 41 of List III. AIR 1959 Punj 8 (12) = 60 Pun LR 461 (FB). (Overruled on another point in AIR 1959 SC 519.)

SCHEDULE 7, LIST 3, ENTRY 42 SYNOPSIS

1. Acquisition and requisition of property.
2. Provision for payment of compensation.
3. Entry 42, List III and Entry 18, List II.

1. Acquisition and requisition of property.— (1) Entry 42 in List 3 is merely a head of legislation. The power to legis-

Schedule 7, List 3, Entry 42 — Note 1 (contd.)

late is given by Articles 245 and 246. AIR 1952 All 88 (89) (DB).

(2) Acquisition means and implies the acquiring of the entire title of the expropriated owner, and the entire bundle of rights which were vested in the original holder would pass on acquisition to the acquirer, leaving nothing to the former. AIR 1951 SC 41 (54) = 1950 SCR 869 = ILR (1951) Hyd 461 ** AIR 1944 FC 62 (65, 66) = ILR (1944) Kar (FC) 165 = 1944 FCR 284 = ILR (1944) Nag 614 ** AIR 1951 All 674 (679) = ILR (1952) 2 All 46 (FB).

(3) Mere increase of an assessment for land revenue does not involve any acquisition of the land or any rights in or over immovable property. AIR 1944 FC 62 (65, 66) = ILR (1944) Kar (FC) 165 = 1944 FCR 284 = ILR (1944) Nag 614. (Case under Government of India Act (1935).)

(4) Amalgamation or merger of certain companies would not amount to acquisition of property. AIR 1953 Cal 695 (699).

(5) There is a distinction between acquisition of property and resumption. While resumption implies that the person or authority which resumes the property has pre-existing rights over it, acquisition carries no such implication and in general while the effect of resumption is to extinguish the interests of the person whose property is resumed, that of the acquisition is to vest that interest in the acquirer. AIR 1955 SC 504 (518) = 1955-2 SCR 303.

(6) There is also a distinction between acquisition and requisitioning of property. In requisitioning the property dealt with is not acquired by the State but is taken out of the control of the owner for the time being for certain purposes. AIR 1955 Nag 153 (157) = ILR (1955) Nag 364 (DB) ** AIR 1953 Assam 177 (181) (DB) ** AIR 1953 Mad 252 (256).

(7) The effect of Seventh Amendment Act, 1956 in Entry 42, List III is that the power of acquisition and requisitioning of property falls in the concurrent list and it makes no reference to the principles on which compensation for acquisition or requisitioning is to be determined. AIR 1969 SC 634 (650) = (1969) 2 SCJ 322.

(8) After deletion of Item 36 in List II and amendment of Item 42 in List III in 1956 the State Legislature is permitted to enact a law of acquisition even without a public purpose and the only obstacle to such a law was Article 31 (2). That obstacle also disappeared if the law in question was within Article 31-A. AIR 1961 SC 1649 = (1962) 2 SCR 382. (AIR 1958 Pat 31, Reversed.) ** AIR 1964 Cal 587 (589, 590).

(9) Parliament has legislative competence to enact laws for compulsory ac-

quisition by the Union of land and other properties vested in or owned by the State. The State of W. B. is not sovereign authority such as to disentitle the Union Parliament to exercise its legislative power under Entry 42, List III — The Coal Bearing Areas (Acquisition and Development) Act (1957) Act is not ultra vires the legislative competence of Parliament. AIR 1963 SC 1241 (1266) = (1964) 1 SCR 371.

(10) Madras Estates (Abolition and Conversion into Ryotwari) Act (26 of 1948), Section 1 does not deal with succession to impartible estate — It is validly enacted under Sch. 7, List II, Item 9, of Government of India Act 1935. AIR 1963 SC 842 (848) = 1963 Supp (2) SCR 280.

(11) The provisions of new Rule (7-a) inserted by Madhya Pradesh Tendu Patta (Vyapar Viniyaman) Niyamavali Sanshodhan Adhyadesh (1965), (Ordinance No. 3 of 1965), S. 3, do not pertain to contracts, partnership, agency or commercial and industrial monopolies or acquisition and requisitioning of property falling under Items 7, 21 and 42 of the concurrent list or to any matter falling under other items of that list. AIR 1966 Madh Pra 110 (114) = 1965 MPLJ 994.

(12) The taking over of Oriental Gas Co., under Oriental Gas Company Act 15 of 1960 is within the field of requisition under Entry 42 in List III. Act does not come in conflict with Union Act 65 of 1951 and is intra vires. AIR 1961 Cal 267 (279) = 1961 (1) Cri LJ 639 = 62 Bom LR 869. (Reversed on another point in AIR 1962 SC 1044.)

(13) Mining Leases (Modification of Terms) Rules made for regulation of mines and development of minerals (1956), do not come within Entry 42 of List III dealing with acquisition or requisitioning of property — They fall within Entry 54 of List I. AIR 1967 SC 964 (968) = (1967) 1 SCR 695.

(14) By the amendment of the Constitution in 1956 the distinction between the Union purpose and the State purpose is abolished and a power has been given to the State Government to acquire land for any public purpose so long as the property is within its territorial jurisdiction. A State Government can therefore acquire property for the Union Government under the Central Act. AIR 1961 Assam 133 (138) (FB).

(15) Rehabilitation of persons displaced from East Pakistan falls under Entry 27, List III and since the U. P. Government is competent to legislate for that matter it is competent to acquire land for rehabilitation in U. P. of persons displaced from East Pakistan. AIR 1961 All 520 (521). (As it stood before Amendment in 1956.)

(16) The word acquisition in Entry 42 includes deprivation of property even

Schedule 7, List 3, Entry 42 — Note 1 (contd.)

when there is no transfer of title as such. Madhya Pradesh Abolition of Cash Grants Act (16 of 1963), Ss. 2 (1) and 3, not providing transfer of any title of the grantee but depriving them of their cash grants are regarding 'acquisition of property' — State Legislature competent to enact such legislation under Item 42. AIR 1965 Madh Pra 77 (80, 81) = 1964 MPLJ 874 (DB).

(17) The supremacy of the legislature in India within the constitutional limits of their jurisdiction is complete — Legislature had power to validate past acquisitions by getting over discriminations caused by two existing procedures. Bangalore Acquisition of Lands (Validation) Act 19 of 1963 held valid. AIR 1969 SC 477 (482) = (1969) 1 SCJ 709. (AIR 1962 Mys 218, Reversed on basis of subsequent event.)

(18) Entry 42 of List III which deals with acquisition does not speak where the property should vest after acquisition. AIR 1959 SC 475 (479) = 1959 Supp 1 SCR 478.

(19) The provisions of the City of Bangalore Improvement Act modifying the provisions of the Acquisition Act are provisions of an existing law with respect to one of the matters enumerated in the concurrent List. The provisions of Section 2 of Ordinance (1 of 1960) and Amending Act (13 of 1960) and Section 27-A sought to be introduced in the Improvement Act are repugnant to the provisions with respect to the same matters in the Improvement Act and are invalid as not complying with the Art. 213 as having reserved for the consideration of the President. AIR 1962 Mys 218 (229, 231).

2. Provision for payment of compensation. — (1) The entry does not, by itself, import any condition as to the existence of a public purpose or the payment of compensation. These conditions under the Indian Constitution are the subject of a specific enactment in the body of the Constitution in Article 31, Clause (2). AIR 1955 SC 810 (811, 812) = 1955-2 SCR 867 ** AIR 1952 SC 252 (284) = 1952 SCR 889 (1020 and 1056) = 31 Pat 565. (On appeal from AIR 1951 Pat 91 (SB).) ** AIR 1951 All 674 (678) = ILR (1952) 2 All 46 (FB) ** AIR 1955 Bom 28 (34) = ILR (1955) Bom 127 (DB). (AIR 1952 SC 252 and AIR 1952 Bom 16, Foll.) ** AIR 1955 Sau 80 (85) (DB). (AIR 1952 SC 252, Foll.) ** (1967) 1 Mad LJ 208 (277) = 80 Mad LW 184 (DB) ** AIR 1966 Assam 51 (55) (DB) ** (1959) 63 Cal WN 751.

(2) In view of the clear provisions of Article 31-A of the Constitution a law providing for acquisition without payment of compensation cannot be questioned. It cannot therefore, be said that Section 9 of Mysore Inam Abolitions Act constitutes

a fraud on the Constitution inasmuch as it is a colourable exercise of the powers under Entry 42 of List III of Sch. 7. AIR 1959 Mys 222 (224, 225) = 37 Mys LJ 312 (DB).

(3) Legislation based on Entry 36 of List II need not necessarily be based simultaneously on Entry 42 of List III. The words "subject to Entry 42 in List III" do not mean that there can be no legislation on the basis of Entry 36, List II without there being also legislation along with it based on Entry 42, List III. (1968) 2 Andh WR 427 (447) (DB). (Hyderabad Inams Abolition Act (VIII of 1955) (as amended by X of 1956). Section 3 (2) (g) is valid.) ** AIR 1969 SC 453 (459) = (1969) 1 SCJ 854 ** AIR 1952 SC 252 (272) = 1952 SCR 889.

[See also ILR (1953) Nag 1 (42) (FB).]

(4) Entry 42, List 3 is merely a description of a legislative head and in deciding about the competency of a legislation under this entry the court is not concerned with justice or propriety of principles upon which the determination of the compensation was to be made or the form and manner in which it was to be paid. But even then the legislation must rest upon some principles of giving compensation. ILR (1956) 8 Assam 379 (406) (FB).

(5) It is not necessary for purposes of Entry 42 of List 3, that the compensation should be the just equivalent of the property taken or even adequate. The requirement of the entry is that the legislation should relate to acquisition and that it should be acquisition on payment of compensation and not merely a thinly or thickly veiled attempt at seizure or confiscation. ILR (1956) 8 Assam 379 (415, 433) (FB).

3. Entry 42, List III and Entry 18, List II. — (1) Entry 18 in List 2 refers to "land, that is to say, rights in or over land." The provisions of Entry 42 in List 3 with respect to the powers of the State Legislature limit the extent of Entry 18 in List 2. Entry 18 in List 2 will exclude from its scope what is mentioned in Entry 42 in List 3. See AIR 1951 All 674 (679) = ILR (1952) 2 All 46 (FB).

(2) The argument that Sections 18, 50 and 55 of Madras Land Reforms (Fixation of Ceiling on Land) Act is a colourable exercise of power under List III, Entry 42 is not open in view of the Seventh Amendment to the Constitution relating to the power of acquisition and of the terms of Article 31-B. It does not provide a power to compel transfer of land from one person to another. AIR 1967 Mad 352 (359) = (1967) 1 Mad LJ 179.

(3) Kerala Agrarian Relations Act (IV of 1961) — Act is not a colourable piece of legislation on the ground of being a device to take money from landowners.

43. Recovery in a State of claims in respect of taxes and other public demands, including arrears of land-revenue and sums recoverable as such arrears, arising outside that State.

JAMMU AND KASHMIR

Omit Entry 43 — See Constitution (Application to J. and K.) Order, 1954, Para. 2, sub-para. (22) (c) (iii) (as amended by C. O. 72).

44. Stamp duties other than duties or fees collected by means of judicial stamps, but not including rates of stamp duty.

JAMMU AND KASHMIR

Omit Entry 44—See Constitution (Application to J. and K.) Order, 1954, Para. 2, sub-para. (22) (c) (iii) (as amended by C. O. 72).

45. Inquiries and statistics for the purposes of any of the matters specified in List II or List III.

[Government of India Act, 1935 — Item 24.]

JAMMU AND KASHMIR

In its application to the State of Jammu and Kashmir, in Entry 45, for the words and figures "List II or List III", the words "this List" shall be substituted.

—See Constitution (Application to Jammu and Kashmir) Order, 1954, Para 2, sub-para. (22) (c) (iv) (as renumbered by C. O. 74).

46. Jurisdiction and powers of all Courts, except the Supreme Court, with respect to any of the matters in this List.

Schedule 7, List 3, Entry 42 — Note 3 (contd.)

The main provisions of the Act clearly fall within Entry 42, List III and Entry 18, List II, Sch. 7. AIR 1962 SC 723 (727) = 1962 Supp (1) SCR 829.

(4) Scope — Assam Fixation of Ceiling on Land Holdings Act (1 of 1957) is of composite character, providing for a limit of land tenure and also for acquisition by State of excess land — State legislature has ample authority to enact it under Entry 18, List 2 and Entry 42 of List 3 read with Articles 245 and 246. AIR 1959 Assam 147 (152) (DB).

Schedule 7, List 3, Entry 43 — Note 1

(1) This entry authorises Parliament as also the States to legislate in respect of recovery of all claims, whether they accrue before or after the Constitution. AIR 1954 Trav-Co 518 (520) = ILR (1954) Trav-Co 1005 (FB).

(2) It has been held that the Bengal Public Demands Recovery Act (2 of 1913), does not fall within this entry since the subject-matter of the Act is not the realisation of a tax which might arise outside the State. AIR 1954 Cal 447 (451) = ILR (1956) 1 Cal 49.

(3) Bengal Public Demands Recovery (Validation of Certificates and Notices) Act (II of 1931) falls under Entries 3 and 45 of State List and does not fall under Entry 43 of Concurrent list — State Legislature was competent to enact it — Assent of President under Article 254 (2) was not necessary. AIR 1964 Cal 165 (171, 173) = 1962 Cal LJ 210 (DB).

Schedule 7, List 3, Entry 44 — Note 1

(1) It is true the Parliament has no power to make laws in respect of rates of stamp duty payable on an application

for enrolment as an advocate. But the payment of stamp duty on such an application under the Bar Councils Act, 1926, was incidental to the object of the Act. In this view, it cannot be held that the proviso to Section 8 (2) (b) of the Act was not within the legislative competence of the Parliament. AIR 1958 Andh Pra 63 (65) = ILR (1957) Andh Pra 467 (SB).

Schedule 7, List 3, Entry 45 — Note 1

(1) The words "for the purposes of" indicate that the scope of inquiry is not necessarily limited to the particular or specific matters enumerated in any of the Entries in the List concerned but may extend to enquiries into collateral matters which may be necessary for the purpose, legislative or otherwise, of those particular matters. It cannot, therefore, be held that the inquiry which may be set up by law made under this entry is, in its scope and ambit, limited to future legislative purposes only. AIR 1958 SC 538 (545). (59 Bom LR 769, Reversed.)

Schedule 7, List 3, Entry 46 — Note 1

(1) The State legislature is competent to take away the jurisdiction of all Courts, including the High Court but excluding the Supreme Court, with respect to any matter in List 3. But it is not competent to reverse the decisions and orders of Courts and to nullify their effect in exercise of such powers. AIR 1952 Pat 166 (172) = 30 Pat 1085 (DB).

(2) The Constitution has given the appropriate legislature, whether Parliament or State legislature, power to derogate from the existing jurisdiction of High Court as can be seen from Articles 200, 225 and Item 78, List I, Item 3 List II

47. Fees in respect of any of the matters in this List, but not including fees taken in any court.

[Government of India Act, 1935 — Items 25, 36.]

Schedule 7, List 3, Entry 46 — Note 1 (contd.)

and Items 1, 2 and 46, List III, Sch. 7. Law like Code of Criminal Procedure (Madras Amendment) Act (Madras Act 34 of 1935) derogating from powers of High Court can, therefore, be passed by the State Legislature without amending the Constitution. AIR 1959 Mad 261 (268) = 1959 Cri LJ 731 = (1958) 2 Mad LJ 123 (DB).

(3) The amendment of the Mysore High Court Act by Mysore Act, 35 of 1951, effecting a change in the number of Judges by whom a second appeal is to be decided is not ultra vires of the State Legislature inasmuch as the matter falls either under Entry 3 or Entry 65 of List 2, or under this entry read with Entry 13. AIR 1952 Mys 75 (76) = ILR (1952) Mys 279.

(4) Scrutiny of Entry 95, List I and Entry 46, List III would clearly show that the power to legislate conferred on the concerned legislatures is only in relation to subjects assigned to the respective legislatures in those lists. These entries do not derogate from the general power given to the State legislature under Item 3 of List II. AIR 1959 Andh Pra 3 (6) = (1959) 1 Andh WR 161 (DB). (It is within competence of Provincial or State Legislature to amend the Madras Civil Courts Act 3 of 1873 by Madras Civil and Village Courts (Amendment) Act (16 of 1951).)

(5) Item 5 of List 3 read with Item 46 shows that Parliament as also the State Legislature specified in Part A or Part B of 1st Schedule has power to make laws with regard to jurisdiction and powers of High Courts in respect of intestacy and succession and therefore the Succession Act, 1925 which was made applicable to the State of Mysore on 1-4-1951 used and did confer such jurisdiction. AIR 1959 Mys 83 (85) = 36 Mys LJ 208 (FB).

(6) M. B. Muafi and Inam Tenants and Sub-tenants Protection Act is a law relating to special jurisdiction about inam tenants and cannot be said to be repugnant to any provision of C. P. C. and is valid. AIR 1957 Madh B 63 (64) = Madh BLR 1956 (Civ) 797.

(7) The Central Legislature is competent to enact a law regarding the jurisdiction of Courts to try offences under the Penal Code as matters included in the Penal Code are covered by Item 1 of this List. See AIR 1943 All 26 (31, 32) = ILR (1943) All 238 = 44 Cri LJ 216 (FB).

Schedule 7, List 3, Entry 47 — Note 1

(1) Each of the entries relating to the levy of fees is to be read as an adjunct to every legislative power including the entries conferring the power to levy particular taxes. This indicates that the Constitution makers conceived of fees being leviable in the course of the levy or collection of taxes, including fees for licences, which, however, must satisfy the test of reasonableness. AIR 1958 Mad 158 (169) = ILR (1958) Mad 35 (DB).

(2) Entry 47 List III enables the legislature to impose fees in respect of any of the matters in that list but not including fees taken in any court. This is in terms identical with Entry 96 List I and Entry 66 List II. A fee may be levied even under an enactment relating to imposition of tax. AIR 1965 SC 1107 (1122, 1123) = (1965) 2 SCR 477.

(3) The State Legislature has power to levy a fee under Entry 28 List III read with Entry 47 List III for rendering services in connection with the maintenance, supervision and control over the religious institutions and it can be levied retrospectively. AIR 1963 SC 966 (971, 972) = (1963) Supp 2 SCR 302 ** AIR 1961 Andh Pra 216 (218) = (1960) 2 Andh WR 347 (FB). (W. P. No. 58 of 1953 (Andh) and W. A. No. 68 of 1956 (Andhra), Overruled.)

(4) State legislature was competent to enact Section 58, Bombay Public Trusts Act 29 of 1950, under Entry 47, List 3, Constitution which has got to be made by public trusts which are registered do not constitute a tax but is a fee. AIR 1953 Bom 242 (249) = 55 Bom LR 86 (DB). (Point affirmed but case Reversed on another point in AIR 1954 SC 388.)

(4-A) The Constitution does not contemplate to be an essential element of a fee that it should be credited to a separate fund and not to the consolidated fund. AIR 1960 All 462 (465, 466) (FB). (Court-fees Act (1870), Section 4 and Schedule II, Article 1, Clause (e) (U. P. Amendment) — Court-fee imposed by Amendment is not a tax but a fee — Section 4 and Schedule II, Article 1 (e) as amended by Court-fees (U. P. Amendment) Act (10 of 1959), are within legislative competence of U. P. Legislature.)

(5) There is an inherent limitation on the legislative power under this entry, namely that the levy should bear a just and reasonable proportion to the services rendered for which the fee is exacted. AIR 1956 Mad 491 (503, 505) (DB) **

EIGHTH SCHEDULE
[Articles 344 (1) and 351.]
LANGUAGES

1. Assamese.
2. Bengali.
3. Gujarati.
4. Hindi.
5. Kannada.
6. Kashmiri.
7. Malayalam.
8. Marathi.
9. Oriya.
10. Punjabi.
11. Sanskrit.
- ^a[12. Sindhi.]
- ^b[13.] Tamil.
- ^b[14.] Telugu.
- ^b[15.] Urdu.

[a] Added by the Constitution (Twenty-first Amendment) Act, 1967, S. 2 (10-4-1967).

[b] Entries 12 to 14 renumbered as 13 to 15 respectively, *ibid*.

^a[**NINTH SCHEDULE**
[Article 31-B.]

1. The Bihar Land Reforms Act, 1950 (Bihar Act XXX of 1950).
2. The Bombay Tenancy and Agricultural Lands Act, 1948 (Bombay Act LXVII of 1948).
3. The Bombay Maleki Tenure Abolition Act, 1949 (Bombay Act, LXI of 1949).
4. The Bombay Taluqdari Tenure Abolition Act, 1949 (Bombay Act LXII of 1949).
5. The Panch Mahals Mehwassi Tenure Abolition Act, 1949 (Bombay Act LXIII of 1949).

Schedule 7, List 3, Entry 47 — Note 1
(contd.)

AIR 1954 SC 282 (295, 296, 297) = 1954 SCR 1005 ** AIR 1954 SC 400 (403) = 1954 SCR 1046 = ILR (1954) Cut 334 ** AIR 1954 SC 388 (395) = 1954 SCR 1055.

(6) Entry 36 of this list read with this entry authorises the levy of fees in connection with control of factories. AIR 1942 All 156 (166) = ILR (1942) All 302 = 43 Cri LJ 674 (2). (Case under corresponding Entries 26 and 36 of List 3, Schedule VII of Government of India Act, 1935.) ** AIR 1954 Raj 178 (181) = ILR (1954) 4 Raj 982 (DB). (Do.)

[See also AIR 1954 All 675 (680).]

(7) Schedule 7 List I item 96 enables Parliament to introduce legislation in regard to matters which are enumerated in that list which does not include the fee payable in Courts other than the Supreme Court. The same must be said of item 66 in List II and item 47 List III. AIR 1959 Andh Pra 271 (272) = (1959) 1 Andh WR 85 (DB).

(8) Bombay Court-fees Act (36 of 1959), Schedule I, Article 16 — Levy imposed is neither tax nor fee in the strict sense — It is within legislative competence of the State under Schedule 7, List 2, Entry 3. Entry 47 in List III excludes the Court-fees from the categories of fees with reference to which that entry empowers State legislature to make laws. AIR 1962 Bom 106 (114) = 63 Bom LR 834 (DB).

(9) License fee under Section 128 (xiv) of the U. P. Municipalities Act (2 of 1916) held could not be justified either under Schedule 7, List 2, Entry 66 or List 3, Entry 47. AIR 1960 Raj 135 (138) = 1958 Raj LW 159 (FB).

Schedule 9, Entry 2 — Note 1

(1) Bombay Tenancy and Agricultural Lands Act (67 of 1948), is saved from the operation of Part III by Article 31-B and 9th Schedule to the Constitution. AIR 1957 Bom 155 (158) = 59 Bom LR 339 (DB).

6. The Bombay Khoti Abolition Act, 1950 (Bombay Act VI of 1950).
7. The Bombay Paragana and Kulkarni Watan Abolition Act, 1950 (Bombay Act LX of 1950.)
8. The Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1950 (Madhya Pradesh Act I of 1951).
9. The Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948 (Madras Act XXVI of 1948).
10. The Madras Estates (Abolition and Conversion into Ryotwari) Amendment Act, 1950 (Madras Act I of 1950).
11. The Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 (Uttar Pradesh Act I of 1951).
12. The Hyderabad (Abolition of Jagirs) Regulation, 1358F (No. LXIX of 1358, Fasli).
13. The Hyderabad Jagirs (Commutation) Regulation, 1359F. (No. XXV of 1359, Fasli).
- b[14. The Bihar Displaced Persons Rehabilitation (Acquisition of Land) Act, 1950 (Bihar Act XXXVIII of 1950).
15. The United Provinces Land Acquisition (Rehabilitation of Refugees) Act, 1948 (U. P. Act XXVI of 1948).
16. The Resettlement of Displaced Persons (Land Acquisition) Act, 1948 (Act LX of 1948).
17. Sections 52A to 52G of the Insurance Act, 1938 (Act IV of 1938), as inserted by Section 42 of the Insurance (Amendment) Act, 1950 (Act XLVII of 1950).
18. The Railway Companies (Emergency Provisions) Act, 1951 (Act LI of 1951).
19. Chapter III-A of the Industries (Development and Regulation) Act, 1951 (Act LXV of 1951), as inserted by Section 13 of the Industries (Development and Regulation) Amendment Act, 1953 (Act XXVI of 1953).
20. The West Bengal Land Development and Planning Act, 1948 (West Bengal Act XXI of 1948), as amended by West Bengal Act XXIX of 1951.]

Schedule 9, Entry 9 — Note 1

(1) Madras Estates (Abolition and Conversion into Ryotwari) Act (26 of 1948), Section 45 — Act is protected by Article 31-B read with Schedule 9, Entry 9 of the Constitution — Section 45 of the Act is not void, and cannot be attacked on the ground that it contravenes the Article 14 of the Constitution. AIR 1963 SC 842 (848) = (1963) Supp 2 SCR 280.

(2) Madras Act (26 of 1948), being included in Ninth Schedule cannot be challenged on ground that it offended Section 299, Government of India Act (1935). AIR 1960 SC 32 (35) = (1960) 1 SCR 552.

Schedule 9 Entry 16 — Note 1

(1) The inclusion of Displaced Persons (Land Acquisition) Act (1948) in the Ninth Schedule does not save the impugned provision from being declared void or from becoming void. AIR 1970 Delhi 44 (52) (DB).

Schedule 9, Entry 20 — Note 1

(1) West Bengal Land Development and Planning Act (21 of 1948), Section 8 (1),

Proviso (b) are valid provisions of law under the protection of Article 31B and Ninth Schedule to the Constitution. Subsequent amendment of Proviso (b) to Section 8 (1) does not curtail further any rights guaranteed under Part III of the Constitution. AIR 1965 Cal 177 (183) (DB).

(2) West Bengal Land Development and Planning Act (21 of 1948), Section 8 — Section continues to be constitutional in view of Constitution (Fourth Amendment) Act 1955 by which Articles 31, 31A, 305 and the 9th Schedule mentioned in Article 31B were amended when the Constitution validated the section in the original Act; the section in the Act extended to Tripura also stood validated. AIR 1962 Tripura 13 (14).

(3) Validity of West Bengal Land Development and Planning Act (21 of 1948), S. 7 does not contravene Article 14 of the Constitution and the attack based on Articles 19 (1) (f) and 31 (2) of the Constitution is futile in view of the pro-

- c[21. The Andhra Pradesh Ceiling on Agricultural Holdings Act, 1961 (Andhra Pradesh Act X of 1961).
22. The Andhra Pradesh (Telangana Area) Tenancy and Agricultural Lands Validation) Act, 1961 (Andhra Pradesh Act XXI of 1961).
23. The Andhra Pradesh (Telangana Area) Ijara and Kowli Land Cancellation of Irregular Pattas and Abolition of Concessional Assessment Act, 1961 (Andhra Pradesh Act XXXVI of 1961).
24. The Assam State Acquisition of Lands Belonging to Religious or Charitable Institution of Public Nature Act, 1959 (Assam Act IX of 1961).
25. The Bihar Land Reforms (Amendment) Act, 1953 (Bihar Act XX of 1954).
26. The Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961 (Bihar Act XII of 1962), (except Section 28 of this Act).
27. The Bombay Taluqdari Tenure Abolition (Amendment) Act, 1954 (Bombay Act I of 1955).
28. The Bombay Taluqdari Tenure Abolition (Amendment) Act, 1957 (Bombay Act XVIII of 1958).
29. The Bombay Inams (Kutch Area) Abolition Act, 1958 (Bombay Act XCVIII of 1958).
30. The Bombay Tenancy and Agricultural Lands (Gujarat Amendment) Act, 1960 (Gujarat Act XVI of 1960).
31. The Gujarat Agricultural Lands Ceiling Act 1960 (Gujarat Act XXVII of 1961).
32. The Sagbara and Mehwassi Estates (Proprietary Rights Abolition, etc.) Regulation, 1962 (Gujarat Regulation 1 of 1962).
33. The Gujarat Surviving Alienations Abolition Act, 1963 (Gujarat Act XXXIII of 1963), except in so far as this Act relates to an alienation referred to in sub-clause (d) of clause (3) of Section 2 thereof.
34. The Maharashtra Agricultural Lands (Ceiling on Holdings) Act, 1961 (Maharashtra Act XXVII of 1961).
35. The Hyderabad Tenancy and Agricultural Lands (Re-enactment, Validation and Further Amendment) Act, 1961 (Maharashtra Act XLV of 1961).
36. The Hyderabad Tenancy and Agricultural Lands Act, 1950 (Hyderabad Act XXI of 1950).

Schedule 9, Entry 20 — Note 1 (contd.)
visions of Article 31B of the Constitution.
AIR 1961 SC 16 (20) = (1961) 1 SCR 368.

Schedule 9 Entry 24 — Note 1

(1) Where the Ninth Schedule as amended is read along with Article 31-B it is clear that the challenge to the Assam State Acquisition of Lands Belonging to Religious or Charitable Institution of Public Nature Act 1959 (9 of 1961) on the ground that it contravenes Articles 26 and 19 is barred. AIR 1966 Assam 51 (54).

Schedule 9, Entry 34 — Note 1

(1) Maharashtra Agricultural Lands (Ceiling on Holdings) Act (XXVII of 1961 as amended by Act XIII of 1962), Preamble and Section 23 is valid — Mention of principal Act without mention of Amending Act in Item 34 of Schedule 9 of the Constitution by Constitution (7th

Amendment) Act, 1964, includes all amendments upto the date of the Constitution (7th Amendment) Act. AIR 1968 SC 1395 (1400) = 1968 Lab IC 1525 = (1968) 3 SCR 712.

Schedule 9, Entry 35 — Note 1

(1) Entries 35 and 36 relate to the Maharashtra Act (45 of 1961) and Hyderabad Act (21 of 1950) respectively Article 31-B gives full protection to an Act and its provisions in the schedule against any challenge on the ground of inconsistency or abridging of any of the rights conferred by Part III of the Constitution. AIR 1970 SC 126 (128) = (1969) 2 SCWR 595.

Schedule 9, Entry 36 — Note 1

(1) Inclusion under Entry 36 Hyderabad Act 21 of 1950 — Act is protected by

37. The Jenmikaram Payment (Abolition) Act, 1960 (Kerala Act III of 1961).
38. The Kerala Land Tax Act, 1961 (Kerala Act XIII of 1961).
39. The Kerala Land Reforms Act, 1963 (Kerala Act I of 1964).
40. The Madhya Pradesh Land Revenue Code, 1959 (Madhya Pradesh Act XX of 1959).
41. The Madhya Pradesh Ceiling on Agricultural Holdings Act, 1960 (Madhya Pradesh Act XX of 1960).
42. The Madras Cultivating Tenants Protection Act, 1955 (Madras Act XXV of 1955).
43. The Madras Cultivating Tenants (Payment of Fair Rent) Act, 1956 (Madras Act XXIV of 1956).
44. The Madras Occupants of Kudiyruppu (Protection from Eviction) Act, 1961 (Madras Act XXXVIII of 1961).
45. The Madras Public Trusts (Regulation of Administration of Agricultural Lands) Act, 1961 (Madras Act LVII of 1961).
46. The Madras Land Reforms (Fixation of Ceiling on Land) Act, 1961 (Madras Act LVIII of 1961).
47. The Mysore Tenancy Act, 1952 (Mysore Act XIII of 1952).
48. The Coorg Tenants Act, 1957 (Mysore Act XIV of 1957).
49. The Mysore Village Offices Abolition Act, 1961 (Mysore Act XIV of 1961).
50. The Hyderabad Tenancy and Agricultural Lands (Validation) Act, 1961 (Mysore Act XXXVI of 1961).
51. The Mysore Land Reforms Act, 1961 (Mysore Act X of 1962).
52. The Orissa Land Reforms Act, 1960 (Orissa Act XVI of 1960).
53. The Orissa Merged Territories (Village Offices Abolition) Act, 1963 (Orissa Act X of 1963).
54. The Punjab Security of Land Tenures Act, 1953 (Punjab Act X of 1953).
55. The Rajasthan Tenancy Act, 1955 (Rajasthan Act III of 1955).
56. The Rajasthan Zamindari and Biswedari Abolition Act, 1959 (Rajasthan Act VIII of 1959).
57. The Kumaun and Uttarakhand Zamindari Abolition and Land Reforms Act, 1960 (Uttar Pradesh Act XVII of 1960).
58. The Uttar Pradesh Imposition of Ceiling on Land Holdings Act, 1960 (Uttar Pradesh Act I of 1961).
59. The West Bengal Estates Acquisition Act, 1953 (West Bengal Act I of 1954).
60. The West Bengal Land Reforms Act, 1955 (West Bengal Act X of 1956).
61. The Delhi Land Reforms Act, 1954 (Delhi Act VIII of 1954).

Schedule 9, Entry 36 — Note 1 (contd.)
Article 31-B. AIR 1970 SC 126 (128) = (1969) 2 SCWR 595.

Schedule 9, Entry 51 — Note 1
(1) Mysore Land Reforms Act, X of 1962 (as Amended by Act XIV of 1965), Section 1 is protected by Article 31-A and cannot be challenged under Article 14, 19 or 31. AIR 1967 SC 1643 (1670) = (1967) 2 SCR 762.

Schedule 9, Entry 52 — Note 1
(1) Orissa Act XVI of 1960 was in force in constitutional sense before its

incorporation in Schedule IX — Once Act or Regulation has come into force in constitutional sense, it can be struck down under Art. 13. (1967) 33 Cut LT 263 = 9 Orissa JD 41 (DB).

Schedule 9, Entry 54 — Note 1

(1) Punjab Security of Land Tenures Act (X of 1963), S. 10-B is protected by Article 31-A and cannot be challenged under Article 14, 19 or 31. AIR 1967 SC 1643 (1670) = (1967) 2 SCR 762.

62. The Delhi Land Holdings (Ceiling) Act, 1960 (Central Act 24 of 1960).
63. The Manipur Land Revenue and Land Reforms Act, 1960 (Central Act 33 of 1960).
64. The Tripura Land Revenue and Land Reforms Act, 1960 (Central Act 43 of 1960).

Explanation.—Any acquisition made under the Rajasthan Tenancy Act, 1955 (Rajasthan Act III of 1955), in contravention of the second proviso to clause (1) of Article 31A shall, to the extent of the contravention, be void.]]

- [a] Added by the Constitution (First Amendment) Act, 1951, S. 14 (18-6-1951).
 [b] Added by the Constitution (Fourth Amendment) Act, 1955, S. 5 (27-4-1955).
 [c] Added by the Constitution (Seventeenth Amendment) Act, 1964, S. 3 (20-6-1964).

JAMMU AND KASHMIR

After Entry 64, add the following entries :—

- “65. The Jammu and Kashmir State Kuth Act (No. I of Svt. 1978).
66. The Jammu and Kashmir Tenancy Act (No. II of Svt. 1980).
67. The Jammu and Kashmir Alienation of Land Act (No. V of Svt 1995.)
68. The Jammu and Kashmir Restitution of Mortgaged Properties Act (No. XVI of Svt. 2006).
69. The Jammu and Kashmir Distressed Debtors Relief Act (No. XVII of Svt. 2006).
70. The Jammu and Kashmir Big Landed Estates Abolition Act (No. XVII of Svt. 2007).
71. Order No. 6-H of 1951, dated 10th March, 1951, regarding Resumption of Jagirs and other assignments of land revenue, etc.”—See the Constitution (Application to J. and K.) Order, 1954, Para. 2, sub-para. (24) (as substituted by C. O. 74 (4-11-1965).)

[THE] CONSULAR RELATIONS ACT, 1968

(1968 C. 18)

[English Act.]

CONTENTS

SECTION

1. Application of Vienna Convention.
2. Restriction of privileges and immunities.
3. Agreements providing for additional or reduced privileges and immunities.
4. Civil jurisdiction concerning service on board ship or aircraft.
5. Jurisdiction over offences committed on board ship.
6. Detention on board ship for disciplinary offences.

7. Nationality of children of consular officers, etc.
8. Refund of customs duty on hydrocarbon oils.
9. Priority of telecommunications.
10. Right of diplomatic agents and consular officers to administer oaths and do notarial acts in certain cases.
11. Evidence.
12. Consequential amendment.
13. Commonwealth and Irish consular officers.

Schedule 9, Entry 59 — Note 1

(1) Since the West Bengal Estates Acquisition Act 1 of 1954 is included in the ninth Schedule by the Constitution (Seventeenth Amendment) Act and by reason of Art. 31-B this inclusion saves the Act from any attack on the ground of unconstitutionality, with retrospective effect, the constitutionality of the Act cannot be challenged. AIR 1965 Cal 539 (540).

Schedule 9, Entry 66 — Note 1

(1) What is saved by Article 31-B are the provisions of J and K Act (2 of 1980) as they stood on 14-5-1954 when the Act was included in the Ninth Schedule and not any other different provision which was enacted by the State Legislature subsequent to that Act. AIR 1959 J and K 35 (39) (FB).

14. Orders in Council.

15. Validation of certain provisions in colonial laws.

16. Short title, interpretation, commencement and repeal.

SCHEDULES :

SCHEDULE 1— Provisions of Vienna Convention having the force of law in the United Kingdom.

SCHEDULE 2— Provisions for giving effect to other agreements.

[THE] CONSULAR RELATIONS ACT, 1968
(1968 C. 18)

[10th April, 1968.]

An Act give effect to the Vienna Convention on Consular Relations, to enable effect to be given to other agreements concerning consular relations and to make further provision with respect to consular relations between United Kingdom and other countries and matters arising in connection therewith; to restrict the jurisdiction of courts with respect to certain matters concerning or arising on board certain ships or aircraft; to enable diplomatic agents and consular officers to administer oaths and do notarial acts in certain cases; and for purposes connected with those matters.

1. Application of Vienna Convention.—(1) Subject to sections 2 and 3 (2) of this Act, the provisions set out in Schedule 1 to this Act (being Articles or parts of Articles of the Vienna Convention on Consular Relations signed in 1963) shall have the force of law in the United Kingdom and shall for that purpose be construed in accordance with sub-sections (2) to (11) of this section.

(2) In those provisions—

“authorities of the receiving State” shall be construed as including any constable and any person exercising a power of entry to any premises under any enactment (including any enactment of the Parliament of Northern Ireland);

“grave crime” shall be construed as meaning any offence punishable (on a first conviction) with imprisonment for a term that may extend to five years or with a more severe sentence;

“Ministry for Foreign Affairs” shall be construed as meaning the Department of the Secretary of State concerned;

“national of the receiving State” shall be construed as meaning a citizen of the United Kingdom and Colonies, a person who is a British subject by virtue of section 2, 13 or 16 of the British Nationality Act, 1948 or the British Nationality Act, 1965, or a British protected person within the meaning of the said Act of 1948.

(3) The reference in paragraph 2 of Article 17 to any privileges and immunities accorded by customary international law or by international agreements shall be construed as a reference to any privileges and immunities conferred under the International Organisations (Immunities and Privileges) Act, 1950.

(4) The references in Article 44 to matters connected with the exercise of the functions of members of a consular post shall be construed as references to matters connected with the exercise of consular functions by consular officers or consular employees.

(5) For the purposes of Article 45 and that Article as applied by Article 58 a waiver shall be deemed to have been expressed by a State if it has been expressed by the head, or any person for the time being performing the functions of head, of the diplomatic mission of that State or, if there is no such mission, of the consular post concerned.

(6) The exemption granted by Article 48 with respect to any services shall be deemed to except those services from any class of employment which is insurable employment, or in respect of which contributions are required to be paid,

under the National Insurance (Industrial Injuries) Acts, 1965 to 1967, the National Insurance Acts 1965 to 1967, any enactment for the time being in force amending any of those Acts, or any enactment of the Parliament of Northern Ireland corresponding to any of those Acts or to any enactment amending it, but not so as to render any person liable to any contribution which he would not be required to pay if those services were not so excepted.

(7) Article 48 shall not affect any agreement made between the United Kingdom and any other State before the commencement of this Act and shall not be taken to prevent the making of any such agreement after the commencement of this Act.

(8) Articles 50, 51, 52, 54, 62 and 67 shall be construed as granting any privilege or immunity which they require to be granted.

(9) The reference in Article 57 to the privileges and immunities provided in Chapter II shall be construed as referring to those provided in Section II of that Chapter.

(10) The reference in Article 70 to the rules of international law concerning diplomatic relations shall be construed as a reference to the provisions of the Diplomatic Privileges Act, 1964.

(11) The references in Article 71 to additional privileges and immunities that may be granted by the receiving State or to privileges and immunities so far as these are granted by the receiving State shall be construed as referring to such privileges and immunities as may be specified by Her Majesty by Order in Council.

2. Restriction of privileges and immunities.—If it appears to Her Majesty that the privileges and immunities accorded to a consular post of the United Kingdom in a territory of any State, or to persons connected with such a consular post, are less than those conferred by this Act on a consular post of that State or on persons connected with such a consular post, Her Majesty may by Order in Council withdraw such of the privileges and immunities so conferred from all or any of the consular posts of that State or from such persons connected therewith as appears to Her Majesty to be proper.

3. Agreements providing for additional or reduced privileges and immunities.—(1) Where any agreement made, whether before or after the passing of this Act, between the United Kingdom and any other State provides for according to consular posts and persons connected with them privileges and immunities not accorded to them by the other provisions of this Act, Her Majesty may by Order in Council exercise, with respect to the consular posts of that State and persons connected with them, the powers specified in Schedule 2 to this Act so far as may be necessary to give effect to that agreement.

(2) Where any agreement made, whether before or after the passing of this Act, between the United Kingdom and any other State provides for according to consular posts and persons connected with them some but not all of the privileges and immunities accorded to them by the other provisions of this Act, Her Majesty may by Order in Council provide for excluding, with respect to consular posts of that State and persons connected with them, any of those privileges and immunities which are not provided for by the agreement.

4. Civil jurisdiction concerning service on board ship or aircraft.—Her Majesty may by Order in Council make provision for excluding or limiting the jurisdiction of any Court in the United Kingdom to entertain proceedings relating to the remuneration or any contract of service of the master or commander or a member of the crew of any ship or aircraft belonging to a State specified in the Order, except where a consular officer of that State has been notified of the intention to invoke the jurisdiction of that Court and has not objected within such time as may be specified by or under the Order.

5. Jurisdiction over offences committed on board ship.—(1) Her Majesty may by Order in Council make provision for securing that, where an offence is alleged to have been committed on board any ship by the master or a member of the crew and the ship belongs to a State* specified in the Order, proceedings for the offence instituted otherwise than at the request or with the consent of a consular officer of that State are not entertained by any Court in the United Kingdom, unless—

- (a) the offence is alleged to have been committed by or against a person who is a citizen of the United Kingdom and Colonies or is otherwise comprised in the definition of “national of the receiving State” in section 1 (2) of this Act, or against a person other than the master or a member of the crew; or
- (b) the offence is one involving the tranquillity or safety of a port or the law relating to safety of life at sea, public health, oil pollution, wireless telegraphy, immigration or customs or is of any other description specified in the Order; or
- (c) the offence is one comprised in the definition of “grave crime” in section 1 (2) of this Act.

(2) For the purposes of this section, an offence which affects the property of any person shall be deemed to have been committed against him.

(3) For the purposes of this section, any document purporting to be signed by or on behalf of a consular officer and stating that he has requested or consented to the institution of any proceedings shall be sufficient proof of that fact unless the contrary is shown.

[*] See S. 16 (2) *infra*, for when can a ship be treated as belonging to a State.

6. Detention on board ship for disciplinary offences.—Her Majesty may by Order in Council designate any State for the purposes of this section; and where a State is so designated, a member of the crew of a ship belonging to that State* who is detained in custody on board for a disciplinary offence shall not be deemed to be unlawfully detained unless—

- (a) his detention is unlawful under the laws of that State or the conditions of detention are inhumane or unjustifiably severe, or
- (b) there is reasonable cause for believing that his life or liberty will be endangered for reasons of race, nationality, political opinion or religion, in any country to which the ship is likely to go.

[*] See Section 16 (2), *infra*.

7. Nationality of children of consular officers, etc.—(1) A person born within the United Kingdom and Colonies at any time after the coming into operation of this section shall not, by virtue of section 4 of the British Nationality Act, 1948, be a citizen of the United Kingdom and Colonies by birth if he is the child of a person who, at that time—

- (a) was serving within the United Kingdom and Colonies as a member of a consular post of any State; and
- (b) was a national of that State;

unless he is the child of a father who at that time was a citizen of the United Kingdom and Colonies.

(2) In this section “member of a consular post” has the same meaning as, by virtue of Article 1 in Schedule 1 to this Act, it has in that Schedule, except that it does not include an honorary consular officer, nor, where a consular post of any State is headed by an honorary consular officer, any member of the post who is not in the full-time service of that State.

(3) Part III of the British Nationality Act, 1948* (supplemental provisions) shall have effect as if any reference in it to that Act, except one referring to the date of the commencement of that Act, included a reference to this section.

[*] For this Act, see Vol. I, p. 1246, of this Manual: Cf. Citizenship Act (1955), Sections 2 (c), 2 (d), 3 and 4 and Registration of Births and Deaths Act, 1969 (18 of 1969), S. 20.

8. Refund of customs duty on hydrocarbon oils.—(1) The Treasury may authorise the Secretary of State or the Commissioners of Customs and Excise to make, if he or they think fit, arrangements for securing the refund of customs duty paid on any hydrocarbon oils (within the meaning of the Customs and Excise Act, 1952) which are—

- (a) bought in the United Kingdom; and
- (b) used for such purpose that, had they been imported for that use, exemption from customs duty thereof would have been required to be granted by virtue of Article 50 in Schedule 1 to this Act or by virtue of an Order under Section 3 (1) of this Act or Section 1 (2) of the Diplomatic Immunities (Commonwealth Countries and Republic of Ireland) Act, 1952.

(2) Any arrangements made under this section may impose conditions subject to which any refund is to be made.

(3) Any amount refunded under arrangements made under this section shall be defrayed—

- (a) if the arrangements are made by the Secretary of State, out of moneys provided by Parliament; and
- (b) if the arrangements are made by the Commissioners of Customs and Excise, out of the moneys standing to the credit of the General Account of the Commissioners of Customs and Excise.

9. Priority of telecommunications.—Nothing in Section 41 of the Telegraph Act, 1863 or in regulations under Section 1 (2) (a) of the Telegraph Act, 1962 shall prevent the giving of priority to messages from consular officers and replies thereto so far as may be necessary for the purpose of giving effect to any agreement made, whether before or after the passing of this Act, between the United Kingdom and any other State.

10. Right of diplomatic agents and consular officers to administer oaths and do notarial acts in certain cases.—(1) A diplomatic agent or consular officer of any State may, if authorised to do so under the laws of that State, administer oaths, take affidavits and do notarial acts—

- (a) required by a person for use in that State or under the laws thereof, or
- (b) otherwise required by a national of that State but not for use in the United Kingdom except under the laws of some other country.

(2) Her Majesty may by Order in Council exclude or restrict the provisions of the preceding sub-section in relation to the diplomatic agents or consular officers of any State if it appears to Her that in any territory of that State diplomatic agents or consular officers of the United Kingdom are not permitted to perform functions corresponding in nature and extent to those authorised by that sub-section.

(3) Her Majesty may by Order in Council make provision for applying Section 6 of the Commissioners for Oaths Act, 1889 (powers as to oaths and notarial acts abroad) to countries within the Commonwealth or the Republic of Ireland by requiring the section to be construed as if—

- (a) the references therein to a foreign country or place included such country or place as may be specified in the Order; and

(b) the diplomatic ranks specified in that section included such ranks of any United Kingdom mission in a country specified in the Order as may be so specified in relation to that country.

(4) In this section "diplomatic agent" has the same meaning as in the Diplomatic Privileges Act, 1964.

11. Evidence.—If in any proceedings any question arises whether or not any person is entitled to any privilege or immunity under this Act, a certificate issued by or under the authority of the Secretary of State stating any fact relating to that question shall be conclusive evidence of that fact.

12. Consequential amendment.—[Amendment to Section 1 (2) of the Diplomatic Immunities (Commonwealth Countries and Republic of Ireland) Act (1952) — Not printed.]

13. Commonwealth and Irish consular officers.—(1) If consular officers are appointed—

(a) by Her Majesty's Government in United Kingdom to serve in any other country within the Commonwealth or in the Republic of Ireland; or

(b) by the Government of any other country within the Commonwealth or of the Republic of Ireland to serve in the United Kingdom;

any enactment passed before the passing of this Act which confers any function on consular officers shall be construed in accordance with the following provisions of this section.

(2) References (however expressed) in any such enactment to a consular officer shall be construed, subject to any provision made under sub-section (3) (a) of this section, as not including a consular officer appointed as mentioned in sub-section (1) (a) of this section.

(3) Her Majesty may by Order in Council make provision—

(a) for requiring references to a consular officer in any enactment passed before the passing of this Act to be construed as including a consular officer appointed as mentioned in sub-section (1) (a) of this section (or as including a consular officer so appointed in any country or place specified in the Order) or for the exercise by a consular officer so appointed (or so appointed in any such country or place) of any functions conferred by the enactment on some other officer;

(b) for making in the Merchant Shipping Acts, 1894 to 1967 or the Consular Conventions Act, 1949 such adaptations of any provision referring to a consular officer of a foreign State as appear to Her to be necessary or expedient to make the provision applicable to consular officers appointed as mentioned in sub-section (1) (b) of this section and to dispense with any requirement as to the conclusion of a consular convention.

(4) The preceding provisions of this section shall not apply to the Consular Salaries and Fees Act, 1891, but the expression "consular officer" in that Act shall include, in addition to the persons mentioned in Section 3 of that Act, any person authorised by Her Majesty's Government in the United Kingdom to exercise consular functions in another country within the Commonwealth or in the Republic of Ireland and to take fees under that Act.

14. Orders in Council.—(1) No recommendation shall be made to Her Majesty in Council to make an Order containing such provision as is mentioned in Section 1 (11) or Section 3 (1) of this Act unless a draft thereof has been laid before and approved by resolution of each House of Parliament.

(2) Any other statutory instrument made under the foregoing provisions of this Act shall be subject to annulment in pursuance of a resolution of either House of Parliament.

(3) Any power to make an Order conferred by this Act includes power to vary or revoke such an Order by a subsequent Order.

15. Validation of certain provisions in colonial laws.—Notwithstanding anything in the Colonial Laws Validity Act, 1865, no colonial law within the meaning of that Act shall be void or inoperative as being repugnant to the Admiralty Offences (Colonial) Act, 1849, the Territorial Waters Jurisdiction Act, 1878 or Section 685 or Section 686 of the Merchant Shipping Act, 1894 by reason only of making provision corresponding to Section 5 of this Act.

16. Short title, interpretation, commencement and repeal.—(1) This Act may be cited as the Consular Relations Act, 1968.

(2) For the purposes of Sections 4, 5 or 6 of this Act a ship, and for the purposes of Section 4 an aircraft, shall be treated as belonging to a State in such circumstances as may be specified by an Order in Council under that section; and different circumstances may be so specified with respect to different States and different classes of ship or aircraft.

(3) This Act, except Sections 7 to 11, shall not come into force until such day as Her Majesty may by Order in Council appoint.

(4) In the Consular Conventions Act, 1949, Section 4, in Section 6 (1) the words “or Section 4” and, in Section 7 (2), paragraph (c) are hereby repealed.

SCHEDULES

SCHEDULE 1

Section 1

PROVISIONS OF VIENNA CONVENTION HAVING THE FORCE OF LAW IN THE UNITED KINGDOM

Article 1.

Definitions.

1. For the purposes of the present Convention, the following expressions shall have the meanings hereunder assigned to them:—

- (a) “consular post” means any consulate-general, consulate, vice-consulate or consular agency;
- (b) “consular district” means the area assigned to a consular post for the exercise of consular functions;
- (c) “head of consular post” means the person charged with the duty of acting in that capacity;
- (d) “consular officer” means any person, including the head of a consular post, entrusted in that capacity with the exercise of consular functions;
- (e) “consular employee” means any person employed in the administrative or technical service of a consular post;
- (f) “member of the service staff” means any person employed in the domestic service of a consular post;
- (g) “members of the consular post” means consular officers, consular employees and members of the service staff;
- (h) “members of the consular staff” means consular officers, other than the head of a consular post, consular employees and members of the service staff;
- (i) “member of the private staff” means a person who is employed exclusively in the private service of a member of the consular post;
- (j) “consular premises” means the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used exclusively for the purposes of the consular post;

(k) "consular archives" includes all the papers, documents, correspondence, books, films, tapes and registers of the consular post, together with the ciphers and codes, the card-indexes and any article of furniture intended for their protection or safekeeping.

2. Consular Officers are of two categories, namely career consular officers and honorary consular officers. The provisions of Chapter II of the present Convention apply to consular posts headed by career consular officers; the provisions of Chapter III govern consular posts headed by honorary consular officers.

3. The particular status of members of the consular posts who are nationals or permanent residents of the receiving State is governed by Article 71 of the present Convention.

CHAPTER I—CONSULAR RELATIONS IN GENERAL

Article 5

Consular functions.

Consular functions consist in :

- (a) Protecting in the receiving State the interests of the sending State and of its nationals, both individuals and bodies corporate, within the limits permitted by international law;
- (b) Furthering the development of commercial, economic, cultural and scientific relations between the sending State and the receiving State and otherwise promoting friendly relations between them in accordance with the provisions of the present Convention;
- (c) ascertaining by all lawful means conditions and developments in the commercial economic, cultural and scientific life of the receiving State, reporting, thereon to the Government of the sending State and giving information to persons interested;
- (d) issuing passports and travel documents to nationals of the sending State, and visas or appropriate documents to persons wishing to travel to the sending State;
- (e) helping and assisting nationals, both individuals and bodies corporate, of the sending State;
- (f) acting as notary and civil registrar and in capacities of a similar kind, and performing certain functions of an administrative nature, provided that there is nothing contrary thereto in the laws and regulations of the receiving State;
- (g) safeguarding the interests of nationals, both individuals and bodies corporate, of the sending State in cases of succession mortis causa in the territory of the receiving State, in accordance with the laws and regulations of the receiving State;
- (h) safeguarding, within the limits imposed by the laws and regulations of the receiving State, the interests of minors and other persons lacking full capacity who are nationals of the sending State, particularly where any guardianship or trusteeship is required with respect to such persons;
- (i) subject to the practices and procedures obtaining in the receiving State, representing or arranging appropriate representation for nationals of the sending State before the tribunals and other authorities of the receiving State, for the purpose of obtaining, in accordance with the laws and regulations of the receiving State, provisional measures for the preservation of the rights and interests of these nationals, where, because of absence or any other reason, such nationals are unable at the proper time to assume the defence of their rights and interests;

- (j) transmitting judicial and extra-judicial documents or executing letters rogatory or commissions to take evidence for the Courts of the sending State in accordance with international agreements in force or, in the absence of such international agreements, in any other manner compatible with the laws and regulations of the receiving State;
- (k) exercising rights of supervision and inspection provided for in the laws and regulations of the sending State in respect of vessels having the nationality of the sending State, and of aircraft registered in that State, and in respect of their crews;
- (l) extending assistance to vessels and aircraft mentioned in sub-paragraph (k) of this Article and to their crews, taking statements regarding the voyage of a vessels, examining and stamping the ships papers, and, without prejudice to the powers of the authorities of the receiving State, conducting investigations into any incidents which occurred during the voyage, and settling disputes into any kind between the master, the officers and the seamen in so far as this may be authorised by the laws and regulations of the sending State;
- (m) performing any other functions entrusted to a consular post by the sending State which are not prohibited by the laws and regulations of the receiving State or to which no objection is taken by the receiving State or which are referred to in the international agreements in force between the sending State and the receiving State.

Article 15

Temporary exercise of the functions of the head of a consular post.

1. If the head of a consular post is unable to carry out his function or the position of head of consular post is vacant, an acting head of post may act provisionally as head of the consular post.
2. The full name of the acting head of post shall be notified either by the diplomatic mission of the sending State or, if that State has no such mission in the receiving State, by the head of the consular post, or, if he is unable to do so, by any competent authority of the sending State, to the Ministry for Foreign Affairs of the receiving State or to the authority designated by that Ministry. As a general rule, this notification shall be given in advance. The receiving State may make the admission as acting head of post of a person who is neither a diplomatic agent nor a consular officer of the sending State in the receiving State conditional on its consent.
3. The competent authorities of the receiving State, shall afford assistance and protection to the acting head of post. While he is in charge of the post, the provisions of the present convention shall apply to him on the same basis as to the head of the consular post concerned. The receiving State shall not, however, be obliged to grant to an acting head of post any facility, privilege or immunity which the head of the consular post enjoys only subject to conditions not fulfilled by the acting head of post.
4. When, in the circumstances referred to in paragraph 1 of this Article, a member of the diplomatic staff of the diplomatic mission of the sending State in the receiving State is designated by the sending State as an acting head of post, he shall, if the receiving State does not object thereto, continue to enjoy diplomatic privileges and immunities.

Article 17

Performance of diplomatic acts by consular officers.

1. In a State where the sending State has no diplomatic mission and is not represented by a diplomatic mission of a third State, a consular officer may, with the consent of the receiving State, and without affecting his consular status, be authorised to perform diplomatic acts. The performance of such acts by a con-

sular officer shall not confer upon him any right to claim diplomatic privileges and immunities.

2. A consular officer may, after notification addressed to the receiving State, act as representative of the sending State to any inter-governmental organisation. When so acting, he shall be entitled to enjoy any privileges and immunities accorded to such a representative by customary international law or by international agreements; however, in respect of the performance by him of any consular function, he shall not be entitled to any greater immunity from jurisdiction than that to which a consular officer is entitled under the present Convention.

CHAPTER II—FACILITIES, PRIVILEGES AND IMMUNITIES RELATING TO CONSULAR POSTS, CAREER CONSULAR OFFICERS AND OTHER MEMBERS OF A CONSULAR POST

Section I

FACILITIES, PRIVILEGES AND IMMUNITIES RELATING TO A CONSULAR POST

Article 31

Inviolability of the consular premises.

1. Consular premises shall be inviolable to the extent provided in this Article.

2. The authorities of the receiving State shall not enter that part of the consular premises which is used exclusively for the purpose of the work of the consular post except with the consent of the head of the consular post or of his designee or of the head of the diplomatic mission of the sending State. The consent of the head of the consular post may, however, be assumed in case of fire or other disaster requiring prompt protective action.

4. The consular premises, their furnishing the property of the consular post and its means of transport shall be immune from any form of requisition for purposes of national defence or public utility. If expropriation is necessary for such purposes, all possible steps shall be taken to avoid impeding the performance of consular functions, and prompt, adequate and effective compensation shall be paid to the sending State.

Article 32

Exemption from taxation of consular premises.

1. Consular premises and the residence of the career head of consular post of which the sending State or any person acting on its behalf is the owner or lessee shall be exempt from all national, regional or municipal dues and taxes whatsoever, other than such as represent payment for specific services rendered.

2. The exemption from taxation referred to in paragraph 1 of this Article shall not apply to such dues and taxes if, under the law of the receiving State, they are payable by the person who contracted with the sending State or with the person acting on its behalf.

Article 33

Inviolability of the consular archives and documents.

The Consular archives and documents shall be inviolable at all times and wherever they may be.

Article 35

Freedom of communication.

1. The receiving State shall permit and protect freedom of communication on the part of the consular post for all official purposes. In communicating with

the Government, the diplomatic missions and other consular posts, wherever situated, of the sending State, the consular post may enjoy all appropriate means including diplomatic or consular couriers, diplomatic or consular bags and messages in code or cipher. However, the consular post may instal and use a wireless transmitter only with the consent of the receiving State.

2. The official correspondence of the consular post shall be inviolable. Official correspondence means all correspondence relating to the consular post and its functions.

3. The consular bag shall be neither opened nor detained. Nevertheless, if the competent authorities of the receiving State have serious reason to believe that the bag contains something other than the correspondence, documents or articles referred to in paragraph 4 of this Article, they may request that the bag be opened in their presence by an authorised representative of the sending State. If this request is refused by the authorities of the sending State, the bag shall be returned to its place of origin.

4. The packages constituting the consular bag shall bear visible external marks of their character and may contain only official correspondence and documents or articles intended exclusively for official use.

5. The consular courier shall be provided with an official document indicating his status and the number of packages constituting the consular bag. Except with the consent of the receiving State, he shall be neither a national of the receiving State, nor, unless he is a national of the sending State, a permanent resident of the receiving State. In the performance of his functions he shall be protected by the receiving State. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.

6. The sending State, its diplomatic missions and its consular posts may designate consular couriers ad hoc. In such cases the provisions of paragraph 5 of this Article shall also apply except that the immunities therein mentioned shall cease to apply when such a courier has delivered to the consignee the consular bag in his charge.

7. A consular bag may be entrusted to the captain of a ship or of a commercial aircraft scheduled to land at any authorised port of entry. He shall be provided with an official document indicating the number of packages constituting the bag, but he shall not be considered to be a consular courier. By arrangement with the appropriate local authorities, the consular post may send one of its members to take possession of the bag directly and freely from the captain of the ship or of the aircraft.

Article 39

Consular fees and charges

1. The consular post may levy in the territory of the receiving State the fees and charges provided by the laws and regulations of the sending State for consular acts.

2. The sums collected in the form of the fees and charges referred to in paragraph 1 of this Article, and the receipts for such fees and charges, shall be exempt from all dues and taxes in the receiving State.

Section II

FACILITIES, PRIVILEGES AND IMMUNITIES RELATING TO CAREER CONSULAR OFFICERS AND OTHER MEMBERS OF A CONSULAR POST

Article 41

Personal inviolability of Consular Officers

1. Consular officers shall not be liable to arrest or detention pending trial, except in the case of a grave crime and pursuant to decision by the competent judicial authority.

2. Except in the case specified in paragraph 1 of this Article, consular officers shall not be committed to prison or liable to any other form of restriction on their personal freedom save in execution of a judicial decision of final effect.

Article 43

Immunity from jurisdiction

1. Consular officers and consular employees shall not be amenable to the jurisdiction of the judicial or administrative authorities of the receiving State in respect of acts performed in the exercise of consular functions.

2. The provisions of paragraph 1 of this Article shall not, however, apply in respect of a civil action either—

- (a) arising out of a contract concluded by a consular officer or a consular employee in which he did not contract expressly or impliedly as an agent of the sending State; or
- (b) by a third party for damage arising from an accident in the receiving State caused by a vehicle, vessel or aircraft.

Article 44

Liability to give evidence

1. Members of a consular post may be called upon to attend as witnesses in the course of judicial or administrative proceedings. A consular employee or a member of the service staff shall not, except in the cases mentioned in paragraph 3 of this Article, decline to give evidence. If a consular officer should decline to do so, no coercive measure or penalty may be applied to him.

2. The authority requiring the evidence of a consular officer shall avoid interference with the performance of his functions. It may, when possible, take such evidence at his residence or at the consular post or accept a statement from him in writing.

3. Members of a consular post are under no obligation to give evidence concerning matters connected with the exercise of their functions or to produce official correspondence and documents relating thereto. They are also entitled to decline to give evidence as expert witnesses with regard to the law of the sending State.

Article 45

Waiver of privileges and immunities

1. The sending State may waive, with regard to a member of the consular post, any of the privileges and immunities provided for in Articles 41, 43 and 44.

2. The waiver shall in all cases be express, except as provided in paragraph 3 of this Article, and shall be communicated to the receiving State in writing.

3. The initiation of proceedings by a consular officer or a consular employee in a matter where he might enjoy immunity from jurisdiction under Article 43 shall preclude him from invoking immunity from jurisdiction in respect of any counter-claim directly connected with the principal claim.

4. The waiver of immunity from jurisdiction for the purposes of civil or administrative proceedings shall not be deemed to imply the waiver of immunity from the measures of execution resulting from the judicial decision; in respect of such measures, a separate waiver shall be necessary.

Article 48

Social security exemption

1. Subject to the provisions of paragraph 3 of this Article, members of the consular post with respect to services rendered by them for the sending State, and members of their families forming part of their households, shall be exempt from social security provisions which may be in force in the receiving State.

2. The exemption provided for in paragraph 1 of this Article shall apply also to members of the private staff who are in the sole employ of members of the consular post, on condition:

- (a) that they are not nationals of or permanently resident in the receiving State; and
- (b) that they are covered by the social security provisions which are in force in the sending State or a third State.

3. Members of the consular post who employ persons to whom the exemption provided for in paragraph 2 of this Article does not apply shall observe the obligations which the social security provisions of the receiving State impose upon employers.

4. The exemption provided for in paragraphs 1 and 2 of this Article shall not preclude voluntary participation in the social security system of the receiving State, provided that such participation is permitted by that State.

Article 49

Exemption from taxation

1. Consular officers and consular employees and members of their families forming part of their households shall be exempt from all dues and taxes, personal or real, national, regional or municipal, except—

- (a) indirect taxes of a kind which are normally incorporated in the price of goods or services;
- (b) dues or taxes on private immovable property situated in the territory of the receiving State, subject to the provisions of Article 32;
- (c) estate, succession or inheritance duties, and duties on transfers, levied by the receiving State, subject to the provisions of paragraph (b) of Article 51;
- (d) dues and taxes on private income, including capital gains, having its source in the receiving State and capital taxes relating to investments made in commercial or financial undertakings in the receiving State;
- (e) charges levied for specific services rendered;
- (f) registration, court or record fees, mortgage dues and stamp duties, subject to the provisions of Article 32.

2. Members of the service staff shall be exempt from dues and taxes on the wages which they receive for their services.

3. Members of the consular post who employ persons whose wages or salaries are not exempt from income-tax in the receiving State shall observe the obligation which the laws and regulations of that State impose upon employers concerning the levying of income-tax.

Article 50

Exemption from customs duties and inspection

1. The receiving State shall, in accordance with such laws and regulations as it may adopt, permit entry of and grant exemption from all customs duties, taxes, and related charges other than charges for storage, cartage and similar services, on—

- (a) articles for the official use of the consular post;
- (b) articles for the personal use of a consular officer or members of his family forming part of his household, including articles intended for his establishment. The articles intended for consumption shall not exceed the quantities necessary for direct utilisation by the persons concerned.

2. Consular employees shall enjoy the privileges and exemptions specified in paragraph 1 of this Article in respect of articles imported at the time of first installation.

3. Personal baggage accompanying consular officers and members of their families forming part of their households shall be exempt from inspection. It may be inspected only if there is serious reason to believe that it contains articles other than those referred to in sub-paragraph (b) of paragraph 1 of this Article, or articles the import or export of which is prohibited by the laws and regulations of the receiving State or which are subject to its quarantine laws and regulations. Such inspection shall be carried out in the presence of the consular officer or member of his family concerned.

Article 51

Estate of a member of the consular post or of a member of his family

In the event of the death of a member of the consular post or of a member of his family forming part of his household, the receiving State:

- (a) shall permit the export of the movable property of the deceased, with the exception of any such property acquired in the receiving State the export of which was prohibited at the time of his death;
- (b) shall not levy national, regional or municipal estate, succession or inheritance duties, and duties on transfers, on movable property the presence of which in the receiving State was due solely to the presence in that State of the deceased as a member of the consular post or as a member of the family of a member of the consular post.

Article 52

Exemption from personal services and contributions

The receiving State shall exempt members of the consular post and members of their families forming part of their households from all personal services, from all public service of any kind whatsoever, and from military obligations such as those connected with requisitioning, military contributions and billeting.

Article 53

Beginning and end of consular privileges and immunities.

1. Every member of the consular post shall enjoy the privileges and immunities provided in the present Convention from the moment he enters the territory of the receiving State on proceeding to take up his post or, if already in its territory, from the moment when he enters on his duties with the consular post.

2. Members of the family of a member of the consular post forming part of his household and members of his private staff shall receive the privileges and immunities provided in the present Convention from the date from which he enjoys privileges and immunities in accordance with paragraph 1 of this Article or from the date of their entry into the territory of the receiving State or from the date of their becoming a member of such family or private staff, whichever is the latest.

3. When the functions of a member of the consular post have come to an end, his privileges and immunities and those of a member of his family forming part of his household or a member of his private staff shall normally cease at the moment when the person concerned leaves the receiving State or on the expiry of a reasonable period in which to do so, whichever is the sooner, but shall subsist until that time, even in case of armed conflict. In the case of the persons referred to in paragraph 2 of this Article, their privileges and immunities shall come to an end when they cease to belong to the household or to be in the service of a member of the consular post provided, however, that if such persons intend leaving the receiving State within a reasonable period thereafter, their privileges and immunities shall subsist until the time of their departure.

4. However, with respect to acts performed by a consular officer or a consular employee in the exercise of his functions, immunity from jurisdiction shall continue to subsist without limitation of time.

5. In the event of the death of a member of the consular post, the members of his family forming part of his household shall continue to enjoy the privileges and immunities accorded to them until they leave the receiving State or until the expiry of a reasonable period enabling them to do so, whichever is the sooner.

Article 54**Obligations of third States**

1. If a consular officer passes through or is in the territory of a third State, which has granted him a visa, if a visa was necessary, while proceeding to take up or return to his post or when returning to the sending State, the third State shall accord to him all immunities provided for by the other Articles of the present Convention as may be required to ensure his transit or return. The same shall apply in the case of any member of his family forming part of his household enjoying such privileges and immunities who are accompanying the consular officer or travelling separately to join him or to return to the sending State.

2. In circumstances similar to those specified in paragraph 1 of this Article, third States shall not hinder the transit through their territory of other members of the consular post or of members of their families forming part of their households.

3. Third States shall accord to official correspondence and to other official communications in transit, including messages in code or cipher, the same freedom and protection as the receiving State is bound to accord under the present Convention. They shall accord to consular couriers who have been granted a visa, if a visa was necessary, and to consular bags in transit, the same inviolability and protection as the receiving State is bound to accord under the present Convention.

4. The obligations of third States under paragraphs 1, 2 and 3 of this Article shall also apply to the persons mentioned respectively in those paragraphs, and to official communications and to consular bags, whose presence in the territory of the third State is due to force majeure.

Article 55**Respect for the laws and regulations of the receiving State.**

2. The consular premises shall not be used in any manner incompatible with the exercise of consular functions.

3. The provisions of paragraph 2 of this Article shall not exclude the possibility of offices of other institutions or agencies being installed in part of the building in which the consular premises are situated, provided that the premises assigned to them are separate from those used by the consular post. In that event, the said offices shall not, for the purposes of the present Convention, be considered to form part of the consular premises.

Article 57**Special provisions concerning private gainful occupation.**

2. Privileges and immunities provided in this Chapter shall not be accorded—

- (a) to consular employees or to members of the service staff who carry on any private gainful occupation in the receiving State;
- (b) to members of the family of a person referred to in sub-paragraph (a) of this paragraph or to members of his private staff;
- (c) to members of the family of a member of a consular post who themselves carry on any private gainful occupation in the receiving State.

CHAPTER III—REGIME RELATING TO HONORARY CONSULAR OFFICERS AND CONSULAR POSTS HEADED BY SUCH OFFICERS

Article 58**General provisions relating to facilities, privileges and immunities.**

1. Articles.....35..... and 39, paragraph 3 of Article 54 and paragraphs 2 and 3 of Article 55 shall apply to consular posts headed by an honorary consular officer. In addition, the facilities, privileges and immunities of such consular posts shall be governed by Articles....., 60, 61 and 62.

2. Articles....., 43, paragraph 3 of Article 44, Articles 45 and 53..... shall apply to honorary consular officers. In addition, the facilities, privileges and immunities of such consular officers shall be governed by Articles.....60 and 67.

3. Privileges and immunities provided in the present Convention shall not be accorded to members of the family of an honorary consular officer or of a consular employee employed at a consular post headed by an honorary consular officer.

Article 60

Exemption from taxation of consular premises

1. Consular premises of a consular post headed by an honorary consular officer of which the sending State is the owner or lessee shall be exempt from all national, regional or municipal dues and taxes whatsoever, other than such as represent payment for specific services rendered.

2. The exemption from taxation referred to in paragraph 1 of this Article shall not apply to such dues and taxes if, under the laws and regulations of the receiving State, they are payable by the person who contracted with the sending State.

Article 61

Inviolability of consular archives and documents

The consular archives and documents of a consular post headed by an honorary consular officer shall be inviolable at all times and wherever they may be, provided that they are kept separate from other papers and documents and, in particular, from the private correspondence of the head of a consular post and of any person working with him, and from the materials, books or documents relating to their profession or trade.

Article 62

Exemption from customs duties

The receiving State shall, in accordance with such laws and regulations as it may adopt, permit entry of, and grant exemption from all customs duties, taxes, and related charges other than charges for storage, cartage and similar services on the following articles, provided that they are for the official use of consular post headed by an honorary consular officer; coats-of-arms, flags, signboards, seals and stamps, books, official printed matter, office furniture, office equipment and similar articles supplied by or at the instance of the sending State to the consular post.

Article 66

Exemption from taxation

An honorary consular officer shall be exempt from all dues and taxes on the remuneration and emoluments which he receives from the sending State in respect of the exercise of consular functions.

Article 67

Exemption from personal services and contributions

The receiving State shall exempt honorary consular officers from all personal services and from all public services of any kind whatsoever and from military obligations such as those connected with requisitioning, military contributions and billeting.

CHAPTER IV—GENERAL PROVISIONS

Article 70

Exercise of consular functions by diplomatic missions

1. The provisions of the present Convention apply also, so far as the context permits, to the exercise of consular functions by a diplomatic mission.

2. The names of members of a diplomatic mission assigned to the consular section or otherwise charged with the exercise of the consular functions of the

mission shall be notified to the Ministry for Foreign Affairs of the receiving State or to the authority designated by that Ministry.

x x x x x x x x x

4. The privileges and immunities of the members of a diplomatic mission, referred to in paragraph 2 of this Article shall continue to be governed by the rules of international law concerning diplomatic relations.

Article 71

Nationals or permanent residents of the receiving State

1. Except in so far as additional facilities, privileges and immunities may be granted by the receiving State, consular officers who are nationals or permanently resident in the receiving State shall enjoy immunity from jurisdiction and personal inviolability in respect of official acts performed in the exercise of their functions, and the privilege provided in paragraph 3 of Article 14.

2. Other members of the consular post who are nationals of, or permanently resident in the receiving State and members of their families, as well as members of the families of consular officers referred to in paragraph 1 of this Article, shall enjoy facilities, privileges and immunities only in so far as these are granted to them by the receiving State. Those members of the families of the members of the consular post and those members of the private staff who are themselves nationals of or permanently resident in the receiving State shall likewise enjoy facilities, privileges and immunities only in so far as these are granted to them by the receiving State.

Section 3 (1)

SCHEDULE 2

PROVISIONS FOR GIVING EFFECT TO OTHER AGREEMENTS

1. The like exemption from dues and taxes may be extended to the residence of any member of a consular post as is accorded under Article 32 in Schedule I to this Act to the residence of the career head of a consular post.

2. Paragraph 1 of Article 49 in that Schedule may be extended to members of the service staff.

3. Paragraph 2 of Article 50 in that Schedule may be applied as if it were among the Articles mentioned in paragraph 2 of Article 58 in that Schedule, as if the reference to consular employees included members of the service staff and also such members of the families of consular employees or of members of the service staff as form part of their households, and as if the words "in respect of articles imported at the time of first installation" were omitted.

4. Articles 29 and 31 in Schedule 1 to the Diplomatic Privileges Act, 1964 (inviolability and immunity from jurisdiction and arrest of diplomatic agents and exemption from duty to give evidence) may be extended to members of a consular post and members of their families forming part of their households.

5. Article 22 in Schedule 1 to the Diplomatic Privileges Act, 1964 (inviolability and protection of mission) may be extended to consular premises and paragraph 1 of Article 30 in that Schedule (inviolability of private residence) may be extended to the residences of consular officers.

6. Article 27 in Schedule 1 to the Diplomatic Privileges Act, 1964 (freedom of communications) may be extended to the communications of a consular post.

[THE] CONTEMPT OF COURTS ACT, 1952**(ACT XXXII OF 1952)**

[The text of the Act printed here is as on 1-3-1970.]

STATEMENT OF OBJECTS AND REASONS

"The Constitution recognises the power of High Courts to punish for contempts of them; but there is no specific provision of law which enables a High Court to exercise this power in respect of a contempt committed beyond its territorial jurisdiction. It is desirable that a High Court, as a Court of record, should be able to punish for contempt of itself and of Courts subordinate to it irrespective of whether the contempt is committed within or outside its territorial jurisdiction and irrespective of whether the alleged contemner is for the time being at a place within or outside such jurisdiction. The Bill seeks mainly to achieve this object. Incidentally the Act is sought to be made applicable to Part B States also, the local laws on the subject being repealed"—Gaz. of Ind., 12-5-1951, Pt. II, Sec. 2, p. 344.

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION

—Adapted by 3 A. L. O., 1956.

—Repealed (in part) by Act 36 of 1957.

[THE] CONTEMPT OF COURTS ACT, 1952**(ACT XXXII OF 1952)***

....

[14th March, 1952.]

An Act to define and limit the powers of certain Courts in punishing contempts of Courts

Be it enacted by Parliament as follows:—

[°] For Statement of Objects and Reasons, see Gaz. of Ind., 1951, Pt. II, Sec. 2, p. 344.

The Act has been extended to the Union Territory of Pondicherry by Reg. 7 of 1963 (1-10-1963).

Preamble — Note 1

(1) Contempt of Courts Act cannot be held nugatory on the ground of absence of a definition of the term "contempt". AIR 1954 Pat 203 (206) = 32 Pat 1069 = 1954 Cri L Jour 533 (DB) ** AIR 1969 Delhi 201 (207) = 1969 Cri LJ 884 (FB) ** 1968 Ker LT 299 = 1968 Ker LJ 197 (FB) ** AIR 1968 Ker 301 (309) = 1968 Cri LJ 1424 = 1968 Ker LT 157 (DB).

(2) Contempt of Courts Act does not put any unreasonable restriction on the fundamental rights of a citizen granted by Article 19 (1) (a) of the Constitution. AIR 1954 Pat 203 (206) = 32 Pat 1069 = 1954 Cri L Jour 533 (DB) ** AIR 1969 Delhi 201 (206) = 1969 Cri LJ 884 (FB) ** 1968 Ker LT 299 = 1968 Ker LJ 197 (FB).

(3) Contempt of Courts Act is not violative of Article 19 (1) (a) of the Constitution merely because by practice the High Courts do not take evidence in contempt cases. The very nature and purpose of contempt proceedings require speedy disposal. Court is bound to consider contemner's affidavit and follow the principles. Contemner has ample safeguards. AIR 1967 Andh Pra 299

(311, 312) = 1967 Cri LJ 1470 = ILR (1968) Andh Pra 42 (DB).

(4) Procedure provided for the summary trial of the contempt of Court is not violative of Article 14. AIR 1968 Punj 217 (230) = 69 Pun LR 673 (FB).

(5) There is nothing invalid in practice and procedure followed in matters of contempt prior to Constitution on account of Article 21. AIR 1960 Pat 430 (440) = 1960 Cri LJ 1254 = 1960 BLJR 622 (FB).

(6) There is no inconsistency of any kind between the Contempt of Courts Act (1952) and Article 13 inasmuch as Article 19 (2) forms part of Part III of the Constitution itself. AIR 1960 Pat 430 (440) = 1960 Cri LJ 1254 = 1960 BLJR 622 (FB).

(7) Section 3 is not ultra vires the Constitution. AIR 1966 Bom 19 (29) = 1966 Cri LJ 9 = 67 Bom LR 380 (DB).

(8) Expression 'contempt of Court' though not statutorily defined, is not vague or indefinite. There is nothing unconstitutional in judicial determination by Courts as to the meaning of that expression. AIR 1969 Delhi 201 (206, 207) = 1969 Cri LJ 884 (FB).

1. Short title and extent.—(1) This Act may be called THE CONTEMPT OF COURTS ACT, 1952.

(2) It extends to the whole of India except the State of Jammu and Kashmir.

SECTION 1 — SYNOPSIS

1. Scope.
2. Essentials of contempt.
3. Scandalizing the Court.
4. Disobedience to orders of Court.
5. Interference with due course of justice in pending proceedings.
6. Comments and reports on pending cases.
7. Attempts to influence decision in pending cases.

1. Scope.— (1) The Contempt of Courts Act is not a codifying and consolidating Act — It creates no new powers but merely recognises the powers which already exist and seeks to define and limit them. AIR 1939 Oudh 131 (136, 137) = 14 Luck 492 = 40 Cri L Jour 421.

(2) The Contempt of Courts Act has been enacted in order to remove doubts which had arisen as to the powers of a High Court but does not imply that the Legislature recognised that no such power did in fact exist. AIR 1926 All 623 (632) = 48 All 711 (SB).

(3) The Act does not deal with the offence of contempt of Courts which is prejudicial to the security of the State. Hence a State legislation dealing with such a kind of special contempt cannot be struck down as being repugnant to this Act which is one passed by the Parliament. AIR 1956 Punj 169 (171) = ILR (1956) Punj 1146 = 1956 Cri L Jour 1015 (DB).

(4) The intention of contempt proceedings is solely not the enforcement of orders but to see that a person who has brought the authority and administration of law into disrespect is punished. (1968) Mad LJ (Cri) 766 = (1968) 2 Andh WR 587 (DB).

(5) The law of contempt of Court is a special law within the meaning of Section 41, I. P. C. Section 4 of that Act makes a contempt of Court punishable. Contempt of Court is, therefore, an offence within the meaning of Ch. IV of the I. P. C. and a defence such as, mistake of fact under Section 79, I. P. C. would be open. ILR (1968) 1 Ker 384 (406) = 1968 Ker LJ 197 (FB).

(6) A law which, after fair trial, punishes, out of public necessity, the great public mischief of obstructing the course of justice, cannot be regarded as an unreasonable restriction on the right of freedom of speech either with regard to its substance or with regard to the procedure by which it is enforced. It is,

therefore, a valid law. ILR (1968) 1 Ker 384 (419) = 1968 Ker LJ 197 (FB).

2. Essentials of contempt.— (1) Contempts can be classified into two broad categories namely the criminal and civil contempts. AIR 1957 All 37 (43) = 1957 Cri L Jour 18 (DB) ** 1969 Ker LT 513 = 1969 Ker LJ 453 (DB) ** AIR 1960 All 231 (234) = 1960 Cri LJ 442 = 1960 All LJ 247 (DB).

(2) Criminal contempt consisting of words or acts obstructing or tending to obstruct the administration of justice; and contempt in procedure consisting of disobedience to judgments, orders or process of Court and involving private injury. AIR 1953 Cal 627 (628) = 1953 Cri L Jour 1414 (DB).

(3) Except to the extent that certain forms of contempt in the face of the Court are described in Sections 175, 178, 179, 180 and 228, I. P. C., there is no statutory definition of the offence of contempt of Court although, of course, there is statutory recognition of such an offence in the Contempt of Courts Act, 1952. ILR (1968) 1 Ker 384 (404) = 1968 Ker LJ 197 (FB).

(4) Contempt is of two kinds: (a) that which interferes with the due course of justice and pollutes the stream of justice in so far as it concerns parties to a cause, as for instance, when comments are made on a pending case; (b) that which is calculated to bring a Judge into contempt or lower his authority or to interfere with the lawful process of the Court. AIR 1953 Orissa 33 (38) = 1953 Cri L Jour 349 (DB).

(5) A civil contempt is a failure to obey the order issued for the benefit of the opposite party and the principal object of action taken in respect of it is to secure the enforcement of the order. AIR 1951 Pat 443 (444) = 52 Cri L Jour 558 (DB) ** AIR 1955 Mad 121 (129) = ILR (1955) Mad 1084 = 1955 Cri LJ 505 (DB) ** AIR 1954 Orissa 167 (170) = ILR (1954) Cut 467 = 1954 Cri L Jour 988 (DB) ** 1964 (1) Cri LJ 449 (451) = 68 Cal WN 693 (DB) ** (1961) 65 Cal WN 722 (DB).

(6) Disobedience of judgments and orders of the Court and breach of undertakings given to Courts come in the category of civil contempt. 1969 Ker LT 513 = 1959 Ker LJ 453 (DB).

(7) Contempts which are criminal consist in a conduct which offends the majesty of law and undermines the dignity of Court. AIR 1951 Pat 443 (444) = 52 Cri L Jour 558 (DB) ** AIR 1954 Orissa 167 (170) = ILR (1954) Cut 467 = 1954 Cri L Jour 988 (DB).

(8) In a general way contempt of Court may be said to be constituted by

Section 1 — Note 2 (contd.)

any conduct that tends to bring the authority and administration of law into disrespect or disregard or to interfere with or prejudice parties to action or their witnesses during litigation — Unfailing criterion is whether or not there has been an interference or a tendency to interfere with administration of justice. AIR 1970 Mad 14 (16) (DB) ** AIR 1969 Delhi 291 (293) (DB).

(9) There can be no comprehensive or final definition of what would constitute contempt of Court; but any conduct which has the effect of diminishing the prestige and authority of the Court, which is likely to lower the esteem of the Court in the minds of the public and which gives an impression that, with impunity, the orders of the High Court could be disobeyed by mere stratagem or contrivance, would certainly amount to contempt. (1969) Mad LW (Cri) 25 (27, 28) (DB).

(10) The gravamen of the offence of contempt is the interference or the likelihood of interference with the course of justice. AIR 1935 Cal 419 (435) = 36 Cri LJ 1053 (FB) ** AIR 1958 Punj 377 (381) = ILR (1958) Punj 1723 = 1958 Cri LJ 1225 ** AIR 1958 Punj 273 (282) = ILR (1958) Punj 1272 = 1958 Cri L Jour 952 ** AIR 1956 Andhra 84 (86) = ILR (1955) Andhra 545 = 1956 Cri L Jour 475 (DB) ** AIR 1956 Sau 102 (103) = 1956 Cri L Jour 1355 (DB) ** AIR 1955 Pat 135 (138) = 1955 Cri L Jour 520 (DB) ** AIR 1962 Ker 52 (54, 55) = 1962 (1) Cri LJ 336 = 1961 Ker LT 608 (DB).

(11) Contempt jurisdiction is reserved and exercised for what essentially brings the administration of justice into contempt or unduly weakens it, as distinguished from a wrong that might be inflicted on a private party by infringing a decretal order of Court. AIR 1970 Mad 14 (16) (DB).

(12) Acts which are calculated to interfere with the course of justice including libels or insults to Judges and publications prejudicing the fair conduct of proceedings fall within the category of criminal contempts. AIR 1955 Mad 121 (129) = ILR (1955) Mad 1084 = 1955 Cri L Jour 505 (DB) ** AIR 1969 Pat 140 (144) = 1969 Cri LJ 631 = 1968 Pat LJR 589 ** AIR 1965 Mad 415 (415, 416) = 1965 (2) Cri LJ 371 = (1965) 1 Mad LJ 322 (DB) ** AIR 1961 Pat 217 (221, 222) = 1961 (1) Cri LJ 698 = 1961 BLJR 331 (DB) ** 1964 (1) Cri LJ 449 (451) = 68 Cal WN 693 (DB) ** (1961) 65 Cal WN 722 (DB). (Entry upon land in disobedience of order of injunction.)

(13) Any act which is calculated to disturb the confidence of the public in the unquestioned effectiveness of the orders of the Court even against the

highest executive authority is contempt of Court. AIR 1953 Orissa 33 (38) = 1953 Cri L Jour 349 (DB).

(14) Altercation in the Chambers of the Munsiff-Magistrate between Advocate and Court clerk S—Held that it was no more than a mere small tiff of which no one should have taken any serious notice S.'s complaint demonstrates that what next happened in the Court hall was a mere verbal wrangle when the Court was not in session. Such small skirmishes through which there is no 'deposing of the authority, justice or dignity of the Court', do not constitute contempt of Court. (1969) MLJ (Cri) 659 (661) (Mys) (DB).

(15) Obstruction to justice must be understood in a very wide sense and it would amount to contempt. — It would include even anything done to prevent the police from investigating into a complaint regarding an offence or the subsequent Magisterial enquiry into the complaint. AIR 1955 All 638 (653) = ILR (1956) 2 All 470 = 1955 Cri L Jour 1451 (DB).

(16) Actual obstruction to or interference with the course of justice is not necessary to constitute an act or conduct into a contempt — It is enough if the act or conduct in question is calculated to do so or is likely to have that effect. AIR 1953 All 266 (269) = ILR (1951) 1 All 80 = 1953 Cri L Jour 630 (DB) ** AIR 1954 Pat 289 (296) = 1954 Cri L Jour 942 (DB) ** AIR 1954 SC 743 (746) ** AIR 1969 Delhi 207 (210) = 1969 Cri LJ 884 (FB) ** AIR 1968 Punj 217 (233) = 1968 Cri LJ 775 = 69 Punj LR 673 (FB) ** 1968 Ker LT 299 = 1968 Ker LJ 197 (FB) ** AIR 1959 Cal 174 (176) = 1959 Cri LJ 316 = 62 Cal WN 862 (FB) ** AIR 1969 Orissa 117 (128) = 1969 Cri LJ 763 = ILR (1968) Cut 437 (DB) ** AIR 1969 Pat 140 (144) = 1969 Cri LJ 631 = 1968 Pat LJR 589 ** AIR 1968 Ker 301 (306) = 1968 Cri LJ 1424 = 1968 Ker LT 157 (DB) ** AIR 1967 Ker 177 (180) = 1967 Cri LJ 1147 = 1967 Ker LT 59 (DB) ** AIR 1965 All 606 (608) = 1965 (2) Cri LJ 707 = 1964 All WR (HC) 724 ** AIR 1964 Pat 446 (449, 450) = 1964 (2) Cri LJ 439 = 1964 BLJR 370 (DB) ** 1963 (2) Cri LJ 219 (222) = 1962 MPLJ 1121 (DB) ** ILR (1960) 1 All 25 ** AIR 1959 Ker 266 (271, 272) = 1959 Cri LJ 1075 = 1959 Ker LT 102 (DB).

(17) The tendency of a statement to interfere with proper administration of law does not depend solely on its contents — Much depends on the circumstances in which it is made, its context, the person making it, the person to whom it is addressed, the nature and degree of publicity it receives and other like factors — Nor will the Court lose sight of prevailing local conditions. 1968 Ker LT 299 = 1968 Ker LJ 197 (FB).

Section 1 — Note 2 (contd.)

(18) It is the effect of the act or words complained of, that is, their tendency to interfere with the due course of justice or the likelihood of their doing so that determines their character as a contempt. The intention or motive of their author is irrelevant to that question. AIR 1950 Pepsu 9 (14) = 1 Pepsu LR 253 = 51 Cri L Jour 1219 (SB) ** AIR 1958 Orissa 168 (181) = ILR (1958) Cut 195 = 1958 Cri L Jour 1055 (DB) ** AIR 1958 Pat 144 (146) = 1958 Cri L Jour 401 ** AIR 1957 All 37 (43) = 1957 Cri L Jour 18 (DB) ** AIR 1956 Pat 321 (323) = 1956 Cri L Jour 1087 (DB) ** AIR 1956 Sau 102 (103) = 1956 Cri L Jour 1355 (DB) ** AIR 1955 Madh B 183 (185) = 1955 Cri L Jour 1502 (DB) ** 1968 Ker LT 299 = 1968 Ker LJ 197 (FB) ** AIR 1968 Ker 301 (306) = 1968 Cri LJ 1424 = 1968 Ker LT 157 (DB) ** AIR 1967 Cal 153 (157) = 1967 Cri LJ 350 (DB) ** AIR 1966 Madh Pra 342 (344) = 1966 Cri LJ 1448 = 1966 MPLJ 821 (DB) ** AIR 1963 Madh Pra 61 (67, 68, 70) = 1963 (1) Cri LJ 187 = 1962 MPLJ 953 (DB) ** 1961 (2) Cri LJ 109 (111) = 1960 Ker LT 338 (DB).

(19) Nobody can be guilty of contempt unless he does an act which constitutes contempt. Mere intention to commit contempt without doing any act in furtherance is not punishable as contempt. AIR 1959 All 686 (688) = 1959 All LJ 849.

(20) Knowledge of the pendency of the proceeding must exist to complete an offence of contempt relating to a pending proceeding. AIR 1956 Sau 102 (104) = 1956 Cri L Jour 1355 (DB) ** AIR 1958 Punj 377 (381) = ILR (1958) Punj 1723 = 1958 Cri L Jour 1225.

[See however AIR 1966 Cal 411 (420) = 1966 Cri LJ 883 = 70 Cal WN 579 ** AIR 1963 Madh Pra 61 (67) = 1963 (1) Cri LJ 187 = 1962 MPLJ 953 (DB).] ** AIR 1957 All 37 (43) = 1957 Cri LJ 18 (DB). (No hard and fast rule can be laid down regarding the necessity for knowledge of pending proceedings in contempt cases. It all depends upon the nature of act complained of. Where the act itself is wrong its necessity may be dispensed with but not so where there is nothing wrong in the act. In some other cases knowledge can be presumed.)]

(21) Contempt is an offence not because of its capacity to cause damage to the party but because of its adverse effects to the cause of justice itself. AIR 1953 All 153 (157) = 1953 Cri L Jour 402.

(22) Contempts of Court are of three kinds, namely, those which (1) scandalize the Court (2) abuse the parties concerned in causes before the Court or (3) prejudice the mankind against persons before the cause is heard. AIR

1938 Mad 248 (249) = ILR (1938) Mad 545 = 39 Cri L Jour 328 (DB) ** AIR 1943 Lah 329 (325) = ILR (1944) Lah 111 = 45 Cri L Jour 445 (FB) ** AIR 1955 Hyd 264 (267) = ILR (1955) Hyd 571 = 1955 Cri L Jour 1590 (DB) ** AIR 1945 Lah 206 (207) = 47 Cri L Jour 115 (DB) ** 1969 Ker LT 513 (519) = 1969 Ker LJ 453 (DB).

(23) There are three categories of contempt: (i) contempt in respect of orders of Court, (ii) contempt by letters or pamphlets addressed to the Judge who is to decide the case with the intention either by threats or flattery or bribery to influence his decisions, and (iii) constructive contempt, depending upon the influence of an intention to obstruct the course of justice. AIR 1955 Andhra 156 (159) = ILR (1955) Andhra 57 = 1955 Cri L Jour 1028 (DB).

(24) A person cannot be prosecuted for committing contempt of Court if he is instrumental in the breach of a convention which is against the law for, such a convention creates no legal obligation and cannot bind parties — Wrong information supplied by a party to his counsel with a view to secure wrongful gain cannot per se be declared to be contempt of Court. AIR 1959 All 211 (213) = 1959 Cri LJ 406 = 1958 All LJ 872 (DB).

(25) High Court's power to punish contempts should be used sparingly. AIR 1969 Delhi 304 (308).

(26) A party in contempt may not be heard until he has purged his contempt but this general rule has to be given effect to only when the alleged contempt has the tendency of impeding the cause of justice and there is no other way of enforcing obedience. AIR 1969 Delhi 304 (307).

3. Scandalizing the Court. — (1) Any thing done or published, which is calculated to bring a Court or a Judge of that Court into contempt or lower his authority is a contempt inasmuch as it would amount to scandalizing a Court or a Judge. AIR 1950 Sind 1 (1, 2) = 51 Cri L Jour 810 (FB) ** AIR 1940 Sind 239 (246) = ILR (1941) Kar 3 = 42 Cri L Jour 1 (FB) ** AIR 1958 Orissa 168 (171) = ILR (1958) Cut 195 = 1958 Cri L Jour 1055 (DB) ** AIR 1969 Orissa 117 (126) = 1969 Cri LJ 763 = ILR (1968) Cut 437 (DB) ** 1968 Ker LJ 197 = 1968 Ker LT 299 (FB) ** AIR 1967 Cal 153 (157) = 1967 Cri LJ 350 (DB) ** AIR 1966 Cal 411 (419) = 1966 Cri LJ 883 = 70 Cal WN 579 ** AIR 1967 Cal 216 (229) ** AIR 1964 Cal 572 (578, 579, 581, 582, 583) = 1964 (2) Cri LJ 660 = 69 Cal WN 82 (DB) ** AIR 1962 All 315 (327, 328) = 1962 (2) Cri LJ 1 = 1962 All LJ 235 (FB).

(2) The Law of contempt with reference to scandalizing the Court itself as

Section 1 — Note 3 (contd.)

enunciated by the decisions of the Indian Courts and the Privy Council on the date of the Constitution is "existing law" within the meaning of Article 19 (2) of the Constitution. ILR (1968) 1 Ker 384 (522) = 1968 Ker LJ 197 (FB).

(3) Contempt by scandalising the Court is not confined to defamation or aspersions against any particular Judge or bench and in connection with any particular case but would embrace defamation or aspersions cast against a whole Court in general. AIR 1935 All 1 (2, 5) (DB) ** 1967 Andh Pra 299 (322) = 1967 Cri LJ 1470 = ILR (1968) Andh Pra 42 (DB) ** AIR 1961 Pat 437 (438, 439) = (1961) 2 Cri LJ 674 = ILR 39 Pat 482 (FB).

(4) Scandalising the Court may manifest itself in various ways, but in substance, it is an attack on individual judges or the Court, as a whole, with or without reference to particular cases, casting unwarranted and defamatory aspersions upon the character or ability of the judges. AIR 1967 Andh Pra 299 (317) = 1967 Cri LJ 1470 = ILR (1968) Andh Pra 42 (DB) ** AIR 1970 Bom 48 (51) = 71 Bom LR 420. (Direct attack through newspaper article against particular trial judge by calling his judgment of conviction as strange and whimsical — Article also containing sweeping remarks ridiculing entire lower judiciary — Article falls under category of scandalizing Court and constituted contempt of Court.)

(5) The ground on which unjustified and excessive criticism of the judiciary is treated as contempt of Court is that such unwarranted, unjustified and unoccasioned malicious criticism tends to undermine the prestige and dignity of the judiciary. AIR 1970 Bom 48 (52) = 71 Bom LR 420.

(6) Contempt is not confined to cases which directly interfere with the administration of justice in pending cases. Any conduct, even though it may be after the termination of a pending case, is contempt of Court where it tends to bring the authority of a Court into disrespect or when it amounts to an insult offered to the Judge or the dignity of the Court. AIR 1926 All 623 (628) = 48 All 711 (SB) ** AIR 1935 Cal 419 (429, 430) = 63 Cal 217 = 36 Cri L Jour 1053 (FB) ** AIR 1958 Punj 273 (280) = ILR (1958) Punj 1272 = 1958 Cri L Jour 952. (Imputation of corruption levelled against Judge.) ** AIR 1967 Andh Pra 299 (323) = 1967 Cri LJ 1470 = ILR (1968) Andh Pra 42 (DB) ** AIR 1966 All 588 (589) = 1966 Cri LJ 1361 = 1966 All LJ 547 ** AIR 1960 Orissa 132 (136) = 1960 Cri LJ 1120 = 26 Cut LT 116 ** AIR 1961 Pat 1 (9, 10) = 1961 (1) Cri LJ 134 = 1960 BLJR 541 ** AIR 1959 Pat 373 (373,

374) = 1959 Cri LJ 1013 = 1959 BLJR 352.

(7) Rajasthan Co-operative Societies Act (13 of 1965), Sections 37 and 77 (3) — Interlocutory order passed under Section 77 (3) by Assistant Registrar to stay proceedings before Magistrate under Section 37 till further orders with the sole purpose to maintain status quo — No case for contempt of Court is made out against the Assistant Registrar (Obiter). 1969 Cri LJ 1193 (1197) (DB) (Raj).

(8) A slander on the entire subordinate Judiciary in a province, amounts to a clear case of contempt irrespective of the truth or otherwise of the allegations contained in the slander. AIR 1935 All 38 (39, 40) = 36 Cri L Jour 620 (DB).

[But see 1968 Ker LT 299 = 1968 Ker LJ 197 (FB) ** AIR 1938 Bom 197 (198) = ILR (1938) Bom 179 = 39 Cri L Jour 440.]

(9) Attributing improper motives to the Judges of the Court exceeds the limits of fair and bona fide criticism and amounts to gross contempt. AIR 1953 SC 75 (76) = 1953 SCR 215 = 1953 Cri L Jour 519 ** AIR 1954 Assam 201 (205) = 1954 Cri LJ 1609 (FB) ** AIR 1942 Mad 711 (711) = ILR (1943) Mad 26 = 44 Cri L Jour 162 (SB) ** AIR 1958 Punj 273 (280) = ILR (1958) Punj 1272 = 1958 Cri L Jour 952 ** AIR 1968 Punj 217 (238) = 1968 Cri LJ 775 = 69 Pun LR 673 (FB). (Statement alleging interference by High Court Judge with administration of justice in a subordinate Court amounts to contempt of Court.) ** AIR 1968 Andh Pra 370 (374) = (1967) 2 Andh WR 470 (DB) ** AIR 1967 All 586 (589) = 1967 Cri LJ 1594 = 1967 All LJ 381 ** (1967) Mad LJ (Cri) 233 = 1967 Ker LT 118 (DB) ** AIR 1966 All 588 (589) = 1966 Cri LJ 1361 = 1966 All LJ 547 ** 1966 All WR (HC) 561 = 1966 All Cri R 339 ** AIR 1961 J and K 76 (79, 80) = 1961 (2) Cri LJ 766 (DB) ** AIR 1961 Pat 1 (8, 9) = 1961 (1) Cri LJ 134 = 1960 BLJR 541 (DB) ** 1960 Jab LJ 636 = 1960 MPLJ 441 (DB) ** AIR 1961 Mys 12 (20, 21) = 1961 (1) Cri LJ 111 = 38 Mys LJ 936 ** AIR 1961 Punj 113 (117, 118, 119, 120) = 1961 (1) Cri LJ 426 = 63 Punj LR 121.

[See also AIR 1955 Pat 135 (137) = 1955 Cri LJ 520 (DB). (Held, publication did not suggest dishonest motives to Judge.)]

(10) An allegation that a Judge had abused his powers as such and acted dishonestly and in bad faith, prejudice, bias and malice in the course of his judicial duties amounts to serious contempt. AIR 1941 Bom 228 (232) = ILR (1941) Bom 548 = 42 Cri L Jour 723 (DB) ** AIR 1940 Sind 239 (249) = ILR (1941) Kar 3 = 42 Cri L Jour 1 (FB) **

Section 1 — Note 3 (contd.)

AIR 1958 Orissa 168 (171) = ILR (1958) Cut 195 = 1958 Cri L Jour 1055 (DB) ** AIR 1968 Andh Pra 207 (213) = (1968) 2 Andh WR 112 = 1968 Cri LJ 888 (DB) ** ILR (1968) 1 Ker 384 (411) = 1968 Ker LJ 197 (FB) ** AIR 1967 Cal 153 (155) = 1967 Cri LJ 350 (DB) ** AIR 1966 All 495 (497) = 1966 Cri LJ 1106 ** AIR 1963 Bom 254 (261, 262) = 1963 (2) Cri LJ 603 = 65 Bom LR 131 (DB).

(11) A criticism that the Judges of the High Court act, in discharging their judicial function, upon extra judicial considerations, sectional prejudices and with unconstitutional practices and discriminations amounts to a contempt. AIR 1954 Hyd 175 (177) = ILR (1954) Hyd 270 = 1954 Cri L Jour 1281 (DB) ** 1968 Ker LT 299 = 1968 Ker LJ 197 (FB) ** ILR (1958) 1 Ker 384 (430) = 1968 Ker LJ 197 (FB) ** AIR 1967 Andh Pra 299 (317) = 1967 Cri LJ 1470 = ILR (1968) Andh Pra 42 (DB) ** AIR 1967 Madh Pra 104 (106, 107) = 1967 Cr LJ 498 = 1966 MPLJ 1096 (DB) ** AIR 1967 Raj 203 (207) = 1967 Cri LJ 1057 = 1966 Raj LW 454 (DB) ** AIR 1965 Pat 360 (362) = 1965 (2) Cri LJ 394 = 1964 BLJR 102 (DB) ** AIR 1960 Pat 430 (446, 447) = 1960 Cri LJ 1254 = 1960 BLJR 622 (FB).

(12) Sending to the Chief Justice scurrilous and extremely offensive communication containing allegations and abuses against him and copies of the same to the Prime Minister, Home Minister, the Rajpramukh and the anti-corruption Committee constitutes a gross contempt. AIR 1954 Hyd 180 (181, 182) = ILR (1954) Hyd 170 = 1954 Cri L Jour 1300 (DB).

[See also AIR 1961 Pat 360 (361) = 1961 (2) Cri LJ 362 = 1961 BLJR 152 (DB).]

(13) Scurrilous abuses of Judges by themselves may or may not amount to contempt of Court, but when they, read in the context in which they are, give rise to the inference that the Judges by their conduct have put themselves in a position in which they cannot function with independent minds and deal even-handed and impartial justice as between the Crown and the subjects then there can be no doubt that they amount to contempt by scandalizing the Court, even if the conduct commented upon is not one in a cause which had been tried or which is pending trial. AIR 1935 Cal 419 (424) = 63 Cal 217 = 36 Cri L Jour 1053 (FB) ** AIR 1945 Cal 107 (123) = ILR (1944) 1 Cal 489 (SB).

(14) Accusing judicial officers of incompetence and their work as one which did not inspire public confidence amounts to contempt. AIR 1954 SC 10 (15) = 1953 SCR 1169 = 1954 Cri L Jour 238 ** AIR 1958 Orissa 168 (171) = ILR (1958) Cut 195 = 1958 Cri L Jour 1055 (DB) ** AIR 1958 Punj 273 (280) = ILR (1958)

Punj 1272 = 1958 Cri L Jour 952 ** AIR 1951 Vindh Pra 14 (15) ** AIR 1967 SC 1494 (1497) = 1967 Cri LJ 1380 = (1967) 3 SCR 163 ** AIR 1967 Andh Pra 299 (318) = 1967 Cri LJ 1470 = ILR (1968) Andh Pra 42 (DB) ** AIR 1965 Pat 227 (237, 238) = 1965 (1) Cri LJ 48 = 1966 BLJR 15 (DB) ** (1963) 1 Cri LJ 543 (544, 545) (Madh Pra). (Public Prosecutor alleging in transfer application that the newly appointed Addl. Sessions Judge would find it difficult to deal instantly with important points of law that would crop up.) ** 1961 (2) Cri LJ 109 (111) = 1960 Ker LT 338 (DB) ** AIR 1960 Orissa 132 (134, 135, 136) = 26 Cut LT 116 = 1960 Cri LJ 1120.

(15) Remarks that "in many instances judgments of High Court were corrected by Supreme Court and in many instances Supreme Court held that High Court has abused powers given to it" tend to lower the authority of the High Court and bring the Judges into contempt. AIR 1958 Orissa 168 (183) = 1958 Cri LJ 1055 = ILR (1958) Cut 195 (DB).

(16) Describing the proceedings of High Court as tamasha constitutes a contempt of Court. AIR 1945 Cal 107 (121) = ILR (1944) 1 Cal 489 (SB).

(17) A criticism suggesting that public confidence has suffered by the manner in which the High Court wrote its judgments and to restore that confidence judgments should be written differently amounts to contempt. AIR 1935 Lah 212 (212) = 16 Lah 266 = 36 Cri L Jour 837 (SB).

(18) A Judge or a Magistrate who contemptuously refers to the order of another Judge as a foolish order and characterises the Judge a foolish Judge commits a serious contempt. AIR 1949 Lah 270 (273) = Pak LR (1949) Lah 437 = 51 Cri L Jour 44 (FB).

(19) A statement that a Judge ignores arguments and authorities in the cases tried by him and hence the life and liberty of persons tried by him are always in peril amounts to a serious contempt. AIR 1929 Pat 72 (77) = 30 Cri L Jour 741 = 8 Pat 323 (FB).

(20) Allegations in an application presented to a Magistrate having the double effect of creating a feeling of embarrassment to the Magistrate in the discharge of his duties as a Court thereby preventing him from doing justice freely and unhesitatingly and of impairing the confidence of the litigants in placing reliance upon the Court's administration of justice, amounts to contempt. AIR 1959 Madh Pra 238 (240) = 1959 Cri LJ 842 = 1959 MPLJ 781 (DB).

(21) Allegation by Solicitor engaged in case that Judge has prejudged issue of fact before evidence has been called on either side amounts to contempt of Court known as scandalizing Court.

Section 1 — Note 3 (contd.)

AIR 1942 Bom 331 (331, 332) = 44 Cri L Jour 93.

(22) A pamphlet which contains reflections of a serious nature on the conduct and character of one of the parties to a pending proceeding and also states that the ultimate decision would be in favour of that party in which case there would be a miscarriage of law and justice amounts to a clear contempt. AIR 1939 Cal 672 (673) = ILR (1939) 1 Cal 399 = 41 Cri L Jour 148 (SB).

(23) A criticism of the judgment of the lower Court when the matter is pending in appeal before the higher Court is in the nature of a preliminary trial by the person who has criticised the judgment and an affront to the dignity of the appellate Court and as such amounts to a contempt. AIR 1933 Cal 118 (123) = 60 Cal 603 = 34 Cri L Jour 662 (DB).

(24) A criticism that an order passed by the Court has emboldened the opposite party to commit acts injurious to the complaining party does not amount to a contempt as there is nothing in it which amounts to a contemptuous reference to the Court. AIR 1937 Pat 124 (125, 127) = 38 Cri L Jour 412 (DB).

(25) Judicial officers and Magistrates are not entitled to criticise the judgments of the High Court to which they are subordinate and if they do that even in the course of their judgments they commit a contempt of the High Court. AIR 1953 Madh B 60 = 1953 Cri L Jour 570.

(26) An open insult and disrespect shown to a judicial officer amounts to a contempt of Court. 1954 BLJR 46 (51).

(27) A person who disturbs the Court by talking loudly in the corridor of the Court and defies the authority of police official who, upon the Court's orders, asks him to observe silence, interferes with administration of justice and such conduct amounts to contempt of Court. 1963 (2) Cri LJ 62 (63) (All).

(28) Counsel's statement before Full Bench that his client does not wish matter to be argued before the Bench as constituted amounts to a deliberate and intentional insult to the Court. AIR 1932 Lah 485 (485) (FB).

(29) Counsel who sign applications or pleadings containing matter scandalizing the Court without reasonably satisfying themselves about the prima facie existence of adequate grounds therefor with a view to prevent or delay the course of justice, are themselves guilty of contempt of Court and they cannot claim any privilege. AIR 1959 Madh Pra 238 (240) = 1959 Cri LJ 842 = 1959 MPLJ 781 (DB) ** AIR 1968 Andh Pra 370 (374) = (1967) 2 Andh WR 470 (DB)

** AIR 1959 Orissa 89 (94, 95) = ILR (1958) Cut 631 = 1959 Cr LJ 636 (DB).

(30) Threatening a Judge on account of a certain judicial act of his to expose him by publishing a pamphlet amounts to a contempt of Court inasmuch as that is calculated to lower the prestige of the Court and make people lose confidence in the justice administered by that Court. AIR 1956 Him Pra 49 (50) = 1956 Cri L Jour 1317.

(31) If a threat of action at law is held out to a Magistrate unless he apologizes for what he did acting in his judicial capacity, even if what he did was not strictly justifiable, that constitutes contempt. AIR 1966 Madh Pra 342 (345) = 1966 Cri LJ 1448 = 1966 MPLJ 821 (DB).

(32) Accusing a Judge of discourteous treatment of the bar coupled with a warning that if he persisted to do so measures would be taken amounts to a contempt. AIR 1950 Sind 1 (1, 3) = 51 Cri L Jour 810 (FB) ** AIR 1961 Cal 495 (498) = 1961 (2) Cri LJ 334 = ILR (1962) 1 Cal 304 (FB).

(33) Comments having tendency to overawe Public Prosecutor coupled with threat constitutes contempt. AIR 1961 Pat 1 (9, 10) = 1961 (1) Cri LJ 134 = 1960 BLJR 541 (DB) ** AIR 1961 Pat 217 (221, 222) = 1961 (1) Cri LJ 698 = 1961 BLJR 331 (DB).

(34) Attacks made by a party to a proceeding on opponents' advocate outside the Court after termination of the proceedings and having no relation to the proceedings which had terminated cannot be considered to be scandalising the Court or administration of justice. AIR 1956 Mad 621 (625) = ILR (1956) Mad 1239 (DB).

(35) Fair and reasonable criticism of the conduct and character of the Judges in relation to the judicial duties discharged by them does not amount to a contempt. AIR 1954 SC 10 (13, 14) = 1953 SCR 1169 = 1954 Cri L Jour 238. (AIR 1950 All 556 (FB). **Reversed.**) ** AIR 1950 Sind 1 (2) = 51 Cri L Jour 810 (FB) ** AIR 1954 Cal 403 (403) = ILR (1956) 1 Cal 99 = 1954 Cri L Jour 1160 (DB) ** AIR 1954 Pat 203 (210) = 32 Pat 1069 = 1954 Cri L Jour 533 ** AIR 1959 Pat 262 (266, 267) = 1959 Cri LJ 754 = 1958 BLJR 802 (DB).

[See also AIR 1960 Pat 326 (328) = 1960 Cri LJ 979 (DB).]

(36) To say that a Judge, in his judicial capacity, made remarks which could not be expected from any sane man does amount to a serious contempt. AIR 1959 Pat 262 (267, 268) = 1959 Cri LJ 754 = 1958 BLJR 802 (DB).

(37) Private communications with Judges touching upon merits of case — Such communication tends to bring Courts into disrepute and undermine

Section 1 — Note 3 (contd.)

respect of people for laws and Courts.
AIR 1969 Delhi 319 (320) (DB).

(38) Bona fide complaints against judicial officers addressed to authorities to seek redress for some grievances and not intended to exert pressure upon them in the exercise of judicial functions or to diminish their authority as Judges by vilifying them cannot be treated as contempts. AIR 1950 All 549 (553, 554) = 51 Cri L Jour 1500 ** AIR 1958 J and K 19 (19) = 1958 Cri L Jour 636 (FB) ** 1968 MPLJ 725 = 1968 Jab LJ 678 (DB) ** 1965 (2) Cri LJ 268 (269) = 1964 All WR (HC) 347 (DB) ** (1963) 1 Cri LJ 818 (819) (Cal).

(39) Letter to superior Court asking it to see and verify as to real situation in cases pending before lower Court -- On facts, held, contempt proceedings were not warranted — Discouraging approach to superior Court with request to scrutinise proceedings pending before lower Court, held, not commendable. AIR 1969 Delhi 291 (294, 295) (DB).

(40) A defamatory attack on a Judge unless it is also calculated to interfere with the due course of justice or proper administration of law by such Court will not be treated as a contempt of Court. AIR 1954 SC 10 (14) = 1953 SCR 1169 = 1954 Cri L Jour 238 ** (1965) 2 Andh LT 170 (DB) ** AIR 1959 Punj 319 (321, 322) = 1959 Cri LJ 896 = 61 Pun LR 459 (DB).

(41) When allegations made against a judicial officer in an application for transfer of a proceeding from his Court are found to have been based on mistaken and misconceived view of the facts, it is a technical contempt of which the Court does not take notice. AIR 1968 Punj 217 (231) = 1968 Cri LJ 775 = 69 Punj LR 678 (FB).

(42) A petition addressed to the executive authorities, however much vile an attack it may contain against a Magistrate in respect of his disposal of a particular case, cannot amount to a contempt inasmuch as it neither interferes with the due administration nor is it calculated to lower the prestige of the Court by undermining public confidence. AIR 1954 All 308 (309) = ILR (1954) 2 All 278 = 1954 Cri L Jour 645 (FB).

(43) Criticism of Judges in relation to something done by them which has absolutely no relevance to their position as Judges does not amount to a contempt. AIR 1943 PC 202 (204, 205) = 70 Ind App 216 = ILR (1944) Kar (PC) 7 = ILR (1944) All 32 = 46 Cri LJ 318. ((1942) Oudh WN 6 (20) (DB), **Reversed.**)

(44) Any criticism of a retired Judge is not likely to interfere with the due administration of justice and hence does not constitute contempt. AIR 1962 Assam

96 (98) = ILR (1962) 14 Assam 323 (DB).

(45) Criticism of the executive acts of a Judicial officer where he possesses both executive and judicial functions does not amount to contempt. AIR 1950 All 549 (551) = 51 Cri LJ 1500 ** AIR 1961 Ker 321 (324) = 1961 (2) Cri LJ 771 = 1961 Ker LT 345.

(46) A Court does not perform any judicial act by rejecting a complaint and hence a criticism of the rejection cannot be considered to be a criticism of a judicial act amounting to a contempt. AIR 1937 Pat 124 (126) = 38 Cri LJ 412 (DB).

(47) Appearing before a Court in a state of drunkenness without anything more is not a contempt of Court. AIR 1956 All 258 (263) = ILR (1956) 1 All 656 = 1956 Cri LJ 679 (DB).

(48) Though notings in Secretariat files may be confidential, once copies of such notings are taken out and circulated, they cease to be confidential and any remarks therein which are prima facie derogatory to the dignity of Court, may amount to contempt. AIR 1959 Orissa 116 (117) = 1959 Cri LJ 884 = ILR (1958) Cut 549 (DB).

4. Disobedience to orders of Court.—

(1) An action by way of a writ is an action in personam and disobedience of the order therein is punishable in contempt. AIR 1954 Hyd 33 (33) = ILR (1953) Hyd 616 (DB) ** AIR 1969 SC 329 (335) = (1969) 1 SCJ 805 = 71 Bom LR 438.

(2) It is competent for the person against whom a writ has been issued to raise the objection, at any point of time, that the writ is not in conformity with judgment or is in excess thereof. AIR 1965 Cal 484 (487, 488) = 1965 (2) Cri LJ 471.

(3) Disregard of an order in rem such as grant of probate, is contempt. (1968) 1 Mys LJ 273.

(4) However highly placed the State official may be, who is responsible, he may be sent to prison by the High Court if he is guilty of flouting the orders of the High Court or of interfering with the course of justice or with the right of a subject to come to the Court for redress of his grievances. AIR 1952 Cal 562 (563) = 1952 Cri L Jour 1255 (DB).

(5) Disobedience to an order of injunction would be a contempt although the order was passed in circumstances in which the Court was not justified in passing it. (1950) 55 Mys HCR 148 (149, 150) ** AIR 1969 Andh Pra 47 (54) = 1969 Cri LJ 149 = (1968) 1 Andh WR 382 (DB).

[See however 1966 Raj LW 637 = ILR (1966) 16 Raj 756 (DB).]

(6) The person who acts in contravention of order restraining him from proceeding with a certain action commits

Section 1 — Note 4 (contd.)

a contempt despite the fact that he acted in the belief under advice that the order is wrong in law. AIR 1937 Cal 601 (602) = 39 Cri L Jour 654.

(7) Person wilfully disobeying order of Court prohibiting him from performing marriage of minor in his custody, is guilty of criminal contempt. AIR 1940 Nag 203 (207) = ILR (1942) Nag 45 = 41 Cri L Jour 803.

(8) Disobedience to an order by Chief Judge of Presidency Small Cause Court under Section 6-A, Mussalman Wakf Act, directing to furnish accounts within 30 days, on the plea that the property in respect of which it is made is not wakf property, amounts to contempt of Court. AIR 1942 Bom 154 (154) = 43 Cri L Jour 667 (DB). (Affirmed in AIR 1945 PC 147 = 72 Ind App 226 = 47 Cri L Jour 61 = ILR (1945) Kar (PC) 355 = ILR (1945) Bom 959.)

(9) Accused evading warrant of arrest and misrepresenting in revision application that he was in jail is guilty of contempt of Court. AIR 1940 All 386 (387) = ILR (1940) All 507 = 41 Cri L Jour 741 (DB).

(10) It is a serious contempt to assault, ill-treat or threaten a process-server or a bailiff engaged in his duty. AIR 1959 Punj 627 (629) = 1959 Cri LJ 1466 = 61 Pun LR 661.

(11) The failure of a Counsel to comply with the order of the Court which while refusing him permission to withdraw from the cause directed him to conduct the case amounts to a contempt of the Court. AIR 1958 Mad 122 (125).

(12) If a third party interferes with the property although alleging himself to be the representative-in-interest of the party under restraint and the latter merely keeps quiet without in any way aiding or abetting him he cannot be said to have committed a contempt by disobeying the order of Court. AIR 1938 PC 295 (299, 300) = ILR (1939) Kar (PC) 42 = 17 Pat 770 ** AIR 1965 Orissa 222 (224) = 31 Cut LT 509 = 1965 (2) Cri LJ 796 (DB).

(13) Although a direction which a Court is authorised to give by a statute may, in the context in which the word 'direction' is used in the statute, amounts to an order, the disobedience of which would be contempt, a direction which the Court is authorised to give only in its consultative capacity cannot amount to any such order. AIR 1945 Sind 81 (89, 92, 93) = ILR (1945) Kar 384 = 47 Cri L Jour 283 (FB) ** 1964 (1) Cri LJ 362 (365, 366) (All).

(14) Violation of an order which is of an ambiguous and contingent character the directions in it being dependent on certain other facts which are left undetermined by the order cannot amount

to a contempt. AIR 1958 Cal 474 (481) = 1958 Cri L Jour 1162 ** (1967) 9 Law Rep 141 (DB).

(15) Disobedience to an order of Court made without jurisdiction does not amount to a contempt. AIR 1949 Lah 131 (155) = Pak LR (1949) Lah 215 = 50 Cri L Jour 598 (FB).

[But see AIR 1966 Mad 53 (55, 56) = 1966 Cri LJ 146 = 78 Mad LW 437 (DB).]

(16) Where a Commissioner while executing the order of Court, exceeds in his rights, disobedience to him does not amount to contempt of Court. AIR 1959 All 211 (213, 214) = 1959 Cri LJ 406 = 1958 All LJ 872 (DB).

(17) Where a decree directed the General Manager of the Eastern Railway to withdraw forthwith the order of suspension passed against the plaintiff, disobedience of the mandatory injunction will not ipso facto constitute contempt of Court if the time prescribed by Section 82 (2), C. P. C. has not expired. AIR 1960 Cal 454 (455) = 1960 Cri LJ 903 (DB).

Wilful disobedience necessary.

(18) Disobedience of orders of Court in order to constitute punishable contempts must be wilful. AIR 1953 Nag 179 (180) = ILR (1952) Nag 950 = 1953 Cri L Jour 1025 ** AIR 1951 Orissa 230 (231) (DB) ** AIR 1960 SC 190 = 1960 Cri LJ 282 = ILR (1959) Cut 385. (AIR 1952 Orissa 215, Reversed.) ** 1968 Cri LJ 268 (270) (Punj) ** 1968 Cr LJ 704 (Punj) ** AIR 1967 All 295 (299) = 1967 Cri LJ 682 ** 1966 All Cri R 413 = 1966 All WR (HC) 693 ** AIR 1965 Cal 484 (486) = 1965 (2) Cri LJ 471 ** AIR 1960 All 231 (234) = 1960 Cri LJ 442 = 1960 All LJ 247 (DB).

(19) The mere unintentional disobedience to judgment order or process of Court amounts to a contempt in theory only and does not render the respondent liable to punishment. AIR 1954 Pat 513 (520) = 33 Pat 603 = 1954 Cri LJ 1593 (DB) ** AIR 1957 Pat 528 (533) = 36 Pat 955 = 1957 Cri L Jour 1156.

[See however 1964 (1) Cri LJ 449 (453) = 68 Cal WN 693 (DB).]

(20) Knowledge of the order of Court and the deliberate disregard of it are essential to constitute contempt. AIR 1952 Cal 919 (927) = ILR (1953) 1 Cal 355 = 1953 Cri L Jour 136 ** AIR 1955 All 483 (486) = ILR (1955) 2 All 46 = 1955 Cri L Jour 1223 (DB) ** ILR (1953) 3 Raj 85 (92) ** (1968) 2 Andh WR 587 = 1968 Mad LJ (Cri) 766 (DB) ** AIR 1969 Andh Pra 47 (53) = 1969 Cri LJ 149 = (1968) 1 Andh WR 382 (DB) ** AIR 1969 Punj 60 (62) = 1969 Cri LJ 320 = 70 Pun LR 1042 (DB) ** AIR 1967 All 394 (396, 398) = 1967 Cri LJ 980 = ILR (1965) 2 All 790.

[See also (1968) 2 Andh WR 208 = 1968 Mad LJ (Cri) 531 (DB) ** 1969 Cri

Section 1 — Note 4 (contd.)

LJ 1571 (1573) (DB) (Delhi) ** AIR 1958 Punj 180 (182) = ILR (1958) Punj 580 = 1958 Cri L Jour 685. (Injunction granted against municipal corporation binds all its officers although they were not parties to suit in which order was passed — Disobedience by them with knowledge of the injunction renders them liable for contempt even if order had not been served on them.) ** AIR 1965 Orissa 222 (224) = 31 Cut LT 509 = 1965 (2) Cri LJ 796 (DB).]

(21) There can be no disobedience by a person of an order passed by a Court which has not been brought home to him by personal service on him in the manner required by law. AIR 1952 Mad 180 (180) = 1952 Cri L Jour 389 ** AIR 1952 Cal 702 (705) ** (1968) 70 Punj LR 214 = 1968 Cur LJ 116.

(22) Mere non-attendance in Court where there is no credible evidence of the summons having been served on a person is not sufficient to show that he has committed the offence of contempt of the summons. AIR 1952 Pat 243 (244) = 1952 Cri L Jour 796.

(23) In the matter of a prohibitory order it is not necessary that the order should have been served upon the party against whom it has been granted in order to justify committal for breach of such an order, provided it is proved that the person complained against had notice of the order aliunde. AIR 1962 SC 1089 (1093) = 1962 (2) Cri LJ 236 = 1962 Sup (3) SCR 127 ** AIR 1964 Assam 92 (97, 98) = 1964 (2) Cri LJ 139 (FB) ** AIR 1962 Pat 280 (281, 282) = 1962 (2) Cri LJ 87 = 1961 BLJR 878 (FB) ** AIR 1947 Bom 468 (471) = 49 Bom LR 450.

(24) In the case of prohibitive orders, the fact that they were not served on the officers concerned is not a defence to their liability for contempt of Court, if they came to know of the orders from a source whose authenticity they cannot doubt. (1967) 1 Andh WR 129 (DB) ** AIR 1968 SC 1348 (1350) = 1968 Cri LJ 1514 = (1969) 1 SCJ 11 ** (1968) 2 Andh WR 208 = 1968 Mad LJ (Cri) 531 (DB).

Disobedience by Public Officers or Courts.

(25) An officer who deliberately disobeys the order of the Court and the officer by whose negligence such disobedience became possible both must be held to have committed contempt of the Court which passed the order. AIR 1958 Orissa 69 (74) = 1958 Cri L Jour 541 ** AIR 1968 Delhi 208 (210) = 1968 Cri LJ 1265 = (1968) 70 Pun LR (D) 96 (FB).

(26) Intentional disobedience to an order of a superior Court amounts to a contempt on the part of the subordinate

judicial officer. AIR 1952 All 56 (58) = ILR (1953) 2 All 332 = 1952 Cri L Jour 223 ** AIR 1953 Madh B 60 (61) = 1953 Cri L Jour 570 ** AIR 1961 SC 1367 (1370) = 1961 (2) Cri LJ 438 = (1962) 1 SCR 319 ** AIR 1967 All 394 (396, 398) = 1967 Cri LJ 980 = ILR (1965) 2 All 790 ** 1966 All Cr R 128 = 1966 All WR (HC) 204 ** AIR 1961 Ker 194 (196) = 1961 (2) Cri LJ 89 = 1961 Ker LT 130.

(27) Order by High Court to Officer — He cannot judge correctness of order himself and take any action contrary to or inconsistent with the same on the basis of his own judgment. AIR 1969 Mad 232 (233).

(28) A subordinate judicial officer who avoids or circumvents the order of the Superior Court commits contempt of Court. AIR 1950 Dacca 19 (Prs. 19, 20) = 51 Cri L Jour 1561 (DB) ** AIR 1955 All 161 (162) = ILR (1955) 2 All 320 = 1955 Cri L Jour 436 (DB) ** 1967 Cri LJ 1441 (1442) (Pat).

(29) Failure to return the documents to the record of Appellate Court, after express notice, is an act of grave contempt on the part of the party concerned. 1962 Ker LT 354.

(30) Appeal against conviction by accused dismissed by High Court and accused directed to surrender to bail — Additional District Magistrates not carrying out orders — Time allowed to accused which was in contravention of Rule 43 (5) of the Criminal Rules and Orders — Additional District Magistrates members of Indian Administrative Service inexperienced in Court procedure and relying on Bench Clerk — Held, that the Additional District Magistrates were guilty of contempt of Court but in the circumstances High Court would accept apology tendered by them — Laxity in judicial administration in the District deplored. AIR 1969 Cal 602 (604) (DB).

(31) An officer of Court such as a receiver commits contempt of Court if he fails to obey an order of the Court even where the breach complained of is a failure to pay a sum of money. The fact that somebody has stood surety for the payment cannot render him immune from the consequences of his disobedience. AIR 1932 Bom 638 (641, 642).

(32) Where a Court sub-Inspector deliberately flouted the order of Court for confining the accused in the jail and confined him in the Court lock-up by obtaining an order from the sub divisional officer to enable him to do so it was held that both he and the sub-divisional officer who passed the order on the mere representation of the Court sub-Inspector and without even ascertaining what were the terms of the order of the Court had committed contempt. AIR 1951 Pat 451 (2) (452, 453) (DB).

Section 1 — Note 4 (contd.)

[See also AIR 1968 Bom 273 (277) = 1968 Cri LJ 903 = 69 Bom LR 859 (DB).]

(33) An officer who is charged by an order of Court, passed in favour of a party, with the duty of giving effect to it commits contempt by his failure to do so for a long time although such failure is not due to any intention to flout the order. AIR 1951 Cal 397 (398) (DB).

[But see 1968 Cri LJ 704 (Punj).]

(34) An officer to whom summonses are sent by Court for service upon a subordinate of his commits contempt by refusing to serve the same unless such refusal is based on the ground of non-availability of the subordinate officer. AIR 1958 Raj 293 (294) = ILR (1958) 8 Raj 632 = 1958 Cri L Jour 1348.

(35) Failure by Police to make any report on the matter referred to them under Section 202, Cr. P. C., is a contempt of the authority of the Magistrate. AIR 1959 Manipur 30 (31) = 1959 Cri LJ 742.

(36) A municipal commissioner even though he has the power to decide a question of title as between an applicant for permission to build and a party opposing the application would be committing a contempt if he were to exercise that power and refuse the permission where the applicant in a proceeding before the High Court to which the municipal corporation was a party had obtained a direction to the corporation to give the permission and leave the objecting party to get his title decided in a civil suit. AIR 1958 Andh Pra 170 (172) = ILR (1957) Andh Pra 559 = 1958 Cri L Jour 349.

(37) Although a bailiff in attempting to deliver possession used force in a manner which was not warranted by the rules of the High Court a charge of contempt of Court was held could not be sustained against him. AIR 1956 Cal 249 (253) = 1956 Cri L Jour 734 (DB).

(38) Where all that the Government undertook before Court in a proceeding was that certain confiscated goods will not be sold within a month from the date on which their order in revision is communicated to the petitioner it was held that the Government did not commit a contempt by not deciding the revision within a month. AIR 1957 SC 478 (482) = 1957 SCR 701.

(39) The disobedience of directions of the High Court by a subordinate court which is not intentional but which is only due to its carelessness and ignorance of the law does not amount to contempt of Court. AIR 1953 Pat 99 (100) = 1953 Cri L Jour 816 (DB) ** AIR 1967 Andh Pra 219 (229) = 1967 Cri LJ 984 = ILR (1967) Andh Pra 487 (DB).

(40) Where a mandatory direction issued by the High Court to certain

officers was not served on them personally they cannot be committed in contempt for a disobedience of the direction. AIR 1953 Cal 96 (98) = ILR (1953) 1 Cal 295 = 1953 Cri L Jour 306.

(41) Where the District Magistrate, being away on tour when an order of the High Court releasing certain detenus reached his office, was not aware of it and some delay was caused due to the inexperience of his clerks in releasing the detenus it was held that he had committed no contempt. AIR 1953 SC 436 (437) = 31 Pat 182 = 1953 Cri L Jour 1837.

(42) But for the fact that the order had not been communicated to him in time by his superior officer the magistrate would have committed a contempt of the High Court by proceeding with the trial of a case notwithstanding the stay order passed by the High Court. AIR 1952 Orissa 167 (167) = 1952 Cri L Jour 924 ** AIR 1969 SC 189 (193) = 1969 Cri LJ 401 = (1969) 1 SCJ 533.

(43) A magistrate cannot be said to commit a contempt of Court by not taking action on an order of a Superior Court delivered to him at his house. AIR 1956 All 417 (420) = 1956 Cri L Jour 852 (DB).

(44) A person ordered to be released on a writ of habeas corpus cannot be arrested before he reaches home only under a civil process. Therefore if he is arrested under a warrant of commitment issued under Bengal State Prisoners Regulation 3 of 1818 immediately on release, even in the Court itself when it is not sitting or within the precincts of the Court when it is sitting, it would not amount to a contempt. AIR 1945 Cal 107 (119) = ILR (1944) 1 Cal 489 (SB).

(45) An order of allotment of land by the Rehabilitation Authorities is not a proceeding for delivery of possession, and, therefore such an order made with full knowledge of an order of the High Court staying proceedings for delivery of possession does not amount to contempt of Court. (1951) 53 Pun LR 276 (277).

(46) The failure of a subordinate Judge or Magistrate to enquire into the truth of the information given to him by a party by the production of a letter from the advocate who appeared in the superior Court to the effect that the superior Court has ordered stay of the proceedings pending before him and to stay the proceedings accordingly would not amount to a contempt of Court. AIR 1951 Pat 494 (497) = 52 Cri L Jour 638 (DB) ** AIR 1954 Pat 554 (555) = 1954 Cri L Jour 1789 ** AIR 1961 SC 1367 (1370) = 1961 (2) Cri LJ 438 = (1962) 1 SCR 319.

[But see AIR 1969 Pat 151 (153) ** AIR 1960 Orissa 18 (20, 21, 22) = 25 Cut LT

Section 1 — Note 4 (contd.)

53 = 1950 Cri LJ 261 (2) ** AIR 1959 Punj 205 (205) = 1959 Cri LJ 643 = 61 Pun LR 321.]

Disobedience by third parties.

(47) Where party is not bound by an order of the Court his disobedience thereto is no contempt even though his interest is only an interest derived from the party against whom the order was made. AIR 1952 Cal 452 (453) = ILR (1953) 1 Cal 261 = 1952 Cri L Jour 971 ** AIR 1938 PC 295 (299, 300) = ILR (1939) Kar (PC) 42 = 17 Pat 770 ** ILR (1950) All 333 (345) (DB) ** AIR 1962 Pat 280 (282) = 1962 (2) Cri LJ 87 = 1961 BLJR 878 (FB).

[But see (1968) 2 Andh WR 208 = 1968 Mad LJ (Cri) 531 (DB) ** ILR (1964) Andh Pra 571 (DB).]

(48) A direction given by Under Secretary to Board of Revenue to Magistrates to ignore decision of State High Court, which is binding on them, is a flagrant interference with administration of justice by Courts and clear contempt of Court. AIR 1961 SC 1315 (1316) = 1961 (2) Cri LJ 437 = (1962) 1 SCR 826. (ILR (1958) Cut 496, Affirmed.)

(49) A writ issued in equity binds only the person named therein and therefore the disobedience of it by any other person, although he claims interest through the person bound, would not amount to contempt. AIR 1949 Pat 39 (40) = 27 Pat 414 = 49 Cri L Jour 639 (SB) ** AIR 1967 Andh Pra 219 (226) = 1967 Cri LJ 984 = ILR (1967) Andh Pra 487 (DB).

(50) A Court has undoubted jurisdiction to commit for contempt a person not included in an injunction and/or not a party to the action, who knowing of the injunction, aids and abets a defendant in committing a breach of it. AIR 1967 Andh Pra 219 (226) = 1967 Cri LJ 984 = ILR (1967) Andh Pra 487 (DB) ** 1968 Cri LJ 671 (672) = 72 Cal WN 927 ** AIR 1965 Orissa 222 (224) = 1965 (2) Cri LJ 796 = 31 Cut LT 509 (DB).

(51) An order of injunction passed against a Municipal Corporation is binding upon all individuals who act on behalf of the corporation even though they were not parties to the suit in which the order was passed and if those persons with knowledge of the order disobey it they would become liable for contempt. AIR 1958 Punj 180 (183) = ILR (1958) Punj 580 = 1958 Cri L Jour 685.

Breach of undertaking given to the Court.

(52) Breach of an undertaking given to a Court by a party in a pending proceeding on the faith of which the Court sanctions a particular course of action is misconduct amounting to contempt. AIR 1955 Cal 182 (183) =

1955 Cri L Jour 654 (DB) ** AIR 1929 Bom 417 (417) ** AIR 1953 Cal 627 (629) = 1953 Cri LJ 1414 (DB) ** (1964) 68 Cal WN 148 (DB) ** 1964 All Cr R 358 = 1964 All WR (HC) 504.

[But see (1966) 7 Law Reports 326 = (1966) 2 Mys LJ 288 (DB).]

(53) Where an order restraining a certain party from doing something was passed after he had given his undertaking not to do that thing his disobedience amounts to contempt even though the order was not served on him. AIR 1932 Cal 705 (707) = 33 Cri L Jour 945 (DB).

(54) A person commits contempt of Court by making a false representation in his application for the purpose of obtaining a favourable order. 1966 All WR (HC) 776 = 1966 All Cri R. 484.

(55) Where the Court stays execution of a decree for ejectment on the judgment-debtor giving it an undertaking to vacate by a certain time judgment-debtor's failure to vacate accordingly amounts to contempt. ILR (1946) 2 Cal 499 (508) ** (1963) 67 Cal WN 819 (DB) ** 1961 (2) Cri LJ 222 (224, 225) (Cal).

(56) Since in case of compromise, a Court can accept an undertaking from a party to the suit, before the decree recording the terms of compromise is passed, such undertaking can be enforced by proper committal proceedings for contempt. AIR 1950 Bom 336 (337) = ILR (1951) Bom 125 ** (1938) 42 Cal WN 203 (205).

[But see AIR 1960 Madh Pra 280 (282) = 1960 MPLJ 642.]

(57) In case of a consent decree passed by a Court, disobedience of the undertaking given by one of the parties to the other party does not amount to contempt. AIR 1951 Pat 231 (237) (DB) ** AIR 1948 Cal 294 (296) = ILR (1948) 2 Cal 239 = 49 Cri L Jour 567 ** 1967 All LJ 442 = 1967 All WR (HC) 420 ** AIR 1959 Punj 322 (323, 324) = 1959 Cri LJ 809 = 61 Pun LR 372.

(58) The failure to keep to the terms of an undertaking to the Court when the undertaking cannot be considered to be an unqualified one cannot be treated as a contempt. AIR 1952 Cal 591 (593, 594) = 1952 Cri L Jour 1301 ** (1964) 68 Cal WN 148 (DB).

(59) Litigants before the High Court would not be permitted to break the undertakings they gave before it nor would they be permitted to have recourse to the orders of a Subordinate Court in the prosecution of their scheme to flout the orders of the High Court. AIR 1952 Cal 669 (670) = 1952 Cri L Jour 1385.

Interference with possession of receiver.

(60) A person whether a party to the suit or an outsider who interferes with the possession of receiver is guilty of

Section 1 — Note 4 (contd.)

contempt. AIR 1945 Sind 75 (80) = 47 Cri L Jour 408 = ILR (1944) Kar 396 ** AIR 1958 Punj 471 (475) = ILR (1958) Punj 1822 = 1958 Cri L Jour 1529 ** AIR 1940 Cal 487 (488) (DB) ** 1964 (1) Cri LJ 449 (451, 452, 453) = 68 Cal WN 693 (DB) ** (1962) 66 Cal WN 983.

(61) The case of interference with or obstruction to a receiver appointed by a Court is treated as a contempt of a criminal nature and the fact that the order appointing him was improperly procured is no justification for interference with his possession. AIR 1934 Bom 452 (455) = 59 Bom 10 ** 1964 (1) Cri LJ 449 (451) = 68 Cal WN 693 (DB) ** AIR 1958 Punj 471 (475) = 1958 Cri LJ 1529 = 60 Pun LR 624.

(62) An attempt to interfere with receiver's possession constitutes contempt even if the person who interferes was not personally served with the order which appointed the receiver. AIR 1932 Cal 705 (707) = 33 Cri L Jour 945 (DB).

(63) Interference with possession of the official liquidator appointed under Companies Act, 1913, constitutes contempt of authority of Court under which the company is being wound up. AIR 1958 Punj 445 (452) = 1958 Cri LJ 1439 = ILR (1958) Punj 2014.

(64) Refusal by a party who is aware of the appointment of a receiver to deliver possession to him when called upon to do so would amount to criminal contempt. AIR 1954 Orissa 167 (170) = ILR (1954) Cut 467 = 1954 Cri L Jour 988 (DB).

(65) A mere decision of Court to appoint a receiver without designating a person to that office does not amount to an effective order and hence the collection and disbursement by a person of the money intended by the Court to fall within the power of the receiver does not amount to a contempt, even though that person is aware of the decision. 1941 Rang LR 747 (753, 754).

(66) An official liquidator like a receiver appointed by the Court is an officer of the Court — Notice of attachment under S. 46 (5A), Income-Tax Act (1922), by Income-tax Officer to official Liquidator — Prior consent of Court not obtained — Notice amounts to contempt of Court. (1958) 24 Cut LT 479.

[See also AIR 1962 Punj 433 (441) = (1963) 33 Com Cas 1043.]

5. Interference with due course of justice in pending proceedings. — (1) Where an act is complained of as a contempt on the ground that it interfered with due course of justice it is essential that there should have been pending proceedings at the time when the act is alleged to have been done. AIR 1943 Lah 329 (335) = ILR (1944) Lah 111 = 45 Cri L Jour 445 (FB) ** AIR 1947

Cal 414 (415, 416) = ILR (1948) 1 Cal 441.

(2) Purpose of contempt jurisdiction is to uphold majesty and dignity of law courts and the image of such majesty in the minds of public cannot be allowed to be distasteful. Action for contempt is not for the purpose of placing Judges in a position of immunity from criticism but is aimed at protection of freedom of individuals and the orderly and equal administration of laws. AIR 1969 Delhi 214 (218) (SB).

Pendency of proceedings.

(3) A Criminal case is sub judice even when a person has been arrested and is under custody. It is not necessary that an enquiry or trial should have actually commenced. AIR 1950 Pepsu 9 (19) = 1 Pepsu LR 253 = 51 Cri L Jour 1219 (SB) ** AIR 1943 Lah 329 (335) = ILR (1944) Lah 111 = 45 Cri L Jour 445 (FB) ** AIR 1954 Kutch 2 (3) = 1954 Cri L Jour 390 ** AIR 1963 Madh Pra 61 (65, 66, 67) = 1963 (1) Cri LJ 187 = 1962 MPLJ 953 (DB) ** AIR 1962 Pat 2 (6) = 1962 (1) Cri LJ 62 = ILR 39 Pat 490.

[See also AIR 1961 Pat 217 (222, 223, 224) = 1961 (1) Cri LJ 698 = 1961 BLJR 331 (DB).]

[But see AIR 1957 All 37 (41) = 1957 Cri L Jour 18 (DB) ** AIR 1953 All 600 (604) = ILR (1954) 2 All 354 = 1953 Cri L Jour 1337 (DB).]

(4) Actual pendency of proceedings is not necessary to attract a comment on any occurrence within the fold of contempt. It is sufficient even if proceedings in respect of that occurrence are imminent and that is known to the publisher. AIR 1955 Orissa 36 (42) = ILR (1955) Cut 204 = 1955 Cri L Jour 547 (DB) ** AIR 1939 Mad 257 (259) = ILR (1939) Mad 466 = 40 Cri L Jour 533 (SB) ** 1969 Ker LT 513 (518) = 1969 Ker LJ 453 ** AIR 1968 Ker 301 (307) = 1968 Cri LJ 1424 = 1968 Ker LT 157 (DB). (In cognizable offences it is enough if proceedings under Chap. XIV, Cr. P. Code have been commenced by police.) ** AIR 1962 Pat 2 (6) = 1962 (1) Cri LJ 62 = ILR 39 Pat 490 (DB) ** AIR 1961 Pat 217 (224, 225) = 1961 (1) Cri LJ 698 = 1961 BLJR 331 (DB) ** AIR 1961 Pat 217 (221, 222) = 1961 (1) Cri LJ 698 = 1961 BLJR 331 (DB).

[See however 1966 Cri LJ 214 (216) = 1965 MPLJ 844 (DB).]

(5) During the time between the conviction of an accused person on an indictment and his appeal to the Court of Criminal appeal the case is not ended at all, but is still sub judice or pending and therefore if a comment interfering with justice is made even when only an appeal is pending there may be contempt. AIR 1952 Nag 259 (262, 263) = ILR (1949) Nag 640.

(6) Where pending proceedings in a case, the Public Prosecutor applies

Section 1 — Note 5 (contd.)

under Section 494, Cr. P. Code for withdrawal of prosecution of one of the accused, giving reasons therefor, no contempt is committed by the Public Prosecutor. (1969) 71 Punj LR 299 (302).

Withholding applications to High Court.

(7) Any official, however high placed he may be, commits contempt on the ground of interference with due course of justice when he withholds an application addressed by a prisoner to the High Court. AIR 1945 Nag 33 (35, 49) = ILR (1945) Nag 74 (DB) ** AIR 1954 All 351 (352) = 1954 Cri L Jour 354 (DB).

(8) Officers of Government who withheld certain habeas corpus applications addressed to the High Court on their own opinion that in the circumstances the applications were not necessary were held to have interfered with the due course of justice and thereby committed contempt. AIR 1950 East Punj 259 (261) = 51 Cri L Jour 1316 (DB).

[See however AIR 1944 Lah 196 (203, 204) = 46 Cri L Jour 174 (SB). (Withholding an application under Section 491, Criminal P. C., amounts only to a technical contempt.)]

(9) Any officer of the Government who is found to have unduly delayed the transmission of applications addressed to the High Court by detenus, to seek redress for certain grievances, commits contempt and is liable to be punished. AIR 1952 Cal 562 (563) = 1952 Cri LJ 1255.

(10) Making of a false affidavit by a Sub-Inspector of Police by way of return to a petition for writ of habeas corpus under Section 491, Cr. P. Code to the effect that the alleged detenu is not in his custody, resulting in the dismissal of the writ petition, cannot but obstruct and impede the administration of justice; and for that reason, it is punishable as contempt of Court. AIR 1961 Punj 18 (20, 21) = 1961 (1) Cri LJ 146 = 62 Pun LR 752.

(11) Tampering with the dates found in an application of a prisoner addressed to the High Court by itself constitutes contempt on the part of the jail authorities. AIR 1945 Nag 33 (38) = ILR (1945) Nag 74 (DB).

(12) A person who forces or attempts to force a party to refrain from instituting a suit or a party or prosecution witness to withdraw or abandon the prosecution or defence or an action or proceeding, is guilty of contempt of Court AIR 1959 Punj 182 (183, 184, 185) = 1959 Cri LJ 513 = 61 Pun LR 57 (DB).

Threat to parties.

(13) Any kind of threat or any action which may amount to a threat held out to a person, who has approached the civil Courts for a redress of his grievances,

with a view to induce him to forego the assistance of the Civil Courts, amounts to a contempt of Court. AIR 1965 All 160 (160) = 1956 Cri L Jour 195 (DB) ** AIR 1962 SC 1172 (1178) = 1962 (2) Cri LJ 262 = 1962 Supp (2) SCR 838 ** 1969 Lab IC 880 (884) = (1969) 1 Andh WR 559 (DB) ** AIR 1968 SC 1513 (1517) = 1968 Cri LJ 1661 = (1969) 1 SCJ 309 ** 1967 Cri LJ 1225 (1226) (All) ** AIR 1966 All 305 (314, 315) = 1966 Cri LJ 632 ** AIR 1964 Pat 245 (246, 247) = 1964 (1) Cri LJ 691 = 1962 BLJR 554 (DB).

(14) It is now well settled that any conduct by which the course of justice is perverted, either by a party or a stranger, is contempt. (1969) 1 An WR 559 (563, 564) (DB).

(15) Addressing a threatening notice to the opposite party in the suit to withdraw a plea he has taken in his pleadings amounts to a contempt. AIR 1935 All 117 (118, 119) = 57 All 573 (DB) ** AIR 1940 Nag 110 (112, 113) = ILR (1940) Nag 69 = 41 Cri L Jour 709.

(16) A letter to a third party by one of the parties to a proceeding to persuade the opposite party to settle his claim in order to save the political party of which he was a member from ill fame amounts to a contempt inasmuch as its aim is to bring pressure on the opposite party and thereby to interfere with the course of justice. AIR 1953 Cal 53 (55) = ILR (1954) 1 Cal 415 = 1953 Cri L Jour 214.

(17) An article by an editor against whom proceedings under Section 500, Penal Code are pending characterising the complainant as a king of liars and threatening him as well as the witnesses with future proceedings if the action against him failed amounts to a contempt. AIR 1941 Oudh 67 (69) = 42 Cri LJ 221 = 16 Luck 506 (DB).

(18) Mere notice by solicitor on behalf of parties defamed demanding apology, during pendency of criminal case, does not amount to contempt of Criminal Court. AIR 1967 Cal 173 (184) = 1967 Cri LJ 455 (DB).

(19) A person who is not a party to the case and who feels aggrieved by certain references made to him in the written statements by the accused commits no contempt by interference with due course of justice by merely demanding apology and compensation from the accused but not the withdrawal of the statement itself. AIR 1941 Nag 241 (243) = ILR (1942) Nag 506 = 43 Cri L Jour 98 ** AIR 1940 All 114 (116) = 41 Cri L Jour 390 (DB) ** AIR 1960 Madh Pra 115 (117) = 1960 Cri LJ 484 = 1959 MPLJ 1139 (DB).

(20) A notice by a stranger to the suit to one of the parties demanding that he should expunge certain defamatory statements from his pleading would not amount to a contempt of Court when

Section 1— Note 5 (contd.)

the statement in question is absolutely irrelevant to the suit and cannot therefore affect its fair trial if it is expunged. AIR 1952 All 408 (410, 411, 412) = ILR (1950) All 415 = 1952 Cri L Jour 786.

(21) Where the counsel in the course of his cross-examination of the complainant intimidates him with the threat that it would go to the detriment of his family if he did not withdraw his case he commits a contempt by interfering with the course of justice. AIR 1957 Punj 105 (105) = 1957 Cri LJ 657.

Interference with counsel.

(22) Abuses, insults or aspersions cast on counsel in the course of the discharge of their duties and tending to deter them from duty amount to contempt of Court. AIR 1956 Mad 621 (623) = ILR (1956) Mad 1239 (DB) ** (1947) 48 Cri L Jour 757 (762, 763) (Lah) **AIR 1966 Bom 19 (27, 28) = 1966 Cri LJ 9 = 67 Bom LR 380 (DB).

(23) A Judge or a Magistrate who insults and intimidates a counsel in a cause for something done by him legitimately is guilty of contempt. AIR 1949 Lah 270 (272, 273) = Pak LR (1949) Lah 437 = 51 Cri L Jour 44 (FB).

(24) Words or action used in face of the Court or in the course of proceedings to be a contempt must be such as would interfere or tend to interfere with the course of justice. Words used in argument before Court, however irrelevant, very rarely amount to a contempt when they relate to an opponent whether counsel or litigant. AIR 1945 PC 134 (135) = 72 Ind App 189 = ILR (1945) Kar (PC) 294 = ILR (1945) Bom 950.

(25) Defamatory statements made against advocates after the termination of a case stand on a different footing from insults offered to such advocates while actually conducting cases and they do not amount to a contempt of Court. AIR 1926 All 623 (628) = 48 All 711 (FB).

(26) A police officer who arrests the counsel while he comes out casually when conducting a criminal case and takes him away to the thana in handcuffs is clearly guilty of a substantial contempt. AIR 1956 Raj 179 (184) = ILR (1956) 6 Raj 964 = 1956 Cri L Jour 1350 (DB).

(27) Arrest of counsel proceeding to file or appear in case by police amounts to contempt when there is something in nature of mala fides, and the arrest is intended to interfere with due course of justice or calculated so to interfere. AIR 1944 Lah 196 (199, 200) = 46 Cri L Jour 174 (SB) ** AIR 1956 Raj 179 (183) = ILR (1956) 6 Raj 964 = 1956 Cri L Jour 1350 (DB) ** 1961 (2) Cri LJ 875 (877) = 1961 MPLJ 1310 (DB).

(28) An arrest of a counsel in the Court precincts, when he is not appearing in any case or when such arrest does not prevent him from appearing in a case does not amount to contempt of Court. AIR 1956 Raj 179 (183) = ILR (1956) 6 Raj 964 = 1956 Cri L Jour 1350 (DB).

(29) Article demanding that counsel should not undertake defence of accused amounts to contempt of Court. AIR 1941 Pat 185 (190) = 20 Pat 306 = 42 Cri L Jour 225 (DB).

Acts lawfully done are not contempts.

(30) Taking a legitimate step during the pendency of a proceeding would not amount to the party interfering with the course of justice even though the effect of his action would be to render the proceedings infructuous. AIR 1953 Madh B 245 (247) = 1953 Cri L Jour 1675 (FB).

(31) A superior judicial officer, who has the duty to supervise the work of his subordinate officers, commits no contempt when he calls for a report from any such officer by sending an entire application made to him, which besides the allegations against the officer also contains matter having a tendency to interfere with the due course of justice in a case pending before him. AIR 1953 SC 185 (186) = 1953 SCR 581 = ILR (1953) 2 All 904 = 1953 Cri L Jour 911.

(32) A superior Police Officer commits no contempt in making legitimate enquiries, during pendency of a criminal trial, with a view to find out the truth and with a view to ascertain whether the action of his subordinate in connection with the investigation of an offence was bona fide or not. AIR 1960 Orissa 137 (139) = 1960 Cri LJ 1124 = 26 Cut LT 332.

(33) Where the Bishop of a diocese threatened the plaintiff in a suit against the church with excommunication if the suit was not withdrawn it was held that the Bishop had not committed any contempt inasmuch as his threat was only that he would assert his legal rights if the suit was not withdrawn. AIR 1952 Trav-Co 75 (76) = 1952 Cri L Jour 394.

(34) When an advocate bona fide answered a question put to him by the Court, he would not be guilty of contempt of Court. AIR 1955 Andhra 156 (161) = ILR (1955) Andhra 57 = 1955 Cri L Jour 1228 (DB).

(35) An expression of opinion by Investigating Officer in his report that it is difficult to sustain the complaint cannot be regarded as contumacious in respect of the Court before which the complaint is lodged. AIR 1961 Mys 12 (18) = 1961 (1) Cri LJ 111 = 38 Mys LJ 936 (DB).

Section 1 — Note 5 (contd.)

(36) An application by Court Inspector at the instance of Police Superintendent stating that the Police, during the pendency of proceedings under Section 107 Cr. P. C. had come upon certain material which, in their view would not necessitate execution of a bond by the person proceeded against, does not interfere with due course of justice. AIR 1963 Cal 336 (337) = (1963) 1 Cri LJ 754 (DB).

[See also AIR 1961 Mys 12 (18) = 1961 (1) Cri LJ 111 = 38 Mys LJ 936 (DB).]

Instituting proceedings against party during pendency of action.

(37) If a person takes legal action in a Court of law which is open to him, he cannot commit any contempt of Court unless the action be held to be not an approach to the Court for redress of the wrong but was really such as can be said to be abusing the process of the Court. AIR 1955 All 391 (393) = 1955 Cri L Jour 1023 (DB).

(38) A party who applies to the Court for the striking out from the written statement of something which is defamatory commits no contempt of Court. AIR 1940 All 114 (115) = 41 Cri L Jour 390 (DB).

[See also AIR 1966 Mad 136 (142) = 1966 Cri LJ 421 = (1965) 2 Mad LJ 559 (DB).]

(39) An accused in a pending criminal case commits no contempt if he institutes criminal proceedings for defamation in regard to certain allegations made in the complaint against him in the pending case. AIR 1952 All 674 (678) = ILR (1950) All 530 = 1952 Cri L Jour 1160 (DB).

(40) A party to proceedings who has been defamed by the other party while deposing as a witness and where the defamatory statement is irrelevant to the subject-matter in issue in the proceedings commits no contempt if he, even before the termination of the proceedings, bona fide commences a criminal action for defamation to vindicate his reputation. AIR 1939 Oudh 225 (226, 227) 40 Cri L Jour 569 (DB).

(41) Starting proceedings under Section 476, Criminal P. C. against prosecution witnesses for giving false evidence in committing magistrate's court before commencement of sessions trial was held not to amount to contempt of Sessions Court inasmuch as the act amounted only to exercise of the right which the prosecution was legally entitled to do. AIR 1955 All 391 (392) = 1955 Cri L Jour 1023 (DB).

(42) Instituting criminal proceedings for defamation in respect of certain statements made by the opposite party in an

affidavit filed in court does not amount to a contempt in the absence of any indication in the conduct of the complainant that he would drop the proceedings if the opposite party withdrew the defamatory allegations. AIR 1940 All 497 (499, 500) = ILR (1940) All 710 = 42 Cri L Jour 211 (DB) ** AIR 1941 All 95 (97) = 42 Cri L Jour 370 (DB).

(43) An accused person by sending a notice to the complainant offering to settle the dispute amicably if he withdrew the prosecution and otherwise threatening to institute criminal and civil proceedings against the complainant commits no contempt inasmuch as the threat conveyed amounts only to an intimation of his resolve to prosecute his legal rights in a certain event. AIR 1952 All 674 (678) = ILR (1950) All 530 = 1952 Cri L Jour 1160 (DB).

(44) A superior officer who gives a charge sheet to his subordinate while his examination as a witness in court is in progress, in respect of some statement made by him, commits contempt on the ground of interference with the due course of justice. AIR 1955 Raj 123 (127) = ILR (1955) Raj 660 = 1955 Cri L Jour 1108 (DB).

(45) When an order of suspension is stayed by an interim order by High Court, passing of another order of suspension, after resumption of work by delinquent, on fresh charges does not amount to contempt. AIR 1959 All 688 (689) = 1959 All LJ 849.

(46) If the validity of an order of detention is pending consideration by the High Court, a fresh but illegal order of detention on revocation of the prior order would amount to contempt of Court. AIR 1953 Orissa 33 (39) = 1953 Cri L Jour 349 (DB).

(47) Even where the application for questioning the prior detention has not been actually filed but the new illegal order of detention is passed with the knowledge of the imminence of such an application being made, the passing of the illegal order would amount to contempt of Court. AIR 1953 Orissa 33 (39) = 1953 Cri L Jour 349 (DB).

Abuse of judicial powers.

(48) Judges and magistrates acting in abuse of their judicial powers oppressively, unjustly or irregularly can be punished for contempt. AIR 1953 Madh B 60 (61) = 1953 Cri L Jour 570 ** AIR 1967 Andh Pra 219 (228, 229) = 1967 Cri LJ 984 = ILR (1967) Andh Pra 487 (DB).

(49) If an authority bona fide considering that it alone has jurisdiction to determine a matter and under such belief, does not stay its hands after the institution of a suit in the civil Court, it commits no contempt. 1967 All WR (HC) 15 = 1967 All Cri R 21.

Section 1 — Note 5 (contd.)

(50) It would amount to contempt of court to misuse the process of court for obtaining a warrant against a person with no intention of proceeding against him but merely to use the warrant as a lever for blackmailing him. AIR 1939 Lah 143 (144) = 40 Cri L Jour 571 (DB).

(51) Interference by an executive officer with the execution of the process of a Civil Court is contempt of Court. AIR 1953 Orissa 266 (270) = ILR (1952) Cut 467 = 1953 Cri L Jour 1578 (DB).

Creation of prejudicial atmosphere.

(52) Conduct calculated and having tendency to produce an atmosphere of prejudice in the midst of which the proceedings must go on is contempt of Court even though it is not likely that the mind of Magistrates or judges charged with case would thereby be prejudiced. AIR 1932 Mad 26 (27) = 55 Mad 262 = 33 Cri L Jour 270 (DB) ** AIR 1943 Lah 329 (337) = ILR (1944) Lah 111 = 45 Cri L Jour 445 (FB) ** AIR 1957 All 457 (459) = 1957 Cri L Jour 801 ** AIR 1966 SC 1418 (1420) = 1966 Cri LJ 1071 = (1966) 2 SCR 678.

(53) Any act done or writing published that has a tendency to interfere with due course of justice is contempt. If witnesses are prevented from giving evidence by dissuading or frightening them, it is contempt. 1969 Ker LJ 453 (456) = 1969 Ker LT 513 (DB).

(54) Any act done or writing published calculated to obstruct or interfere with due course of justice or lawful process of Courts is contempt of Court. AIR 1962 Pat 2 (7) (DB).

(55) Any conduct, not necessarily publications in news-papers and comments from public platforms, which has a tendency to inculcate a belief in the public or a section of it that a state of affairs prejudicial to a party to the litigation exists amounts to contempt. AIR 1953 All 266 (269) = ILR (1951) All 80 = 1953 Cri L Jour 630 (DB) ** 1969 Ker LT 513 (518) = 1969 Ker LJ 453 (DB).

(56) Any act done or writing published that has a tendency to interfere with the due course of justice is contempt. If witnesses are prevented from giving evidence by dissuading or frightening them, it is contempt. Publications which have a tendency to poison the minds of the general public and threaten witnesses or parties would make the atmosphere impossible for administration of justice. Mobilising public opinion for or against parties to pending cases would certainly interfere with the administration of justice. 1969 Ker LT 513 (518) = 1969 Ker LJ 453 (DB).

(57) Publication of Court proceedings — Press-reporter of publisher of newspaper cannot claim an indefeasible right to put his own gloss on statements in Court by selecting stray passages out of context which may have a tendency to convey to reader to the prejudice, of a party to proceedings, a sense different from what would appear when they are read in their own context. While reproducing Court proceedings no words may be added, omitted or substituted if their effect is to be more prejudicial to party litigant than actual proceedings. AIR 1969 Delhi 201 (213) (FB).

(58) Conduct which is likely to affect the conduct of the parties to the proceedings and thereby the true course of justice amounts to contempt even though it is not likely to directly affect the judge's mind. AIR 1956 Pat 321 (323) = 1956 Cri L Jour 1087 (DB) ** AIR 1953 Orissa 249 (252) = ILR (1953) Cut 283 = 1953 Cri L Jour 1491.

(59) If during the pendency of a Criminal case against an accused person an important piece of documentary evidence bearing on the innocence of the accused is tampered with or otherwise rendered ineffective by the action of a person, there is obstruction to the due administration of justice and that person may be liable for contempt. AIR 1960 Orissa 137 (138, 139) = 1960 Cri LJ 1124 = 26 Cut LT 332.

(60) Attempt to approach a witness summoned by Court or by the opposite party for the purpose of discussing the evidence he should give before the Court, amounts to an improper interference with the course of justice. 1964 All Cri R 353 = 1964 All WR (HC) 498 (DB).

(61) If an important document like the acknowledgment receipt is removed from the record of the Court, there is certainly obstruction to due administration of justice and the person responsible for the loss of the receipt is liable for contempt. 1964 BLJR 481 (DB).

(62) It is only an action that tends to interfere with course of justice or with freedom of a witness to give evidence that would constitute contempt. What is prohibited is exercise of a power to punish a witness for giving evidence as such or to intimidate from giving or to induce him to prevent justice. ILR (1964) Andh Pra 811 (816, 817) (DB).

(63) Delivering speeches at public meetings with the object of influencing the decision of Court in a pending criminal case, preventing the witnesses from giving evidence at the trial and forcing the complainant to withdraw

Section 1 — Note 5 (contd.)

the case amounts to contempt. AIR 1941 Oudh 14 (15, 16) = 41 Cri L Jour 584 = 16 Luck 61 (DB).

(64) Private persons by merely going about and making enquiries into the facts of a pending case cannot be said to be committing a contempt by interfering with the course of justice. It is only when they publish the results of their enquiries that can be said to be committing a contempt inasmuch as the publication would be likely to create prejudice for or against a party. AIR 1950 Pepsu 9 (14) = 1 Pepsu LR 253 = 51 Cri L Jour 1219 (SB).

(65) Any parallel enquiry conducted by an executive officer with regard to a matter which is sub judice amounts to an attempt on his part to prejudge the merits of the case. As such, act is bound to interfere with the even and the ordinary course of justice and amounts to a contempt. AIR 1955 Ardhra 156 (159) = ILR (1955) Andhra 57 = 1955 Cri L Jour 1028 (DB) ** AIR 1959 Punj 182 (184) = 1959 Cri LJ 513 = 61 Pun LR 57 (DB).

(66) An enquiry by a domestic tribunal, in good faith in exercise of powers statutorily vested in it, into the charges of misconduct against an employee does not amount to contempt of Court merely because an enquiry into the same charges is pending before a Civil or a Criminal Court. AIR 1969 SC 30 (32) = 1969 Lab IC 194 = 1969 Cri LJ 267 = (1968) 2 SCJ 955 ** AIR 1969 SC 215 (226-227) = (1968) 3 SCR 789 ** AIR 1961 SC 633 (639) = 1961 (1) Cri LJ 749 = (1961) 3 SCR 460 ** 1968 All LJ 95 = (1968) 2 Lab LJ 154 ** AIR 1966 Guj 233 (235, 236) = 1966 Cri LJ 1001 = (1966) 7 Guj LR 409 (DB) ** AIR 1964 Pat 368 (369, 371, 372) = (1964) (2) Cri LJ 180 (DB) ** AIR 1962 Cal 386 (387) = 1962 (2) Cri LJ 48 = (1962) 1 Lab LJ 731 (DB) ** AIR 1962 Madh Pra 72 (73) = 1962 (1) Cri LJ 342 = 1961 MPLJ 363 (DB).

[See also AIR 1968 SC 1050 (1052) = 1968 Cri LJ 1234 = (1968) 3 SCR 422.]

(67) Bona fide exercise of power conferred upon Heads of Department by statutory rules to enquire into conduct of subordinate officials, cannot fall within mischief of law of contempt, especially when the order is not publicised. ILR (1964) Andh Pra 811 (819) (DB).

6. Comments and reports on pending cases. — (1) Comments which have a tendency to prejudice the administration of justice in any pending case when published amount to contempt. AIR 1929 All 81 (82) = 30 Cri L Jour 217 (SB) ** AIR 1950 Pepsu 9 (17) = 1 Pepsu LR 253 = 51 Cri L Jour 1219

(SB) ** 1961 (2) Cri LJ 491 (493, 494) = 1962 MPLJ 25 (DB) ** AIR 1961 Pat 217 (221, 222) = 1961 (1) Cri LJ 698 = 1961 BLJR 331 (DB) ** AIR 1959 Punj 41 (42) = 1959 Cri LJ 81.

[See also AIR 1961 Punj 101 (102) = (1961) (1) Cri LJ 308 = 62 Punj LR 883 ** AIR 1955 All 377 (378, 379) = 1955 Cri L Jour 904 (DB).]

(2) It is the duty of newspaper editor to verify news or information supplied to him, especially when the news might be of a defamatory nature, because ultimately it is he who would be held responsible for publishing defamatory material in his paper. AIR 1969 Punj 201 (204).

(3) In regard to matters involving contempt of Court newspapers publish articles and speakers make speeches at their peril. An editor takes the responsibility for all that is published in the newspaper. Editing, printing and publishing of newspapers and making speeches have to be done prudently and cautiously with a full sense of responsibility. It is no excuse for the editor to say that he had no knowledge of the contents. It may be that a newspaper may be only copying in its issue matters appearing in a handbill but that is no valid defence because even if it is only a copy, publication of it has the effect of prejudicing a fair trial. 1969 Ker LT 513 (517, 518) = 1969 Ker LJ 433 (DB).

(4) Fundamental right of freedom of speech and expression — Freedom of press — Cannot override law of Contempt of Courts. AIR 1969 Delhi 201 (206) (FB).

(5) A publication which has a tendency to prejudice public or Court for or against any party before cause is finally heard amounts to contempt of Court. AIR 1943 Lah 329 (346) = ILR (1944) Lah 111 = 45 Cri L Jour 445 (FB) ** AIR 1950 Pepsu 9 (17) = 1 Pepsu LR 253 = 51 Cri L Jour 1219 (SB) ** AIR 1929 All 81 (82) = 30 Cri L Jour 217 (SB) ** AIR 1969 Orissa 117 (128) = 1969 Cri LJ 763 = ILR (1968) Cut 437 (DB) ** AIR 1969 Pat 140 (146) = 1969 Cri LJ 631 = 1968 Pat LJR 589 ** AIR 1968 Ker 301 (305, 308, 309) = 1968 Cri LJ 1424 = 1968 Ker LT 157 (DB) ** AIR 1967 Ker 177 (180) = 1967 Cri LJ 1147 = 1967 Ker LT 59 ** 1966 Cri LJ 214 (215, 216) = 1965 MPLJ 844 (DB) ** 1966 BLJR 502 ** AIR 1963 Madh Pra 61 (65) = 1963 (1) Cri LJ 187 = 1962 MPLJ 953 (DB) ** ILR (1960) 1 All 25 ** AIR 1959 Madh Pra 50 (51, 52) = 1958 MPLJ 820 = 1959 Cri LJ 199 (DB).

[See also AIR 1958 Mad 558 (561) = ILR (1958) Mad 851 = 1958 Cri L Jour 1421.]

Section 1 — Note 6 (contd.)

(6) All debates and expressions of opinion on a question which is the subject matter of dispute before a Court should be hushed as long as the Court is seized of the controversy. Where, however, the nature of the controversy itself has a broad sweep, affecting a very large section of people and is not confined to contesting parties only, then in such a case, the Court would take notice of only such comments which pointedly refer to the proceedings before it and which may be construed to interfere with the judicial process. AIR 1969 All 68 (71) = 1968 Cri LJ 133.

(7) The motive of the writer of an article or the speaker at a meeting is not a relevant consideration at all in deciding the question whether contempt of Court has been committed or not. The truth or falsity of the allegations contained in the articles or speeches and the lack of intention or knowledge are also equally irrelevant matters. 1969 Ker LT 513 (516, 517) = 1969 Ker LJ 453 (DB).

(8) It is true that criticism of the police is not contempt of Court. But if it relates to the investigation of a case and has a tendency to effect adversely a fair investigation and consequently a fair trial to that limited extent it is contempt. 1969 Ker LT 513 (519) = 1969 Ker LJ 453 (DB).

(9) Abusing and vilifying parties to a pending proceeding, in relation to proceeding, amounts to contempt — Publication containing imputation against accused that he had exercised his influence in getting magistrate transferred on account of search warrant issued against him — Amounts to contempt. AIR 1961 Ker 321 (324) = 1961 (2) Cri LJ 771 = 1961 Ker LT 345 (DB).

(10) Reports of proceedings in Court even if they are true and correct would amount to contempt if they had been published with the intent of causing prejudice to a party's case or is calculated to cause such prejudice. AIR 1951 Nag 26 (29) = ILR (1951) Nag 266 = 52 Cri L Jour 452 (DB) ** AIR 1958 Punj 377 (381) = ILR (1958) Punj 1723 = 1958 Cri L Jour 1225.

(11) A report on a pending case which contains untrue statements and which is also likely to have the effect of driving one of the parties, though he might have an honest case, to settle it out of Court cannot but be considered as interfering with the fair trial of the case and hence a substantial contempt. AIR 1942 Bom 86 (90) = ILR (1942) Bom 151 = 43 Cri L Jour 583.

(12) Comments on pending case made in such a form as may lead to the belief that it is a statement of facts by the newspaper itself rather than a representation of the substance of the allegations as made in the proceedings would amount to a contempt. AIR 1946 All 298 (300) = 47 Cri L Jour 333.

(13) The publication in a newspaper with regard to any matter 'sub judice' in a Court of law under scare head lines and clearly intended and calculated to prejudice the mankind against a party while the cause was pending amounts to a contempt of Court. AIR 1955 Madh B 183 (185) = 1955 Cri L Jour 1502 (DB) ** AIR 1938 Lah 815 (816) = 40 Cri L Jour 156 (DB) ** AIR 1933 Cal 118 (121, 122) = 60 Cal 603 = 34 Cri L Jour 662 (DB).

(14-15) Describing a party to a pending case as a notorious character tends to prejudice him in his defence and amounts to contempt. AIR 1956 Sau 102 (103) = 1956 Cri L Jour 1355 (DB).

(16) Referring to the accused in a pending case as communists amounts to contempt as being calculated to create prejudice against them and deter persons from deposing in their favour when called upon as witnesses. AIR 1950 Cal 129 (133) = ILR (1951) 1 Cal 94 = 51 Cri L Jour 610 (DB).

(17) Where documents including pleadings filed in a suit have the tendency, if published, of severely reflecting on the conduct of the defendant and prejudicing his defence their publication amounts to a contempt. AIR 1936 Lah 917 (918) = 38 Cri L Jour 73 ** AIR 1943 Lah 329 (338) = ILR (1944) Lah 111 = 45 Cri L Jour 445 (FB) ** AIR 1938 Lah 815 (816) = 40 Cri L Jour 156 (2) (DB) ** AIR 1931 All 420 (421) = 53 All 712 = 33 Cri L Jour 259.

(18) Publication of a statement of a witness under S. 164 of Criminal Procedure Code before the Magistrate, when the case is about to come for trial constitutes contempt of Court. AIR 1958 Punj 273 (280) = ILR (1958) Punj 1272 = 1958 Cri LJ 952.

(19) Publishing a photograph of the car which is connected with an offence long before the trial commences and at a place which is at a considerable distance from the scene of trial is no offence. AIR 1958 Punj 377 (383) = ILR (1958) Punj 1723 = 1958 Cri L Jour 1225.

(20) Adverse comments on a party which amounts merely to a libel without interfering with the course of justice do not amount to contempt. AIR 1953

Section 1 — Note 6 (contd.)

Orissa 249 (252) = ILR (1953) Cut 283 = 1953 Cri L Jour 1491 ** AIR 1954 Orissa 57 (58) = 1954 Cri L Jour 311 (DB) ** AIR 1952 Nag 259 (264) = ILR (1949) Nag 640 ** AIR 1942 Bom 86 (89) = ILR (1942) Bom 151 = 43 Cri L Jour 583.

(21) Stating conclusion in a published article on a fact which is sub judice amounts to a contempt as it would tend to influence the minds of the public and the Court to the prejudice of a party in the proceedings. AIR 1952 Kutch 74 (76, 77) = 1952 Cri L Jour 1482 ** AIR 1950 Lah 84 (88) = Pak LR (1950) Lah 75 = 51 Cri L Jour 801 (SB) ** AIR 1939 Cal 672 (673) = ILR (1939) 1 Cal 399 = 41 Cri L Jour 148 (SB) ** AIR 1955 Orissa 36 (39) = ILR (1955) Cut 204 = 1955 Cri L Jour 547 (DB) ** AIR 1954 Kutch 2 (4) = 1954 Cri L Jour 390 ** AIR 1969 All 68 (72) = 1969 Cri LJ 133.

[See also AIR 1958 Punj 377 (382) = ILR (1958) Punj 1723 = 1958 Cri L Jour 1225. (Mere omission of word 'alleged' with reference to the crime or criminal act would not render publication an offence in the absence of indication that the publisher intended to convey the impression that accused were guilty.)]

(22) Although criticisms of executive acts by themselves do not amount to contempt they would become so when they are made while the propriety of the acts have been challenged in Court and the matter is sub judice and the burden of the criticism is that the act is illegal. AIR 1943 Lah 329 (337) = ILR (1944) Lah 111 = 45 Cri L Jour 445 (FB).

(23) A general comment on the political opinions and activities of an advocate would no doubt not amount to a contempt but when in order to seek strength for the comment reference is made to his appearance in a particular case with the result that a suggestion by implication arises that the accused in that case are or are not likely to be innocent then the comment amounts to at least a technical contempt. AIR 1931 Cal 257 (259) = 58 Cal 884 = 32 Cri L Jour 675 (DB).

(24) A comment on a pending case which discusses the rights and wrongs of the matter involved in the case and suggests what the Court ought to do in the matter amounts to contempt inasmuch as its effect would be to discourage people from giving evidence or influence their evidence where they choose to appear as witnesses. AIR 1939 Mad 257 (259) = 40 Cri L Jour 533 = AIR (1939) Mad 466 (SB).

(25) A publication by a party asserting the truth of his case and protesting against the action of the opposite party amounts to contempt as its effect would be to prejudice mankind against the other party. AIR 1938 Cal 772 (774) = ILR (1938) 2 Cal 447 (DB) ** AIR 1954 Orissa 57 (62) = 1954 Cri L Jour 311 (DB) ** AIR 1948 Oudh 131 (135) = 23 Luck 182 = 49 Cri L Jour 212.

(26) Comment relating to the accused who are facing their trial amounts to contempt of the Court when they have a tendency to interfere with the fair trial of the accused although they may not refer either to the pending case or the facts which constitute the subject matter of the charge against them. AIR 1955 Orissa 169 (170) = ILR (1955) Cut 323 = 1955 Cri L Jour 1514 (DB) ** AIR 1953 Orissa 249 (252) = ILR (1953) Cut 283 = 1953 Cri L Jour 1491 ** AIR 1951 All 667 (668) = ILR (1951) 2 All 521 = 52 Cri L Jour 984 (2) (DB).

(27) A comment which contains sufficient description to identify it as one relating to a pending case and possesses the tendency to prejudice the cause of the accused in that case constitutes a contempt although it does not expressly mention the name of the accused. AIR 1950 Cal 129 (131) = ILR (1951) 1 Cal 94 = 51 Cri L Jour 610 (DB).

[See also AIR 1955 Pat 141 (142) = 1955 Cri L Jour 570 (DB).]

(28) An expression of opinion, on a matter sub judice, not in any way, prejudicing the trial, cannot be a matter for contempt of Courts proceedings. AIR 1953 Mys 103 (103, 104) = ILR (1953) Mys 137 = 1953 Cri L Jour 1154.

(29) A publication which contains merely a resume of the plaint allegations and no personal attack on the defendant is not likely to prejudice the defendant either in the eyes of the public or before the Court and hence would not amount to a contempt. AIR 1934 Cal 606 (608) ** AIR 1964 Punj 428 (430, 432) = 1964 (2) Cri LJ 450 = 66 Pun LR 927.

(30) The publication of the version of one side in a pending case can no doubt amount to a contempt under certain circumstances. But where what is published cannot be characterised as any version of the case at all it would not be a contempt. AIR 1950 Pepsu 9 (18) = 1 Pepsu LR 253 = 51 Cri L Jour 1219 (SB).

(31) An omission to mention a certain contention took up by a party in a proceeding before administrative officers in the newspaper report of such proceeding does not amount to a contempt. AIR 1958 Punj 377 (383) = ILR (1958) Punj 1723 = 1958 Cri L Jour 1225.

Section 1 — Note 6 (contd.)

(32) Where the criminal proceedings pending against the person adversely commented on are not legal the adverse comments do not amount to a contempt. AIR 1955 Hyd 264 (267) = ILR (1955) Hyd 571 = 1955 Cri L Jour 1590 (DB).

(33) It is contempt of Court to publish reports of chamber proceedings without permission of Judge concerned. AIR 1942 Bom 86 (87) = ILR (1942) Bom 151 = 43 Cri L Jour 583.

7. Attempts to influence decision in pending cases. — (1) Any act or conduct with reference to a pending proceeding which has a tendency to deprive the Court the power to administer justice duly and impartially and to reduce it to impotence as regards effectual elimination of prejudice and prepossession amounts to contempt. AIR 1946 All 298 (300) = 47 Cri L Jour 333 ** AIR 1969 Orissa 117 (128) = 1969 Cri LJ 763 = ILR (1968) Cut 437 (DB).

(2) A superior executive authority who sends a letter to the Magistrate dictating the terms of the order which is to be passed in pending proceeding commits contempt. AIR 1949 Pat 233 (235) = 50 Cri L Jour 488 (FB) ** AIR 1954 Orissa 1 (4) = ILR (1953) Cut 246 = 1953 Cri L Jour 1906 (DB) ** AIR 1954 Pat 289 (295) = 1954 Cri L Jour 942 (DB) ** AIR 1950 Cal 545 (547, 548).

(3) A member of the legislature who issues instructions to a Magistrate relating to a pending case interferes with the administration of justice and thereby commits a contempt. AIR 1939 All 247 (248) (DB) ** AIR 1955 J & K 30 (31) = 1955 Cri L Jour 1595 (FB).

(4) Where a party approached the Magistrate in Court with the object of influencing his decision in the matter of bail in favour of certain accused, it was held that the conduct of the party was both audacious and reprehensible and constituted a contempt of Court. AIR 1953 Pepsu 79 (80) = ILR (1952) Patiala 531 = 1953 Cri L Jour 919 (DB).

(5) Putting forward a plea in an article for cancelling the bail bond of the accused and placing them under police guard till the termination of their trial amounts to a contempt inasmuch as it has the effect of interfering with the judicial discretion of the Magistrate. AIR 1950 Cal 129 (131) = ILR (1951) 1 Cal 94 = 51 Cri L Jour 610 (DB).

(6) Any private communication by a party to a case or even a stranger to a cause addressed or made to the presiding officer of a Court which is calculated to influence his decision in a pending case amounts to contempt. AIR 1953 All 153 (156) = 1953 Cri L Jour 402 ** AIR 1958 All 728 (729) = 1958 Cri

L Jour 1260 ** AIR 1952 All 86 (87) ** AIR 1948 Oudh 114 (115) = 23 Luck 37 = 49 Cri L Jour 108 (DB) ** AIR 1940 Oudh 178 (178, 179) = 41 Cri L Jour 233 (DB) ** AIR 1959 Cal 174 (175, 176) = 1959 Cri LJ 316 = 62 Cal WN 862 (FB) ** AIR 1965 Mad 336 (337) = 1965 (2) Cri LJ 223 = (1965) 1 Mad LJ 356 (DB) ** 1962 Jab LJ 1147 = 1964 MPLJ 645 (DB) ** 1961 (2) Cri LJ 109 (111) = 1960 Ker LT 338 (DB) ** AIR 1959 Punj 632 (638) = 1959 Cri LJ 1469.

(7) Writing recommendatory letter to a judicial officer about the facts of a case is a communication for the purpose of influencing his decision and hence amounts to a high contempt of Court. AIR 1953 SC 185 (187) = 1953 SCR 581 = ILR (1953) 2 All 904 = 1953 Cri L Jour 911.

(8) When a person communicates to a Judge his opinion or decision on the facts of a case, which is sub judice, it constitutes contempt and his motive in so communicating is irrelevant. AIR 1955 Andhra 156 (161) = ILR (1955) Andhra 57 = 1955 Cri L Jour 1028 (DB).

(9) Addressing an extra judicial communication to a Magistrate expressing the writer's opinion of the character of the accused in a pending case and the manner in which he had dealt with the case amounts to a contempt. AIR 1949 Pat 435 (443) = 50 Cri L Jour 935 (DB) ** AIR 1954 Pepsu 91 (93) = ILR (1953) Patiala 483 = 1954 Cri L Jour 748.

(10) Party sending to Judge, seised of case, letter containing threat and imputations about Judge's impartiality is guilty of contempt of serious nature. AIR 1940 Nag 407 (408) = ILR (1941) Nag 304 = 42 Cri L Jour 237 ** AIR 1934 All 317 (318) = 35 Cri L Jour 433 (DB).

(11) A party writing a letter in advance to a Court in anticipation of a case, commits contempt of Court. AIR 1952 All 108 (109) ** AIR 1954 Madh B 66 (67) = ILR (1953) Madh B 126 = 1954 Cri L Jour 769.

(12) Deliberate acts of suppressio veri and suggestio falsi amount to contempt, even though Judge's mind was not influenced by those acts. 1967 Cur LJ 888 (Punj).

(13) When there is no judicial proceeding pending, a letter written to a Magistrate requesting him to take steps in his executive capacity for ensuring peaceful celebration of certain ceremonies likely to be obstructed by certain persons not containing any prayer to bind over such persons, does not amount to contempt of Court. AIR 1939 Oudh 182 (183, 184) = 14 Luck 649 = 40 Cri L Jour 566 (DB).

2. Definition.—In this Act, “High Court” means the High Court for **[a State]*, and includes the Court of the Judicial Commissioner in a †*[Union territory]*.

[°] Substituted for “a Part A State or a Part B State”, by 3 A. L. O., 1956.

[†] Substituted for “Part C State”, *ibid.*

[Note.—There are only 3 Judicial Commissioners’ Courts at present: (1) Manipur, (2) Tripura, and (3) Goa, Daman and Diu. Two Union Territories, Delhi and Himachal Pradesh, have a common High Court, i.e., Delhi High Court, established from 31-10-1966.]

3. Power of High Court to punish contempts of subordinate Courts.—(1) Subject to the provisions of sub-section (2), every High Court* shall have and exercise the same jurisdiction, powers and authority, in accordance with the same procedure and practice, in respect of contempts of Courts subordinate to it as it has and exercises in respect of contempts of itself.

Section 2 — Note 1

(1) The common High Court of Punjab and Haryana is a High Court for the State of Punjab, a High Court for the State of Haryana and a High Court for the Union Territory of Chandigarh and thus it is within the definition of the expression ‘High Court’ in Section 2 and is competent to proceed with the proceedings for contempt of subordinate Court in Haryana. In view of Section 13 (2) of the General Clauses Act, 1897 the words ‘a State’ in Section 2 can be read as States. AIR 1968 Punj 217 [231] = 69 Punj LR 673 (FB).

SECTION 3 — SYNOPSIS

1. Power of High Court to punish contempts.
2. Subordination of Courts.
3. “Court”.
4. Jurisdiction.
5. Manner of initiating proceedings.
6. Commencement of proceeding on report of subordinate Court.
7. Commencement of proceeding suo motu.
8. Proceedings against State or Union.
9. Party entitled to make application.
10. Notice of motion.
11. Scope of enquiry.
12. Defences in contempt proceedings.
13. Evidence and mode of proof.
14. Exercise of power is discretionary.
15. Contempt proceedings and Criminal P. C.
16. Court has power to adopt its own procedure.
17. Costs.
18. Appeal.
19. Bar of jurisdiction under sub-s. (2).
20. Contempt of Court, what amounts to — See Notes under S. 1.

1. Power of High Court to punish contempts — Inherent powers. — (1) The power of a High Court to institute pro-

ceedings for contempt and punish where necessary is a special jurisdiction which is inherent in all Courts of Record. AIR 1954 SC 186 (187) = 1954 SCR 454 = 1954 Cri L Jour 460 ** AIR 1957 All 37 (41, 42) = 1957 Cri L Jour 18 (DB) ** AIR 1955 All 638 (640) = ILR (1956) 2 All 470 = 1955 Cri L Jour 1451 (DB) ** AIR 1955 Orissa 36 (40) = ILR (1955) Cut 204 = 1955 Cri LJ 547 (DB) ** ILR (1946) 2 Cal 499 (506) ** AIR 1945 Oudh 266 (267) = 20 Luck 442 = 47 Cri LJ 294 (DB).

(2) Power of High Court to punish for contempt is to safeguard dignity of Courts and to create an atmosphere in which judges can dispense justice with equal hand and fearlessly perform functions which they are called upon to discharge. AIR 1969 Delhi 319 (320) (DB).

(3) The power to punish for contempt which is inherent in the very nature and purpose of Courts of justice may be exercised in civil or criminal cases or independently of both and either solely for the preservation of the authority of the Court or in aid of the rights of the litigant or for both these purposes combined. AIR 1957 Pat 528 (533) = 36 Pat 955 = 1957 Cri LJ 1156.

(4) Powers which the High Court has as a court of record in relation to contempt are powers exercisable by one or more judges of the court and not merely or only by all the judges sitting together. AIR 1959 Bom 182 (187) = 1959 Cri LJ 567 = 60 Bom LR 873 (DB).

(5) The inherent power of the High Court to punish contempt is in no way diminished or restricted by the Code of Civil or Criminal Procedure. ILR (1937) 1 Cal 345 (354).

(6) No notion of the liberty of the press can stand in the way of the inherent power of Court to punish any publication which amounts to contempt. Article 19 (2) of the Constitution makes it clear that reasonable restrictions could be imposed on the fundamental right to freedom of speech and expression, inter

(2) No High Court shall take cognizance of a contempt alleged to have been committed in respect of a Court subordinate to it where such contempt is an offence punishable under the Indian Penal Code.

[*] For Rules framed under Art. 225 of the Constitution of India regarding contempts punishable under the Contempt of Courts Act, 1952, by the former High Court of Judicature at Nagpur, see Notification No. 8958 published in Madhya Pradesh Gazette, 13-11-1953, Pt. IV-(Ga), page 299. These Rules came into force with retrospective effect from 26-9-1953. For Rules made by the High Court of Mysore to regulate proceedings for contempts of subordinate Courts and of the High Court, see Mysore Gazette, 18-8-1955, Pt. IV, S. 2-D, p. 7. For Rules made by the High Court at Calcutta, see Notifn. No. 5261-G published in Calcutta Gazette, dated 25-7-1968, Pt. I, p. 1553. For such rules made by the A. P. High Court, see A. P. Gaz., 17-10-1957, Pt. II (R. S.), p. 311.

Section 3 — Note 1 (contd.)

alia, in relation to contempt of Court. AIR 1958 Punj 273 (279, 280) = ILR (1958) Punj 1272 = 1958 Cri LJ 952 ** AIR 1958 Punj 377 (380) = ILR (1958) Punj 1723 = 1958 Cri LJ 1225 ** AIR 1953 Orissa 249 (252) = ILR (1953) Cut 283 = 1953 Cri LJ 1491 ** AIR 1969 Cal 1 (3) = 1969 Cri LJ 40 = 72 Cal WN 82 (SB) ** AIR 1968 Punj 217 (230) = 1968 Cri LJ 775 = 69 Punj LR 673 (FB) ** AIR 1960 Pat 430 (440) = 1960 Cri LJ 1254 = 1960 BLJR 622 (FB) ** AIR 1959 Bom 182 (189) = 1959 Cri LJ 567 = 60 Bom LR 873 (DB).

Power to punish its own contempt.

(7) The power of the High Court to commit for any contempt of itself is an inherent power and it arises from the fact that it is a Court of Record. AIR 1930 Cal 759 (760) = 58 Cal 458 = 32 Cri LJ 352 (DB) ** AIR 1942 Lah 105 (107) = ILR (1942) Lah 411 = 43 Cri LJ 599 (FB) ** AIR 1957 Hyd 17 (17) = ILR (1956) Hyd 468 (DB) ** AIR 1952 Ajmer 33 (33) = 1952 Cri LJ 1234 ** AIR 1951 Vindh Pra 14 (16) ** AIR 1959 Cal 106 (108, 109, 110) = 1959 Cri LJ 172 (DB) ** AIR 1959 Bom 182 (186, 187) = 1959 Cri LJ 567 = 60 Bom LR 873 (DB).

(8) The Contempt of Courts Act, whether the one of 1926 or the one of 1952 which repealed it, should not be interpreted as conferring any new jurisdiction on the High Courts, but must be taken as having assumed the existence of such jurisdiction even from before. At least in so far as the power of the High Court in relation to contempt of itself has been vested in the High Courts by the Constitution itself the new Act cannot be interpreted to have taken away that jurisdiction and conferred it again on the High Courts by virtue of its own authority. AIR 1954 SC 186 (190) = 1954 SCR 454 = 1954 Cri LJ 460.

(9) The inherent power which the High Court possesses to commit for contempt of itself is ancillary to the exercise of its various jurisdictions and it may be expedient to exercise it in or in relation to any one of those jurisdictions. AIR 1930 Cal 759 (760) = 58 Cal 458 = 32 Cri LJ 352 (DB).

Power to punish contempts of subordinate Courts.

(10) Before the Contempt of Courts Act of 1926 was passed the High Courts in matters of contempt possessed the same jurisdiction as the King's Bench in England and as such could punish contempts of the inferior Courts. AIR 1955 Andhra 156 (159) = ILR (1955) Andhra 57 = 1955 Cri LJ 1028 (DB) ** AIR 1922 Bom 52 (62) = 46 Bom 592 = 23 Cri LJ 177 (DB). (Per Mac Leod, C. J.)

(11) A High Court is a Court of Record and as such has an inherent power and authority to protect its subordinate Courts from interference with the course of justice administered by them, in any way which may be necessary. AIR 1939 Oudh 131 (139) = 14 Luck 492 = 40 Cri LJ 421 (FB) ** AIR 1952 Ajmer 33 (33) = 1952 Cri LJ 1234 ** AIR 1952 Kutch 74 (76) = 1952 Cri LJ 1482.

[But see AIR 1933 Pat 204 (205, 206) = 12 Pat 172 (DB).]

(12) High Court cannot deal with matters alleged to be of contempt of the Supreme Court. AIR 1967 Andh Pra 299 (305) = 1967 Cri LJ 1470 = ILR (1968) Andh Pra 42 (DB).

(13) The applicability or otherwise of the Contempt of Courts Act to a superior Court of Record does not affect its right to exercise the power which is inherent in every superior Court of Record to punish contempts of Courts subordinate to it. AIR 1951 Vindh Pra 14 (16).

(14) The Contempt of Courts Act only gives a statutory recognition to the already existing inherent powers of the High Courts to punish contempts of subordinate Courts also. AIR 1957 Hyd 17 (17) = ILR (1956) Hyd 468 (DB) ** AIR 1939 Oudh 131 (139) = 14 Luck 492 = 40 Cri L Jour 421 (FB) ** AIR 1955 Andhra 156 (159) = ILR (1955) Andhra 57 = 1955 Cri L Jour 1028 (DB).

(15) Article 215 of the Constitution which vests in the High Court all the powers of a Court of Record including the power to punish for contempt of itself does not limit the powers which the High Court possessed before to punish contempts of subordinate Courts either as a superior Court of Record or under the

Section 3 — Note 1 (contd.)

Contempt of Courts Act of 1926 which has been replaced by the present Act of 1952. AIR 1953 All 342 (345) = ILR (1953) 1 All 796 = 1953 Cri LJ 733 ** AIR 1950 All 556 (558) = ILR (1952) 1 All 131 = 52 Cri LJ 1062 (FB) ** AIR 1960 Pat 430 (442, 443, 444, 445, 446) = 1960 Cri LJ 1254 = 1960 BLJR 622 (FB) ** AIR 1964 Cal 572 (582, 583) = 1964 (2) Cri LJ 660 = 69 Cal WN 82 (DB) ** AIR 1959 Bom 182 (187) = 1959 Cri LJ 567 (DB).

(16) The inherent power of the High Court to punish contempts of subordinate Courts and tribunals has not been touched by Article 227 of the Constitution, just as such power was left untouched by Section 15 of the High Courts Act of 1861 which Article 227 replaced. AIR 1955 Mad 1 (18) = ILR (1955) Mad 1 = 1955 Cri LJ 1 (FB).

(17) Contempt of Court is contempt of the authority of the sovereign State exercised through its Courts duly constituted for the administration of justice and the power which the High Court exercises to punish contempt of itself and the Courts and tribunals subordinate to it is the power of the sovereign State. AIR 1955 Mad 1 (20) = ILR (1955) Mad 1 = 1955 Cri LJ 1 (FB).

(18) It is open to the Parliament of India which exercises the sovereign authority of the State in the legislative field to provide specifically for the exercise of the power of the sovereign State to punish contempts of any specified classes of Courts or tribunals. AIR 1955 Mad 1 (20) = ILR (1955) Mad 1 = 1955 Cri LJ 1 (FB).

(19) Where a subordinate tribunal can protect itself or when any statutory provision is made for its protection from contempts the High Court cannot invoke its inherent powers to punish contempt of that tribunal. AIR 1955 Mad 1 (20) = ILR (1955) Mad 1 = 1955 Cri LJ 1 (FB).

(20) Subordinate Courts which are not Courts of Record have no power to entertain proceedings in contempt. AIR 1943 Nag 334 (334) = 45 Cri LJ 407.

(21) Apart from there being inherent jurisdiction in the High Court to punish for contempt of subordinate Courts such jurisdiction has now been expressly conferred upon them by the Contempt of Courts Act in all cases of contempts other than those which amount to an offence under the Penal Code. AIR 1935 All 117 (118) = 57 All 573 (DB) ** AIR 1953 All 419 (430, 431) = ILR (1953) 1 All 84 = 1953 Cri LJ 943 ** AIR 1952 All 86 (87) ** AIR 1951 All 667 (674) = ILR (1951) 2 All 521 = 52 Cri LJ 984 (2) (DB).

(22) The absence of a definition for the term 'Contempt of Court' either in this Act or the Constitution creates in

no way any difficulty in the High Court exercising the power conferred by them to punish contempts of subordinate Courts. Since the term had long since been judicially interpreted both in England and in this Country it is reasonable to assume that it has been used in that sense both in the Act and the Constitution. AIR 1955 Orissa 36 (42) = ILR (1955) Cut 204 = 1955 Cri LJ 547 (DB).

(23) That the Court or tribunal in relation to the proceedings in which the contempt was committed has ceased to exist, does not deprive the High Court of its power to punish the contempt. AIR 1955 Mad 1 (21, 22) = ILR (1955) Mad 1 = 1955 Cri LJ 1 (FB).

(24) The High Court of Jammu and Kashmir has a statutory power given to it by the Constitution of the State itself to punish contempts of itself as well as any Court subordinate to it. AIR 1955 J and K 30 (31) = 1955 Cri LJ 1595 (FB).

2. Subordination of Courts.— (1) The expression "Courts subordinate to the High Courts" would prima facie mean the Courts of law subordinate to the High Courts in the hierarchy of Courts established for the purpose of administration of justice throughout the Union. AIR 1956 SC 66 (69) = 1955-2 SCR 955 = 35 Pat 65 = 1956 Cri LJ 156 ** AIR 1968 Madh Pra 253 (254) = 1968 MPLJ 354 (DB) ** AIR 1968 Madh Pra 232 (233) = 1968 Cri LJ 1433 = 1968 MPLJ 507 (DB) ** 1964 (1) Cri LJ 362 (364) (All). (AIR 1956 All 258, Rel. on.)

(2) For the purposes of this section the position of the subordinate Court must be considered in its totality in relation to the High Court and not with reference to a particular Act or provision of law under which it may be acting at the time its contempt has been committed. AIR 1953 All 419 (433) = ILR (1953) 1 All 84 = 1953 Cri LJ 943.

(3) Chapter VI of the Constitution is not exhaustive of the Courts which are subordinate to the High Court much less does the provision apply to the interpretation of the expression as used in the Act. AIR 1960 Madh Pra 115 (116) = 1960 Cri LJ 484 = 1959 MPLJ 1139 (DB).

(4) Subordination contemplated by the Act is not the subjection to the mere administrative control of the High Court. AIR 1950 All 556 (558) = ILR (1952) 1 All 131 = 52 Cri LJ 1062 (FB).

[See also AIR 1956 All 258 (266) = ILR (1956) 1 All 656 = 1956 Cri LJ 679 (DB).]

(5) The subordination contemplated by the Act is judicial subordination. AIR 1950 All 556 (558) = ILR (1952) 1 All 131 = 52 Cri LJ 1062 (FB) ** AIR 1956 All 258 (266) = ILR (1956) 1 All 656 = 1956 Cri L Jour 679 (DB) ** AIR 1955

Section 3 — Note 2 (contd.)

Bom 103 (105) = ILR (1954) Bom 1362 = 1955 Cri LJ 351 (DB) ** AIR 1953 All 419 (433) = ILR (1953) 1 All 84 = 1953 Cri LJ 943 ** AIR 1967 SC 1494 (1504) = 1967 Cri LJ 1380 = (1967) 3 SCR 163 ** 1964 (1) Cri LJ 362 (365) (All).

(6) A Court may be subordinate to a High Court for purposes other than judicial controls. AIR 1967 SC 1494 (1504) = 1967 Cri LJ 1380 = (1967) 3 SCR 163.

(7) Any Court over which a High Court exercises any authority, appellate, revisional or supervisory may be subordinate to the High Court for the purposes of the Contempt of Courts Act. AIR 1957 All 495 (503) ** AIR 1950 All 556 (558) = ILR (1952) 1 All 131 = 52 Cri LJ 1062 (FB) ** AIR 1956 All 258 (266) = ILR (1956) 1 All 656 = 1956 Cri LJ 679 (DB) ** AIR 1952 All 86 (87).

(8) Where a Court created by a special statute has been made subject to the appellate jurisdiction of the High Court although to a lesser extent than the ordinary Criminal Courts of the Country, it is a Court subordinate to the High Court within the meaning of the Contempt of Courts Act. It is not the less such a Court merely because the power to make rules in respect of it has been conferred on the Government and not the High Court. AIR 1933 Cal 118 (120) = 60 Cal 603 = 34 Cri LJ 662 (DB).

(9) Any tribunal, which is subordinate to the High Court under Article 227 of the Constitution would come within the scope of the Act even though it is not subordinate to the High Court as a civil Court. AIR 1955 Bom 103 (105) = ILR (1954) Bom 1362 = 1955 Cri LJ 361 (DB) ** AIR 1967 Andh Pra 299 (320) = 1967 Cri LJ 1470 = ILR (1968) Andh Pra 42 (DB) ** AIR 1960 Madh Pra 115 (117) = 1960 Cri LJ 484 (DB).

(10) The Court of a Magistrate passing order under Section 144, Criminal P. C., is a Court subordinate to the High Court within the meaning of Section 3 of the Contempt of Courts Act. AIR 1954 Pat 203 (207) = 32 Pat 1069 = 1954 Cri LJ 533 (DB) ** AIR 1959 Cal 174 (176) = 1959 Cri LJ 316 = 62 Cal WN 862 (FB).

(11) Panchayati Adalats are Courts judicially subordinate to the High Court. AIR 1951 All 667 (Pr 22) = ILR (1951) 2 All 521 = 52 Cri LJ 984 (2) (DB) ** AIR 1962 All 315 (322, 324, 327) = 1962 (2) Cri LJ 1 = 1962 All LJ 235 (FB). (AIR 1951 All 667, Approved. AIR 1956 All 258 and AIR 1957 All 495, Overruled.)

(12) A Magistrate holding an enquiry under Section 176 of the Code of Criminal Procedure is not a Court subordinate to the High Court contempt of which is punishable under Section 3 of the Contempt of Courts Act. AIR 1958 Punj 141 (143) = ILR (1958) Punj 745 = 1958

Cri LJ 673. (AIR 1940 Rang 68 held no longer good law.)

[But see AIR 1940 Rang 68 (70) = 1940 Rang LR 188 = 41 Cri LJ 470 (DB).]

(13) The appointment of a Judge of the High Court as the sole member of an Industrial Tribunal it was held did not equate it with the High Court. The status of the tribunal as an inferior Court was not in any way altered by such appointment. AIR 1955 Mad 1 (16) = ILR (1955) Mad 1 = 1955 Cri LJ 1 (FB).

(14) An Election Tribunal constituted under Representation of the People Act is a Court subordinate to the High Court. AIR 1960 Madh Pra 115 (116, 117) = 1960 Cri LJ 484 = 1959 MPLJ 1139 (DB) ** AIR 1959 Madh Pra 50 (51) = 1959 Cri LJ 199 = 1958 MPLJ 820 (DB).

(15) The Authority functioning under the Payment of Wages Act is a Court subordinate to the High Court within the meaning of Section 3 of the Contempt of Courts Act. AIR 1963 Bom 254 (261) = 1963 (2) Cri LJ 603 = 65 Bom LR 131 (DB).

(16) In view of the provisions of S. 22 of the Andhra Pradesh Buildings (Lease, Eviction and Rent) Control Act (XV of 1960), Rent Controller is a Court subordinate to the High Court within the terms of Section 3. (1968) 2 Andh WR 587 = 1968 Mad LJ (Cri) 766 (DB).

(17) The Assistant Registrar exercising powers of Registrar under Section 48 of Bihar and Orissa Co-operative Societies Act (6 of 1935) is a Court subordinate to the High Court. AIR 1965 Pat 227 (236, 237) = 1965 (1) Cri LJ 748 = 1966 BLJR 15 (DB) ** AIR 1967 SC 1494 (1504) = 1967 Cri LJ 1380 = (1967) 3 SCR 163.

(18) An Arbitrator appointed by the State under Section 37 read with S. 12 of the U. P. Consolidation of Holdings Act and the Rules framed thereunder is not a Court subordinate to the High Court within the meaning of Section 3 of the Contempt of Courts Act. AIR 1968 All 157 (162) = 1968 Cri LJ 577 = 1966 All LJ 460.

(19) The Registrar or the Assistant Registrar appointed under U. P. Co-operative Societies Act are not a Court of Law and they cannot also be said to be subordinate to the High Court. 1963 (1) Cri LJ 507 (511) = 1962 All LJ 57.

3. "Court." — (1) By the word "Court" used by it the Act contemplates "a Court of justice" which as defined in the Penal Code denotes "a Judge who is empowered by law to act judicially." AIR 1954 Nag 71 (76) = ILR (1954) Nag 1 = 1954 Cri LJ 366 (DB) ** AIR 1964 Bom 147 (153) = 1964 (1) Cri LJ 652 = 65 Bom LR 533 (DB) ** AIR 1959 Bom 6 (8) = 60 Bom LR 822 = 1959 Cri LJ 30 (DB).

Section 3 — Note 3 (contd.)

(2) The word 'Court' as defined in the Evidence Act is only for the purposes of that Act and cannot be made use of in interpreting that word in the Contempt of Courts Act. AIR 1968 All 157 (160) = 1968 Cri LJ 577 = 1966 All LJ 460.

(3) The Presiding Officer alone does not constitute a 'Court,' which in fact and law, is an impersonal being or entity. It is true that one of its main limbs is the Presiding Officer but there are other more or less equally important limbs which constitute a 'Court', like the counsel practising before it, the officials of the Court, the litigants and even the witnesses who appear for one party or the other. 1966 All WR (HC) 197 = 1966 All LJ 953.

(4) In order to constitute a 'Court' in strict sense of the term, an essential condition is that the Court should have the power to give a decision or a definitive judgment which has finality and authoritativeness. AIR 1956 SC 66 (70) = 1955-2 SCR 955 = 35 Pat 65 = 1956 Cri LJ 156.

(5) As the Constitution has made a distinction between "Courts" and "tribunals" in the Contempt of Courts Act of 1952 which was passed subsequent to the Constitution the word "Court" cannot be interpreted to include all Tribunals. AIR 1956 All 258 (265) = ILR (1956) 1 All 656 = 1956 Cri LJ 679 (DB).

(6) A tribunal in which justice is judicially administered and which is empowered to arrive at an independent judicial decision on legal evidence is a "Court". AIR 1950 Assam 25 (30) = ILR (1949) 1 Assam 244 = 51 Cri LJ 247 (DB).

(7) The term "Court" in the Act is wide enough to include even a tribunal provided it is entrusted with judicial functions including that of deciding litigated questions according to law that is to say, according to certain rules and procedure which would ensure its deciding them with fairness and impartiality. AIR 1953 All 419 (432) = ILR (1953) 1 All 84 = 1953 Cri LJ 943.

(8) A tribunal in order to possess the status of a "Court", for the purposes of this Act should possess the capacity to deliver a definite judgment. AIR 1954 Nag 71 (76) = ILR (1954) Nag 1 = 1954 Cri LJ 366 ** AIR 1967 SC 1494 (1504) = 1967 Cri LJ 1380 = (1967) 3 SCR 163 ** AIR 1968 Madh Pra 232 (233) = 1968 Cri LJ 1433 = 1968 MPLJ 507 (DB) ** AIR 1959 Bom 6 (8) = 1959 Cri LJ 30 = 60 Bom LR 822 (DB).

(9) For the purpose of Contempt of Courts Act, (a) Court is that person, Tribunal or authority which has been permanently constituted by the State for the administration of justice, (b) the pronouncement of such person, Tribunal

or authority must be a decisive judgment binding on the parties; (c) such person, authority or Tribunal must arrive at its decision on the evidence which the parties have a right to adduce; (d) he or it must possess authority to summon parties and their witnesses, to compel production of documents and to take evidence and (e) he or it must possess power to have his or its judgment, decree or order enforced against the parties. AIR 1968 All 157 (160) = 1968 Cri LJ 577 = 1966 All LJ 460.

(10) Only those arbitrators can be deemed to be Courts who are appointed through a Court. 1963 (1) Cri LJ 507 (509, 510) = 1962 All LJ 57.

The following are "Courts".

(11) The Magistrate taking cognizance of the report under Section 173 (1) (a), Criminal P. C. irrespective of whether it is a charge-sheet or a final report. 1965 All WR (HC) 783 = 1965 All Cr R 520.

(12) Magistrate, seized of committal proceedings. AIR 1966 All 495 (498) = 1966 Cri LJ 1106.

(13) The authority constituted under the Payment of Wages Act. AIR 1963 Bom 254 (260) = 1962 (2) Cri LJ 603 = 65 Bom LR 131 (DB).

(14) Where in connection with the administration of justice a Magistrate is approached as a Court to make an order and as a Court he declines to make it even though the Magistrate says that he is not doing any judicial work on the day he is so approached. AIR 1962 Cal 495 (499) = 1961 (2) Cri LJ 334 = ILR (1962) 1 Cal 304 (FB).

(15) Assistant Registrar discharging the function of Registrar under Section 48 read with Section 6 (2) of Bihar and Orissa Co-operative Societies Act (6 of 1935). AIR 1967 SC 1494 (1499, 1502) = 1967 Cri LJ 1380 = (1967) 3 SCR 163.

(16) Election Tribunal constituted under Representation of the People Act. AIR 1967 Andh Pra 299 (320) = 1967 Cri LJ 1470 = ILR (1968) Andh Pra 42 (DB).

(17) Rent Control Tribunal. AIR 1969 Delhi 319 (322) (DB).

(18) Financial Commissioner acting under Section 39 of Pepsu Tenancy and Agricultural Lands Act (13 of 1955). AIR 1969 Punj 435 (440) (DB).

The following are not "Court".

(19) A Commissioner appointed under the Public Servants (Inquiries) Act 37 of 1850. AIR 1956 SC 66 (74, 75) = 1955-2 SCR 955 = 1956 Cri LJ 156. (AIR 1954 Pat 289, Reversed; AIR 1951 Punj 49, Overruled.)

(20) A fact finding commission appointed under the provisions of the Commissions of Inquiry Act of 1952. AIR 1954 Nag 71 (76) = 1954 Cri LJ 366 = 1954 Nag LJ 238 (DB).

Section 3 — Note 3 (contd.)

(21) The committee appointed under Section 36 (1) (b) of U. P. Homoeopathic Medicine Act, 1964 (1) Cri LJ 362 (364) (All). (AIR 1956 SC 66, Foll.)

(22) Registrar's nominee under Section 54 (1) of Bombay Co-operative Societies Act (7 of 1925). AIR 1964 Bom 147 (154) = 65 Bom LR 533 (DB).

(23) The Registrar and the Assistant Registrar appointed under U. P. Co-operative Societies Act, 1963 (1) Cri LJ 507 (510) = 1962 All LJ 57. (Overruled on another point in AIR 1965 All 263 (DB).)

(24) The Nyaya Panchayat constituted under Saurashtra Gram Panchayat Ordinance, 1949. ILR (1964) Guj 433 (DB).

(25) A coroner appointed under the Coroners Act, 1871. AIR 1959 Bom 6 (10) = 1960 Cri LJ 30 = 60 Bom LR 822 (DB).

(26) An arbitrator appointed by the State under Section 37 read with Section 12 of the U. P. Consolidation of Holdings Act. AIR 1968 All 157 (164) = 1968 Cri LJ 577 = 1966 All LJ 460.

(27) Sub-Divisional Officer holding enquiry under Section 247 (7), M. P. Land Revenue Code. AIR 1968 Madh Pra 253 (254) = 1968 MPLJ 354 (DB).

(28) Revenue Officer appointed as inquiry officer under Section 30 (2), M. P. Land Revenue Code (20 of 1959). AIR 1968 Madh Pra 232 (234) = 1968 Cri LJ 1435 = 1968 MPLJ 507 (DB).

(29) "Courts subordinate to the High Court" — Magistrate functioning under Section 37 of Rajasthan Co-operative Societies Act (13 of 1965). The power exercised by him under the Section is administrative in nature. 1969 Cri LJ 1193 (1196) (DB) (Raj).

4. Jurisdiction.— (1) The High Court has jurisdiction over a matter of contempt committed within its territorial jurisdiction and the place where the contemner resides does not affect that jurisdiction. AIR 1934 Mad 423 (424) = 57 Mad 831 = 35 Cri LJ 962 (DB) ** 1962 (2) Cri LJ 118 (121) = ILR (1962) 1 All 221 (DB).

(2) A contempt of High Court is an offence which can be enquired into according to the provisions of Criminal P. C., as set out in Section 5 (2). Hence a High Court in case of contempt committed within its territorial jurisdiction is competent to issue process to secure the attendance of the offender, wherever he may be residing. AIR 1945 All 1 (4) = 46 Cri LJ 272 = ILR (1944) All 665 (DB).

(3) In cases of contempt, a High Court acting under its inherent powers may send a special bailiff to arrest a person at a place within its general jurisdiction. ILR (1937) 1 Cal 345 (356) **

1962 (2) Cri LJ 118 (122) = ILR (1962) 1 All 221 (DB).

(4) Where a moffusil Court has no jurisdiction a party complaining of contempt has to make an application direct to the High Court instead of to the moffusil Court for making that Court to refer the matter to the High Court. AIR 1932 Cal 254 (255) = 33 Cri LJ 444 (DB).

(5) Where the Court whose contempt is alleged to have been committed finds, on an application made by the petitioner to that Court under Section 151, Civil P. C., that there was no contempt of that Court, it would be in very extreme and rare cases that the High Court would even entertain an application for contempt. AIR 1960 All 231 (236) = 1960 Cri LJ 442 = 1960 All LJ 247.

5. Manner of initiating proceedings.—

(1) As the proceedings taken by the Court in matters of contempt is a judicial proceeding and if the offence is not committed in the presence of the Court, it is started by means of an application supported by an affidavit. AIR 1929 Cal 115 (116) (DB) ** AIR 1958 Punj 141 (143) = ILR (1958) Punj 745 = 1958 Cri LJ 673.

(2) Application under Section 3 filed without complying with rules framed by the High Court under the Contempt of Courts Act, is void and without jurisdiction. AIR 1966 Mad 136 (139) = 1966 Cri LJ 421 = (1965) 2 Mad LJ 559 (DB).

(3) There is no hard and fast rule as to the time within which contempt matters have to be brought to the notice of the Court. The only requirement will be that matter must be brought to the notice of the Court as quickly as possible and if there is any inordinate delay, it must be properly explained. AIR 1959 Ker 266 (270) = 1959 Cri LJ 1075 = 1959 Ker LT 102 (DB) ** AIR 1967 All 394 (395) = 1967 Cri LJ 980 = ILR (1965) 2 All 790.

(4) Any delay in filing the affidavit in support of the application for proceedings in contempt should normally be regarded as fatal although in exceptional cases the delay may be overlooked. AIR 1952 Nag 34 (35) = ILR (1951) Nag 803.

(5) An applicant for proceedings in contempt must in his affidavit disclose the source of his information regarding the facts which he alleges to constitute the contempt or swear to them from his own knowledge. AIR 1952 Nag 259 (260) = ILR (1949) Nag 640 ** AIR 1951 Nag 26 (31) = ILR (1951) Nag 266 = 52 Cri LJ 452 (DB).

(6) The affidavit filed in support of an application to start proceedings must state the act alleged to constitute contempt in such a way as to show a prima facie case. AIR 1958 Punj 141 (143) = ILR (1958) Punj 745 = 1958 Cri LJ 673 **

Section 3 — Note 5 (contd.)

** AIR 1960 Pat 430 (446) = 1960 Cri LJ 1254 = 1960 BLJR 622 (FB).

(7) When the Court moves suo motu, the question of notice of motion or statement on affidavit is wholly redundant. AIR 1960 Pat 430 (446) = 1960 Cri LJ 1254 = 1960 BLJR 622 (FB).

(8) In case of application to the High Court for starting of contempt proceedings, the affidavit filed in support of the application should be sworn by some responsible officer, an affidavit of a clerk is not proper. AIR 1941 Pat 185 (187) = 20 Pat 306 = 42 Cri L Jour 225.

(9) Petition for issue of process for contempt made by Governor-in-Council with affidavit signed by Secretary is proper and within authority until contrary is shown. AIR 1933 Cal 118 (120) = 60 Cal 603 = 34 Cri L Jour 662 (DB).

(10) Even where the rules and practice of a High Court require the petitions for taking action for contempt to be signed by or on behalf of the persons presenting it, the Courts can issue a rule if in spite of absence of proper signature, the evidence shows prima facie that contempt has been committed. AIR 1933 Cal 118 (120) = 60 Cal 603 = 34 Cri LJ 662 (DB).

(11) The High Court can treat an application presented to a subordinate Court as one presented to itself and initiate proceedings for contempt. AIR 1932 Cal 254 (255) = 33 Cri LJ 444 (DB).

(12) There is no warrant for the practice of making the Chief Justice and Judges parties to an appeal against the decision of a High Court in a contempt matter. The title of such proceedings should be "In re . . . (the alleged contemner)." AIR 1961 SC 1367 (1369) = 1961 (2) Cri LJ 438 = (1962) 1 SCR 319.

(13) Once the proceedings get going, it quite clearly becomes a matter between contemner on the one hand, and the Court, of which the contempt is stated to have been committed, on the other. Therefore, on death of the private party initiating the proceeding, there is no need to call upon his legal representatives to pursue the proceedings. AIR 1968 Punj 217 (223, 228) = 1968 Cri LJ 775 = 69 Punj LR 673 (FB) ** ('64) 68 Cal WN 330 (DB).

(14) Normally where a party is alleged to have disobeyed an order of injunction made by Court of Law, it would not be expedient to initiate summary proceedings in contempt before the High Court. 1968 Cri LJ 107 (All).

6. Commencement of proceeding on report of subordinate Court.— (1) A subordinate Court has no jurisdiction under the Contempt of Courts Act to try an offence for contempt or punish the

offender therefor. AIR 1956 Pat 321 (324) = 1956 Cri LJ 1087 (DB).

(2) Every Judge and Magistrate should report any matter of contempt to the High Court to which he is subordinate. AIR 1952 Nag 34 (36) = ILR (1951) Nag 803 ** AIR 1956 Pat 321 (324) = 1956 Cri LJ 1087 (DB).

(3) It is the duty of Magistrates to bring to notice of Chief Court attempt made to bring improper influence on them in connection with magisterial work. AIR 1939 Oudh 180 (181) = 14 Luck 653 (DB).

(4) Where a contempt of Court is committed by a person addressing a communication to the Court with an intention to influence it in the trial of a case, the Court should take a serious view of the matter and should immediately report the case to the High Court for speedy and quick action. AIR 1952 All 86 (88) (DB).

(5) The report regarding the contempt of a subordinate Court can be made to the High Court either by the Court contemned or by a superior Court. The superior Court when the report is sent through it, can, instead of forwarding it direct to the High Court, hold a preliminary enquiry and give an opportunity to the accused to show cause. AIR 1956 All 258 (262) = ILR (1956) 1 All 656 = 1956 Cri LJ 679 (DB).

(6) A Judge or a Magistrate need not obtain the permission of the State Government to report to the High Court a contempt committed against him. AIR 1952 Nag 34 (36) = ILR (1951) Nag 803.

7. Commencement of proceeding suo motu.— (1) The High Court of its own motion can issue a rule calling upon a person to show cause why he should not be committed for contempt and in this respect its powers in relation to contempt of subordinate Courts are not different. AIR 1941 Pat 185 (188) = 20 Pat 306 = 42 Cri LJ 225 (DB).

(2) When the Court moves suo motu, the question of notice of motion or statement on affidavit is wholly redundant. AIR 1960 Pat 430 (446) = 1960 Cri LJ 1254 = 1960 BLJR 622 (FB) ** AIR 1966 Cal 411 (428) = 1966 Cri LJ 883 = 70 Cal WN 579 ** AIR 1961 J & K 76 (80) = 1961 (2) Cri LJ 766 (DB).

(3) When the Court acts suo motu and not on application, Rules framed by High Court do not strictly apply. AIR 1964 Cal 572 (583, 584) = 1964 (2) Cri LJ 660 = 69 Cal WN 82 (DB).

(4) Although it is the party who alleges that he has been damaged by the interference of the other party with the receiver appointed by Court that should move the Court for action being taken against that party for contempt, in some cases the Court could take action also on the application of the receiver or of its own accord. AIR 1932 Cal 254 (255) = 33 Cri LJ 444 (DB).

Section 3 (contd.)**8. Proceedings against State or Union.—**

(1) Contempt proceeding by its nature is a proceeding in personam. AIR 1956 Manipur 44 (48) = 1956 Cri LJ 1411.

(2) No doubt the State Government not being a natural person cannot be ordered to be detained in civil prison, on the analogy of Corporations for which special provision is made in O. 39, R. 5, but beyond that, both when a decree for a permanent injunction is executed and when an order of temporary injunction is enforced the liability of the State Government to be proceeded against appears to be clear. AIR 1961 SC 221 (228) = (1961) 1 SCR 728 ** AIR 1969 Pat 72 (76) (DB).

(3) A person seeking contempt proceedings against an officer of a State or the Union on the ground of disobedience to an order issued to the State or the Union must obtain leave of the Court concerned to proceed against the particular officer after satisfying the Court that the officer was aware of the order and was also under a duty to carry it out or to see that it was not disobeyed. AIR 1952 Cal 919 (921) = ILR (1953) 1 Cal 355 = 1953 Cri LJ 136. (Per Chakravarti C. J.; Mukherji J. contra.)

(4) In the proceedings against Government officer for contempt State is not a necessary party. AIR 1956 Manipur 44 (48) = 1956 Cri LJ 1411.

9. Party entitled to make application.—

(1) Proceedings in contempt must be allowed to be initiated by a motion of private parties. AIR 1952 Cal 919 (926) = ILR (1953) 1 Cal 355 = 1953 Cri LJ 136.

(2) Person other than the person directly aggrieved can also move the Court for taking contempt proceedings. 1967 All Cri R 488 = 1967 All WR (HC) 776.

(3) Even a complainant in a pending case can move the High Court for taking action against the author of an article on that case published during its pendency. AIR 1952 Kutch 74 (75) = 1952 Cri LJ 1482.

(4) Where the contempt consists of interference with the Receiver appointed by the Court, it is the plaintiff in whose suit the receiver was appointed rather than the receiver who should initiate proceedings. AIR 1935 Cal 684 (686) = 37 Cri LJ 65 (DB).

(5) Where the official receiver is forcibly obstructed from taking possession by the defendant and he considers such obstruction to be an interference with justice it is for him and not the plaintiff to institute proceedings for contempt. (1937) 41 Cal WN 1325 (1326).

(6) In Bihar, the Legal Remembrancer is the Chief Law Officer empowered to make a petition for contempt of Court on behalf of Government and to instruct the Advocate-General to carry on proceedings

in the High Court. AIR 1941 Pat 185 (188) = 20 Pat 306 = 42 Cri LJ 225 (DB).

(7) A contempt which consists in a libellous attack on Court can be brought to the notice in any manner and therefore the objection that the complainant upon whose complaint the proceeding in question was initiated had no right to complain or appear inasmuch as he had only an indirect interest in the matter is of no force especially when on the direction of the Court the Government advocate also appears on behalf of the Government to support the complaint. AIR 1926 All 623 (626) = 48 All 711 (SB).

10. Notice of motion.—(1) The verification of the statement or charge is necessary as a condition precedent to the issue of a rule to the offender to show cause why he should not be punished for alleged contempt. AIR 1958 Punj 141 (143) = ILR (1958) Punj 745 = 1958 Cri LJ 673.

(2) When the Court moves suo motu, the question of notice of motion or statement on affidavit is wholly redundant. AIR 1960 Pat 430 (446) = 1960 Cri LJ 1254 = 1960 BLJR 622 (FB).

(3) Where doubtful questions of fact are involved the High Court may refuse to issue notice to the person charged with contempt, before being satisfied by affidavit that there was reasonable ground for thinking that contempt had been committed. AIR 1945 All 67 (68) = ILR (1945) All 7 = 46 Cri LJ 458 (DB).

(4) In an application for committal for contempt, notice of motion should be personally served on the party alleged to have committed contempt. ILR (1946) 2 Cal 499 (503) ** AIR 1932 Bom 638 (639). (Service upon his attorneys not sufficient.) ** (1951) 88 Cal LJ 70.

[See also (1964) 68 Cal WN 148 (DB).]

(5) Proceedings for committal for contempt are in the nature of quasi-criminal proceedings and in such proceedings established practice must be strictly followed, not only in substance but also in form. (1951) 88 Cal LJ 70.

(6) Notice of the motion for contempt of Court must state the precise act complained of inasmuch as the proceeding is of a criminal nature. AIR 1934 Bom 452 (454) = 59 Bom 10 ** AIR 1959 Pat 262 (265, 266) = 1959 Cri LJ 754 = 1958 BLJR 802 (DB) ** (1951) 88 Cal LJ 70.

(7) The deeds or words which are said to constitute contempt must be set out precisely and in detail in the notice or Rule for contempt. AIR 1958 Cal 474 (480) = 1958 Cri LJ 1162.

(8) Where a contempt is committed by breach of a Court's order the precise breach or breaches of order complained of must be set out in the notice of motion itself. AIR 1932 Bom 638 (640).

(9) Under the practice prevalent in India, a notice to show cause in a contempt

Section 3 — Note 10 (contd.)

proceeding which is in substance sufficient to apprise the accused of the charge he has to meet with is a valid notice and it cannot be condemned on the ground of its non-compliance with any technical form. AIR 1957 Pat 528 (530) = 36 Pat 955 = 1957 Cri LJ 1156 (DB).

(10) Wherever the grounds indicated in the notice of motion clearly indicate the charge of contempt, failure to give in the notice of motion minute particulars as to the contempt complained of is not a fatal objection to the application for contempt. ILR (1946) 2 Cal 499 (506).

(11) The procedure of issuing a notice to show cause in the first instance containing only extracts of news items as amounting prima facie to contempt and subsequently issuing another notice containing the entire news items amounting to contempt, is not irregular provided such procedure does not cause any prejudice. AIR 1952 Orissa 318 (326) = ILR (1952) Cut 1 = 1952 Cr LJ 1605.

11. Scope of enquiry.— (1) Proceedings for contempt are of summary nature and so a hotly contested question of fact cannot be decided. AIR 1944 Lah 196 (201) = 46 Cri LJ 174 (SB) ** AIR 1951 Pat 443 (444) = 52 Cri LJ 558 (DB) ** AIR 1967 Mad 162 (164) = 1967 Cri LJ 551 = (1966) 2 Mad LJ 219 (DB) ** AIR 1961 Punj 18 (20) = 1961 (1) Cri LJ 146 = 62 Punj LR 752.

(2) A party guilty of contempt cannot escape the consequences of his act by merely traversing the allegations even though on affidavit and thus making the matter a hotly contested issue of fact. Facts in contempt cases are generally admitted or are established beyond controversy. Of course there is no hard and fast rule about it. (1947) 48 Cri LJ 757 (763) (DB) (Lah).

(3) The Court in contempt proceedings based on the ground of disobedience to judicial orders will not enquire into the merits of the case to ascertain whether the order is erroneous. AIR 1958 Punj 180 (183) = ILR (1958) Punj 580 = 1958 Cri LJ 685 ** (1968) 1 Andh WR 382 = (1968) Mad LJ (Cri) 260.

(4) In practice the opposite parties, namely the parties charged with contempt cannot be called upon to answer to anything which is not set out specifically in the grounds used before the Court at the time the Rule was issued. AIR 1932 Cal 255 (257) = 33 Cri LJ 369 (DB).

(5) The nature of the proceedings for contempt is commonly treated as of criminal aspect, even when they arise in civil actions. Freest opportunity should always be given to the respondent to present his defence. AIR 1959 Punj 632 (636) = 1959 Cri LJ 1469.

(6) Though contempt jurisdiction is considered to be summary jurisdiction,

Courts are not barred from holding a detailed enquiry, when necessary. (1967) All Cri R 488 = 1967 All WR (HC) 776.

12. Defences in contempt proceedings.—

(1) A person charged with committing contempt of Court by disobeying its order is entitled to raise any technical objection which might stand in his favour on the question as to whether there had been actual disobedience of the order of the Court. AIR 1953 Pat 99 (99, 100) = 1953 Cri LJ 816 (DB).

(2) Rule that party in contempt cannot be heard is inapplicable when order for the breach of which contempt is alleged is challenged on ground of want of jurisdiction. AIR 1931 Bom 402 (402) = 55 Bom 803 (DB) ** ILR (1968) 1 Ker 384 (541) = 1968 Ker LJ 197 (FB) ** (1966) 68 Bom LR 453 = 1966 Mah LJ 693.

(3) It is no defence for a charge of contempt by interference with the possession of Receiver appointed by the Court, to state that the order was erroneous, unjustified or even contrary to law, so long as the Court making the order acted within jurisdiction. AIR 1958 Punj 471 (476) = ILR (1958) Punj 1822 = 1958 Cri LJ 1559.

(4) A disrespectful conduct in Court if it amounts to a contempt cannot be defended on the ground that the Court was acting without jurisdiction in the proceedings during which the contempt was committed. AIR 1956 All 258 (267) = ILR (1956) 1 All 656 = 1956 Cri LJ 679 (DB).

(5) Violation of the order of injunction cannot be excused on the ground that though the Court acted within its jurisdiction, the order that is passed was erroneous. (1968) 1 Andh WR 382 = (1968) Mad LJ (Cri.) 260 (DB).

(6) Innocence of the contemner in doing the act which amounts to contempt is no defence to the charge of contempt. It would be relevant only for determining the punishment. AIR 1945 Nag 33 (47) = ILR (1945) Nag 74 (DB) ** AIR 1962 SC 1172 (1179) = 1962 (2) Cri LJ 262 = 1962 Supp (2) SCR 838. (AIR 1959 Punj 182. Affirmed.) ** 1965 Ker LT 871 = 1965 Ker LJ 882 (DB) ** 1964 All WR (HC) 504.

(7) It is no defence, to a charge of contempt that the offensive article never reached the eyes of the Court, or that the Court was not prevented from performing its duties fairly and properly or that they were published without intent to injure the parties or interfere with the administration of justice. (1961) 2 Cri LJ 104 (106) = 1960 Ker LT 792 (DB) ** (1965) 2 Ker LR 124 = 1965 Ker LT 871 (DB).

(8) In a proceeding for contempt, the truth of the imputations is no defence at all. AIR 1966 Andh Pra 167 (173) = 1966 Cri LJ 642 = (1966) 1 Andh WR 164 (DB) ** 1968 MPLJ 725 = 1968 Jab.

Section 3 — Note 12 (contd.)

LJ 678 (DB) ** AIR 1965 Ker 49 (49, 50) = 1965 (1) Cri LJ 176 = 1964 Ker LT 429 (DB) ** AIR 1961 J & K 76 (80) = (1961) (2) Cri LJ 766 (DB).

(9) Pleas of justification or privilege are strictly speaking not available to contemner except perhaps as matters of tending to aggravate or mitigate offence of contempt. AIR 1966 All 588 (589) = 1966 Cri LJ 1361 ** AIR 1963 Bom 254 (262) = 1963 (2) Cri LJ 603 = 65 Bom LR 131 (DB).

(10) The excuse that a person may be found fault with by the higher authorities or that he should consult the higher authorities before complying with the orders of Court can be of no avail when he is asked to show cause why he should not be committed for contempt. (1965) 2 Andh WR 483 = (1966) 1 Andh LT 158 (DB) ** AIR 1967 Andh Pra 19 (21) = 1967 Cri LJ 19 = (1965) 2 Andh WR 483 (DB).

(11) In case of prohibitive orders, the fact that they were not served on the officers concerned is not a defence to their liability for contempt of Court, if they came to know of that order from a source whose authenticity they cannot doubt. (1967) 1 Andh WR 129 (DB).

(12) The fact that the offending publication was of the report as given by the Police Officer himself and the publication itself showed this, did not absolve the publishers and the editor of the publication of the responsibility for contempt, when the report amounted to contempt of Court. AIR 1959 Ker 266 (272, 273) = 1959 Cri LJ 1075 = 1959 Ker LT 102 (DB).

(13) Person charged for committing contempt by acting in contravention of prohibitory order issued by High Court, cannot take plea that he was not party to that proceeding or that the order was not received by the concerned person. (1968) 2 Andh WR 208 = 1968 Mad LJ (Cri) 531 (DB).

(14) A Police Officer cannot escape the consequences of his acts of contempt by setting up a plea under Section 43, Police Act. Nor would Section 23 of that Act avail him against his deliberate unlawful acts of contempt. AIR 1958 Punj 471 (478) = ILR (1958) Punj 1822 = 1958 Cri LJ 1529.

(15) The immunity granted to the Judicial Officers by the Judicial Officers Protection Act of 1850 cannot be used as a shield in proceedings for contempt of Courts. AIR 1958 Punj 471 (478) = ILR (1958) Punj 1822 = 1958 Cri LJ 1529.

(16) The sooner the misconception is removed from the mind of those taking defence of freedom of press that they are not accountable to the law for what they edit, write and print, the better it will be for society. 1966 Cri LJ 214 (217) = 1965 MPLJ 844 (DB).

13. Evidence and mode of proof.— (1) In proceedings for contempt, a Court should not act on inferences and surmises, but must give a finding that the persons charged with contempt have been proved to have committed the contempt. AIR 1952 Mad 180 (180) = 1952 Cri LJ 389.

(2) In the case of breach of an order of the Court if it is done by a private person, apparently to gain some unlawful advantage, the presumption would be that infringement or disobedience was wilful, but in the case of an official, if he commits a certain disobedience, there would be a presumption in his favour, that he had in the ordinary circumstances, done it bona fide and unintentionally. The presumption is not irrebuttable. AIR 1960 All 231 (234) = 1960 Cri LJ 442 = 1960 All LJ 247 (DB).

(3) In the absence of evidence showing the connection with or responsibility of a managing director in the publication of a news item which amounts to contempt, such managing director of a news agency is not ipso facto and as a matter of law, liable in contempt for such news. AIR 1952 Orissa 318 (324) = ILR (1952) Cut 1 = 1952 Cri LJ 1605.

(4) In proceedings for contempt against newspaper editors for comments on pending proceedings, the prosecution need not affirmatively establish that the offender had knowledge of pendency of proceedings. AIR 1955 Orissa 169 (171) = ILR (1955) Cut 323 = 1955 Cri LJ 1514 (DB). ** AIR 1966 Cal 411 (420) = 1966 Cri LJ 883 = 70 Cal WN 579.

(5) Contempt proceedings even if they are judicial proceedings within the meaning of Section 1 of the Evidence Act have always been treated as falling outside the scope of that section and hence it is not necessary to prove a contempt in the manner provided for proving any fact by that Act. In those proceedings the Court is competent to adopt its own procedure for deriving satisfaction on the question that a contempt has been committed. AIR 1955 All 638 (640) = ILR (1956) 2 All 470 = 1955 Cri LJ 1451 (DB) ** AIR 1960 Pat 430 (436, 437) = 1960 Cri LJ 1254 = 1960 BLJR 622 (FB).

(6) In cases of criminal contempt the facts can be proved by affidavit. AIR 1955 All 638 (640) = ILR (1956) 2 All 470 = 1955 Cri LJ 1451 (DB).

(7) In the contempt proceedings, if an alleged contemner does not deny on affidavit, an allegation made by the applicant, he runs the risk of the applicant's statement being accepted and acted upon. AIR 1951 Nag 26 (32) = ILR (1951) Nag 266 = 52 Cri LJ 452 (DB).

(8) Generally speaking it is not necessary to take oral evidence in Court in contempt cases. The evidence in such

Section 3 — Note 13 (contd.)

cases usually consists of sworn affidavits. (1947) 48 Cri LJ 757 (763) (Lah).

(9) Where a contemner wishes to defend himself he is to be given every opportunity having regard to the nature of summary proceedings in the trial of contempt matters, but it is for the Court to decide whether the documents produced had the tendency or were calculated to interfere with the course of justice by embarrassing the trial Judge in the trial of the cause and any witness outside the Court need not be examined to give opinion on the matter. AIR 1968 Punj 217 (236) = 1968 Cri LJ 775 = 69 Pun LR 673 (FB).

(10) For conviction for contempt of Court arising from scandalising the Court, it is not necessary that 'clear and present danger' to the orderly and impartial administration of justice has to be made out. ILR (1968) 1 Ker 384 (519-20) = 1968 Ker LJ 197 (FB).

(11) An affidavit filed by the complainant in contempt of Courts proceedings attributing knowledge of pendency of proceedings to alleged contemner which rests on information and belief without any particulars in regard to the source and basis of that information is not a legal evidence of the fact that contemner had knowledge of the case. AIR 1958 Mad 558 (560) = ILR (1958) Mad 851 = 1958 Cri LJ 1421 ** AIR 1959 Cal 106 (113) = 1959 Cri LJ 172 (DB) ** AIR 1958 Mad 558 (561) = 1958 Cri LJ 1421 = (1958) 2 Mad LJ 425 (DB).

(12) Where the contempt is obvious from the documents produced the Court can proceed against the person guilty of the contempt even without first obtaining an affidavit from same person. AIR 1943 All 67 (68) = ILR (1942) All 942.

(13) Where a contempt is committed in presence of the Court, it is competent for the Court to punish the offender on the evidence of what it has seen and heard, without any trial or issue. AIR 1958 Punj 141 (143) = ILR (1958) Punj 745 = 1958 Cri LJ 673.

(14) If a contumacious speech is denied by the contemner, Courts can always take evidence and on proof of the speech deal with the contemner according to law. AIR 1966 Cal 411 (423) = 1966 Cri LJ 883 = 70 Cal WN 579.

(15) The report of the Court stands on the same footing as an affidavit by it and would be evidence to prove its contents. AIR 1956 All 258 (263) = ILR (1956) 1 All 656 = 1956 Cri LJ 679 (DB).

[But see AIR 1929 Cal 115 (116) (DB).]

(16) There is no prescribed or settled practice in Orissa High Court to mark documents as exhibits in contempt cases. AIR 1953 Orissa 266 (268) = ILR (1952) Cut 467 = 1953 Cri LJ 1578.

(17) An alleged contemner not being exactly an accused person can file an affidavit or make a statement on oath. AIR 1951 Pat 443 (444) = 52 Cri LJ 558 (DB) ** AIR 1943 Lah 329 (346) = ILR (1944) Lah 111 = 45 Cri LJ 445 (FB).

(18) Although there is no bar to a contemner giving evidence on his own behalf by an affidavit, his not doing so and remaining silent cannot be treated as supplying the prima facie evidence against him which is absent in the case. AIR 1952 Orissa 318 (324) = ILR (1952) Cut 1 = 1952 Cri LJ 1605.

(19) A person against whom a charge of contempt of Court has been levelled is neither an accused within the meaning of Section 5 of the Oaths Act nor a person accused of an offence within the meaning of Article 20 (3) of the Constitution of India. Hence the cross-examination of him upon an affidavit filed by him voluntarily is not barred. AIR 1954 All 523 (537) = ILR (1954) 1 All 394 = 1954 Cri LJ 1141 (FB).

(20) Where there is any reasonable doubt in a case of contempt of Court the person charged with the contempt is entitled to the benefit of that doubt. AIR 1944 Lah 196 (202) = 46 Cri LJ 174 (SB) ** AIR 1957 All 37 (45) = 1957 Cri LJ 18 (DB) ** AIR 1955 All 638 (647) = ILR (1956) 2 All 470 = 1955 Cri LJ 1451 (DB) ** AIR 1968 SC 1348 (1351) = 1968 Cri LJ 1514 = (1969) 1 SCJ 11 ** AIR 1968 Punj 217 (232) = 1968 Cri LJ 775 = 69 Pun LR 673 (FB) ** AIR 1969 Delhi 201 (212) = 1969 Cri LJ 884 (FB) ** AIR 1969 Delhi 137 (140) = 1969 Cri LJ 599 (DB) ** 1968 Cri LJ 671 (673) = 72 Cal WN 927 ** AIR 1966 All 588 (589) = 1966 Cri LJ 1361 = 1966 All LJ 547 ** (1964) 68 Cal WN 330 (DB) ** AIR 1961 Punj 18 (20) = 1961 (1) Cri LJ 146 = 62 Punj LR 752 ** AIR 1960 All 231 (236) = 1960 Cri LJ 442 = 1960 All LJ 247 (DB) ** AIR 1960 Orissa 132 (136) = 1960 Cri LJ 1120 = 26 Cut LT 116 ** AIR 1959 Punj 632 (636) = 1959 Cri LJ 1469.

(21) In the matter of a prohibitory order issued by a Court, it is not necessary that the order itself should have been served on the party against whom it has been granted in order to justify committal for breach of such an order, provided it is proved that the person complained against had notice of the order aliunde. AIR 1967 All 93 (98) = 1967 Cri LJ 291.

14. Exercise of power is discretionary.

— (1) The grant of relief in a case of contempt of Court is purely discretionary. AIR 1957 All 37 (47) = 1957 Cri LJ 18 (DB) ** AIR 1945 PC 147 (150) = 72 Ind App 226 = ILR (1945) Kar (PC) 355 = ILR (1945) Bom 959 = 47 Cri LJ 61 ** AIR 1957 Hyd 17 (17) = ILR

Section 3 — Note 14 (contd.)

(1956) Hyd 468 (DB) ** AIR 1951 Cal 507 (509).

(2) High Court will not exercise summary jurisdiction except in a case beyond reasonable doubt. AIR 1967 Andh Pra 299 (308) = 1967 Cri LJ 1470 = ILR (1968) Andh Pra 42 (DB).

(3) Although the Court has issued a rule in a case of contempt it can examine the grounds on which it was issued and discharge the accused when those grounds are found to be insufficient. AIR 1932 Cal 255 (257) = 33 Cri LJ 369.

(4) The fact that in a case of contempt committed in its face the Court before it calls upon the contemner to show cause comes to a decision that a contempt has been committed does not disqualify the Court from adjudicating upon the matter when cause is shown by the contemner. AIR 1932 Lah 502 (503) = 33 Cri LJ 675 (FB).

(5) The jurisdiction to commit for contempt is an extraordinary one and should be sparingly and circumspectly used. AIR 1956 Andhra 84 (86) = ILR (1955) Andhra 545 = 1956 Cri LJ 475 (DB) ** AIR 1943 Lah 329 (337) = ILR (1944) Lah 111 = 45 Cri LJ 445 (FB) ** AIR 1956 Mad 621 (626) = ILR (1956) Mad 1239 (DB) ** AIR 1954 All 308 (309) = ILR (1954) 2 All 278 = 1954 Cri LJ 645 (DB) ** AIR 1965 SC 745 (791) = (1965) 1 SCR 413 ** AIR 1969 Delhi 6 (6) ** AIR 1969 Delhi 304 (308) ** AIR 1969 Orissa 117 (128) = 1969 Cri LJ 763 = ILR (1968) Cut 437 (DB) ** (1968) 2 Andh WR 208 = 1968 Mad LJ (Cri) 531 (DB) ** 1968 Cri LJ 248 (250) = 71 Cal WN 771 (DB) ** AIR 1968 Ker 301 (307) = 1968 Cri LJ 1424 = 1968 Ker LT 157 (DB) ** AIR 1967 Andh Pra 219 (225, 226) = 1967 Cri LJ 984 = ILR (1967) Andh Pra 487 (DB) ** 1963 (1) Cri LJ 820 (823) = 1963 MPLJ 148 (DB).

(6) Power to proceed against persons for contempt is a shield given to Courts for protecting their authority and making the same effective. It is a protective power necessary for the proper functioning of Court and due administration of justice. 1969 Ker LT 513 (517) = 1969 Ker LJ 453 (DB).

(7) Proceedings by way of contempt being summary, and the Court being both accuser and judge of accusation, such proceedings have to be initiated in exceptional cases where there is a serious interference with proceedings of Court. The jurisdiction for committing for contempt being practically arbitrary and unlimited, must be most jealously and carefully watched and exercised with greatest reluctance and greatest anxiety on the part of judges. AIR 1969 Delhi 291 (293, 294) (DB).

(8) In action by way of contempt, Court is both the accuser and judge of

the accusation. It behoves the Court to act with due circumspection — Court must always be jealous in vindicating its dignity and impartiality while at the same time, it must exercise its power with restraint and care — Litigant may have a grievance in a matter decided by Courts, but that cannot justify use of intemperate or improper language by aggrieved party in reference to Courts. AIR 1969 Delhi 169 (169, 170) (FB).

(9) A Court will not exercise its extraordinary power of committal upon light occasions and where the ends of justice do not require its use. AIR 1956 Sau 102 (104) = 1956 Cri LJ 1355 (DB) ** AIR 1951 Punj 49 (52) = ILR (1951) Punj 362 = 52 Cri LJ 950 (DB) ** AIR 1950 All 285 (286) = ILR (1950) All 674 = 51 Cri LJ 595 ** AIR 1941 Pat 185 (192) = 20 Pat 306 = 42 Cri LJ 225 (DB) ** AIR 1969 Delhi 137 (141) = 1969 Cri LJ 599 (DB) ** AIR 1969 Delhi 6 (6) ** 1968 Cri LJ 107 (All) ** 1961 (2) Cri LJ 104 (109) (DB) (Ker) ** AIR 1960 All 231 (234) = 1960 Cri LJ 442 = 1960 All LJ 247 (DB) ** AIR 1958 Cal 474 (482) = 1958 Cri LJ 1162 = 62 Cal WN 595 ** ILR (1955) Mys 524 (DB).

(10) The remedy of committal for contempt should be applied with the greatest reluctance and anxiety on the part of the Judges. AIR 1953 Orissa 33 (38, 39) = 1953 Cri LJ 3490 (DB).

(11) In order to justify the exercise of the jurisdiction in contempt the interference with the due course of justice must be a substantial interference. AIR 1953 SC 185 (187) = 1953 SCR 581 = ILR (1953) 2 All 904 = 1953 Cri LJ 911 ** AIR 1950 All 556 (562) = ILR (1952) 1 All 131 = 52 Cri LJ 1062 (FB) ** AIR 1950 Lah 84 (89) = Pak LR (1950) Lah 75 = 51 Cri LJ 801 (SB) ** 1968 Cri LJ 107 (108, 109) (All) ** AIR 1968 Ker 301 (307) = 1968 Cri LJ 1424 = 1968 Ker LT 157 (DB) ** AIR 1967 Ker 177 (180) = 1966 Ker LT 1157 (DB) ** (1966) 2 Mys LJ 288 = (1966) 7 Law Rep 326 (DB) ** AIR 1965 All 606 (608) = 1965 (2) Cri LJ 707 = 1964 All WR (HC) 724 ** AIR 1963 Madh Pra 61 (70, 71) = 1963 (1) Cri LJ 187 = 1962 MPLJ 953 ** 1963 (2) Cri LJ 219 (222) = 1962 MPLJ 1121 (DB) ** 1961 (2) Cri LJ 104 (109) (DB) (Ker) ** AIR 1958 Cal 474 (482) = 1958 Cri LJ 1162 = 62 Cal WN 595 (DB).

(12) Interference with course of justice — Likelihood and not actual interference is essential. AIR 1969 Delhi 201 (210) (FB).

(13) Criticism of police investigation — Giving opinion in newspaper as to who is real culprit — Amounts to contempt. 1969 Ker LJ 453 (463) = 1969 Ker LT 513 (DB).

(14) Courts should be reluctant to take notice of technical contempts. AIR 1954 All 308 (309) = ILR (1954) 2 All 278 =

Section 3 — Note 14 (contd.)

1954 Cri LJ 645 (DB) ** AIR 1950 All 556 (562) = ILR (1952) 1 All 131 = 52 Cri LJ 1062 (FB) ** AIR 1967 Andh Pra 299 (309) = 1967 Cri LJ 1470 = ILR (1968) Andh Pra 42 (DB) ** 1961 (2) Cri LJ 104 (109) (DB) (Ker).

(15) The power to commit for contempt should be used only when contempt is deliberate. AIR 1939 Mad 257 (260) = ILR (1939) Mad 466 = 40 Cri LJ 533 (SB) ** AIR 1953 All 266 (270) = ILR (1951) 1 All 80 = 1953 Cri LJ 630 (DB) ** AIR 1969 Delhi 137 (140) = 1969 Cri LJ 599 (DB) ** 1968 Cri LJ 107 (108, 109) (All) ** 1966 All WR (HC) 759 = 1966 All Cri R 477 ** 1964 All WR (HC) 450 (452) ** 1963 (2) Cri LJ 219 (223) = 1963 MPLJ 1121 (DB) ** AIR 1959 Pat 262 (266) = 1959 Cri LJ 754 = 1958 BLJR 802 (DB).

(16) Interference with due course of justice in pending proceedings — Case in question referred to in public speech made by P — P explicitly declaring that that case was sub judice and he would refrain from any discussion about it — In view of cautionary trends of speech, jurisdiction relating to contempt of Court held could not be invoked. AIR 1969 Mad 378 (380) (DB).

(17) Benefit of doubt — Publication of letter in a pending case marked by Court only for identification — Letter neither proved, nor admitted in evidence nor read out in Court — Held that in view of principle that action for contempt should be taken with caution and deliberation, it was proper to ignore publication of full text of letter in newspaper in peculiar facts of case and benefit of doubt given to accused. AIR 1969 Delhi 201 (212) (FB).

(18) The High Court will not exercise its jurisdiction in contempt upon a mere question of propriety. AIR 1957 All 37 (46) = 1957 Cri LJ 18 (DB) ** AIR 1953 SC 185 (187) = 1953 SCR 581 = ILR (1953) 2 All 904 = 1953 Cri LJ 911 ** AIR 1945 PC 134 (136) = 72 Ind App 189 ** AIR 1949 Lah 131 (154) = Pak LR (1949) Lah 215 = 50 Cri LJ 598 (FB) ** AIR 1955 Cal 368 (368) = 1955 Cri LJ 943 (DB) ** 1968 Cri LJ 248 (251) = 71 Cal WN 771 (DB) ** AIR 1967 Ker 177 (180) = 1967 Cri LJ 1147 = 1967 Ker LT 59 (DB).

(19) The matter of dealing with the contempt is totally within the jurisdiction of the High Court and is not the right of any party in any sense. Further, this jurisdiction must be very sparingly used only where the interests of justice imperatively require its use, and even then only to the limit strictly called for by such interests: any impression that the exercise of such jurisdiction or the power to punish for contempt, has been made in a somewhat hasty or dominating

mode without carefully considering the consequence involved to parties may be even more unfavourable to the administration of justice, than permitting such acts of contempt to go unnoticed. (1969) Mad LW 25 (28) (DB) (Cri).

(20) The jurisdiction to commit for contempt should not be used to vindicate any personal interest of the Judge but only the general administration of law which is the public concern. AIR 1956 Andhra 84 (86) = ILR (1955) Andhra 545 = 1956 Cri LJ 475 (DB) ** AIR 1950 All 285 (286) = ILR (1950) All 674 = 51 Cri LJ 595 ** ILR (1968) 1 Ker 384 (403) = 1968 Ker LJ 197 (FB) ** 1968 Cri LJ 248 (251) = 71 Cal WN 771 (DB) ** 1968 MPLJ 725 = 1968 Jab LJ 678 (DB) ** AIR 1967 Andh Pra 299 (308) = 1967 Cri LJ 1470 = ILR (1968) Andh Pra 42 (DB) ** AIR 1961 J and K 76 (81) = 1961 (2) Cri LJ 766 (DB) ** AIR 1959 Orissa 89 (93) = 1959 Cri LJ 626 = ILR (1958) Cut 631 (DB).

(21) Proceedings by way of contempt of Court should not be used as a 'legal thumbscrew' by a party against his opponent for enforcement of his claim. AIR 1970 Mad 14 (16, 17) (DB).

(22) Ordinarily, in the case of civil contempt, the Courts are reluctant to interfere unless the disobedience to the Court's order issued for the benefit of the other party, is wilful. AIR 1968 Punj 180 (183) = ILR (1958) Punj 580 = 1958 Cri LJ 685 ** AIR 1969 Delhi 6 (6). (Ground that opponent raised incorrect or even false plea is insufficient to initiate contempt proceeding.)

(23) An application for contempt made by a party when it is not made for a genuine purpose of vindicating cause of jeopardised justice but is made for the ulterior purpose of parading a fancied grievance in order to secure the punishment of the other party must be dismissed. AIR 1957 All 37 (47) = 1957 Cri LJ 18 ** 1968 Cri LJ 107 (108, 109) (All) ** AIR 1967 Andh Pra 219 (227) = 1967 Cri LJ 984 = ILR (1967) Andh Pra 487 (DB) ** AIR 1967 Ker 177 (181) = 1967 Cri LJ 1147 = 1967 Ker LT 59 (DB).

(24) Power of High Court to punish contempts can be invoked only when facts ex facie support such proceeding and not for enforcement of decretal rights between parties. AIR 1966 Mad 21 (22) = 1966 Cri LJ 35 = (1965) 2 Mad LJ 162 (DB).

(25) The Court must take into consideration the fact that there is another remedy available while exercising its discretion to commit or not to commit a person for contempt of Court. AIR 1945 PC 147 (150) = 72 Ind App 226 = 47 Cri LJ 61 = ILR (1945) Kar (PC) 355 = ILR (1945) Bom 959 ** AIR 1958 Cal

Section 3 — Note 14 (contd.)

474 (482) = 1958 Cri LJ 1162 ** 1968 Cri LJ 430 (431) (Punj).

(26) A party guilty of disobedience of an interim injunction order can be punished under Order 39, Rule 2-A (Allahabad) of the Civil Procedure Code and also under the Contempt of Courts Act. It is however not necessary to award separate punishment. 1964 All WR 127 (128).

(27) Where the alleged contempt is some form of physical violence or obstruction which could be punished as some form of offence by the criminal Courts it should be allowed to be dealt with there rather than be taken to the High Court under proceedings for contempt. (1937) 41 Cal WN 1325 (1326) ** AIR 1926 Cal 701 (703) = 53 Cal 401 (DB).

(28) Where the circumstances require it, Courts should not hesitate to exercise the powers conferred by the Act. AIR 1954 Pat 203 (208) = 32 Pat 1069 = 1954 Cri LJ 533 (DB) ** AIR 1937 Bom 305 (307) = 38 Cri LJ 942 ** (1966) 68 Bom LR 453 = 1966 Mah LJ 693.

(29) The High Court must take a serious view where responsible public officers act in a manner so as to obstruct the course of justice or prevent the implementation of the orders of the Court. AIR 1958 Punj 471 (476) = ILR (1958) Punj 1822 = 1958 Cri LJ 1529.

(30) The fact that the contemner, a Government servant, could be departmentally punished for the contempt is no reason why the High Court would not take action against him in the exercise of its jurisdiction in contempt. AIR 1952 All 56 (58) = ILR (1953) 2 All 332 = 1952 Cri LJ 223.

(31) Where the person directed by a subordinate Court to do a particular thing in a certain time disobeys the order the High Court in proceeding in contempt against that person to enforce the order does not exercise its discretion wrongly. AIR 1945 PC 147 (150) = 72 Ind App 226 = ILR (1945) Kar (PC) 355 = ILR (1945) Bom 959 = 47 Cri LJ 61. (AIR 1942 Bom 154, Affirmed.)

(32) Where a contempt could be sufficiently punished by some other tribunal the High Court should not exercise its summary jurisdiction to punish the contempt. AIR 1943 Nag 334 (335) = 45 Cri LJ 407.

(33) Merely because the party who suffers losses as a result of an act which amounts to a deliberate contempt has a remedy to recover those losses the contempt should not be left unpunished. AIR 1953 All 266 (270) = ILR (1951) 1 All 80 = 1953 Cri LJ 630 (DB).

(34) A person who commits contempt of Court by obstructing the course of justice cannot escape punishment by interfering with the contempt proceedings

by winning over the complainant. AIR 1955 All 638 (646) = ILR (1956) 2 All 470 = 1955 Cri LJ 1451 (DB).

(35) Unless delay in making an application for contempt is shown to be unavoidable the opposite party ought not to be punished on such application. AIR 1933 Cal 118 (122) = 60 Cal 603 = 34 Cri LJ 662 (DB).

(36) The Court's power to punish contempts carries with it the power to pardon contempts in suitable cases. AIR 1951 Cal 507 (509) ** 1968 Cri LJ 248 (252) = 71 Cal WN 771 (DB).

(37) The law of contempt should not be so strained as to materially affect the freedom of speech and the press guaranteed by Article 19 (1) (a) of the Constitution. AIR 1954 Orissa 149 (160) = 1954 Cri LJ 926 (DB) ** AIR 1957 All 37 (43) = 1957 Cri LJ 18.

(38) A party who disobeys the order of the Court is in contempt. If the disobedience of the order is such that, so long as it continues, it impedes the course of justice in the cause, by making it difficult for the Court to ascertain the truth or to enforce the orders it may make, then the Court may in its discretion refuse to hear him until the impediment is removed or good reason shown why it should not be removed. 1962 Ker LT 354 = 1962 Ker LJ 273.

(39) Contempt of Court by one person — Another person taking entire responsibility for offence and expressing unqualified regrets — Is no ground for absolving former. AIR 1969 Delhi 201 (205) (FB).

(40) Complaint for defamation against printer and publisher of newspaper — Accused publishing in their newspaper Court proceedings in such manner as to hamper fair trial of complaint by poisoning public mind against complainant — Accused held were guilty of contempt of Court — Ignorance of law or inability of legal advisers to properly guide their clients though not a mitigating circumstance Court in the circumstances of case gave the contemnors a severe warning. AIR 1969 Delhi 201 (213) (FB).

15. Contempt proceedings and Criminal P. C. — (1) The Code of Criminal Procedure does not apply to the trial of cases under the Contempt of Courts Act. AIR 1954 SC 186 (190) = 1954 SCR 454 = 1954 Cri LJ 460 ** AIR 1956 All 258 (262) = ILR (1956) 1 All 656 = 1956 Cri LJ 679 (DB) ** AIR 1955 All 638 (640) = ILR (1956) 2 All 470 = 1955 Cri LJ 1451 (DB) ** AIR 1963 SC 692 (697) = 1963 (1) Cri LJ 633 = (1963) Supp 1 SCR 40. (The provisions of Sections 87 and 88, Cr. P. C. cannot be made available in order to secure presence of contemner before Court. (1962) 2 Cr LJ 118 (All), Reversed.) ** AIR 1968 Punj 217 (230) = 69 Pun LR 673 (FB).

Section 3 — Note 15 (contd.)

(2) The inherent power of a Court to punish for contempt is not restricted by the provisions of the Criminal Procedure Code relating to proceedings which may be instituted with the sanction of the Government. AIR 1935 All 1 (3) (DB) ** AIR 1958 Punj 471 (475) = ILR (1958) Punj 1822 = 1958 Cri LJ 1529.

(3) The summons procedure laid down in the Code of Criminal Procedure does not apply to contempt proceedings. AIR 1952 Nag 259 (262) = ILR (1949) Nag 640 (DB).

(4) A warrant for contempt has no resemblance to a warrant under Criminal P. C. (1958) 60 Bom LR 279 = ILR (1957) Bom 218.

(5) Contempt is an offence and hence the arrest and subsequent conviction therefor are not illegal. AIR 1945 Oudh 266 (267) = 20 Luck 442 = 47 Cri LJ 294 (DB).

(6) Rule issued by Calcutta High Court to show cause against committal for contempt of itself and a subordinate Court. Party need not appear through Advocate instructed by attorney. AIR 1930 Cal 759 (760) = 58 Cal 458 = 32 Cri LJ 352 (DB).

(7) Section 527 of the Criminal P. C. does not apply to a contempt case as the power of a High Court to institute proceedings for contempt of itself and to punish the contemner where necessary is a special jurisdiction which is inherent in all Courts of record and Section 1 (2) of the Criminal P. C. excludes such special jurisdiction from its scope. (1958) 60 Bom LR 279 = ILR (1957) Bom 218.

(8) An order by a sub-Divisional Magistrate rejecting an application to start contempt proceedings against the opposite parties cannot tantamount to an acquittal or discharge of those parties and therefore this order would not bar the commencement of proceedings before the High Court for contempt and its punishment. AIR 1956 Pat 321 (324) = 1956 Cri LJ 1087 (DB).

(9) The Supreme Court has no power either under Section 527 Criminal P. C. or otherwise to transfer a proceeding for contempt of Court pending before one High Court to another. AIR 1954 SC 186 (190) = 1954 SCR 454 = 1954 Cri LJ 460.

(10) Section 556, Criminal P. C., does not apply to the summary proceedings taken for punishing contempts and therefore a Judge who has been personally attacked is under no bar to initiate proceedings for the contempt and sit in judgment in the case. AIR 1942 Lah 105 (107, 108) = ILR (1942) Lah 411 = 43 Cri LJ 599 (FB).

16. Court has power to adopt its own procedure.— (1) The High Court can punish a person for contempt of a subordinate Court in the same manner as for a contempt of its own self. AIR 1950 Pepsu 9 (11) = 1 Pepsu LR 253 = 51 Cri LJ 1219 (SB).

(2) In the absence of any defined procedure in India the Courts have uniformly acted upon the rules of the procedural law of England in contempt proceedings. AIR 1957 Pat 528 (532) = 36 Pat 955 = 1957 Cri LJ 1156.

(3) There is no substantial difference between the procedure in India and that prevailing in England. AIR 1960 Pat 430 (442) = 1960 Cri LJ 1254 = 1960 BLJR 622 (FB).

(4) American law regarding power of courts to punish for contempt cannot be made applicable to Indian conditions. AIR 1960 Pat 430 (444) = 1960 Cri LJ 1254 = 1960 BLJR 622 (FB).

(5) The High Court is entitled to deal with a case of contempt summarily and adopt its own procedure subject to the conditions that the procedure is fair and the contemner is made aware of the charge and also given a fair and reasonable opportunity to defend himself. AIR 1954 SC 186 (190) = 1954 SCR 454 = 1954 Cri LJ 460 ** AIR 1955 All 638 (640) = ILR (1956) 2 All 470 = 1955 Cri LJ 1451 (DB) ** AIR 1966 All 305 (310, 311) = 1966 Cri LJ 632 ** AIR 1966 Cal 411 (423) = 1966 Cri LJ 883 = 70 Cal WN 579 ** AIR 1960 Pat 430 (446) = 1960 Cri LJ 1254 = 1960 BLJR 622 (FB).

(6) The jurisdiction of the High Court to punish by summary procedure even contempts of Court by scandalising it still exists. AIR 1935 Cal 419 (423, 424) = 63 Cal 217 = 36 Cri LJ 1053 (FB).

(7) Attachment and commitment as a form of procedure in the case of criminal contempt and civil contempt is the same, namely whether it be followed as a summary process for the former kind of contempt or as the form of execution of an order or judgment in a civil contempt. AIR 1957 Pat 528 (533) = 36 Pat 955 = 1957 Cri LJ 1156 (DB).

(8) The State as a party to a suit is in no better position than any other individual and is bound by the orders of the Court. The difference in its character as contradistinguished from that of an individual will only affect the form of disciplinary action; that is there can only be an attachment of its property and no detention inasmuch as it is not a person. AIR 1954 Pat 513 (522) = 33 Pat 603 = 1954 Cri LJ 1593.

17. Costs.— (1) Frivolous applications for contempt amount to an abuse of process of Court and the Court will award exemplary costs against a person who makes such an application. AIR 1955

Section 3 — Note 17 (contd.)

Andhra 156 (159) = ILR (1955) Andhra 57 = 1955 Cri LJ 1028 (DB).

(2) Where the Court passes an order for costs in the contempt proceedings it can enforce it as a part of its inherent jurisdiction. AIR 1956 All 79 (80).

18. Appeal. — (1) A High Court does not have an inherent jurisdiction to entertain an appeal against an order of conviction for contempt passed by a Judge of the High Court acting alone in summary proceedings. AIR 1947 Bom 184 (185) = ILR (1947) Bom 613 = 48 Cri LJ 628 ** 1967 All LJ 982 = 1968 All WR (HC) 72 (DB).

(2) An order of attachment for contempt not being one passed by a High Court in the exercise of its original Civil Jurisdiction may not be appealable under the provisions of Civil P. C., but that does not mean it is not appealable under Clause 15 of the Letters Patent also. (1883) 7 Bom 5 (12) (DB).

[But see AIR 1948 Cal 214 (218) = ILR (1948) 2 Cal 231 = 49 Cri LJ 379.]

(3) When a High Court punishes a person for criminal contempt, it exercises a criminal jurisdiction and no appeal will lie under Clause 15 of the Letters Patent as to the merits of the order, although an appeal can lie on the question of jurisdiction. AIR 1958 Cal 474 (476) = 1958 Cri LJ 1162 (DB).

[See also (1967) 69 Pun LR (D) 393 (DB).]

(4) Orders passed in cases of civil contempts are appealable. AIR 1955 Mad 121 (129) = ILR (1955) Mad 1084 = 1955 Cri LJ 505 (DB) ** AIR 1958 Cal 474 (476) = 1958 Cri LJ 1162 ** AIR 1969 Punj 60 (62) = 1969 Cri LJ 320 = 70 Pun LR 1042 (DB).

Leave to appeal to Supreme Court. — (5) No leave to appeal to the Supreme Court can be granted under Article 133 of the Constitution where the contempt adjudged against the petitioner is a criminal contempt and not a civil one. AIR 1953 Orissa 266 (271) = ILR (1952) Cut 467 = 1953 Cri LJ 1578.

(6) An order refusing to punish a person for contempt being one passed in proceedings which are of a criminal nature, section 109 of the Civil P. C. cannot be invoked to grant leave to appeal to the Privy Council against that order. AIR 1941 All 211 (212) = ILR (1941) All 364 (DB).

(7) An application against an order made in the proceedings for contempt of the High Court—a Court of record—does not lie under Clause 41 of the Letters Patent. AIR 1935 Cal 419 (451, 452) = 63 Cal 217 = 36 Cri LJ 1053 (FB).

(8) The High Court has power to grant leave to appeal to the Supreme Court but not to challenge its findings on merits but only on the limited ground

of jurisdiction. AIR 1953 Orissa 266 (273) = ILR (1952) Cut 467 = 1953 Cri LJ 1578 (DB) ** AIR 1956 Manipur 44 (47) = 1956 Cri LJ 1411.

(9) Where, on conviction for contempt of High Court, a petition for grant of certificate under Article 134 (1) (c) is made, the High Court would not be justified in applying a standard of scrutiny different from that by which it judges applications for certificates of fitness in other cases. AIR 1953 Madh Bha 206 (208) (DB).

(10) Where the remedy in respect of contempt proceedings can be given by way of civil execution only, the proceedings for the purposes of leave to appeal to Supreme Court are civil and leave could be granted only under Article 133 (1) (c). AIR 1952 Pat 23 (25) = 30 Pat 287.

(11) The Privy Council will not interfere with the orders of the High Court in contempt cases unless there is a serious disregard of the principles of natural justice by the High Court. AIR 1945 PC 147 (150) = 72 Ind App 226 = ILR (1945) Kar (PC) 355 = ILR (1945) Bom 959 = 47 Cri LJ 61. (AIR 1942 Bom 154. Affirmed.)

(12) Single Judge of High Court whose judgment or order is under appeal cannot be made a respondent to that appeal. AIR 1969 Punj 60 (62) = 1969 Cri LJ 320 = 70 Pun LR 1042 (DB).

(13) Where a person was not let off on the acceptance of his apology but was convicted of the offence of having committed contempt of Court, he has the right to file an appeal. AIR 1969 Punj 60 (62) = 1969 Cri LJ 320 = 70 Pun LR 1042 (DB).

19. Bar of jurisdiction under sub-section (2). — (1) The jurisdiction of High Court under the Act is barred where the contempt complained of is also punishable under the Penal Code as an offence of contempt. AIR 1952 Trav-Co 113 (114) = 1952 Cri LJ 658 (FB) ** AIR 1950 All 556 (559) = ILR (1952) 1 All 131 = 52 Cri LJ 1062 (FB) ** AIR 1959 SC 102 (106, 107) = 1959 Cri LJ 251 = 1959 SCR 1367 ** AIR 1968 Andh Pra 207 (213) = 1968 Cri LJ 888 = (1968) 2 Andh WR 112 (DB) ** 1968 Cri LJ 1259 (1260) = 1967 Cur LJ 490 (Punj) ** 1967 All Cri R 488 = 1967 All WR (HC) 776 ** AIR 1967 Mad 162 (164) = 1967 Cri LJ 551 = (1966) 2 Mad LJ 219 (DB) ** AIR 1966 Bom 19 (29) = 1966 Cri LJ 9 = 67 Bom LR 380 (DB) ** (1966) 2 Mad LJ 219 = 79 Mad LW 365 (DB) ** AIR 1964 Bom 147 (154, 155) = 1964 (1) Cri LJ 652 = 65 Bom LR 533 (DB) ** (1961) 65 Cal WN 722 (DB) ** AIR 1961 Pat 1 (5) = 1961 (1) Cri LJ 134 = 1960 BLJR 541 (DB).

(2) Where an offence is punishable under the Penal Code not as a contempt but as a different offence the jurisdiction

4. **Limit of punishment for contempt of Court.**—Save as otherwise expressly provided by any law for the time being in force, a contempt of Court may be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to two thousand rupees, or with both:

Provided that the accused may be discharged or the punishment awarded may be remitted on apology being made to the satisfaction of the Court:

Provided further that notwithstanding anything elsewhere contained in any law for the time being in force, no High Court shall impose a sentence in excess of that specified in this section for any contempt either in respect of itself or of a Court subordinate to it.

Section 3 — Note 19 (contd.)

of the High Court to take proceedings in respect of that offence under this Act is not barred. AIR 1952 SC 149 (151) = 1952 SCR 425 = 1952 Cri LJ 832. (AIR 1943 Nag 334, Overruled.) ** AIR 1956 All 258 (261, 262) = ILR (1956) All 656 = 1956 Cri LJ 679 (DB) ** AIR 1954 Nag 99 (102) = ILR (1953) Nag 972 = 1954 Cri LJ 555 (DB) ** AIR 1951 Cal 489 (489, 490) = ILR (1952) 1 Cal 312 = 52 Cri LJ 1030 (DB) ** AIR 1968 Punj 217 (237) = 1968 Cri LJ 775 = 69 Pun LR 673 (FB) ** AIR 1961 Punj 113 (119) = 1961 (1) Cri LJ 426 = 63 Pun LR 121.

(3) The words "where such a contempt is an offence punishable under the I. P. Code" do not extend to offences punishable under the Penal Code otherwise than as contempt. AIR 1952 Orissa 215 (218) = ILR (1959) Cut 387 = 1952 Cri LJ 1106.

(4) Mere existence of an element of insult in the alleged act of contempt of Court is not conclusive as to the applicability of Section 228, Penal Code so as to oust the jurisdiction of the High Court under Section 3 (2). The true test is whether the act complained of is an offence under Section 228, Penal Code or is something more than that. If it is something more, the jurisdiction of High Court is not ousted by Section 3 (2) of the Act. AIR 1959 SC 102 (106, 107) = 1959 Cri LJ 251 = 1959 SCR 1367. (Madh BLR 1955 Cri 111, Reversed.) ** 1968 Cri LJ 1259 (1260) = 1967 Cur LJ 490 (Punj).

(5) Held on facts that the object of contemner clearly was to scandalize the magistrates and thus to deflect them from a strict and non-hesitant performance of their duties and hence Section 3 (2) was no bar to jurisdiction of High Court to punish contemner for contempt of subordinate Court—Penal Code (1860), Section 228. AIR 1969 Delhi 214 (219) (SB).

20. **Contempt of Courts, what amounts to** — See Notes under S. 1.

SECTION 4 — SYNOPSIS

1. Principles governing award of punishment.
2. Order for payment of costs by contemner.
3. Apology.

1. **Principles governing award of punishment.** — (1) Punishment for contempt of Court is inflicted not with a view to protect the individual Judges from repetition of the attack or the Court as a whole or maintain the individual or collective dignity of the judges but to ensure the confidence of the public in the administration of free, fearless and impartial justice and to avert the tremendous public mischief which will inevitably be caused if such confidence is allowed so to be undermined or impaired. AIR 1967 Raj 203 (206) = 1967 Cri LJ 1057 = 1966 Raj LW 454 (DB) ** AIR 1967 Andh Pra 299 (308) = 1967 Cri LJ 1470 = ILR (1968) Andh Pra 42 (DB) ** AIR 1958 Orissa 168 (182) = 1958 Cri LJ 1055 = ILR (1958) Cut 195 (DB).

(2) The High Court's powers for punishment of contempt have been preserved by the Constitution and they are also inherent in a Court of Record. AIR 1964 SC 1625 (1630) = 1964 (2) Cri LJ 590 = (1964) 5 SCR 86.

(3) Although the Court's power to punish contempt is unlimited and absolute it has to be exercised with great forbearance and circumspection in view of the fact that the ordinary protection available to a person accused of any criminal act or offence is not open to a person accused of criminal contempt. AIR 1956 Hyd 33 (34) = ILR (1955) Hyd 833 = 1956 Cri L Jour 400 (DB) ** AIR 1969 SC 189 (193) = 1969 Cri LJ 401 = (1969) 1 SCJ 533 ** AIR 1966 Cal 411 (417) = 1966 Cri LJ 883 = 70 Cal WN 579.

[See also AIR 1968 Ker 301 (307) = 1968 Cri LJ 1424 = 1968 Ker LT 157 (DB).]

(4) It is only in very grave cases of contempt that the Court would exercise its power under the Act to mete out punishment. AIR 1952 Orissa 318 (333) = ILR (1952) Cut 1 = 1952 Cri L Jour 1605 ** AIR 1966 Cal 411 (417) = 1966 Cri LJ 883 = 70 Cal WN 579 ** (1967) All Cr R 488 = 1967 All WR (HC) 776.

(5) The Court would ordinarily exercise its extraordinary powers to punish contempts only in cases where the act or conduct is intentional and deliberate. AIR 1956 Hyd 33 (34) = ILR (1955) Hyd 833 = 1956 Cri L Jour 400 (DB) ** AIR 1969 SC 189 (193) = 1969 Cri LJ 401 =

Section 4 — Note 1 (contd.)

(1969) 1 SCJ 533 ** 1968 Ker LJ 197 = ILR (1968) 1 Ker 384 (FB).

(6) A stricter view has to be taken where the contemner tries to interfere with the course of judicial proceeding and not a word of regret or apology is expressed at any stage. AIR 1966 All 305 (315) = 1966 Cri LJ 632.

(7) Even if a contempt is not of a serious kind the accused should be punished where he instead of apologising persists in contending that he had not committed any offence. AIR 1941 Pat 185 (194) = 20 Pat 306 = 42 Cri L Jour 225 (DB).

(8) Contempt is aggravated where the accused persistently justifies his action. AIR 1945 Nag 33 (49, 50) = ILR (1945) Nag 74 (DB) ** AIR 1968 Andh Pra 207 (213) = 1968 Cri LJ 888 = (1968) 2 Andh WR 112 (DB) ** (1965) 2 Andh LT 170 (DB).

(9) Maximum sentence of six months was awarded to the habitual contemner who was convicted of contempt of Court on previous occasions for similar acts but sentences awarded found to have no deterrent effect. (1965) 2 Andh LT 170 (DB) ** AIR 1966 Bom 19 (29) = 1966 Cri LJ 9 = 67 Bom LR 380 (DB) ** (1961) 65 Cal WN 722 (DB).

(10) The summary jurisdiction exercised by the superior Courts in punishing contempt of their authority exists for the purpose of preventing interference with the course of justice and for maintaining the authority of law. This is an extraordinary power which must be sparingly exercised, but where the public interest demands it, the Court will not shrink from exercising it and imposing punishment even by way of imprisonment in cases where a mere fine may not be adequate. AIR 1954 SC 743 (747) = 1955 SCR 677.

(11) A contempt committed by making scandalous allegations against subordinate judges should be dealt with by inflicting deterrent punishment to contemner. AIR 1958 Pat 276 (278) = 1958 Cri L Jour 670 ** 1968 Ker LJ 197 = 1968 Ker LT 299 (FB) ** AIR 1968 Andh Pra 207 (213) = 1968 Cri LJ 888 = (1968) 2 Andh WR 112 (DB) ** AIR 1966 Andh Pra 167 (173) = 1966 Cri LJ 642 = (1966) 1 Andh WR 164 (DB) ** AIR 1961 Pat 360 (361) = 1961 (2) Cri LJ 362 = 1961 BLJR 152 (DB).

(12) Serious contempt of Court such as preventing the bailiff from making an attachment in execution on two occasions and maltreating him and pushing him out of contemner's shop, calls for a deterrent punishment and not a sentence of fine. AIR 1959 Punj 627 (629) = ILR (1959) Punj 1770.

(13) Reckless attacks on the impartiality of presiding officer of Court would

not only imperil dignity of Court, but would also endanger proper administration of justice and impair confidence of public in administration of justice. The offence is not such as to be lightly wiped out by a mere expression of regret. 1967 Ker LT 118 (119) = 1967 Mad LJ (Cri) 233 (DB).

(14) A criminal contempt is punishable with fine or imprisonment by the summary process of attachment or committal. AIR 1954 Pat 513 (520) = 33 Pat 603 = 1954 Cri L Jour 1593 (DB) ** (1883) 7 Bom 5 (13) (DB).

(15) A person imprisoned for the disobedience of direction given in a decree against him under a process of contempt is not entitled to be released after the lapse of the period prescribed in the Civil P. C. The provisions of the Civil P. C. do not apply to his case. (1879) 4 Cal 655 (657) (DB).

(16) Mitigating circumstances and discretion of Court. — Whether a contempt actually committed is to be followed by substantive punishment and if so to what extent, must depend upon the circumstances of each case. AIR 1952 Orissa 318 (333) = ILR (1952) Cut 1 = 1952 Cri L Jour 1605.

(17) It is in the discretion of the Court to commit or not to commit the person for the contempt which has been established against him. AIR 1945 PC 147 (150) = 72 Ind App 226 = ILR (1945) Kar (PC) 355 = ILR (1945) Bom 959 = 47 Cri L Jour 61 ** AIR 1957 Hyd 17 (17) = ILR (1956) Hyd 468 (DB) ** AIR 1951 Cal 507 (509).

(18) The object of punishment being prevention of crime, its measure varies according to the prevalence of a particular offence. AIR 1950 Pepsu 9 (21) = 1 Pepsu LR 253 = 51 Cri L Jour 1219 (SB) ** AIR 1959 Orissa 89 (96) = 1959 Cri LJ 626 = ILR (1958) Cut 631 (DB).

(19) Good faith or innocence of the contemner although it cannot absolve him of his culpability is an extenuating circumstance. AIR 1952 Orissa 318 (339) = ILR (1952) Cut 1 = 1952 Cri L Jour 1605 ** AIR 1945 Nag 33 (47) = ILR (1945) Nag 74 (DB) ** 1966 All LJ 953 = 1966 All WR (HC) 197.

(20) Motive or intention of the accused may be properly taken into account in awarding punishment for contempt. 1942 Oudh WN 6 (20) (DB) ** AIR 1952 Kutch 74 (77) = 1952 Cri L Jour 1482 ** AIR 1959 Cal 174 (175) = 1959 Cri LJ 316 = 62 Cal WN 862 (FB) ** AIR 1968 Ker 301 (308) = 1968 Cri LJ 1424 = 1968 Ker LT 157 (DB).

[But see AIR 1954 Pat 289 (296) = 1954 Cri L Jour 942 (DB).]

(21) Pleas of justification or privilege are not strictly speaking available to contemner except perhaps as matters tending to aggravate or mitigate offence of

Section 4 — Note 1 (contd.)

contempt. AIR 1966 All 588 (589) = 1966 Cri LJ 1361 = 1966 All LJ 547.

(22) The motive is not a relevant consideration at all in deciding the question whether contempt of Court has been committed or not. Truth or falsity of allegations and lack of intention or knowledge are equally irrelevant matters. But lack of intention or knowledge has bearing on the question whether offender should be convicted after he is found to have committed contempt of Court. It is not necessary that every finding of guilty should be followed by conviction. Every conviction need not be followed by sentence also. 1969 Ker LJ 453 (457) = 1969 Ker LT 513 (DB).

(23) Excitable temper of the accused is a justification for mitigation of the maximum sentence for contempt of Court. AIR 1938 All 358 (362) = ILR (1938) All 548 = 39 Cri L Jour 677 (DB) ** AIR 1961 Pat 1 (11) = 1961 (1) Cri LJ 134 = 1960 BLJR 541 (DB).

(24) Where a person disobeys the order of the Court upon the advice of his advocate, the advice though would not absolve him from liability is a mitigating circumstance. (1950) 55 Mys HCR 148 (150, 151) (DB).

(25) Ignorance of law or inability of the legal advisers to properly advise their clients is not a mitigating circumstance. AIR 1969 Delhi 201 (213) = 1969 Cri LJ 884 (FB).

(26) The inherent difficulty of an officer who possesses both magisterial and executive functions is neither an excuse nor an extenuation in his favour when he is found guilty of having committed contempt by addressing certain communication to a subordinate magistrate in connection with a case which was pending before him. AIR 1954 Orissa 1 (6) = ILR (1953) Cut 246 = 1953 Cri L Jour 1906 (DB).

(27) Where certain literate persons, who also held positions in the village panchayat, attempted to influence a magistrate in his decision in a pending case and in their explanation tendered to the Court expressed an opinion that they had a right to do what they did it was held that the ends of justice required that they should be awarded nothing less than a sentence of imprisonment. AIR 1952 All 86 (88).

(28) If the circumstances of a case warrant it, the Court can take a lenient view of the contempt proved against the accused and let him off with a fine only. AIR 1953 Cal 53 (54) = ILR (1954) 1 Cal 415 = 1953 Cri L Jour 214 ** AIR 1966 Andh Pra 167 (173) = 1966 Cri LJ 642 = (1966) 1 Andh WR 164 (DB) ** (1968) 2 Andh WR 208 = 1968 Mad LJ (Cri) 531 (DB).

(29) Where it is uncertain whether the impugned criticism is fair or not, the contemner is entitled to the benefit of this uncertainty. AIR 1966 All 588 (589) = 1966 Cri LJ 1361 = 1966 All LJ 547.

(30) Where facts disclose that only a technical contempt is committed and it is inexpedient in public interest to take any action in the matter, Court would not punish contemner. 1969 Ker LJ 453 (457) = 1969 Ker LT 513 (DB).

(31) Although ordinarily the Court would sentence the accused to imprisonment and fine in a case of gross contempt it could in any particular case take into consideration the fact that the case itself is the first of its kind and sentence the accused only to a fine with imprisonment for default. ILR (1955) Punj 717 (723).

(32) The accused who was found guilty of an act amounting to scandalizing the Court in reference to a pending case was let off with a fine in view of the fact that he so acted not because he had any personal interest in the case but because he had been approached by the parties to the case to give them assistance in his capacity as a responsible officer of a political party to which he belonged. 1954 BLJR 46 (53).

(33) High Court being unable to decide as to the quantum of prejudice likely to be caused by the speech, let off the contemner with expression of disapproval of his conduct. AIR 1966 Cal 411 (428) = 1966 Cri LJ 883 = 70 Cal WN 579.

(34) The fact that the accused who interfered with the course of justice were raw and illiterate villagers was taken into consideration in their favour and they were let off with a mere fine. AIR 1956 Pat 321 (325) = 1956 Cri L Jour 1087 ** 1962 Jab LJ 1147 (DB).

(35) Tender age of the contemner is a circumstance which the Court has to take into consideration. AIR 1959 Cal 174 (175) = 1959 Cri LJ 316 = 62 Cal WN 862 (FB).

(36) The fact that the contemner is a college student and editor only in name of the paper in which offending article was published was taken into consideration in his favour and he was let off only with fine. 1966 Cri LJ 214 (217) = 1965 MPLJ 844 (DB).

(37) Alleged contempt of Court consisted of objectionable language in revision petition — Petition drafted and signed by lawyer — Mere fact that it bears signatures of petitioner also, does not constitute actionable contempt by petitioner. AIR 1969 Delhi 304 (307).

(38) In cases of contempts of a very trifling nature mere warning to the accused that a repetition of the offence

Section 4 — Note 1 (contd.)

would be viewed with severity may be sufficient. AIR 1953 Orissa 249 (253, 254) = ILR (1953) Cut 283 = 1953 Cri L Jour 1491 ** AIR 1957 Hyd 17 (17) = ILR (1956) Hyd 468 (DB) ** AIR 1954 Orissa 57 (64) = 1954 Cri L Jour 311 ** AIR 1950 East Punj 366 (367) ** 1968 Ker LJ 197 = ILR (1968) 1 Ker 384 (FB) ** AIR 1969 Pat 140 (147) = 1969 Cri LJ 631 = 1968 Pat LJR 589.

(39) Additional District Magistrate not carrying out order of High Court directing accused to surrender to bail — A. D. M. inexperienced in Court procedure and relying on bench clerk — Held guilty of contempt of Court but in the circumstances apology tendered by him was accepted by High Court. AIR 1969 Cal 602 (604) (DB).

(40) In cases of contempt committed by Senior Advocate, the condemnation for contempt by a High Court is itself a heavy punishment against such advocate. AIR 1955 SC 19 (25) = 1955 SCR 757 = 1955 Cri L Jour 133.

(41) If contempt of Court is committed by a person, then merely because someone else takes entire responsibility, it is no ground in law to absolve the former. AIR 1969 Delhi 201 (205) = 1969 Cri LJ 884 (FB).

(42) Simple imprisonment for 3 months for contempt of Court in wilful and deliberate disobedience of the direction of the Court to produce the person detained in Court, is not excessive. AIR 1964 SC 1625 (1629) = (1964) 2 Cri LJ 590 = (1964) 5 SCR 86.

(43) Court's power to punish contempt always carries with it the power to pardon contempt if need be. AIR 1951 Cal 507 (509).

2. Order for payment of costs by contemner.— (1) High Court has jurisdiction to order the payment and recovery of fine from a person punished under the Act. AIR 1935 All 1013 (1014) = 58 All 374 = 36 Cri L Jour 1365 (DB).

(2) The High Court has got inherent power to award costs in a proceeding for contempt. AIR 1969 Pat 70 (71) = 1969 Cri LJ 398 = 1969 BLJR 655 (DB).

(3) Person not interested in case approaching Magistrate in his Chambers after Court hours and asking him to accept bail on behalf of accused — On Magistrate's refusal, person threatening by show of his wealth, to teach him a lesson — Amounts to contempt of Court — Contemner, considering his age was administered warning and was ordered to pay costs. AIR 1969 Delhi 214 (218) (SB).

(4) The Court while discharging the Rule for contempt on the ground that the opposite party had been guilty of only a technical contempt, ordered him to pay costs of the application. AIR

1951 Punj 49 (52) = ILR (1951) Punj 362 = 52 Cri L Jour 950 (DB).

(5) Though the Court rejects the application for contempt accepting the apology of the accused it can award costs of the application against him. AIR 1954 Him Pra 31 (31) ** AIR 1914 Cal 550 (554) = 15 Cri L Jour 65.

(6) Person obstructing receiver in discharge of his duty may be made to pay costs of a hearing. AIR 1914 Cal 550 (554) = 15 Cri L Jour 65.

(7) Costs directed to be paid by a person punished under the Contempt of Courts Act can be recovered on the same lines as on which decrees are executed. AIR 1935 All 1013 (1014) = 58 All 374 = 36 Cri L Jour 1365 (DB).

3. Apology.— (1) An apology by itself is not sufficient to purge the guilt of the contemner. AIR 1955 SC 19 (23) = 1955 SCR 757 = 1955 Cri L Jour 133 ** AIR 1934 All 317 (318) = 35 Cri L Jour 433 (DB) ** AIR 1969 Cal 1 (3, 4) = 1969 Cri LJ 40 = 72 Cal WN 82 (SB) ** AIR 1967 Raj 203 (207) = 1967 Cri LJ 1057 = 1966 Raj LW 454 (DB) ** AIR 1964 Cal 572 (586) = 1964 (2) Cri LJ 660 = 69 Cal WN 82 (DB) ** AIR 1959 Cal 174 (175) = 62 Cal WN 862 = 1959 Cri LJ 316 (FB) ** 1962 Jab LJ 1147 (DB).

(2) An apology does not entitle the accused to a discharge as a matter of right. AIR 1948 Oudh 114 (116) = 23 Luck 37 = 49 Cri L Jour 108 (DB) ** AIR 1967 Ker 177 (180) = 1967 Cri LJ 1147 = 1967 Ker LT 59 (DB) ** AIR 1959 Cal 174 (176) = 1959 Cri LJ 316 = 62 Cal WN 862 (FB) ** AIR 1959 Madh Pra 50 (52) = 1959 Cri LJ 199 = 1958 MPLJ 820 (DB).

(3) A Court can even when it accepts an apology, commit the offender to prison or otherwise punish him. AIR 1953 All 153 (158) = 1953 Cri L Jour 402 ** AIR 1940 Sind 239 (246) = ILR (1941) Kar 3 = 42 Cri L Jour 1 (FB) ** AIR 1961 Pat 1 (11) = 1961 (1) Cri LJ 134 = 1960 BLJR 541 (DB).

(4) In considering the steps to be taken and the punishment to be awarded to the person accused of having committed contempt of Court it is open to the Court to take into account the apology tendered by him. AIR 1957 Madh Pra 152 (152) = 1957 Cri L Jour 1137.

(5) Punishment can be remitted by accepting the unconditional apology of the accused. AIR 1934 All 317 (318) = 35 Cri L Jour 433 (DB) ** AIR 1950 Sind 1 (2, 3) = 51 Cri L Jour 810 (FB).

(6) Unqualified apology accompanied by genuine regret in a clear case of contempt entitled a pardon to the offender. 1966 All LJ 953 = 1966 All WR (HC) 197.

(7) The question whether an apology should be accepted in any case depends upon the facts of that case and the

Section 4 — Note 3 (contd.)

Court is not bound as a matter of rule to accept an apology in every case even if it is an unqualified one. AIR 1953 All 153 (157) = 1953 Cri L Jour 492 ** AIR 1953 Pat 364 (365) = 1953 Cri L Jour 1779 (DB) ** AIR 1952 All 86 (87) ** AIR 1961 Pat 1 (10) = 1961 (1) Cri LJ 134 = 1960 BLJR 541 (DB) ** AIR 1969 Cal 1 (3) = 1969 Cri LJ 40 = 72 Cal WN 82 (SB) ** AIR 1967 Ker 177 (180) = 1967 Cri LJ 1147 = 1967 Ker LT 59 (DB) ** AIR 1967 Raj 203 (207) = 1967 Cri LJ 1057 = 1966 Raj LW 454 (DB) ** AIR 1964 Cal 572 (586) = 1964 (2) Cri LJ 660 = 69 Cal WN 82 (DB) ** 1967 Cur LJ 883 (Punj).

(8) Mere apology is not enough to purge the guilt of contempt. The Court has to consider the background in the light of the facts both antecedent to the offer of apology as also the contemner's subsequent conduct right upto the contempt proceedings. AIR 1959 Orissa 89 (94) = 1959 Cri LJ 626 = ILR (1958) Cut 631 (DB).

(9) Unqualified apology tendered at the outset by admitting mistake in a straightforward manner, for act done unwittingly, should be accepted. AIR 1967 All 93 (100) = 1967 Cri LJ 291.

(10) An apology in order to dilute the offence must be voluntary. AIR 1957 All 457 (459) = 1957 Cri L Jour 801 ** AIR 1961 Pat 1 (11) = 1961 (1) Cri LJ 134 = 1960 BLJR 541 (DB) ** AIR 1960 Orissa 132 (137) = 1960 Cri LJ 1120 = 26 Cut LT 116.

(11) The apology must be an unconditional apology born out of repentance or remorse. The contemner cannot enter into any kind of stipulation with the Court in that respect. AIR 1966 Bom 19 (29) = 1966 Cri LJ 9 = 67 Bom LR 380 (DB) ** AIR 1969 Delhi 201 (211) = 1969 Cri LJ 884 (FB).

(12) Unconditional apology amounts in law to a confession of the guilt. Consequently, once unqualified apology is tendered by the contemner, the Court cannot drop the proceedings against him, but must convict him though the Court might accept unqualified apology and discharge him without punishment, when the offence is only technical. (1958) 24 Cut LT 479 = (1959) 29 Com Cas 264.

(13) An apology should not necessarily be taken as a confession of guilt and the accused may be pronounced not guilty of contempt although he has made an apology. AIR 1953 SC 436 (437) = 31 Pat 182 = 1953 Cri L Jour 1837.

(14) An expression of regret if genuine should ordinarily be accepted in mitigation of the offence. AIR 1958 Punj 377 (384) = ILR (1958) Punj 1723 = 1958 Cri L Jour 1225 ** AIR 1940 Sind 239 (246) = ILR (1941) Kar 3 = 42 Cri L Jour 1 (FB) ** AIR 1954 Hyd 180 (181) = ILR (1954)

Hyd 170 = 1954 Cri L Jour 1300 ** (1954) 56 Pun LR 302 (304) = ** AIR 1968 Ker 301 (308) = 1968 Cri LJ 1424 = 1968 Ker LT 157 (DB) ** AIR 1967 Guj 124 (126) = 7 Guj LR 970 ** 1966 All LJ 953 = 1966 All WR (HC) 197 ** 1963 (2) Cri LJ 219 (224) = 1962 MPLJ 1121 (DB).

(15) The apology must be unequivocal and not hedging and hypothetical. AIR 1964 Cal 572 (586) = 1964 (2) Cri LJ 660 = 69 Cal WN 82 (DB).

(16) Although a contempt of Court by a subordinate judicial officer must be treated as an intentional one and a more serious matter because he is one who in the nature of things is educated and should have known his duty his apology when he tenders one carries with it, for the same reason, the stamp of being a genuine apology. AIR 1952 All 56 (59) = ILR (1953) 2 All 332 = 1952 Cri L Jour 223 (DB).

[See also AIR 1959 Pat 373 (373, 374) = 1959 Cri LJ 1013 = 1959 BLJR 352 (DB).]

(17) An apology is intended to be evidence of real contriteness the manly consciousness of a wrong done, of an injury inflicted, and the earnest desire to make such reparation as lies in the wrongdoer's power. Only then it is of any avail in a Court of justice. AIR 1961 Pat 1 (10) = 1961 (1) Cri LJ 134 = 1950 BLJR 541 (DB) ** AIR 1955 SC 19 (23) = 1955 SCR 757 = 1955 Cri L Jour 133 ** AIR 1950 Sind 1 (2, 3) = 51 Cri L Jour 810 (FB) ** AIR 1969 SC (189, 193) = 1969 Cri LJ 401 = (1969) 1 SCJ 533 ** AIR 1969 Delhi 201 (211) = 1969 Cri LJ 884 (FB) ** AIR 1969 Cal 1 (3) = 1969 Cri LJ 40 = 72 Cal WN 82 ** AIR 1967 Ker 177 (181) = 1967 Cri LJ 1147 = 1967 Ker LT 59 (DB) ** AIR 1963 Madh Pra 61 (71) = 1963 (1) Cri LJ 187 = 1962 MPLJ 953 (DB) ** AIR 1961 Pat 1 (11) = 1961 (1) Cri LJ 134 = 1960 BLJR 541 (DB) ** AIR 1960 Orissa 132 (137) = 1960 Cri LJ 1120 = 26 Cut LT 116 ** AIR 1959 Orissa 89 (94) = 1959 Cri LJ 626 = ILR (1958) Cut 631 (DB) ** AIR 1959 Punj 627 (629) = 1959 Cri LJ 1466 = 61 Punj LR 661.

(18) The contemner first tendered an unconditional apology but subsequently resiled from it and wanted to lead evidence in support of his allegations. Held, as his behaviour and conduct did not show the least trace of contrition, substantive term of imprisonment should be given. AIR 1965 Ker 49 (51) = 1965 (1) Cri LJ 176 = 1964 Ker LT 429 (DB).

(19) The apology of a person who has once been previously warned for a contempt on another occasion cannot be accepted for a complete discharge. AIR 1954 Kutch 2 (6) = 1954 Cri L Jour 390 ** AIR 1957 Madh Pra 152 (153) = 1957 Cri L Jour 1137.

Section 4 — Note 3 (contd.)

(20) Apology to be effective must be tendered at the earliest stage. AIR 1957 All 457 (459) = 1957 Cri L Jour 801 ** AIR 1956 Pat 321 (324) = 1956 Cri L Jour 1087 (DB) ** AIR 1969 SC 189 (193) = 1969 Cri LJ 401 = (1969) 1 SCJ 533 ** AIR 1969 Delhi 201 (211) = 1969 Cri LJ 884 (FB) ** 1969 Cri LJ 1571 (1573, 1574) (DB) (Delhi) ** AIR 1969 Cal 1 (3) = 1969 Cri LJ 40 = 72 Cal WN 82 (SB) ** AIR 1967 Ker 177 (181) = 1967 Cri LJ 1147 = 1967 Ker LT 59 (DB) ** AIR 1967 Raj 203 (208) = 1967 Cri LJ 1057 = 1966 Raj LW 454 (DB) ** AIR 1964 Cal 572 (586) = 1964 (2) Cri LJ 660 = 69 Cal WN 82 (DB) ** AIR 1960 Ori 132 (137) = 1960 Cri LJ 1120 = 26 Cut LT 116 ** 1963 (2) Cri LJ 219 (224) = 1963 MPLJ 1121 (DB).

(21) If an apology is tendered at the appellate stage of the proceedings it should be tendered unreservedly and unconditionally before the argument begins. AIR 1956 Pat 321 (324) = 1956 Cri L Jour 1087 (DB) ** AIR 1940 Nag 407 (408, 409) = ILR (1941) Nag 304 = 42 Cri L Jour 237 ** AIR 1964 Cal 572 (586) = 1964 (2) Cri LJ 660 = 69 Cal WN 82 (DB).

(22) While Courts will assume an unconditional apology tendered at an early stage to be sincere they would refuse to do so in the case of belated apologies even if they are unqualified. AIR 1954 Kutch 2 (6) = 1954 Cri L Jour 390 ** AIR 1969 SC 189 (193) = 1969 Cri LJ 401 = (1969) 1 SCJ 533 ** AIR 1967 Raj 203 (208) = 1967 Cri LJ 1057 = 1966 Raj LW 454 (DB) ** 1969 Cri LJ 1571 (1573, 1574) (Delhi) (DB). (Belated apology may not be accepted, for the delay may negative contrition which is the essence of purging of a contempt.)

(23) A belated apology tendered after the arguments have closed when all else have failed and there seems to be no hope will be considered to be only a device to escape punishment and will not be accepted by the Court even if it is an unqualified apology. AIR 1953 All 153 (158) = 1953 Cri L Jour 402 ** AIR 1941 Oudh 67 (69, 70) = 16 Luck 506 = 42 Cri L Jour 221 (DB) ** AIR 1970 Bom 48 (57) (DB) ** AIR 1969 Cal 1 (3) = 1969 Cri LJ 40 = 72 Cal WN 82 (SB) ** AIR 1967 All 93 (100) = 1967 Cri LJ 291 ** AIR 1965 Pat 360 (363, 364) = 1965 (2) Cri LJ 390 = 1964 BLJR 102 (DB) ** AIR 1963 Madh Pra 61 (71) = 1963 (1) Cri LJ 187 = 1962 MPLJ 953 (DB) ** AIR 1959 Madh Pra 50 (52) = 1959 Cri LJ 199 = 1958 MPLJ 820 (DB) ** AIR 1959 Orissa 89 (96) = 1959 Cri LJ 626 = ILR (1958) Cut 631 (DB).

(24) The written apology tendered by contemner towards end of arguments was "I had no intention to commit any contempt of Court and as advised by my counsel, I committed no such contempt. Still if the Hon'ble Court consider, that

what I uttered constitutes contempt of Court, I tender my unqualified apology" — Held that this was no apology in eye of law. AIR 1969 Delhi 214 (219) (SB) ** AIR 1969 Delhi 209 (211) (FB).

(25) An apology must be unconditional in order to reduce the gravity of an offence of contempt. AIR 1957 All 457 (459) = 1957 Cri L Jour 801 ** (1950) 54 Cal WN (2 DR) 107 (109, 110) (DB) ** AIR 1968 Bom 273 (277) = 1968 Cri LJ 903 = 69 Bom LR 859 (DB) ** AIR 1961 Pat 1 (11) = 1961 (1) Cri LJ 134 = 1960 BLJR 541 (DB) ** AIR 1961 Punj 113 (120) = 1961 (1) Cri LJ 426 = 63 Pun LR 121 ** 1963 (2) Cri LJ 219 (224) = 1963 MPLJ 1121 (DB).

(26) A statement by the accused after fully justifying his action, expressing his unqualified regret in the event the Court held that he had committed contempt does not amount to an unqualified apology from him. AIR 1956 Pat 321 (324) = 1956 Cri L Jour 1087 (DB) ** AIR 1954 Pat 289 (297) = 1954 Cri L Jour 942 (DB) ** AIR 1945 Nag 33 (49, 50) = ILR (1945) Nag 74 (DB) ** AIR 1965 Pat 227 (237, 238) = 1965 (1) Cri LJ 748 = 1966 BLJR 15 (DB) ** AIR 1961 Pat 1 (11) = 1961 (1) Cri LJ 134 = 1960 BLJR 541 (DB) ** 1967 Cur LJ 838 (Punj) ** 1963 (2) Cri LJ 219 (224) = 1963 MPLJ 1121 (DB).

(27) There cannot be both a justification and an apology because the two things are incompatible. AIR 1955 SC 19 (24) = 1955 SCR 757 = 1955 Cri L Jour 133 ** AIR 1955 Raj 123 (125) = ILR (1955) 5 Raj 660 = 1955 Cri L Jour 1108 (DB) ** AIR 1962 SC 1089 (1095) = 1962 (2) Cri LJ 236 = (1962) Supp 3 SCR 127 ** AIR 1969 Delhi 201 (211) = 1969 Cri LJ 884 (FB) ** AIR 1969 Orissa 117 (134) = 1969 Cri LJ 763 = ILR (1968) Cut 437 ** AIR 1967 Cal 153 (159) = 1967 Cri LJ 350 (DB) ** AIR 1965 Mad 415 (415) = 1965 (2) Cri LJ 371 = (1965) 1 Mad LJ 322 (DB) ** AIR 1963 Madh Pra 61 (71) = 1963 (1) Cri LJ 187 = 1962 MPLJ 953 (DB) ** AIR 1961 Pat 1 (10) = 1961 (1) Cri LJ 134 = 1960 BLJR 541 (DB) ** AIR 1959 Ori 89 (94) = 1959 Cri LJ 626 = ILR (1958) Cut 631 (DB) ** 1968 Cri LJ 248 (256) = 71 Cal WN 771 ** 1966 BLJR 502.

(28) Every form of defence in a contempt case cannot be regarded as an act of contumacy. It depends on the circumstances of each case. 1963 (2) Cri LJ 219 (224) = 1963 MPLJ 1121 (DB).

(29) Justification of his act by contemner and at the same time tendering an apology are incompatible and incongruous and such an apology cannot but be taken as an afterthought put forward in the hope of avoiding the consequence. Such an apology cannot be entertained. AIR 1969 Pat 323 (327) = 1969 Pat LJ 110 (113).

Section 4 — Note 3 (contd.)

(30) An apology tendered at the end of the argument in justification of the contempt is nothing more than an after-thought put forward to avoid the consequences of the offence if the Court were to hold the accused guilty. AIR 1953 All 153 (158) = 1953 Cri L Jour 402 ** AIR 1954 Kutch 2 (6) = 1954 Cri L Jour 390 ** AIR 1969 Cal 1 (3) = 1969 Cri LJ 40 = 72 Cal WN 82 (SB).

(31) The proper method for tendering an apology by the person complained against in an action for contempt of Court is to offer it in the first instance and thereafter make his submissions in defence of his conduct. AIR 1955 Raj 123 (125) = ILR (1955) 5 Raj 660 = 1955 Cri L Jour 1108 (DB) ** AIR 1967 Cal 153 (159) = 1967 Cri LJ 350 (DB).

(32) In border line cases where a question of principle about rights of counsel and their duties has to be settled Courts will consider even an alternative plea of apology because in such cases, as it is possible for the Judge to conclude that no contempt has been committed, the defence of unqualified apology, which tantamounts to the admission of guilt, would be meaningless. AIR 1955 SC 19 (24) = 1955 SCR 757 = 1955 Cri L Jour 133 ** AIR 1969 Orissa 117 (132) = 1969 Cri LJ 763 = ILR (1968) Cut 437 (DB).

(33) Unqualified apology coupled with justification for objectionable remarks against Judge — Justification vague — Contemner uneducated and frustrated in litigation — **Held** no serious action against contemner was called for except being admonished. AIR 1965 Mad 415 (416) = 1965 (2) Cri LJ 371 = (1965) 1 Mad LJ 322 (DB).

(34) Where the contempt alleged against the accused is his disobedience to an order of injunction under Order 39, Rule 1 of Civil P. C. and the accused admitting his disobedience tenders an unqualified apology it cannot be said that the apology is a conditional one merely because he has not also given up his defence in the suit but on the other hand mentioned that defence in the apology. AIR 1954 Him Pra 31 (31).

(35) A contempt of a very grave character should be punished in spite of the unconditional apology of the contemner. AIR 1948 Oudh 114 (116) = 23 Luck 37 = 49 Cri L Jour 108 (DB) ** AIR 1951 Pat 451 (2) (452) (DB) ** AIR 1940 Rang 70 (72) = 41 Cri L Jour 445 (DB) ** AIR 1965 Mad 336 (337) = 1965 (2) Cri LJ 223 = (1965) 1 Mad LJ 356 (DB) ** AIR 1961 Pat 360 (361) = 1961 (2) Cri LJ 362 = 1961 BLJR 152 (DB) ** 1961 (2) Cri LJ 109 (111) = 1960 Ker LT 338 (DB).

(36) The Court should not permit a person who is found to have deliberately

sworn a false affidavit in proceedings before the Court, to get away with an apology except in very exceptional circumstances. 1967 Cur LJ 888 (Punj).

(37) The proviso to the section gives the High Court a power of reviewing its judgment awarding punishment to an accused under the Act where the accused offers an apology to the satisfaction of the Court. But that power however is discretionary. AIR 1953 Him Pra 3 (4) = 1953 Cri L Jour 92.

(38) An unqualified apology although it is not sufficient to let go the accused unpunished where his contempt is grave and his conduct persistently contumacious can justify some leniency being shown to the accused in the matter of punishment. AIR 1958 Punj 180 (183) = ILR (1958) Punj 580 = 1958 Cri L Jour 685 ** AIR 1958 Punj 273 (283) = ILR (1958) Punj 1272 = 1958 Cri L Jour 952 ** AIR 1954 Orissa 167 (172) = ILR (1954) Cut 467 = 1954 Cri L Jour 988 ** AIR 1968 Andh Pra 370 (375) = (1967) 2 Andh WR 470 (DB) ** AIR 1967 Raj 203 (208) = 1967 Cri LJ 1057 = 1966 Raj LW 454 (DB).

(39) An apology which is neither sincere nor satisfactory and which besides is a belated one will not be accepted by the Courts especially in cases of gross contempt as sufficient to treat the accused leniently and let him off without any punishment at all. AIR 1958 Andh Pra 170 (172) = ILR (1957) Andh Pra 559 = 1958 Cri L Jour 349 ** AIR 1945 Nag 33 (49, 50) = ILR (1945) Nag 74 (DB) ** AIR 1959 Pat 183 (185) = 1958 BLJR 370 = 1959 Cri LJ 509 = 1958 BLJR 370 (DB).

(40) An unconditional apology may be accepted by the Court especially in a case where the contempt is so trifling that no serious notice need be taken of it. AIR 1952 Ajmer 33 (1) (33) = 1952 Cri L Jour 1234 ** AIR 1940 Oudh 137 (137, 138) = 15 Luck 268 = 41 Cri L Jour 169 (DB) ** AIR 1967 Andh Pra 299 (309) = 1967 Cri LJ 1470 = ILR (1968) Andh Pra 42 ** AIR 1967 Raj 203 (207) = 1967 Cri LJ 1057 = 1966 Raj LW 454 (DB).

(41) An apology may readily be accepted and no punishment inflicted where an offending article was published in the papers due to an accidental slip and not deliberately. AIR 1950 Cal 129 (133) = ILR (1951) 1 Cal 94 = 51 Cri L Jour 610 ** 1966 BLJR 502.

[See also (1951) 4 Sau LR 108 (108, 109) (DB).]

(42) In the case of an unintentional contempt the Court can act upon the apology of the contemner expressing sincere regret and let him off with a warning. (1950) 55 Mys HCR 148 (150, 151) (DB) ** AIR 1933 Oudh 118 (119) =

5. Power of High Court to try offences committed or offenders found outside jurisdiction.—A High Court shall have jurisdiction to inquire into or try a contempt of itself or of any Court subordinate to it, whether the contempt is alleged to have been committed within or outside the local limits of its jurisdiction and whether the person alleged to be guilty of the contempt, is within or outside such limits.

6. Repeals and Savings.—[Repealed by the Repealing and Amending Act, 1957 (36 of 1957), S. 2 and Sch. I. [17-9-1957.]]

THE SCHEDULE.—[Repealed by the Repealing and Amending Act, 1957 (36 of 1957), S. 2 and Sch. I. [17-9-1957.]]

[THE] CONTINGENCY FUND OF INDIA ACT, 1950

(ACT XLIX OF 1950)

[The text of the Act printed here is as on 1-3-1970.]

STATEMENT OF OBJECTS AND REASONS

"Pursuant to Articles 267 (1) and 283 (1) of the Constitution, this Bill seeks to provide for the establishment of the Contingency Fund of India, and for the custody of, the payment of moneys into and the withdrawal of moneys from, such fund. It is proposed to place a sum of fifteen crores of rupees in the Fund, which will be administered by

the Finance Ministry on behalf of the President. The advances will be resumed to the Fund as soon as the necessary supplementary funds have been authorised by Parliament through Supplementary Appropriation Acts or at the end of the Financial Year."

—Gaz. of India., 12-8-1950, Pt. II-S. 2, p. 310.

Section 4 — Note 3 (contd.)

34 Cri L Jour 726 (DB) ** 1966 BLJR 281.

(43) Where a counsel was held guilty of contempt for committing an act intimidating the witnesses, an unconditional apology from the counsel was accepted and no further action was taken against him. AIR 1957 Punj 105 (105) = 1957 Cri L Jour 657.

(44) In view of the fact that the contemner (who was a solicitor) committing contempt by scandalizing the Court had offered a very frank and unqualified apology and had admitted that the letter written by him was improper and ought not to have been written, only a fine of Rs. 1000 was imposed. AIR 1942 Bom 331 (332) = 44 Cri L Jour 93.

(45) A mere admission of error and an expression of regret do not amount to an apology of the nature required under the section. 1942 Oudh WN*6 (20) (DB).

(46) Expression of intention not to repeat offence cannot affect question whether offence committed is serious one. AIR 1941 Pat 185 (194) = 20 Pat 306 = 42 Cri L Jour 225 (DB).

Section 5 — Note 1

(1) The High Court has jurisdiction in view of the provisions of Section 5 of the Act of 1952 to enquire into and try a contempt of itself or of its subordinate Court whether the contempt has been committed within or outside the local limits of its jurisdiction and whether the contemner is within or outside such limits. AIR 1954 Assam 201 (205) = 1954 Cri L Jour 1609 (FB) ** AIR 1961 Cal 422 (429).

(2) Even prior to passing of the Contempt of Courts Act, 1952, every High Court had jurisdiction to commit for contempt even though the act alleged was committed outside its jurisdiction. AIR 1954 Orissa 167 (170, 171) = ILR (1954) Cut 467 = 1954 Cri L Jour 988 (DB) ** ILR (1949) 1 Cal 355 (364) ** AIR 1937 Cal 601 (602, 603) = 39 Cri L Jour 654.

[See also AIR 1945 Oudh 266 (268) = 20 Luck 442 = 47 Cri L Jour 294 (DB). (Once a person is brought before the High Court the question whether his arrest at place outside jurisdiction was legal or illegal becomes irrelevant.)]

[But see AIR 1944 Bom 127 (128, 129) = ILR (1944) Bom 333 = 45 Cri L Jour 647 (DB).

(3) Rules under Order 19 of Original Side Rules Madras will apply only where the 1956 rules under the Contempt of Courts Act do not provide otherwise. An application under Section 3 of Contempt of Courts Act filed before a Single Judge of the High Court must comply with the procedure laid down by Rules 1 (b) and 1 (c) of the 1956 Rules. AIR 1966 Mad 136 (140) = 1966 Cri LJ 421 = (1965) 2 Mad LJ 559 (DB).

Section 6 — Note 1

(1) As a result of the new Act of 1952 applying Section 6 of the General Clauses Act to the repeal of the Act of 1926 it is permissible to take action under the old Act itself for contempts committed prior to the commencement of the new Act. AIR 1952 Kutch 74 (76) = 1952 Cri L Jour 1482.

[THE] CONTINGENCY FUND OF INDIA ACT, 1950

(ACT XLIX OF 1950)*

[14th August, 1950.]

An Act to provide for the establishment and maintenance of
Contingency Fund

Be it enacted by Parliament as follows :

[*] For Statement of Objects and Reasons, see Gaz. of Ind., 12-8-1950, Pt. II-S. 2, page 310.

The Act has been extended to the Union Territories of Goa, Daman and Diu, by Reg. 12 of 1962 (30-1-1963); Dadra and Nagar Haveli by Reg. 6 of 1963 (1-7-1965); Pondicherry by Regulation 7 of 1963 [1-10-1963].

1. Short title.—This Act may be called THE CONTINGENCY FUND OF INDIA ACT, 1950.

2. Establishment of the Contingency Fund of India.—There shall be established a Contingency Fund in the nature of an imprest entitled the Contingency Fund of India, into which shall be paid from and out of the Consolidated Fund of India a sum of fifteen crores of rupees.

3. Custody of the Contingency Fund and withdrawals therefrom.—The Contingency Fund of India shall be held on behalf of the President by a Secretary to the Government of India in the Ministry of Finance, and no advances shall be made out of such fund except for the purposes of meeting unforeseen expenditure pending authorization of such expenditure by Parliament under appropriations made by law.

4. Power to make rules.—For the purpose of carrying out the objects of this Act, the Central Government may make rules* regulating all matters connected with or ancillary to the custody of, the payment of moneys into and the withdrawal of moneys from, the Contingency Fund of India.

[*] For Contingency Fund of India Rules, see S. R. O. 1358 published in Gaz. of Ind., 9-8-1952, Pt. II-S. 3, page 1207.

[THE] CONTINUANCE OF LEGAL PROCEEDINGS ACT, 1948

(ACT XXXVIII OF 1948)

[The text of the Act printed here is as on 1-3-1970.]

STATEMENT OF OBJECTS AND REASONS

"Section 15 (2) of the Indian Independence Act, 1947, provides inter alia that any legal proceedings by or against the Secretary of State in respect of any right or liability of the undivided India or any part thereof which were pending in Indian Courts immediately before the 15th August, 1947, shall be continued by or against such person as may be designated by order of the Governor-General under Section 9 of that Act or otherwise by law of the Dominion concerned. Article 12 (3) of the Indian Independence (Rights, Property and Liabilities) Order, 1947, makes the requisite provision for the continuance of such legal proceedings, but only in respect of any liability of the undivided India or part thereof. This Article does not cover proceedings in respect of any right of the undivided

India. The Bihar Government brought to the notice of the Government of India the existence of a long pending suit which was instituted in 1933 before the passing of the Government of India Act, 1935, in the name of the Secretary of State in Council to establish the right of Government to underground minerals in an estate, and since there was the possibility of a few more cases of a similar character pending by or against the Secretary of State in some of the Courts, an Ordinance entitled the Continuance of Legal Proceedings Ordinance, 1948 (12 of 1948), was promulgated. The object of the present Bill is to convert that Ordinance into an Act of the Legislature."

—Gazette of India, 1948, Part V, page 464.

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION

—Adapted by A. L. O., 1950; 3 A. L. O., 1956.

[THE] CONTINUANCE OF LEGAL PROCEEDINGS ACT, 1948

(ACT XXXVIII OF 1948)*

[3rd September, 1948.]

An Act to provide for the continuance of certain legal proceedings by or against the Secretary of State

WHEREAS it is expedient to provide for the continuance of certain legal proceedings by or against the Secretary of State in respect of any right of India or any part of India which were pending immediately before the 15th day of August, 1947.

It is hereby enacted as follows:—

[*] For Statement of Objects and Reasons see Gaz. of Ind., 1948, Pt. V, p. 464.

1. Short title and extent.—(1) This Act may be called THE CONTINUANCE OF LEGAL PROCEEDINGS ACT, 1948.

(2) It extends to *[the whole of India except †[the territories which, immediately before the 1st November, 1956, were comprised in Part B States].]

[*] Substituted for "all the Provinces of India," by A. L. O., 1950.

[†] Substituted for "Part B States," by 3 A. L. O., 1956. Immediately before the 1st November, 1956, the following were the Part B States in India: Hyderabad, Jammu and Kashmir, Madhya Bharat, Mysore, Pepsu, Rajasthan, Saurashtra and Travancore-Cochin.

Part B States no longer exist: Of these States, Jammu and Kashmir, Mysore, Rajasthan and Travancore-Cochin, now known as Kerala, have become full-fledged States: Hyderabad has merged with Andhra, together forming the State of Andhra Pradesh: Madhya Bharat with the State of M. P.: Pepsu with pre-reorganisation Punjab and Saurashtra now forms part of Gujarat.

2. Interpretation.—In this Act, "the appointed day" means the 15th day of August, 1947.

3. Continuance of legal proceedings.—Any legal proceedings which, immediately before the appointed day,—

(a) were pending by or against the Secretary of State in any Court within the territories which as from the appointed day became the territories of India by virtue of sub-section (1) of Section 2 of the Indian Independence Act, 1947, and

(b) were in respect of any right of India or any part of India, shall—

(i) if the right in question was that of the Governor-General in Council be continued by or against the Dominion of India;

(ii) if the right in question was that of the former Province of Bengal or the Punjab, be continued by or against the Province of West Bengal or East Punjab, as the case may be; and

(iii) if the right in question was that of any Governor's Province other than Bengal, the Punjab, the North-West Frontier Province of Sind, be continued by or against that Province.

SECTION 1 — NOTE 1

(1) The Act is a statute enacted by a legislature lawfully authorised to legislate for the Dominion. It is a law of the

new Dominion of India within the meaning of Section 15 (2) of the Indian Independence Act of 1947. AIR 1950 Pat 168 (172) = 28 Pat 941 (DB).

4. Exclusion of time in computing period of limitation.—In computing the period of limitation prescribed for any appeal or application to a Court in respect of any such proceedings as aforesaid, the period from the appointed day up to the 28th day of May, 1948 shall be excluded.

5. Repeal.—(1) The Continuance of Legal Proceedings Ordinance, 1948, is hereby repealed.

(2) Anything done or any action taken in exercise of any powers conferred by or under the said Ordinance shall be deemed to have been done or taken in exercise of powers conferred by or under this Act as if this Act had commenced on the 28th day of May, 1948.

[THE INDIAN] CONTRACT ACT, 1872

(ACT IX OF 1872)

[The text of the Act printed here is as on 15-3-1970]

CONTENTS

PREAMBLE SECTIONS

PRELIMINARY

1. Short title.
Extent.
Commencement.
2. Interpretation-clause.

CHAPTER I

OF THE COMMUNICATION, ACCEPTANCE AND REVOCATION OF PROPOSALS

3. Communication, acceptance and revocation of proposals.
4. Communication when complete.
5. Revocation of proposals and acceptances.
6. Revocation how made.
7. Acceptance must be absolute.
8. Acceptance by performing conditions, or receiving consideration.
9. Promises, express and implied.

CHAPTER II

OF CONTRACTS, VOIDABLE CONTRACTS AND VOID AGREEMENTS

10. What agreements are contracts.
11. Who are competent to contract.
12. What is a sound mind for the purposes of contracting.
13. "Consent" defined.
14. "Free consent" defined.
15. "Coercion" defined.
16. "Undue influence" defined.
17. "Fraud" defined.

SECTION 4 — NOTE 1

(1) Section 4 of this Act has no application to a suit which falls under the provisions of Section 15 (1) of the Indian Independence Act, 1948. In such a case the right of the designated person to appear and continue the suit as a statutory

18. "Misrepresentation" defined.

19. Voidability of agreements without free consent.

19-A. Power to set aside contract induced by undue influence.

20. Agreement void where both parties are under mistake as to matter of fact.

21. Effect of mistakes as to law.

22. Contract caused by mistake of one party as to matter of fact.

23. What considerations and objects are lawful, and what not.

Void Agreements

24. Agreements void, if considerations and objects unlawful in part.

25. Agreement without consideration, void, unless it is in writing and registered, or is a promise to compensate for something done, or is a promise to pay a debt barred by limitation law.

26. Agreement in restraint of marriage void.

27. Agreement in restraint of trade void.
Saving of agreement not to carry on business of which goodwill is sold.

28. Agreements in restraint of legal proceedings void.

Saving of contract to refer to arbitration dispute that may arise.
Suits barred by such contracts.
Saving of contract to refer questions that have already arisen.

29. Agreements void for uncertainty.

right under Section 15 (2) which he could exercise after formally approaching the Court and obtaining its permission. Even if an application for the purpose is held to be necessary, Article 181 and not 171 of the Limitation Act would govern the case. AIR 1950 Pat 168 (172) = 28 Pat 941 (DB).

SECTIONS

30. Agreements by way of wager void.
Exception in favour of certain prizes for horse-racing.

Section 294-A of the Indian Penal Code not affected.

CHAPTER III

OF CONTINGENT CONTRACTS

31. "Contingent contract" defined.
32. Enforcement of contracts contingent on an event happening.
33. Enforcement of contracts contingent on an event not happening.

34. When event on which contract is contingent to be deemed impossible, if it is the future conduct of a living person.

35. When contracts become void which are contingent on happening of specified event within fixed time.

When contracts may be enforced which are contingent on specified event not happening within fixed time.

36. Agreement contingent on impossible events void.

CHAPTER IV

OF THE PERFORMANCE OF CONTRACTS

Contracts which must be performed.

37. Obligation of parties to contracts.
38. Effect of refusal to accept offer of performance.
39. Effect of refusal of party to perform promise wholly.

By whom contracts must be performed

40. Person by whom promise is to be performed.

41. Effect of accepting performance from third person.

42. Devolution of joint liabilities.

43. Any one of joint promisors may be compelled to perform.

Each promisor may compel contribution.

Sharing of loss by default in contribution.

44. Effect of release of one joint promisor.

45. Devolution of joint rights.

- Time and place for performance.
46. Time for performance of promise where no application is to be made and no time is specified.

47. Time and place for performance of promise where time is specified and no application to be made.

48. Application for performance on certain day to be at proper time and place.

49. Place for performance of promise where no application to be made and no place fixed for performance.

50. Performance in manner or at time prescribed or sanctioned by promisee.

Performance of reciprocal promises.

51. Promisor not bound to perform, unless reciprocal promisee ready and willing to perform.

52. Order of performance of reciprocal promises.

53. Liability of party preventing event on which the contract is to take effect.

54. Effect of default as to that promise which should be first performed, in contract consisting of reciprocal promises.

55. Effect of failure to perform at fixed time, in contract in which time is essential.

Effect of such failure when time is not essential.

Effect of acceptance of performance at time other than that agreed upon.

56. Agreement to do impossible act.
Contract to do act afterwards becoming impossible or unlawful.

Compensation for loss through non-performance of act known to be impossible or unlawful.

57. Reciprocal promise to do things legal, and also other things illegal.

58. Alternative promise, one branch being illegal.

Appropriation of payments

59. Application of payment where debt to be discharged is indicated.

60. Application of payment where debt to be discharged is not indicated.

61. Application of payment where neither party appropriates.

Contracts which need not be performed

62. Effect of novation, rescission, and alteration of contract.

- 63. Promisee may dispense with or remit performance of promise.
- 64. Consequences of rescission of voidable contract.
- 65. Obligation of person who has received advantage under void agreement, or contract that becomes void.
- 66. Mode of communicating or revoking rescission of voidable contract.
- 67. Effect of neglect of promisee to afford promisor reasonable facilities for performance.

CHAPTER V

OF CERTAIN RELATIONS RESEMBLING THOSE CREATED BY CONTRACT

- 68. Claim for necessities supplied to person incapable of contracting, or on his account.
- 69. Reimbursement of person paying money due by another, in payment of which he is interested.
- 70. Obligation of person enjoying benefit of non-gratuitous act.
- 71. Responsibility of finder of goods.
- 72. Liability of person to whom money is paid or thing delivered by mistake or under coercion.

CHAPTER VI

OF THE CONSEQUENCES OF BREACH OF CONTRACT

- 73. Compensation for loss or damage caused by breach of contract.

Compensation for failure to discharge obligation resembling those created by contract.
- 74. Compensation for breach of contract where penalty stipulated for.
- 75. Party rightfully rescinding contract entitled to compensation.

CHAPTER VII

SALE OF GOODS

76-123. [Repealed.]

CHAPTER VIII

OF INDEMNITY AND GUARANTEE

- 124. "Contract of indemnity" defined.
- 125. Rights of indemnity-holder when sued.

- 126. "Contract of guarantee", "surety", "principal debtor" and "creditor".
- 127. Consideration for guarantee.
- 128. Surety's liability.
- 129. "Continuing guarantee".
- 130. Revocation of continuing guarantee.
- 131. Revocation of continuing guarantee by surety's death.
- 132. Liability of two persons, primarily liable, not affected by arrangement between them that one shall be surety on other's default.
- 133. Discharge of surety by variance in terms of contract.
- 134. Discharge of surety by release or discharge of principal debtor.
- 135. Discharge of surety when creditor compounds with, gives time to or agrees not to sue, principal debtor.
- 136. Surety not discharged when agreement made with third person to give time to principal debtor.
- 137. Creditor's forbearance to sue does not discharge surety.
- 138. Release of one co-surety does not discharge others.
- 139. Discharge of surety by creditor's act or omission impairing surety's eventual remedy.
- 140. Rights of surety on payment or performance.
- 141. Surety's right to benefit of creditor's securities.
- 142. Guarantee obtained by misrepresentation invalid.
- 143. Guarantee obtained by concealment invalid.
- 144. Guarantee on contract that creditor shall not act on it until co-surety joins.
- 145. Implied promise to indemnify surety.
- 146. Co-sureties liable to contribute equally.
- 147. Liability of co-sureties bound in different sums.

CHAPTER IX

OF BAILMENT

- 148. "Bailment", "bailor" and "bailee" defined.
- 149. Delivery to bailee how made.
- 150. Bailor's duty to disclose faults in goods bailed.
- 151. Care to be taken by bailee.

SECTIONS

152. Bailee when not liable for loss, etc., of thing bailed.
153. Termination of bailment by bailee's act inconsistent with conditions.
154. Liability of bailee making unauthorized use of goods bailed.
155. Effect of mixture, with bailor's consent, of his goods with bailee's.
156. Effect of mixture, without bailor's consent, when the goods can be separated.
157. Effect of mixture, without bailor's consent, when the goods cannot be separated.
158. Repayment, by bailor, of necessary expenses.
159. Restoration of goods, lent gratuitously.
160. Return of goods bailed on expiration of time or accomplishment of purpose.
161. Bailee's responsibility when goods are not duly returned.
162. Termination of gratuitous bailment by death.
163. Bailor entitled to increase or profit from goods bailed.
164. Bailor's responsibility to bailee.
165. Bailment by several joint owners.
166. Bailee not responsible on redelivery to bailor without title.
167. Right of third person claiming goods bailed.
168. Right of finder of goods; may sue for specific reward offered.
169. When finder of thing commonly on sale may sell it.
170. Bailee's particular lien.
171. General lien of bankers, factors, wharfingers, attorneys and policy-brokers.

Bailments of pledges

172. "Pledge", "pawnor" and "pawnee" defined.
173. Pawnee's right of retainer.
174. Pawnee not to retain for debt or promise other than that for which goods pledged.

Presumption in case of subsequent advances.

175. Pawnee's right as to extraordinary expenses incurred.
176. Pawnee's right where pawnor makes default.
177. Defaulting pawnor's right to redeem.

178. Pledge by mercantile agent.
- 178-A. Pledge by person in possession under voidable contract.
179. Pledge where pawnor has only a limited interest.

Suits by bailees or bailors against wrong-doers

180. Suit by bailor or bailee against wrong-doer.
181. Apportionment of relief or compensation obtained by such suits.

CHAPTER X

AGENCY

Appointment and authority of agents

182. "Agent" and "principal" defined.
183. Who may employ agent.
184. Who may be an agent
185. Consideration not necessary.
186. Agent's authority may be expressed or implied.
187. Definitions of express and implied authority.
188. Extent of agent's authority.
189. Agent's authority in an emergency.

Sub-agents

190. When agent cannot delegate.
191. "Sub-agent" defined.
192. Representation of principal by sub-agent properly appointed.
Agent's responsibility for sub-agent.
Sub-agent's responsibility.
193. Agent's responsibility for sub-agent appointed without authority.
194. Relation between principal and person duly appointed by agent to act in business of agency.
195. Agent's duty in naming such person.

Ratification

196. Right of person as to acts done for him without his authority.
Effect of ratification.
197. Ratification may be expressed or implied.
198. Knowledge requisite for valid ratification.
199. Effect of ratifying unauthorized act forming part of a transaction.
200. Ratification of unauthorized act cannot injure third person.

SECTIONS

Revocation of Authority

- 201. Termination of agency.
- 202. Termination of Agency where agent has interest in subject-matter.
- 203. When principal may revoke agent's authority.
- 204. Revocation where authority has been partly exercised.
- 205. Compensation for revocation by principal, or renunciation by agent.
- 206. Notice of revocation or renunciation.
- 207. Revocation and renunciation may be expressed or implied.
- 208. When termination of agent's authority takes effect as to agent, and as to third persons.
- 209. Agent's duty on termination of agency by principal's death or insanity.
- 210. Termination of sub-agent's authority.

Agent's duty to principal

- 211. Agent's duty in conducting principal's business.
- 212. Skill and diligence required from agent.
- 213. Agent's accounts.
- 214. Agent's duty to communicate with principal.
- 215. Right of principal when agent deals, on his own account, in business of agency without principal's consent.
- 216. Principal's right to benefit gained by agent dealing on his own account in business of agency.
- 217. Agent's right of retainer out of sums received on principal's account.
- 218. Agent's duty to pay sums received for principal.
- 219. When agent's remuneration becomes due.
- 220. Agent not entitled to remuneration for business misconducted.
- 221. Agent's lien on principal's property.

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION

- Amended by Acts 4 of 1886; 12 of 1891; 4 of 1930; 3 of 1951.
- Amended in C. P. by C. P. Act, 1 of 1915.
- Amended in C. P. and Berar by C. P. and Berar Act, 15 of 1938 (Amend-

Principal's duty to agent

- 222. Agent to be indemnified against consequences of lawful acts.
- 223. Agent to be indemnified against consequences of acts done in good faith.
- 224. Non-liability of employer of agent to do a criminal act.
- 225. Compensation to agent for injury caused by principal's neglect.

Effect of agency on contract with third persons

- 226. Enforcement and consequences of agent's contracts.
- 227. Principal how far bound, when agent exceeds authority.
- 228. Principal not bound when excess of agent's authority is not separable.
- 229. Consequences of notice given to agent.
- 230. Agent cannot personally enforce, nor be bound by, contracts on behalf of principal.

Presumption of contract to contrary.

- 231. Rights of parties to a contract made by agent not disclosed.
- 232. Performance of contract with agent supposed to be principal.
- 233. Right of person dealing with agent personally liable.
- 234. Consequences of inducing agent or principal to act on belief that principal or agent will be held exclusively liable.
- 235. Liability of pretended agent.
- 236. Person falsely contracting as agent not entitled to performance.
- 237. Liability of principal inducing belief that agent's unauthorized acts were authorized.
- 238. Effect, on agreement, of misrepresentation or fraud by agent.

CHAPTER XI

OF PARTNERSHIP

239-266. [Repealed.]

SCHEDULE. [Repealed.]

ments made repealed in Vidarbha area by Maharashtra Act 26 of 1963.)

—Adapted by A. O. 1937; A. C. A. O. 1948; A. L. O. (1950).

—Repealed in part and amended by Acts 6 of 1899; 24 of 1917.

—Repealed in part by Acts 1 of 1877; 10 of 1914; 3 of 1930; 9 of 1932.

Extended by Acts 59 of 1949; 30 of 1950; 26 of 1968: Regs. 6 of 1963; 11 of 1963 and 8 of 1965.

Extended in Bombay by Bombay Act 4 of 1950.

Extended in Punjab by Punjab Act 5 of 1950.

Extended to Berar by Act 4 of 1941.

COGNATE ACTS AND PROVISIONS

1. Carriers Act, 3 of 1865.
2. Forward Contracts (Regulation) Act, 74 of 1952.
3. Limitation Act, 1963, Section 29 (1).
4. Partnership Act, 9 of 1932.
5. Securities Contracts (Regulation) Act, 42 of 1956.
6. Penal Code, 1860, Section 491.

7. Powers of Attorney Act, 7 of 1882.
8. Sale of Goods Act, 3 of 1930.
9. Specific Relief Act, 47 of 1963.
10. Transfer of Property Act, 1882, Section 4.
11. Carriage by Air Act, 20 of 1934.
12. Carriage of Goods by Sea Act, 26 of 1925.

[THE INDIAN] CONTRACT ACT, 1872

(ACT IX OF 1872)*

[25th April, 1872.]

Preamble.

WHEREAS it is expedient to define and amend certain parts of the law relating to contracts; It is hereby enacted as follows:—

[*] For the Statement of Objects and Reasons for the Bill, which was based on a Report of Her Majesty's Commissioners appointed to prepare a body of substantive law for India, dated July 6, 1866, see Gazette of India, 1867, Extraordinary, page 34; for the Report of the Select Committee, see *ibid*, Extraordinary, dated 28th March, 1872; for discussion in Council, see *ibid*, 1867, Supplement, p. 1064; *ibid*, 1871, p. 313 and *ibid*, 1872, p. 527.

The Chapters and Sections of the Transfer of Property Act, 1882 (4 of 1882), which relate to contracts are, in places in which that Act is in force, to be taken as part of this Act—see T. P. Act 4 of 1882, S. 4.

PREAMBLE — SYNOPSIS

1. Applicability and scope of the Act.

2. Interpretation of the Act.

3. Illustrations to sections.

1. Applicability and scope of the Act.

— (1) The Contract Act is both an amending and a consolidating Act and it is not exhaustive of the law of contract to be applied by the Courts in India. AIR 1942 Bom 302 (303) = ILR (1942) Bom 670 ** AIR 1917 Bom 268 (270).

(2) The Contract Act, so far as it goes, is exhaustive and imperative. (1903) 30 Cal 539 (548) = 30 Ind App 114 (PC).

(3) Although the Indian Contract Act purports to deal only with certain parts of the law relating to contracts yet where it treats with a subject in a way at variance with the English law, it should be considered as exhaustive and binding on Courts in India. AIR 1916 Nag 104 (110) (DB).

(4) Wherever the provisions of the Contract Act do not apply in terms to a case the principles of English law become applicable as rules of justice, equity and good conscience. AIR 1952 Cal 93 (98) ** AIR 1942 Bom 302 (304) = ILR (1942) Bom 670 ** AIR 1939 Bom 23 (25) = ILR (1938) Bom 794 (DB) ** AIR 1966 SC 543 (549) = (1966) 1 SCR 656. (Act is not exhaustive — It does not refer to Banker's lien in respect of cash deposits.) ** AIR 1960 Punj 632 (635) = ILR (1960) 2 Punj 823 (DB) ** AIR 1959 Madh Pra 234 (237) = 1959 Jab LJ 281.

(5) English principles of equity can be applied only if they are not opposed to the provisions of the Contract Act. AIR 1937 Oudh 82 (86) = 13 Luck 65 (DB).

(6) The Contract Act, including Section 73, applies in terms to all contracts including those in respect of lands. The Indian Courts cannot, therefore, even where the result might appear hard, apply to such contracts foreign rules of law or equity, modifying the express terms of

PRELIMINARY

1. **Short title.**—This Act may be called THE INDIAN CONTRACT ACT, 1872.

Extent: Commencement.—It extends to the *whole of India †[except the State of Jammu and Kashmir]; and it shall come into force on the first day of September, 1872.

‡[* ° °] Nothing herein contained shall affect the provisions of any Statute, Act or Regulation not hereby expressly repealed, nor any usage or custom of trade, nor any incident of any contract, not inconsistent with the provisions of this Act.

[*] This Act has been declared to be in force in—the Santhal Parganas [See the Santhal Parganas Settlement Regulation (3 of 1872), S. 3]; Panth Piploda [See the Panth Piploda Laws Regulation, 1929 (1 of 1929), S. 2.]

It has been declared by notification under S. 3 (a) of the Scheduled Districts Act, 1874 (14 of 1874) to be in force in the Tarai of the Province of Agra—see Gaz. of Ind., 1876, Pt. I, page 505; and in the Districts of Hazaribagh, Lohardaga and Manbhum, and Pargana Dhalbhum and the Kolhan in the District of Singbhum—See Gaz. of Ind., 1881, Pt. I, page 504. (The District of Lohardaga included at this time the present District of Palamau which was separated in 1894. The District of Lohardaga is now called the Ranchi District—See Calcutta Gazette, 1899, Pt. I, page 44). (All these districts form parts of Bihar State now.)

It has been extended to Berar by the Berar Laws Act, 1941 (4 of 1941).

This Act has been extended to the new Provinces and Merged States, by the Merged States (Laws) Act, 1949 (59 of 1949), S. 3 [1-1-1950] and to the Union Territories of Manipur and Tripura by the Union Territories (Laws) Act, 1950 (30 of 1950), S. 3 [16-4-1950]. Vindhya Pradesh to which the Act was extended by this Act, now forms part of State of M. P. — See Act 37 of 1956, S. 9 (1) (e) [1-11-1956].

Preamble — Note 1 (contd.)

the Statute. AIR 1927 Sind 120 (122) = 19 Sind LR 337.

(7) Justice, equity and good conscience mean the rules of English law so far as they are applicable to Indian circumstances. AIR 1939 Sind 125 (126) = ILR (1939) Kar 422 (DB) ** (1935) 62 Cal 612 (617) (DB).

(8) The general provisions of the Contract Act do not supersede the provisions of a special later enactment such as Bombay Hereditary Offices Act. AIR 1928 Bom 201 (203) (DB).

(9) The Contract Act (9 of 1872), is not retrospective. (1874) 12 Beng LR 451 (458, 472) (SB) ** 1946 Jaipur LR 442 (445) (DB).

2. Interpretation of the Act. — (1) The Court must interpret an Act where it applies and the natural meaning of the words should be followed uninfluenced by the previous state of the law. AIR 1932 Bom 168 (172, 173) = 56 Bom 101 (DB).

(2) Indian law of contract is similar to the English law of contract. But where the Indian law clearly lays down principles that may not be identical with the English law, the Court has to be cautious in accepting citations of English law or rulings applying that law. The duty of the Court is to apply the Indian

statute literally and unambiguously. AIR 1952 Vindh Pra 51 (57).

(3) The definition of "good faith" in General Clauses Act would not apply to Contract Act. The definition of 'good faith' as understood generally in civil law would apply viz., that nothing is said to be done in 'good faith' which is done without due care and attention. AIR 1969 Bom 127 (130) (DB).

3. Illustrations to sections. — (1) The illustration to a section cannot control the plain meaning of the section itself especially when its effect would curtail a right purported to be conferred by the section. AIR 1917 Bom 268 (270).

(2) The illustrations are only intended to assist in construing the language of the Act. It is a mistake to be guided by the illustrations, rather than considering the wording of the sections. (1874) 22 Suth WR 367 (368) (DB).

Section 1 — Note 1

(1) The law of contract is the law of the place where the contract was made. Where the law of one province of British India is distinct from the law of the other province, the two provinces must be regarded for the purposes of this rule, as foreign countries inter se. AIR 1970 All 108 (113). (Act has no extra territorial operation.)

(2) The proper law of contract which would govern the validity, interpretation and effect of a contract of affreightment

It has also been extended to the States Merged in the States of Bombay and Punjab; see Bombay Act 4 of 1950 and Punjab Act 5 of 1950 respectively. States of Bombay and Punjab have now been reorganised into two States each, namely, Maharashtra and Gujarat and Punjab and Haryana respectively — See Acts 11 of 1960 and 31 of 1966.

The Act has been amended in C. P. by C. P. Act 1 of 1915 and in C. P. and Berar by C. P. and Berar Act 15 of 1938. This latter Act, in its application to Berar i.e., Vidarbha region of Maharashtra State, has now been repealed by Maharashtra Act 26 of 1963.

It has been extended to the Union Territories of —
Dadra and Nagar Haveli by Regulation 6 of 1963 [w.e.f. 1-7-1965].
Goa, Daman and Diu by Regulation 11 of 1963 [w.e.f. 1-12-1965].
Laccadive, Minicoy and Amindivi Islands by Regulation 8 of 1965.
Pondicherry by Act 26 of 1968 [18-12-1968].

[†] Substituted for "except Part B States" by the Part B States (Laws) Act, 1951 (3 of 1951), S. 3 and Schedule. [1-4-1951].

[‡] The words "the enactments mentioned in the schedule hereto are repealed to the extent specified in the third column thereof but" were repealed by the Repealing and Amending Act, 1914 (10 of 1914).

Section 1 — Note 1 (contd.)

is the law by which the parties intend their contract to be governed. The expressed intention in the contract would determine the proper law of the contract. AIR 1951 Trav-Co 1 (3) = 1950 Trav-Co LR 339 (DB) ** AIR 1961 SC 1285 (1294) = (1961) 3 SCR 1020 = 64 Bom LR 169.

(3) The Contract Act applies to suits between Hindus in the Calcutta Small Causes Court. (1875) 14 Beng LR 76 (85) (DB).

(4) The liability of common carriers in India is not affected by the Indian Contract Act, 1872. The written law relating to that liability is untouched by the Act; the unwritten law is not within its scope. (1891) 18 Cal 620 (628) = 18 Ind App 121 (PC).

(5) In India the duties and liabilities of the common carrier are governed by the principles of English common law on the subject except where they have been departed by Indian Statutes. The Indian Contract Act does not cover the common carriers responsibility. AIR 1951 Trav-Co 1 (4) = 1950 Trav-Co LR 339 (DB) ** AIR 1951 Sau 83 (85).

(6) Incidence of any insurance contract in India is on the same footing as in England. Agreement is not enforceable if basis of agreement is broken. AIR 1959 Pat 102 (106) = 61 Pun LR 153 (DB).

(7) If the contract is illegal, foreign award made in pursuance of an arbitration clause which formed an integral part of such contract, will not be enforceable. AIR 1964 Mad 532 (536) = ILR (1964) 2 Mad 90 (DB).

(8) The rights and liabilities arising out of a joint ownership created by Hindu law between the members of an undivided family cannot be determined exclusively by Indian Contract Act but

must be considered with the general rules of Hindu law. (1880-1881) 5 Bom 38 (39) (DB).

(9) The general provisions of the Contract Act as to the rights and liabilities of undisclosed principals were not intended to alter well-established rules as to negotiable instrument. (1907) 30 Mad 88 (92) (FB).

(10) The rule of damduppat applies only during contractual relations of debtor and creditor. It does not apply where the contractual relation has come to an end by reason of a decree. AIR 1966 Nag 239 (240) = ILR (1956) Nag 535 (DB).

(11) Trade usage can be pleaded in conflict with the provisions of the Contract Act. Its incidents and details ought to be indicated with clearness and precision. AIR 1931 All 583 (583, 584) (DB) ** AIR 1959 Andh Pra 545 (546, 547).

(12) It is for the parties to decide on what terms contracts should be entered into and if they choose to enter into contracts with full knowledge of the commercial usage governing them, they are bound by them even if the usage does involve some conflicts between the agent's duty and interest. AIR 1932 Lah 633 (635) (DB).

(13) Where an agent by the trade usage sells goods, the question whether he is authorised to do so is not governed by the provisions of the Contract Act inasmuch as Section 1, Contract Act, provides that nothing therein contained shall affect any usage or custom of trade. AIR 1933 Lah 183 (184).

(14) By the mercantile usage prevailing in the Delhi iron market, among big merchants, no interest can be charged on the unpaid price for transactions before 1917. AIR 1933 Lah 127 (127).

(15) The existence of the usage of "Pakki Adat" (a local usage) must be

2. Interpretation-clause.—In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context :—

- (a) When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal:

Section 1 — Note 1 (contd.)

strictly proved. AIR 1935 Sind 38 (40) (DB).

(16) The Barrister's profession cannot be called a trade and therefore the exception contained in this section has no application. AIR 1933 All 417 (420) = 55 All 570 (FB).

(17) Words "not inconsistent with provisions of the Act" are not to be connected with words "usage or custom of trade." Both grammatical construction of sentence and reason of the thing require that application of these words should be confined to subject which immediately precedes them. (1891) 18 Cal 620 (626) = 18 Ind App 121 (PC).

(18) The rule that a person building on the land of another is 'prima facie' entitled to remove the buildings erected upon the land demised or to receive compensation, when applied to a contract of tenancy, is not inconsistent with anything in the Contract Act and therefore, is unaffected by it. (1880) 5 Cal 688 (692).

(19) Where the matter is provided by a statute the Contract Act does not apply. It is meant to cover contracts between parties and not statutory enactments. 1965 Pun LR (Supp) 170 (172).

SECTION 2 (a) — SYNOPSIS

1. Offer.
2. Invitation to offer.
3. Bids at auction sales.

1. Offer. — (1) A proposal is merely an offer to be bound by a promise. AIR 1939 Rang 86 (87, 88) = 1938 Rang LR 667.

(2) The word 'proposal' used in the section is synonymous in English use with offer. AIR 1965 Andh Pra 191 (193) = (1965) 1 Andh WR 176 (DB).

(3) On 2nd September, 1957, the defendant wrote to the plaintiff as follows: 'I hereby agree to assign the said lease area of 184 acres in your favour subject to your paying me one lakh and eighty thousand rupees at your option to be decided by you within three months from this date.' This offer was revoked by the defendants by a letter dated 31st October, 1957, which reached the plaintiff on 6th November, 1957. On 1st November, 1957, the plaintiffs filed a suit to enforce the contract.

Held, the document dated 2nd September, 1957, though worded as an agreement was in point of law only an offer. AIR 1969 SC 1157 (1159) = (1969) 2 SCJ 641. (Reg. Appeal No. 231 of 1960, D/- 19-6-1963 (Mys) Reversed.)

(4) 'Proposal', under Section 2 (a) cannot be treated as an equivalent or synonym of 'offer' in the expression 'offer for sale or hire' appearing in Section 51 (b) (i), Copyright Act 1957. AIR 1969 Bom 302 (306, 307, 308) = 1969 Cri LJ 1109 = 71 Bom LR 409.

(5) A proposal is a declaration by the proposer of his intention to be bound by an obligation if the offeree fulfils or undertakes to fulfil certain conditions. AIR 1951 All 93 (98) = ILR (1950) All 1033 (FB).

(6) An offer which does not contain any particulars as to the thing offered, does not constitute a proposal properly so called. AIR 1947 All 337 (338) = ILR (1947) All 44 (DB).

(7) Where person states that he is prepared to purchase the property for a 'reasonable sum' the proposal cannot be construed as an offer to purchase for any definite amount. AIR 1968 Ker 197 (198) = 1968 Ker LT 520 (DB).

(8) The terms of an offer must be certain and the offer should be such as in law is capable of being accepted and gives rise to a legal relationship. The vagueness of an offer would not carry any contractual relationship. AIR 1966 Mys 118 (122) = (1965) 1 Mys LJ 546 (DB).

(9) Where an instrument is so worded as to be binding only on the promisor, it is in point of law only an offer and until both parties are bound, neither party is bound. AIR 1922 Mad 16 (16) = 46 Mad 30 (DB).

(10) Tender constitutes offer. AIR 1966 Cal 259 (263).

(11) Where the agreement is executory on both sides with an option to one of the parties to do as he likes, there is nothing more than a standing offer. AIR 1922 Mad 16 (17) = 46 Mad 30 (DB).

(12) A 'term of the proposal' signifies a condition without the fulfilment of which the proposer is not willing to undertake the obligation. Whether a particular condition proposed amounts to a term of the proposal depends upon the intention of the proposer. AIR 1951 All 93 (98) = ILR (1950) All 1033 (FB).

(13) A promise to reconvey the property within a specified period at the option of the promisor is at least an offer or option which becomes a promise enforceable at law when the offeree exercises his option and accepts the offer. AIR 1965 All 83 (85) = 1963 All WR (HC) 811 (DB).

(14) When the offer of any payment is subject to any condition, the payment has

Section 2 (a) — Note 1 (contd.)

to be accepted with the condition imposed and it is not permissible in law to accept the payment and ignore the condition. It is always open to a person to elect to accept or not to accept with that condition. AIR 1962 Pat 372 (377) = 1962 BLJR 480 (DB).

(15) A letter requesting a loan and promising to repay with interest by a certain date is not a promissory note but a mere proposal. (1923) 71 Ind Cas 968 (969) (Pesh) ** (1889) 13 Bom 669 (670) (DB).

[But see (1893) 16 Mad 283 (283) (DB).]

(16) Where a party sent a transfer deed for sale of certain shares to a Railway administration accompanied by letter which requested the Railway to pay him any amount which it thought just and reasonable and contained a further assurance that the Railway was not bound to make the purchase it was held that there was only an offer to the Railway to purchase the shares and not out-right sale. (1958) 28 Com Cas 29 (33, 34) (Punj).

(17) Where a person went to the office of a public servant and told him that he would pay him a certain amount if a certain order was obtained for him the very same day it was held that his conduct amounted to an offer of a bribe even though he did not actually produce the money at the time. AIR 1955 Bom 61 (62) = 1955 Cri LJ 181 (DB).

(18) A letter by the Railway company signifying its readiness to pay a certain sum to the consignor in satisfaction of his claim was held not to contain a promise to pay the amount but to contain only an offer to settle the claim at that amount. AIR 1920 All 157 (158) = 42 All 390.

(19) Where a party in order to deposit money in a bank obtains the necessary forms from the bank, fills them up and sends the necessary money to the bank he makes the real offer and the acceptance of that which is to be by the bank takes place when it issues the deposit receipt. AIR 1942 PC 6 (7) = 69 Ind App 1 = ILR (1942) Bom 318 = ILR (1942) Kar (PC) 7.

(20) A person by telegraphing a commission agent to buy certain number of silver bars and keep them with him offers the business of buying the bars as commission agent and keeping them pending instructions as to delivery. AIR 1939 Bom 101 (102, 103) (DB).

(21) A circular by a bank to its debtors which does not signify to them its intention to raise the rate of interest with a view to obtaining their consent to the increase but only intimates to them its unilateral decision to enhance the rate as from the date of the notice cannot be said to be proposal as defined in S. 2 (a). AIR 1958 Cal 644 (646).

(22) A term in a partition deed that in the event of any one of the brothers wishing to sell his share of the house he should sell it to the other brothers at the market value is not an offer itself but merely an undertaking to make an offer of sale upon the arising of certain contingency. AIR 1951 Mad 396 (396).

(23) Where the Honorary Secretary of a bank had an informal talk with a person to enquire whether he would purchase a land belonging to the bank on certain conditions but not as representing the bank and later made a report to the bank that the person had assured to purchase the land it was held that what took place between the two was only an enquiry on the one hand and an assurance on the other. It could not amount either to an offer or a contract. AIR 1949 Nag 286 (288) = ILR (1949) Nag 106.

(24) Informal discussions by interested persons and Court of Wards, culminating in Court of Wards passing a resolution that if possible compromise should be effected in terms arrived at the discussion does not amount to an offer or an acceptance of an offer. The stage of making an offer and getting the acceptance would follow passing of the resolution. AIR 1941 Oudh 529 (539).

(25) Where tenders are called for different commodities together, the fact that quotations in respect of only one commodity has been accepted would not amount to fresh offer in respect of other commodities making it obligatory to call for fresh tenders in respect thereof. AIR 1962 Manipur 47 (51, 52).

(26) Where one person by a letter asks the consent of another to a certain transaction without stating the consideration, it does not become an offer. 1913 Pun LR No. 277, p. 929 (930) (DB).

(27) In a suit where plaintiffs based their claim on a contract alleged to arise out of an offer made by the manager of defendants who said in a suit that if the plaintiffs took into account a certain havala he would have to pay a certain amount to the plaintiffs, it was held that the statement only amounts to an expression of the consequences in law and not an offer. (1936) 162 Ind Cas 327 (328, 329) (PC).

(28) If the party to whom the offer is communicated by a party in Bombay resides or carries on business outside the jurisdiction of the Bombay High Court, the offer cannot be said to have been made within Bombay and therefore no part of cause of action in respect of that transaction can be said to have arisen within the jurisdiction of the Bombay High Court. AIR 1951 Bom 249 (252).

(29) Condition that tenderer should deposit money at any of the branches of Reserve Bank — Tenderer depositing money at Branch C a place within juris-

- (b) When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a promise :

Section 2 (a) — Note 1 (contd.)

diction of Court — Tender accompanied by deposit receipt lodged at B, a place outside Court's jurisdiction as required by terms of contract — Acceptance of tender at B and execution of formal document of contract at B — Court at C held had no jurisdiction to try suit on the contract. AIR 1966 Cal 259 (263).

(30) Telegram by defendant from Gorakhpur to plaintiff communicating the rates of Tora — Plaintiff at Forbesganj writing to defendant to purchase certain quantity of tora — The defendant accordingly purchasing and communicating the fact of purchase. The contract was completed at Gorakhpur on the date when the Telegram of purchase was dispatched, plaintiff's letter to the defendant to purchase tora was an offer and the communication of purchase by defendant was an acceptance of the offer. A suit on the contract would not lie in a Court which has jurisdiction over Forbesganj. AIR 1970 Pat 91 (93) (DB).

2. Invitation to offer.— (1) A catalogue of the goods of a Company for sale is not a series of offers but only an invitation for offers. A person ordering a certain article is the offeror and the Company is the acceptor. (1909) 12 Oudh Cas 17 (20).

(2) When a merchant or commission agent sends his quotations or terms of business it is not an offer but merely an intimation on his part of his readiness to transact business on those terms. The addition of the words "let us have your transaction once" will not convert it into an offer. AIR 1938 Nag 186 (188) ** ILR (1954) 4 Raj 252 (256) ** 56 Bom 324 (DB) ** AIR 1922 Lah 100 (101) ** AIR 1920 Mad 177 (179) (DB).

(3) Telegraphing lowest price on request is not tantamount to an offer but a mere invitation for an offer. AIR 1914 Low Bur 236 (237) = 7 Low Bur Rul 343 (DB).

(4) A tender notice means only an invitation extended to the contractors for making offers. It does not amount to an offer or proposal. AIR 1962 Manipur 47 (50).

(5) Where a person in reply to an offer to buy his property at a certain figure states that he would not sell the property for anything less than a certain amount he thereby merely invites offers and does not make any offer to sell at the price mentioned by him as the minimum. AIR 1951 SC 184 (185, 186) = 1951 SCR 161.

(6) A bank by sending on request by a party certain forms to be filled in by him if he proposed to deposit money with it only sends a quotation and not an offer

to the party. AIR 1942 PC 6 (7) = 69 Ind App 1 = ILR (1942) Bom 318 = ILR (1942) Kar (PC) 7.

(7) Where an advertisement in a newspaper by Railway Company invited tenders for certain contract and was not addressed to any particular person it was held that the advertisement did not constitute a proposal. AIR 1939 Oudh 249 (252) = 14 Luck 710 (DB).

(8) Notice inviting tenders is merely general invitation to make offer. 1966 All LJ 1118 = ILR (1967) 1 All 47.

(9) Letter communicating willingness to sell at a price in reply to an enquiry whether the property is for sale, amounts to an offer and is not merely an invitation to an offer. AIR 1936 Cal 87 (89) (DB) ** (1964) 77 Mad LW 458 (2).

(10) In cases of invitations for orders a contract would come into being only when the invitee places an order and the invitor accepts the same. AIR 1954 SC 236 (238) = 1954 SCR 817.

3. Bids at auction sales.— (1) A bidder at an auction merely makes an offer to buy which he can withdraw until it is accepted. AIR 1922 Mad 486 (491) = 45 Mad 799 (DB) ** (1913) 19 Ind Cas 904 (905) (Cal) ** AIR 1965 Andh Pra 191 (193) = (1965) 1 Andh WR 176 (DB) ** 1965 MPLJ 108 = 1965 Jab LJ 161 (DB) ** AIR 1962 Mys 185 (187) = 1962 Mys LJ (Sup) 119 (DB).

(2) The highest bid at an auction sale held subject to the condition that the sale will not be confirmed until receipt of orders from the Collector amounts only to an offer which could when accepted by the Collector become a concluded contract. The endorsement of the officer conducting the sale at the end of the bidding list stating that the sale has been concluded in favour of the highest bidder cannot override that condition and bring about a concluded contract in the absence of the Collector's order. AIR 1923 Mad 582 (582, 583) (DB).

Section 2 (b) — Note 1

(1) The word 'promise' in the Act is used in a narrow sense to mean an accepted proposal. AIR 1939 Rang 86 (87, 88) = 1939 Rang LR 667.

(2) Definition of 'promise' shows that there must not only be a proposal but there must also be an acceptance of the proposal by other side conditional offer rejected by other party does not amount to a promise within Section 25 (3). AIR 1964 Orissa 111 (113) = ILR (1963) Cut 741 (DB).

(3) 'Promise' defined under clause (b) is not the same thing as an agreement which is defined under clause (e). AIR 1948 Sind 91 (93) = ILR (1947) Kar 182 (DB).

Section 2 (b) — Note 1 (contd.)

(4) When the parties negotiate a contract orally in the presence of each other or over telephone and one of them makes an oral offer, in making the oral acceptance, the acceptor must ensure that his acceptance is audible, heard and understood by the offeror. The acceptance must be by such words which have effect of communicating it. AIR 1959 Madh Pra 234 (237) = 1959 MPLJ 596.

(5) After a proposal has been accepted and there is promise the promisor cannot resile from the promise. AIR 1925 All 271 (271, 272) = 47 All 456 (DB) ** AIR 1962 Pat 372 (377) = 1962 BLJR 480 (DB).

(6) Tender is an offer which is accepted when tender is accepted. Offer after acceptance becomes promise. 1966 All LJ 1118 = ILR (1967) 1 All 47.

(7) A binding promise can be inferred from the circumstances of a case. AIR 1934 All 271 (272). (Where defendant desired that money should be lent to his friend, and the plaintiff money-lender lent on his acknowledging receipt of the money it was held that there was an implied promise by the defendant to repay.) ** AIR 1969 Orissa 301 (304) = 35 Cut LT 678 ** AIR 1959 Mad Pra 234 (237) = (1959) MPLJ 596.

(8) An offer which is not accepted cannot bind the offeror especially when the contract was intended to be reduced into writing. AIR 1955 SC 468 (476) = 1955-2 SCR 48 = 34 Pat 359.

(9) An offer unless accepted by the offeree cannot bind him with any obligation. Thus the mere making of an offer at the first opportunity to buy a property in the event of its sale by the offeror cannot compel the offeree unless he accepts the offer to buy the property when it is sold. AIR 1926 Mad 120 (121).

(10) Acceptance of offer must be absolute and unconditional. AIR 1962 SC 378 (385) = (1962) 3 SCR 760.

(11) Tender constitutes an offer which after acceptance and being embodied in a formal document becomes a contract. AIR 1966 Cal 259 (263).

(12) Auction sale — Acceptance of bid — Revocation — (Municipalities — C. P. and Berar Municipalities Act (2 of 1922), Ss. 42, 176 (1) — Rules under R. 6). (1958) 60 Bom LR 189 = 1957 Nag LJ 637. (An offer is accepted when acceptance is made in manner prescribed or indicated by the offeror. Where a bid is reserved for acceptance of the person who puts the property for sale by auction, it is implicit that acceptance must, in the absence of any agreement to the contrary, be communicated to the offeror.) 1957 Nag LJ 637.

(13) A conditional offer lapses when the condition is not accepted by the offeree. AIR 1957 SC 95 (102) = 1956 SCR 872.

(14) Acceptance of offer by telegram is valid. AIR 1963 Punj 372 (375).

(15) Where an offer is made subject to condition and that offer is accepted, the person accepting the offer must be presumed to have accepted it with the condition so attached and he cannot be heard to say that though he accepted the offer he was not bound by the condition. AIR 1960 Pat 139 (143, 144).

(16) Where a person receiving an offer through a letter remains silent he cannot be taken to have accepted it by his silence. AIR 1941 Rang 270 (272).

(17) A entering into certain forward transactions with B with agreement that contract forms if not returned unsigned with letter will be deemed to have been accepted. A retaining contract forms — Held, A's conduct in not returning contract forms amounted to acceptance of proposal — Held further contract forms being in writing and prescribing compulsory arbitration amounted to arbitration agreement. AIR 1968 All 292 (295) = ILR (1968) 1 All 60.

(18) The quotation of rates offered by a contractor, in response to tender notice, does not amount to an acceptance of offer. It is by the acceptance of any of the offers or proposals by the person calling for tenders that it becomes a promise or an agreement. AIR 1962 Manipur 47 (50).

(19) Where a vendor of certain properties subject to pre-emption offered to sell them to his co-sharers by a notice and the co-sharers remained silent without expressing willingness to buy, it was held that the co-sharers' conduct amounted to a refusal to buy. AIR 1919 All 340 (342) (DB).

(20) There cannot be an acceptance of an offer which has not come to the knowledge of the offeree. (1913) 11 All LJ 489 (492) ** (1959) 63 Cal WN 158 (DB).

(21) Business offer — Not usual to accept it by a plaint — Acceptance cannot be by serving copy of plaint in a suit for specific performance through Court — Reg. App. No. 231 of 1960, D/-19-6-1963 (Mys), Reversed. AIR 1969 SC 1157 (1159) = (1969) 2 SCJ 641.

(22) Reward offered for the search of a missing boy for whose search a servant was already sent cannot be claimed by the servant though he found the boy out; the servant did not undertake the search with knowledge of the offer and finding out by him does not amount to acceptance by conduct. (1913) 11 All LJ 489 (493).

(23) Notification issued by Government introducing system of minimum consump-

- (c) The person making the proposal is called the "promisor", and the person accepting the proposal is called the "promisee":

Section 2 (b) — Note 1 (contd.)

tion of electricity and rate charged thereon. Respondents although protesting against the introduction of new system continuing to take electrical energy. Respondents by their conduct accepted the terms notified in the notification. AIR 1968 Pat 171 (DB).

(24) The mere writing on bills of medical practitioners that interest at 1 per cent. per mensem will be charged cannot amount to a contract. AIR 1941 Oudh 254 (256, 257) = 16 Luck 701 (DB).

(25) No single party can impose any term of contract upon the other, unless it is agreed to by the other party. Merely because the letter on the top of which 'subject to Madras jurisdiction' was printed, it could not become part of contract unless it was agreed to by addressee. AIR 1968 Andh Pra 330 (332) = (1967) 1 Andh WR 445.

(26) An offer unless it is communicated to the other party is not capable of acceptance. Hence, where a party merely makes a mental resolve to make an offer but does not communicate it he cannot be said to have made any offer. AIR 1949 Nag 286 (288) = ILR (1949) Nag 106.

(27) Where a letter addressed to a member of a Company offered him new shares and in the event of his renouncing, to his nominee, and on the member's renouncing the nominee accepted the shares, it was held that a contract with the nominee was concluded even though the offer was made in the letter to the member. AIR 1938 Cal 423 (428) = ILR (1938) 2 Cal 190.

(28) Before a party can be said to accept something other than the performance of the contract he must have the option to refuse to accept such satisfaction and to insist on performance as stipulated. ILR (1937) 1 Cal 757 (763).

(29) Where there was an offer by a letter which was accepted by a minute of the Company which did not incorporate all the terms contained in the letter, it was held that the only binding contract was that contained in the minute. AIR 1914 PC 48 (48) = 10 Nag LR 108.

(30) Where intention of offeror was to sell all the properties at a uniform rate of price offeree cannot accept a portion of it and claim specific performance of that portion of contract. 1913 Punj LR No. 277, page 929 (932, 933) (DB).

(31) Where the plaintiff accepts the offer of the defendant to sell but seeks to add a further term, which the defendant refused to consider at the same time repeating the offer previously made, and the plaintiff accepts the offer, the transaction of contract is complete and binding on the defendant. AIR 1938 Cal 343 (346) ** (1963) 65 Punj LR 681 **

AIR 1961 Ker 21 (22) = 1960 Ker LT 574 (DB).

(32) If the making of the contract be part of the cause of action, it follows that the act of concurrence of either party which is essential to the contract, is itself a part of the cause of action, for without such act of concurrence the contract cannot come into existence. AIR 1931 Cal 659 (662) = 58 Cal 539 (DB).

(33) On 2nd September 1957, defendants wrote to plaintiff as follows: 'I hereby agree to assign the said lease area of 184 acres in your favour subject to your paying me one lakh and eighty thousand rupees at your option to be decided by you within three months from this date'. This offer was revoked by defendant by letter dated 31st, October 1951, which reached plaintiff's on 6th November 1957. On 1st November 1957, plaintiff filed suit to enforce his contract. **Held:** the promise to keep offer open for 3 months was not supported by any consideration and defendant was at liberty to revoke the offer at any time before its acceptance by plaintiff. Such revocation was made by letter dated 31-10-1957 which reached plaintiff by 6-11-1957 before which date plaintiff did not accept the offer either orally or by any letter sent to defendant. AIR 1969 SC 1157 (1159) = (1969) 2 SCJ 641. (Reg. Appeal No. 231 of 1960, D/- 19-6-1963 (Mys), **Reversed.**)

Section 2 (c) — Note 1

(1) Under Section 2 (c) a 'promisor' or a promisee is a 'person' and considering the object of the Act the word 'person' must be given such an extended sense that it will include governments also. AIR 1956 All 383 (384) (DB).

(2) No man can in his own right be under any obligation to himself. Therefore where hat-chita is executed by a person in favour of himself and some others, such person cannot in law become a promisee and the portion of the debt due to himself will stand discharged by the doctrine of merger. AIR 1941 Cal 595 (597) (DB).

(3) The heirs of a promisee merely because they may be entitled to claim what their ancestor could have claimed do not become the promisees themselves. Similarly an assignee of a promisee does not become the promisee himself simply because he could claim what his transferor himself could have claimed. AIR 1939 Mad 818 (821) (DB).

(4) The promisee must include the representative of a deceased promisee as a person to whom the offer of performance can be made. ('08) 4 Mad LT 335 (336).

(5) There can be no agreement to form a partnership by the same person acting in different capacity. He cannot be both

- (d) When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something,* such act or abstinence or promise is called a consideration for the promise :

Section 2 (c) — Note 1 (contd.)

the promisor and the promisee. AIR 1957 Mad 8 (12).

(6) At a meeting between the mortgagees and the family of A and B who were the co-mortgagors it was agreed that A and B should execute a sale deed in favour of the mortgagees in respect of certain properties including the mortgaged properties. It was also agreed that the mortgagees would reconvey the properties to B's wife provided she paid the expenses of reconveyance. The mortgagors subsequently sent a letter to the mortgagees stating these terms to which the mortgagees replied accepting the arrangement and stating that they would reconvey the mortgaged items at the cost of mortgagors. It was held that the promisee under the arrangement was the wife of B and that was in no way affected by the statement in the letter of acceptance that the property would be reconveyed at the cost of mortgagors on their demand. AIR 1953 SC 443 (446).

SECTION 2 (d) — SYNOPSIS

1. "At the desire of the promisor."
2. Consideration need not be to the benefit of the promisor.
3. Consideration may proceed from third party.
4. Compromise as consideration.
5. Consideration to one co-promisor is consideration to all.
6. Essentials of consideration.
7. Evidence as to consideration.
8. Forbearance.
9. Future promise as consideration.
10. Consideration for a promise to pay subscription.
11. Past consideration.
12. Suit by strangers to contract.

1. "At the desire of the promisor".—

(1) The words "at the desire of the promisor" in Section 2 do not necessarily contemplate a promisor who, at the time, possesses contractual liability. (1906) 16 Mad LJ 422 (423) (DB).

(2) Promise to pay at some indefinite time is no promise made "at the desire of promisor." The words 'at the desire of the promisor' imply a promise which has a real effect in conducing to the contract. AIR 1926 Bom 54 (54, 55) (DB).

(3) Where the plaintiff company under an agreement with the joint grantees of a mining concession undertook to manage and develop the right comprised in the licence for remuneration and also agreed to finance the concern and recover the amount from the sale proceeds of the ores shipped or disposed of, it was held that

any advance that the plaintiff company made was not done at the request of the concession holders but was made in consideration of the agreement. (1912) 17 Ind Cas 256 (257) (DB) (Mad).

(3-A) Coal was consigned to company by colliery on orders and sanction of Deputy Coal Commissioner (Distribution) under Colliery Control Order, 1945. An order intimating the same and sanction of a priority supply of wagons for transport of the Coal was intimated to Eastern Railway -- Coal was loaded by the colliery—Colliery was acting as an agent of the company for the purpose of arranging for transport of coal in which the property had under orders of Coal Commissioner passed to the company — Company was liable for demurrage. AIR 1969 SC 193 (197) = (1969) 1 SCJ 340.

(4) Where a depositor drew a cheque upon a bank for an amount bigger than there was money to his credit and the bank had to pay the amount of the cheque because of their own mistake and not because there was any request from the depositor to honour his cheque, it was held that there was no consideration for the promise to pay the amount paid out by mistake by the bank obtained from the depositor subsequently and by misrepresentation of facts also. AIR 1958 Andh Pra 605 (607).

(5) Where the defendant promised to bring a thakur to plaintiff's house on a certain day but there was no evidence that he had asked the plaintiff to invite guests and feed them in consideration of his promise to bring the thakur, it was held that his promise being not one supported by consideration he was not liable for damages for the breach of the promise. AIR 1929 Cal 369 (370).

(6) By an agreement in writing the defendants promised to pay the plaintiff a commission on articles sold in a market Huma Ganj, in consideration of plaintiff having expended money in construction of the Ganj. Plaintiff constructed Ganj at the request of the Collector. In a suit filed by plaintiff to establish the agreement, it was held that the construction of Ganj was not "at the desire" of defendants so as to constitute a consideration as defined in Section 2 (d) and the agreement was therefore void for want of consideration. (1881) 3 All 221 (228) (DB).

(7) Where A executed a patta in favour of B on receipt of selami and execution of a kabuliat by B agreeing to pay rent to A and B in the course of the same day executed an ekrarnama undertaking to convey and release his interest on repayment of the amount paid as selami within six years, it was held that

Section 2 (d) — Note 1 (contd.)

as the act of granting lease by A was done at the desire of the promisor B under the ekrarnama the promise of B to convey was supported by consideration. AIR 1957 Cal 92 (94) (DB).

(8) Where a person advanced money to the son on an undertaking given by the father and obtained promissory notes for the amount advanced it was held that these pronotes were without consideration inasmuch as the advances were not made at the desire of the son who was the promisor under these pronotes. AIR 1948 PC 150 (155) = ILR (1949) Mad 300.

(9) Where one N performed the loi lena ceremony of J's daughter and although it was not clear as to who asked her to perform it there was little doubt that she insisted on getting a village for performing it and J who refused to give her a village however agreed to pay a guzara, it was held that she performed the ceremony at the desire of J and that his promise to pay guzara was in consideration of that. 1950 All LJ 168 (172) (DB).

2. Consideration need not be to the benefit of the promisor.— (1) It is not necessary that promisor should benefit by consideration. AIR 1926 Nag 149 (151) ** AIR 1934 All 271 (272) ** 1967 Raj LW 383.

(2) If the promisee does some act by which a third person is benefited which he would not have done but for the promise, the consideration is sufficient. AIR 1918 Cal 816 (816) = 45 Cal 774 (DB) ** AIR 1934 All 271 (272).

(3) Agreement to pay money to third person is valid consideration for contract. (1809) 1 Ind Cas 572 (572, 573) (DB) (Cal).

(4) An agreement to pay a debt due from a third person is supported by good consideration and can be enforced against the promisor. AIR 1937 Lah 484 (484).

(5) The release by the creditor of the original debtor on the undertaking given by another to pay the debt furnishes good consideration for the contract which the new debtor enters into with the creditor. AIR 1934 Lah 789 (790).

(6) Where a municipality accepting the offer of the government to bear half costs introduced the scheme of compulsory and free education it was held that there was an agreement with the government supported by consideration which consisted in the advantage gained by a section of the Government's subjects. AIR 1934 Bom 277 (281, 282) = 58 Bom 660.

(6-a) The rule regarding lack of mutuality is not without exceptions or apparent exceptions; one such exception is of a contract where one party has an option by the exercise of which the other party, becomes bound to perform his

part'. AIR 1967 Mad 375 (379) = 79 Mad LW 726 (DB).

(6-b) An agreement to reconvey was supported by the element of mutuality. AIR 1964 Mad 219 (220, 221) = (1964) 1 Mad LJ 135 (DB).

3. Consideration may proceed from third party.— (1) The consideration for a promise need not necessarily move from the promisee but may move from a third party. AIR 1939 Pat 477 (485) (DB) ** AIR 1940 Rang 91 (93) ** AIR 1936 Bom 344 (351) = 60 Bom 954 (DB) ** AIR 1930 All 434 (436) (DB) ** AIR 1923 Mad 434 (435) ** (1883) 6 Mad 351 (354) (DB) ** (1965) 2 Mad LJ 329 = 78 Mad LW 446.

(2) The general rule is that although consideration for an agreement may proceed from third party, stranger to the agreement cannot sue upon it. AIR 1943 Sind 190 (192) = ILR (1943) Kar 238 (DB) ** AIR 1957 Bom 276 (279) = ILR (1957) Bom 647 ** AIR 1957 Punj 169 (170) ** AIR 1953 Cal 366 (367) = ILR (1953) 2 Cal 168 ** 56 Cal WN (4DR) 91 (97) ** ILR (1945) Nag 581 (DB) ** AIR 1945 Nag 60 (63) = ILR (1944) Nag 796 ** ILR (1941) 2 Cal 576 (DB) ** AIR 1938 Rang 35 (38) = 1937 Rang LR 234 ** AIR 1935 Lah 354 (357) = 16 Lah 118 (DB) ** AIR 1932 Mad 457 (457) = 55 Mad 436 (DB).

[See also AIR 1956 Mad 316 (319) = ILR (1956) Mad 1014 (DB) ** AIR 1957 Trav-Co 189 (192) = ILR (1956) Trav-Co 998 ** AIR 1947 All 110 (114) = ILR (1947) All 321 (DB).]

[But see AIR 1931 Pat 114 (125) (DB). (Person having beneficial interest under contract can sue in equity to enforce although he himself is stranger to contract.) ** AIR 1939 Pat 194 (196) = 17 Pat 751 (DB) ** AIR 1936 Cal 67 (68) (DB) ** 164 Ind Cas 477 (481) (DB) (Cal) ** AIR 1934 Cal 682 (696) = 61 Cal 841 (DB) ** AIR 1932 Lah 566 (570) (DB).]

(3) In marine insurance broker's undertaking to pay premium is consideration though it moves from a third person. AIR 1926 Bom 82 (85).

(4) A family arrangement may be upheld even if the consideration moves from a third party. AIR 1954 Orissa 80 (84) = ILR (1953) Cut 591 (DB).

(5) A single consideration may support more than one promise and may move from the promisee or any other person. AIR 1957 Cal 92 (95) (DB).

(6) A consideration moving from third party who is a minor is no consideration. AIR 1949 Bom 215 (217).

4. Compromise as consideration.— (1) The compromise of doubtful rights is a sufficient basis of and forms a sufficient consideration for the agreement. AIR 1935 Cal 263 (266) (DB) ** AIR 1918 PC 287 (291) ** AIR 1925 Pat 68 (94) (FB) ** AIR 1957 Assam 10 (13) = ILR (1956) 8 Assam 309 (DB) ** AIR 1937 Lah 708

Section 2 (d) — Note 4 (contd.)

(709) ** AIR 1934 Oudh 442 (2) (444).
 ** AIR 1960 All 446 (448).

(1-A) Family arrangement as such can be arrived at orally. Its terms may be recorded in writing as a memorandum of what had been agreed upon. AIR 1966 SC 292 (295) = (1966) 2 SCJ 290.

(2) Parties can arrange to avoid necessity for legal proceedings and such arrangement is supported by sufficient consideration. (1809) 4 Ind Cas 513 (516) (DB) (Cal) ** AIR 1934 Lah 163 (163).

(2-A) No doubt a family arrangement which is for the benefit of the family generally can be enforced in a Court of law. But before the Court would do so, it must be shown that there was an occasion for effecting a family arrangement and that it was acted upon. AIR 1965 SC 825 (828) = (1965) 1 SCR 26.

(2-B) Courts give effect to a family settlement upon the broad and general ground that its object is to settle existing or future disputes regarding property amongst members of a family. The word 'family' in the context is not to be understood in a narrow sense of being a group of persons who are recognised in law as having a right of succession or having a claim to a share in the property in dispute. AIR 1966 SC 323 (329) = (1965) 3 SCR 841.

(3) The consideration for the family arrangement may be preservation of the family property, preservation of the peace and honour of the family or the avoidance of litigation. AIR 1954 Orissa 80 (84) = ILR (1953) Cut 591 (DB) ** AIR 1959 All 473 (481) = 1959 All WR (HC) 85 (DB) ** AIR 1959 Assam 109 (110) = ILR (1959) 11 Assam 59 (DB) ** AIR 1959 Punj 434 (439) = ILR (1959) Punj 794 (DB) ** ILR (1959) 9 Raj 253.

(4) Family settlement entered into, to avoid the possibility of a future dispute, is supported by consideration. AIR 1919 Oudh 105 (109) = 22 Oudh Cas 300 (FB) ** AIR 1964 Andh Pra 326 (329) = (1963) 1 Andh LT 389 (DB) ** AIR 1959 All 473 (481, 482) = 1959 All WR (HC) 85 (DB). (Family settlement does not involve any sort of transfer.)

(4-A) For the validity of a family arrangement where there are no family disputes to be settled it is also essential that there must be mutuality in the agreement arrived at between the parties; that is to say, some consideration, however small, must pass from the side of the person upon whom a right in property is sought to be conferred and mere love or affection between the members of the family is not enough. AIR 1965 Pat 87 (91, 92) (DB). ((1867) 2 Ch A 294, Appld.)

(4-B) A family arrangement to be good need not necessarily be a compromise of doubtful rights. AIR 1959 All 473 (481) = 1959 All WR (HC) 85 (DB).

(5) Settlement of a doubtful claim for maintenance is not void for want of consideration. AIR 1931 Nag 197 (198) = 27 Nag LR 281.

(5-A) 'Valuable consideration' does not mean sufficient consideration. Transfer for consideration, whatever its extent, will be for valuable consideration in the eye of law. 1966 BLJR 739.

(6) Composition followed by partial acceptance is consideration. AIR 1929 Sind 153 (154) = 23 Sind LR 294 (DB).

(7) In a suit based on an agreement recording a compromise arrived at between the parties for the settlement of outstanding disputes in relation to the estate of a deceased person, the question whether any consideration moved from the plaintiff to support the agreement depends upon whether he had a bona fide claim to the property which was the subject of the agreement of compromise AIR 1948 PC 7 (7).

(8) Compromise is agreement to put an end to dispute and to terminate or avoid litigation, and real consideration is not sacrifice of right but abandonment of claim. AIR 1916 Cal 843 (857) (FB) ** AIR 1933 Pat 306 (396) = 12 Pat 359 (DB) ** (1909) 1 Ind Cas 573 (579) (DB) (Cal).

(9) If there was a compromise of the dispute between the parties in order to render the compromise valid it is not necessary in law for either party to relinquish his rights because the very fact that parties enter into a compromise for the purpose of peace and avoiding litigation is consideration for the compromise. (1909) 4 Ind Cas 133 (2) (134) (DB) (Bom) ** AIR 1959 Assam 109 (111) = ILR (1959) 11 Assam 59 (DB).

(9-A) A compromise of litigation by way of family settlement is in no sense an alienation. AIR 1966 SC 323 (329) = (1965) 3 SCR 841.

(9-B) Where three brothers and their mother were parties to a family arrangement orally and an agreement incorporates the statements of the three brothers only the fact that her statement was not recorded in the agreement does not invalidate the arrangement. AIR 1966 SC 292 (294) = (1966) 2 SCJ 290.

(10) Evidence may be led in to show that the real consideration for a deed of agreement is the settlement of doubtful rights. AIR 1935 Cal 368 (384) = 62 Cal 346 (DB).

(11) A settlement of accounts is a good consideration for a fresh agreement to pay the ascertained amount. 1949 Jai-pur LR 161 (165) (DB).

(12) Where a promissory note was executed for a consideration of the debt due on accounts the fact that the amount was not credited in the accounts does not make it void of consideration. AIR 1950 Kutch 24 (26, 27).

Section 2 (d) (contd.)

5. Consideration to one co-promisor is consideration to all. — (1) Consideration paid to one of several joint promisors is sufficient consideration to support a promise to pay made by others. AIR 1914 Mad 41 (41) = 38 Mad 680 (DB) ** AIR 1929 Lah 466 (467) ** AIR 1928 Bom 316 (318) (DB) ** AIR 1926 Nag 149 (152) ** AIR 1922 Mad 23 (24) = 45 Mad 345 (DB) ** (1962) 2 Andh WR 276 (278) (DB).

6. Essentials of consideration. — (1) Consideration is what moves from the promisee whether it be an advantage to the promisor or detriment suffered by the promisee. AIR 1936 Mad 978 (980) (DB).

(2) To constitute consideration, there must be an act, abstinence or promise on the part of promisee or some other person at the desire of promisor. (1875-77) 1 All 309 (311) (DB).

(3) Reciprocity of obligations is not of the essence of consideration. An act done or forbearance made in return for a unilateral promise is a sufficient consideration to support the promise. AIR 1957 Cal 92 (94) (DB) ** AIR 1943 Oudh 89 (90) = 18 Luck 647.

(4) A consideration to be valid must be "good or valuable" in the sense in which these words appear in English Law though these words do not appear in the Contract Act which speaks only of unlawful and lawful considerations. AIR 1915 Mad 528 (529) (DB).

(4-A) Consideration means something which is of some value in the eye of law. It must be real and not illusory, adequate or not, adequacy being a matter purely for contracting parties to decide and to agree upon. Alienation requiring alienee to discharge debts and maintain wife of alienor, is for value AIR 1961 Mad 405 (407) = 74 Mad LW 16.

(5) A valuable consideration may consist either in some right, interest or profit accruing to one party or some loss or responsibility suffered or undertaken by other. AIR 1918 Bom 183 (184) (DB).

(5-A) The expression "valuable" is implied. Consideration shall be "something which not only parties regard but the law can regard as having some value; consideration may be negative or positive. Where the mortgagees under a trust were obliged to pay certain sum to charity and in discharge of such obligation they transferred the mortgage interest to charity, the transfer was held to be for valuable consideration. AIR 1966 SC 193 (197) = (1966) 1 SCR 168.

(6) The consideration required to support a promise may consist of any damage or any suspension or forbearance of his right or any possibility of a loss occasioned to the plaintiff by the promise of another, though no actual benefit

accrues to the promisee. AIR 1918 Mad 311 (312) (DB).

(7) A meritorious and a gratuitous consideration such as natural love and affection or obedience and submission by way of respect cannot be a good consideration or valuable consideration. AIR 1955 Pat 458 (462) = 34 Pat 440 (DB).

(8) The legal term 'consideration' does not mean payment of money only. Where a person executes a handnote in favour of a Bank on the basis of which he receives a substantial benefit of having current overdraft account with the Bank, the handnote cannot be said to be without consideration. AIR 1953 Tripura 10 (10).

[See also AIR 1950 All 632 (636, 637) = ILR (1953) 1 All 265 (DB). ("Price" is not necessarily cash consideration. Sale deed executed partly for arrears of maintenance and partly for the chargeholder surrendering her right the entire consideration is one which could not be expressed in terms of money.)]

(8-A) Promise to perform existing contract with third person can be good and valid consideration for another contract. AIR 1970 Madh Pra 40 (49).

(9) The mere doing of a thing which a person is already legally bound to do is no consideration for a new promise in his favour. AIR 1915 Mad 528 (529) (DB) ** AIR 1954 Orissa 80 (84) = ILR (1953) Cut 591 (DB) ** AIR 1933 All 511 (512).

(10) Where the mortgagors are already under a legal obligation, by virtue of the terms of the mortgage, to pay the interest due regularly, a fresh undertaking to pay that interest regularly cannot form a good consideration for an agreement for reduction of the rate of interest payable. AIR 1948 Oudh 152 (154) = 22 Luck 503 (DB).

(11) The grant of a permit to an association to extract limestone cannot constitute any consideration in law if it confers no right on the association which it did not already possess under its prospecting licence. AIR 1954 All 393 (397) = ILR (1954) 1 All 582 (DB).

(12) Motive is distinct from and therefore cannot become the consideration for a contract. AIR 1936 Mad 978 (980) ** AIR 1926 Cal 59 (63) = 53 Cal 51 (DB). (Amount paid so that complainant may drop a criminal prosecution for embezzlement was not consideration for dropping down the prosecution but provided only a motive.)

(13) A single consideration cannot be made, by force of the definition in the Contract Act, to support an indefinite series of subsequent contracts. (1910) 8 Ind Cas 302 (2) (305) (Mad) ** AIR 1928 All 440 (441) = 51 All 164 (FB). (Consideration received by a minor cannot be good consideration for fresh promise by him after attaining majority.)

Section 2 (d) — Note 6 (contd.)**Illustrative cases.**

(14) Suit for recovery of amount due on bahi accounts against N brother of G. G opened accounts and died subsequently. His estate came into the possession of N. N had gone into account books, acknowledged their correctness and undertook to pay interest but subsequently pleaded want of consideration. **Held**, that undertaking to pay the amount due on the accounts by N discharges the estate of G from liability and that it was a sufficient consideration. AIR 1932 Lah 135 (136) (DB).

(14-A) An option to repurchase reserved to a vendor under a conveyance can be regarded as an irrevocable offer by the vendee to reconvey the property on the terms and conditions specified therein. The consideration for such an offer is the benefit received by the vendee under the original conveyance. AIR 1965 Mad 506 (507) = 78 Mad LW 515 (DB).

(15) An undertaking given by the mortgagee in the mortgage deed to pay off the debts of the mortgagor constitutes good and sufficient consideration for the mortgage so far as the mortgagor is concerned. AIR 1943 Mad 77 (78).

(15-A) Agreement to reconvey was supported by consideration since the sale itself formed the content of consideration. AIR 1964 Mad 219 (220, 221) = (1964) 1 Mad LJ 135 (DB).

(15-B) Where, under a compromise, a party received certain advantages by paying some amount to the other party, such payment could not be said to be without consideration. AIR 1960 Raj 237 (240) = 1960 Raj LW 352.

(16) A mortgage executed by a major in consideration of the mortgagee paying off certain debts incurred by the mortgagor during his minority is a perfectly valid transaction supported by good consideration. AIR 1933 All 659 (660) (DB). (AIR 1927 All 242 and AIR 1928 All 440 (FB), Distinguished.)

(17) Where a creditor takes a mortgage in favour of his wife in lieu of the money due to him from the debtor under certain simple bonds it results in those bonds becoming unenforceable and therefore, there is good consideration for the mortgage executed by the debtor. AIR 1923 Oudh 3 (4) = 26 Oudh Cas 201.

(18) Marriage contracted by a person in consideration of a promise made to him constitutes a valuable consideration for the promise. AIR 1970 Mad 113 (117) = (1969) 2 Mad LJ 597.

(19) Alteration of his position by one person constitutes good consideration for a promise on the faith of which he has so altered his position. AIR 1925 Cal 94 (97) (DB).

(20) A smaller sum of money advanced can validly constitute the consideration

for an acceptance of liability for a bigger amount by the debtor. AIR 1924 Oudh 193 (195) = 27 Oudh Cas 4.

(20-A) Agreeing to accept lesser amount than what is provided by judicial order constitutes valid consideration. AIR 1966 Raj 163 (164) = 1966 Raj LW 195.

(21) Where one brother at the request of the other agrees to place his interest in the joint property in the hands of the Court of Wards for liquidation of the debts incurred by the latter and also forgoes a large part of his share in the profits during the period of the management by the Court of Wards and further abstains from suing his brother for accounts on the termination of the management by the Court of Wards there is consideration for the relinquishment of his proprietary interest in the estate by the other brother. (1895) 17 All 264 (269, 270) (DB).

(21-A) Vendor's letter to vendee stated that agreement of conditional sale was settled between them but in application for registration, sale deed was referred as unconditional sale deed. Agreement is not without consideration on account of such discrepancy. AIR 1965 Madh Pra 275 (283) = 1966 Jab LJ 32.

(21-B) A entering into contract of employment with a company at the instance and request of B who was its manager. B executing promissory note in favour of A for balance of remuneration due to him — It was held that there was sufficient consideration to execute the note in question. AIR 1965 Ker 155 (156) = 1964 Ker LT 164.

(22) A debt to which the promisee has no legal right, as for instance, where it was assigned to him in spite of the prohibition contained in law, cannot constitute a valid consideration for a promissory note executed by the debtor to that person. AIR 1956 Mad 692 (693).

(23) Decision of the dispute or a point at issue is the consideration for an agreement to refer to arbitration and be bound by a decree passed in terms of an award and that is a valid consideration sufficient to sustain a contract. AIR 1952 All 882 (885) = ILR (1953) 1 All 494 (FB).

(24) Mortgage executed to make good to mortgagee the loss sustained by him for having lost a property by pre-emption is valid and is supported by consideration. AIR 1925 Oudh 215 (216) (DB).

(25) Acceptance of the responsibility for conducting the religious ceremonies in a temple is a valuable consideration recognised by law and that is sufficient to support the gift of a property to the person who accepts the responsibility. AIR 1918 Bom 183 (183, 184) (DB).

(26) Cosharers of a patti agreeing not to enforce their right to collect their share of arrears of rent and to allow one of themselves to collect the same is con-

Section 2 (d) — Note 6 (contd.)

sideration to support the promise of the latter to pay the former their share even if the collection of the arrears become barred by limitation by his default. AIR 1944 Nag 307 (308) = ILR (1944) Nag 412.

(26-A) Consideration for an agreement to maintain illegitimate child is not unlawful. AIR 1966 Raj 163 (164) = 1966 Raj LW 195.

(26-B) Oral award, though not capable of enforcement, can form valid consideration for a negotiable instrument. AIR 1962 Raj 231 (243) = ILR (1961) 11 Raj 103 (DB).

(26-C) Where there was a dispute between A and B as to right to receive way leave rent from C, and at the desire of B, C agreed to pay and actually paid rent to B on his executing an indemnity bond the bond was for lawful consideration. AIR 1963 Pat 160 (162) = 1962 BLJR 942 (DB).

(27) A person under arrest in execution of a decree by a Court having no jurisdiction to make it, gave the holder of such decree, a bond for the amount of the decree and a small amount for stamping and preparation of this bond, so that he might be released from arrest. It was held that such a bond was given without consideration as the small amount paid for stamping and preparation of the bond was not "consideration" in legal sense. (1882) 4 All 352 (355) (DB).

(28) The limitation imposed on trustees to deal with the trust property as required by the trust deed cannot be considered to be a consideration for the transfer of the property to them and hence the trustees cannot be called transferees of the trust property for a valuable consideration. AIR 1923 Oudh 80 (86) = 25 Oudh Cas 291 (DB).

7. Evidence as to consideration. — (1) Section 92 of Evidence Act does not prohibit the disproof of a recital in a contract as to the consideration by showing that the actual consideration was something different to that alleged. (1882) 5 Mad 6 (8) (DB).

(2) Recital in a contract that vendor has received consideration can be disproved by him, by proving a collateral agreement to the effect that money was to remain with the vendee for a specific purpose. (1900) 22 All 370 (375) = 27 Ind App 93 (PC).

(3) Although a mere recital in a deed by itself cannot be proof of payment of consideration, still where the transaction happens to be an old one any little evidence in support of it would be enough to hold the recital to be proved. AIR 1950 Hyd 50 (51) = ILR (1951) Hyd 104.

(4) Onus of proving that there was no consideration rests on a person who denies it. AIR 1932 Lah 135 (136) (DB).

(4-A) No oral evidence admissible to prove variation of consideration. AIR 1965 Mad 147 (149) = (1965) 1 Mad LJ 371 (DB).

(5) When execution of a document and receipt of consideration has been admitted at registration the burden of proving non-receipt of consideration falls upon the party who makes such allegation. (1905) 27 All 71 (72) (DB) ** (1896) 23 Cal 950 (955) = 23 Ind App 92 (PC).

(6) When a defendant vendor admits the execution and registration of a sale-deed, but denies the receipt of the consideration, it is for the plaintiff purchaser who is kept out of possession to prove that the consideration money was paid. (1886) 8 All 641 (643) (DB).

(7) Where the price has been inflated to avoid pre-emption, and the price is clearly beyond the reasonable market value, the vendee must show the actual payment of consideration and explain why an abnormal price was given. AIR 1919 All 340 (342) (DB).

(8) In an agreement to reconvey property the reciprocity between the parties is evidence of consideration. AIR 1931 All 113 (120) (DB).

(9) Where the consideration of a bond is not described but is said to be a previous account, it is not necessary to produce documentary proof of consideration of the bond. If the bond is proved that should be enough. AIR 1950 Kutch 80 (80).

(10) The fact that document does not contain all the terms of a contract is not of itself sufficient to sue upon the original consideration without producing the documents. AIR 1937 Rang 61 (62).

(11) Where document is not silent regarding consideration oral evidence to prove additional consideration not recited in document is not admissible. AIR 1965 Mad 147 (149) = (1965) 1 Mad LJ 371.

8. Forbearance. — (1) Forbearance to sue can form valid consideration for a promise, provided some liability exists. AIR 1925 All 503 (506) = 47 All 637 (FB) ** AIR 1958 Ker 246 (248) ** AIR 1941 Pat 282 (283, 284) ** AIR 1938 Lah 781 (784) (DB). (The forbearance of a plaintiff to sue, coupled with his forbearance to declare the defendant a defaulter, constitutes a good consideration for fresh agreement though the original contract had been in the nature of a wagering transaction.) ** AIR 1930 Nag 298 (300) = 26 Nag LR 320 ** AIR 1928 Bom 316 (318) (DB) ** AIR 1923 Oudh 176 (176) = 26 Oudh Cas 204 ** AIR 1922 All 260 (262) = 44 All 424 (DB) ** AIR 1919 Mad 528 (529) (DB) ** (1911) 11 Ind Cas 773 (773, 774) (Burma) ** (1910) 5 Low Bur Rul 192 (194, 195) ** AIR 1964 Ker 267 (269) = 1963 Ker LJ 1076 ** AIR 1961 All 295 (298).

(2) An agreement to accept a decree and not to appeal against it when both

Section 2 (d) — Note 8 (contd.)

parties to it would have appealed is one which is supported by good consideration. AIR 1934 Pat 644 (645) (DB).

(2-A) Agreement not to file appeal against ejectment decree if tenant was given time to vacate — There is good consideration for agreement. AIR 1969 Bom 221 (223, 224) = 70 Bom LR 788.

(3) An agreement not to appeal, consideration for which is the mutual consent of parties to refer the matter in dispute to Court as an arbitrator, is binding. AIR 1915 Mad 1074 (1074).

(4) The promise or undertaking on the part of a decree-holder not to execute his decree, or the acceptance by him of a bond, or mortgage or other similar contract as satisfaction of the decree is undoubtedly a consideration within the meaning of Section 2 of the Contract Act. (1885) 7 All 124 (131) (DB) ** AIR 1925 Nag 455 (456).

(5) Creditor forbearing to enforce execution and allowing time to pay at the request of the debtor is good consideration for a verbal promise by the debtor to pay the debt. The verbal promise constitutes a fresh contract. AIR 1921 Cal 67 (69) = 48 Cal 817.

(6) Forbearance even if it is one shown in the case of a person other than the promisor himself can constitute good consideration for the promise. (1912) 15 Oudh Cas 314 (315) ** AIR 1941 Pesh 6 (7) (DB).

(7) Release of principal debtor is good consideration for undertaking liability by another. AIR 1916 Cal 740 (740) (DB).

(8) Acceptance by creditor of sole liability of one of two joint debtors is good consideration for agreement to discharge other debtor. AIR 1936 Rang 396 (398) (DB).

(9) Where A and B executed a pro-note for the decretal amount against A alone, the abandonment by the promisee of his decree against A is a consideration for B's liability. AIR 1942 Mad 134 (136) (DB).

(10) Agreement for forbearance to sue need not be for any definite time and it is enough if implied request for forbearance be inferred. AIR 1919 Mad 528 (529) (DB).

(11) A promise to defer bringing a suit upon contract which is void does not amount to a consideration. AIR 1917 Cal 485 (486) (DB).

(12) Forbearance by vendee to enforce terms of prior sale without consideration is not a consideration for subsequent compromise. AIR 1919 Lah 215 (216) = 1919 Pun Re No. 137.

(13) Forbearance to sue will not constitute a valid consideration where the plaintiff does not bona fide believe in the validity of his claim. AIR 1929 Lah 689 (690) (DB).

(14) In order to constitute a forbearance a valid consideration for a contract there should be a request by a debtor to a creditor to refrain from suing and an acceptance by him of that request. The question whether there has or has not been a request by the debtor to the creditor to forbear from suing is a question of fact to be determined on the particular circumstances of each case. AIR 1952 All 996 (1010) = ILR (1952) 2 All 984.

(15) Positive evidence as to postponement of legal action is not essential in every case but may safely be assumed when the circumstances so permit. (1931) 134 Ind Cas 1105 (1106) (DB) (Lah). [See also 1967 Raj LW 383.]

9. Future promise as consideration. —

(1) A promise to do something in future is legal consideration. AIR 1938 Rang 202 (203) = 1938 Rang LR 385 (FB).

(2) A promise so long as it remains executory will not amount to a consideration in the eye of the law unless it involves a legal obligation which the promisor could be compelled to perform. But where it involves no such obligation its execution alone will constitute a sufficient consideration. AIR 1936 Mad 709 (712) (DB).

(3) Where one of terms of a karar for partition was that other coparceners should pay certain sum for costs of marriage of daughter of one of them and in pursuance thereof pro-notes were executed, pro-note and agreement to pay are supported by consideration, namely, the agreement of the father to other term of the karar. (1913) 36 Mad 151 (153, 154) (DB).

(4) Agreement by widow to adopt a particular person is good consideration for adoptee executing agreement in widow's favour. AIR 1926 All 194 (198) (DB).

10. Consideration for a promise to pay subscription. — (1) A mere promise to subscribe a sum of money or the entry of such promised sum in a subscription list does not furnish any consideration and therefore the subscriber is not liable to pay it. AIR 1936 Mad 135 (135) ** AIR 1914 All 22 (23) = 36 All 268 (DB) ** (1887) 14 Cal 64 (66) (DB).

(2) In order that a mere promise to pay subscription may be enforced there must be some request by the promisor to the promisee to do something in consideration of the promised subscription or an undertaking by the promisee to do something as part of the bargain. AIR 1936 Mad 135 (135).

(3) Where the person asked to subscribe knows the purpose to which the money is to be applied and also knows that on the faith of their subscription an obligation to pay was to be incurred by the promisee then the obligation to pay must be taken to be incurred at the

Section 2 (d) — Note 10 (contd.)

desire of the promisor and that the promise for subscription is supported by consideration. (1887) 14 Cal 64 (67) (DB).

11. Past consideration. — (1) In many cases a promise of one party is a consideration for promise of the other party, but that is not the only consideration known to law. A consideration may consist in performance which is known as executed consideration. AIR 1957 Cal 92 (94) (DB).

(2) An executed consideration consists in an act already done by one as consideration for a promise of the other. In an executed consideration the liability is outstanding against only one whereas in an executory consideration it is outstanding on both sides. AIR 1957 SC 652 (655) = 1957 SCR 1039 = ILR (1957) Punj 1701.

(3) Past consideration is as good as present consideration or future consideration and a transaction cannot be held to be not supported by consideration if the consideration for the transaction was a past one. 1956-1 Mad LJ 471 (472) ** (1962) 66 Cal WN 8.

(4) Under the English law consideration must be present at the time of making the promise and there is no such thing as past consideration. A past request to the promisee to do an act even to the detriment of the promisee without simultaneous understanding that it is to be recompensed in future cannot make the act good consideration for a subsequent promise to pay. But the Indian Act does not require any such understanding. AIR 1915 Mad 528 (529) (DB).

(5) It is not every act on the part of the promisee, though done at the request of the promisor, which could support a subsequent promise. The act done by the promisee must be "good or valuable" consideration in the sense in which the terms appear in English law. AIR 1915 Mad 528 (529) (DB).

(6) Services previously rendered at the desire of a promisor are, by Cl. (d) of Section 2 of the Contract Act (9 of 1872), placed on the same footing with services to be rendered in the future, and constitute a good consideration for a definite agreement. (1932) 138 Ind Cas 900 (902) (PC) ** AIR 1939 Bom 250 (251) = ILR (1939) Bom 307 (DB).

(7) If the servants put forth extra work in consideration whereof a bonus is promised to them by the masters it is in law a promise for past services which is good under Indian law. AIR 1925 Mad 192 (194) (DB).

(8) The services performed for a person can constitute the consideration for a promissory note executed by him subsequently in favour of the person who rendered the service. AIR 1951 Cal 55 (59) = ILR (1952) 1 Cal 395 (DB).

(9) Services rendered at the desire of a person during his minority and also continued after his majority form a good consideration for a promise made by him subsequently in favour of the person who rendered the service. (1896) 20 Bom 755 (757) (DB).

(10) Money received during minority can form the consideration for a contract made by a person of full age and competent to contract. AIR 1924 All 730 (731) = 46 All 568 (DB).

(11) Power of attorney given by company to Bank to sell the properties mortgaged with it was for consideration relatable to the loan advanced earlier by Bank. AIR 1968 Mad 50 (52) = (1967) 2 Mad LJ 515 (FB).

(12) Old debts form good consideration for mortgage or transfer of property. AIR 1919 All 348 (348) (DB).

(13) A past debt even if barred by time is a good consideration for a promise to pay under Section 25 of the Contract Act. AIR 1958 Raj 10 (11, 12) = ILR (1957) 7 Raj 129.

(14) A time-barred debt can be valid consideration for transfer of property AIR 1925 Oudh 267 (268).

(15) A stated account is a promise for good consideration to pay the balance even though some of the debts are barred by limitation. AIR 1941 Cal 595 (596) (DB).

(16) A settlement of accounts by all partners even if subsequent to three years from date of dissolution is valid. The mutual promises to abide by it is a good consideration to support the contract. AIR 1933 PC 120 (121).

(17) Where an old bond is said to be consideration of the new bond but in the new bond consideration has not been described at all and there is nothing to connect the two bonds except the deposition of the plaintiff who has no personal knowledge of the previous transaction, the old bond cannot form consideration of the new bond. AIR 1950 Kutch 80 (80, 81).

(18) That which have voluntarily been performed in the past cannot be made consideration for a promise to do something in future. There must be another promise as consideration for that promise. AIR 1943 Oudh 89 (90) = 18 Luck 647.

(19) Though past services voluntarily rendered are not consideration to support promise and not capable of being enforced by the promisee yet they can be pleaded as valuable consideration in a suit to set aside alienation made on account of such past services. (1909) 4 Ind Cas 1104 (1105) (DB) (Mad).

(20) Past co-habitation with a concubine, being an immoral consideration, cannot support a transfer. AIR 1952 Punj 293 (293).

(21) Past co-habitation even if it can properly be called a consideration cannot

Section 2 (d) — Note 11 (contd.)

be considered an immoral consideration which would render the contract to pay an allowance to the woman ab initio void. (1881) 3 All 787 (788) (DB).

(22) Concubine and paramour render service to each other by their agreement to cohabit. Her services were given in lieu of exchange for his promise under which she obtained similar services. Having once operated as consideration for his earlier promise, her past services could not be treated as a subsisting consideration for his subsequent promise to transfer properties. AIR 1968 SC 253 (254) = (1968) 1 SCR 43.

12. Suit by strangers to contract. —

(1) Under the law of contract an agreement can be binding on and can only be enforced against the parties to it. AIR 1958 All 688 (690) ** AIR 1957 Pepsu 21 (22) ** AIR 1940 All 98 (99) = ILR (1940) All 96 (DB). (AIR 1938 All 206, Reversed.) ** AIR 1967 Orissa 89 (89) = 33 Cut LT 86. (A rank trespasser and stranger to sale deed cannot question non-passing of consideration.) ** AIR 1960 Pat 139 (141).

[See AIR 1936 All 700 (701) (DB).]

(2) The general rule is that although consideration for an agreement may proceed from a third party, a person not a party to an agreement cannot sue upon it. AIR 1943 Sind 190 (192) = ILR (1943) Kar 238 (DB) ** AIR 1957 Bom 276 (279) = ILR (1957) Bom 647 ** AIR 1957 Punj 169 (170) ** AIR 1953 Cal 366 (367) = ILR (1953) 2 Cal 168 ** (1952) 56 Cal WN (4 DR) 91 (97) ** AIR 1945 Nag 261 (263) = ILR (1945) Nag 581 (DB) ** ILR (1944) Nag 796 ** AIR 1942 Cal 251 (252) = ILR (1941) 2 Cal 576 (DB) ** AIR 1938 Rang 35 (38) = 1937 Rang LR 234 ** AIR 1935 Lah 354 (357) = 16 Lah 118 (DB) ** AIR 1932 Mad 457 (457) = 55 Mad 436 (DB).

[See also AIR 1956 Mad 316 (319) = ILR (1956) Mad 1014 (DB) ** AIR 1957 Trav-Co 189 (192) = ILR (1956) Trav-Co 998 ** AIR 1947 All 110 (114) = ILR (1947) All 321 (DB).]

[But see AIR 1931 Pat 114 (125) (DB). (Person having beneficial interest under contract can sue in equity to enforce benefit although he himself is a stranger to contract.) ** AIR 1939 Nag 20 (21). (Do.) ** AIR 1939 Pat 194 (196) = 17 Pat 751 (DB). (Do.) ** AIR 1936 Cal 67 (68) (DB). (Do.) ** (1936) 164 Ind Cas 477 (481) (DB) (Cal). (Do.) ** 61 Cal 841 (DB). (Do.) ** AIR 1932 Lah 566 (570) (DB). (Do.)]

(3) The law knows nothing of a *jus quaesitum tertio* arising by way of contract and such a right cannot be conferred on a stranger to a contract as a right to enforce the contract in personam. AIR 1933 PC 11 (14).

(4) There is nothing in Section 2 to allow a stranger to a contract to enforce it. On the other hand, the section, while

it has by Clause (d) widened the definition of "consideration" so as to enable a party to a contract to enforce it, has also rigidly excluded, by the definition of "promisor" and "promisee" a stranger to a contract from enforcing the same. AIR 1928 Cal 518 (522) = 55 Cal 1315 (DB) ** (1957) 61 Cal WN 78 (84).

(5) A clause in a motor insurance policy providing that the insurance company shall indemnify the insured against his legal liability in respect of death of, or accident to, passengers cannot give a right of suit against the insurance company for money due under the policy to a passenger who is a mere stranger to the contract of insurance. AIR 1938 Bom 217 (217).

(6) Where a motor insurance contract contains a clause for reference of any dispute arising between the owner of the car and the company out of the policy to arbitration, a third person who is not a party to the contract claiming damages against the company under the third party risk portion of the insurance contract, cannot enforce the arbitration clause. AIR 1951 Punj 114 (116).

(7) Where a person transfers property to another and stipulates for the payment of money by purchaser to a third person a suit to enforce that stipulation by the third party will not lie. AIR 1930 Mad 382 (389) = 53 Mad 270 (FB) ** AIR 1947 Pat 131 (132) = 25 Pat 269 (DB) ** 1937 Mad WN 408 (409) ** AIR 1933 Lah 695 (696) = 14 Lah 675.

[See also AIR 1934 All 770 (772).]

[But see AIR 1933 Lah 178 (179).]

(8) Although a mortgagee, with whom a portion of the consideration, has been left over by the mortgagor has agreed to pay that amount to a creditor of the mortgagor the creditor himself being a stranger to the contract of mortgage cannot recover his debt from the mortgagee. AIR 1914 Mad 701 (704) = 38 Mad 753 (DB).

(9) An agreement between the sons of a deceased Muhammadan, that one of them should take the whole property of their father and also pay his debts, is not enforceable by the creditors against that brother personally. AIR 1943 Sind 190 (192) = ILR (1943) Kar 238 (DB).

(10) A creditor, who is not a party to compromise effected between his debtors themselves, cannot institute a suit on that contract unless he stood in the capacity of a *cestui que trust*. AIR 1932 Mad 457 (457) = 55 Mad 436 (DB).

(11) A stranger who renders services to arbitrator as his legal adviser and indirectly to parties to an award cannot sue for the benefit conferred upon him under the award, himself not being a party to the award itself, and there being no privity of contract between him

- (e) Every promise and every set of promises, forming the consideration for each other, is an agreement :

Section 2 (d) — Note 12 (contd.)

and parties to the award. AIR 1939 Sind 125 (126) = ILR (1939) Kar 422 (DB).

Exceptions to the Rule.

(12) The principle that a person who is not a party to a contract cannot take advantage of its provisions is subject to certain recognised exceptions. AIR 1932 Lah 566 (568) (DB) ** AIR 1957 Punj 169 (170) ** AIR 1947 Bom 169 (180) ** AIR 1922 Mad 397 (398) ** AIR 1963 Punj 538 (545) = ILR (1963) 2 Punj 463 (DB) ** 1963 Ker LT 94 = 1962 Ker LJ 1420.

(12-A) Except in the case of a beneficiary under a trust created by a contract or in the case of a family arrangement no right may be enforced by a person who is not a party to the contract. AIR 1970 SC 504 (507, 508) = (1969) 2 SCWR 241. (Bank cannot enforce charge created by letter of guarantee on property of executioner.)

(13) A stranger to a contract can sue where one of the parties to the contract afterwards agrees with the stranger to pay him direct or is estopped from denying the liability to so pay. AIR 1933 Cal 407 (408) = 60 Cal 767 (DB) ** AIR 1930 Mad 382 (386) = 53 Mad 370 (FB) ** AIR 1943 Nag 266 (268) = ILR (1943) Nag 643 ** AIR 1940 Rang 91 (94) = 1940 Rang LR 237 ** AIR 1966 Raj 89 (91) = 1966 Raj LW 484. (Suit by vendee for ejection of sub-tenant.)

(14) Where a contract has created a trust in favour of a person who is not a party to a suit by such a party as cestui que trust is maintainable. AIR 1942 Cal 251 (252) = ILR (1941) 2 Cal 576 (DB) ** (1910) 32 All 410 (414) = 37 Ind App 152 (PC) ** AIR 1957 Andh Pra 965 (971) ** AIR 1957 J & K 10 (10) ** AIR 1955 Pat 442 (444) ** AIR 1952 Mys 109 (110) = ILR (1952) Mys 316 ** (1950) 52 Punj LR 117 (121, 122) ** AIR 1947 Bom 169 (180) ** AIR 1943 Nag 266 (268) = ILR (1943) Nag 643 ** AIR 1937 Oudh 99 (105) = 12 Luck 639 (DB) ** (1936) 162 Ind Cas 889 (894) (Mad) ** AIR 1935 Mad 141 (143).

[See also AIR 1957 Punj 169 (170) ** AIR 1965 Ker 203 (206) = 1964 Ker LJ 539 (DB). (Claimant to trusteeship though no party to trust deed can sue to enforce rights under deed of Public trust.) ** 1959 All LJ 271 = 1959 All WR (HC) 7. (Addressee of an insured article can file suit, on non-delivery.)

(15) A stranger to a contract can sue for the money made payable to him by it where the money is charged on immovable properties. AIR 1930 Mad 382 (389) = 53 Mad 270 (FB) ** AIR 1943 Nag 266 (268) = ILR (1943) Nag 643 ** AIR 1937 Oudh 99 (105) = 12 Luck 639 (DB).

(16) A party although a stranger to the transaction can sue to enforce a benefit where it is due to him under a marriage settlement, partition or other family settlement. AIR 1933 Cal 407 (408) = 60 Cal 767 (DB) ** AIR 1947 PC 8 (15) = 73 Ind App 208 = ILR (1946) All 756 = ILR (1947) Kar PC 25 ** AIR 1930 Mad 382 (386) = 53 Mad 270 (FB) ** AIR 1957 Andh Pra 965 (971) ** AIR 1943 Nag 266 (268) = ILR (1943) Nag 643 ** AIR 1937 Oudh 99 (105) = 12 Luck 639 (DB) ** (1912) 14 Ind Cas 517 (518) (Mad).

(16-A) A contract to be specifically enforced by Court must, as a general rule, be mutual. Relevant date on which test of mutuality is to be applied is the date of contract itself and not the date on which it is sought to be enforced. AIR 1969 Mad 470 (473) = (1969) 1 Mad LJ 427.

(17) Where the promisor, between whom and the stranger no privity exists, creates privity by his conduct and by acknowledgement or otherwise constitutes himself an agent of the third party, then such third party can sue under the contract. AIR 1942 Cal 251 (252) = ILR (1941) 2 Cal 576 ** AIR 1940 Lah 471 (473) ** AIR 1935 Mad 904 (906) (DB) ** (1934) 36 Punj LR 244 (246, 247) (DB). [See also AIR 1936 Sind 119 (120) = 30 Sind LR 157 (DB).]

(18) Doctrine of privity of contract — Contract for purchase of goods entered with company — Company in turn contracting with firm for supply of such goods — Transaction between company and firm only in aid and for benefit of purchaser — All moneys for goods paid only by purchaser through company — Goods not supplied — No privity of contract or trust exists between purchaser and firm — Yet firm bound to return money to purchaser for 'prevention of unjust enrichment'. AIR 1969 Cal 496 (508, 509, 510, 514) (DB).

Section 2 (e) — Note 1

(1) The term "agreement" is used in law in two different senses namely to mean a provisional arrangement or a concluded bargain. Whether in any particular case the agreement falls within the former category or the latter category is a matter for construction depending on the facts of each case. AIR 1952 Nag 220 (223, 227) = ILR (1949) Nag 581 (DB).

(2) Every agreement must be construed with reference to language used therein AIR 1967 Cal 168 (170) (DB).

(3) To find out whether there is a concluded contract by correspondence, the entire bunch of correspondence between the parties has to be looked into. The

(f) Promises which form the consideration or part of the consideration for each other are called reciprocal promises :

(g) An agreement not enforceable by law is said to be void :

Section 2 (e) — Note 1 (contd.)

rule has no application in a case in which the contract has to be evidenced by a formal document under Article 299 of the Constitution. AIR 1959 Cal 526 (530).

(4) Agreements are of two kinds, executed and executory agreements. In an executed agreement one party has already performed his part of the agreement while the other party has to perform his part. In an executory contract both the parties have to perform their mutual promises and the fact that they have to perform their parts of the contract does not affect the validity of the contract. AIR 1957 SC 652 (655) = 1957 SCR 1039 = ILR (1957) Punj 1701.

(5) Every "promise" as defined by clause (b) of Section 2 is not necessarily an "agreement" falling within Clause (e) also. The acceptance of a proposal may bring into existence a promise but yet to have an agreement it is very essential that there should be consideration for the promise. AIR 1948 Sind 91 (93) = ILR (1947) Kar 182 (DB).

[But see ('04) 28 Bom 66 (72) (DB).]

(6) A promise ripens into an agreement only after an offer has been accepted by the offeree and until there is such an agreement the question whether there was any consideration for the promise would not arise at all. AIR 1957 SC 95 (102) = 1956 SCR 872.

(7) Agreement includes a single promise or set of promises forming the consideration for each other. Consequently, there is no difficulty in treating promises made to minors for consideration received, as contracts, for they are made by persons competent to contract for consideration received. (1899) 23 Bom 146 (163, 164) (SB).

(8) Where a document besides being an acknowledgment includes a stipulation to pay interest it becomes an agreement. But such a document if it is insufficiently stamped as an agreement its secondary evidence is not admissible. AIR 1958 Raj 72 (74) ** AIR 1958 Raj 260 (261).

(9) Acceptance of terms of trust deed did not mean that trustees agreed inter partes to carry out every term. Arbitration clause in trust deed in order to become an agreement, there must be proposal and acceptance. AIR 1965 Cal 628 (629) = 69 Cal WN 309 (DB).

(10) Supply of electricity by Government — Respondents charged for actual quantity of electrical energy consumed by them — Notification issued by Government introducing system of minimum consumption and rate charged thereon — Respondents although protesting against the introduction of new system continuing

to take electrical energy — Held, the respondents by their conduct, accepted the terms notified in the notification and thereby made themselves liable to pay charges for the units fixed for minimum consumption. AIR 1968 Pat 171 (174) (DB).

(11) Where a mining lease did not provide as a term of lease that State Government should help and assist lessee for getting land and electricity for proposed plant of lessee and the lessee by letters requested Government for help and assistance of Government to get them, the expectations of lessee expressed in letters and suitably replied to by Government could not have the sanctity of a term of an agreement so as to be enforceable in law. AIR 1969 Orissa 152 (157) = ILR (1969) Cut 93 (DB).

(12) Agreement not to file appeal against ejectment decree if tenant was given time to vacate — It is a valid and enforceable agreement. AIR 1969 Bom 221 (223, 224) = 70 Bom LR 788.

(13) On 2-9-1957 defendant wrote to plaintiff as follows: 'I hereby assign the said lease area of 184 acres in your favour subject to your paying one lakh and eighty thousand rupees at your option to be decided by you within three months from this date'. This offer was revoked by defendant by letter dated 31-10-1957, which reached plaintiff on 6-11-1957. On 1-11-1957, plaintiff filed a suit to enforce contract — Held that the document dated 2-9-1957 though worded as an agreement was in point of law only an offer. That the service of copy of plaint through medium of Court is not communication of acceptance and that there was no concluded contract between parties. AIR 1969 SC 1157 (1159) = (1969) 2 SCJ 641. (Reg. Appeal No. 231 of 1960, D/- 19-6-63 (Mys), Reversed.)

Section 2 (g) — Note 1

(1) The words "not enforceable by law" do not refer to a disability to sue arising under any procedural regulations such as the statute of Limitation or any of the Orders under the Civil P. C. The unenforceability which is contemplated is one which arises under the provisions of the substantive law. AIR 1939 PC 110 (113) = 66 Ind App 198 = 1939 Rang LR 358.

(2) A contract void in its inception is no contract at all; it has not passed from the stage of agreement to the stage of a contract. It is an agreement not enforceable at law. AIR 1937 Sind 211 (212) = 31 Sind LR 176 (DB) ** AIR 1939 PC 110 (113) = 66 Ind App 198 = 1939 Rang LR 358 ** AIR 1965 Andh Pra 191 (193, 196) = (1965) 1 Andh WR 176 (DB).

(3) An agreement by which the parties do not intend to create any legal obliga-

(h) An agreement enforceable by law is a contract :

Section 2 (g) — Note 1 (contd.)

tion is not enforceable. AIR 1953 Pat 231 (233) = 32 Pat 152.

(4) Merely because parties have reached an agreement it would not follow that they are bound by it. The question as to when they would be bound depends on their intention and if it is their intention that they ought to be bound only when the agreement is embodied in a formal document then until such document is drawn up the agreement remains only a provisional arrangement. AIR 1952 Nag 220 (227) = ILR (1949) Nag 581 (DB).

(5) The manager of a joint Hindu family being only a representative of the coparceners cannot bring about a valid and binding agreement when such agreement is beyond the capacity of the coparceners themselves to enter into. AIR 1957 Bom 280 (282) = ILR (1958) Bom 667.

(6) An agreement entered into by the mother alone for the marriage of her major daughter and which was not made by her on behalf of her daughter is unenforceable. AIR 1954 Trav-Co 129 (130).

(7) Agreement to pay interest, not awarded by a decree, together with the decretal amount, without the sanction of the Court which passed the decree, is void. (1885) 9 Bom 176 (178) (DB).

(8) Failure to comply with statutory provisions relating to the manner in which a particular agreement should be made would render it void. AIR 1956 Cal 138 (142) ** ILR (1950) 2 Cal 431 (435) ** AIR 1940 Sind 199 (202) = ILR (1940) Kar 3 (DB) ** AIR 1967 Andh Pra 26 (38) = (1966) 1 Andh WR 454 (DB).

[See also AIR 1952 Bom 349 (359).]

(9) If a statement in proposal form which has been made the basis of contract is found to be untrue, the contract would be void irrespective of the question whether the statement is of a material nature or not. AIR 1959 Pat 102 (106) = 1958 Pat LR 194 (DB).

(10) Void partnership agreement could not be made basis of an arbitration reference under Section 20 of Arbitration Act, 1940. AIR 1969 Pat 322 (323).

Section 2 (h) — Note 1

(1) Since a contract can only be bilateral and the same party cannot be a party on both sides, there can hardly be a contract between A on the one side and A and B on the other side, particularly in a contract of employment. AIR 1958 Bom 467 (468) = ILR (1958) Bom 428.

(2) Many contracts have three well-defined stages, namely the stage of negotiation, the stage when they have reached an agreement and thirdly when the parties reduce their agreement into writing and have a formal document. In any case where all these three stages are present it is always a question of construction as

to at what stage both the parties intended to be bound by their contract. AIR 1952 Nag 220 (223, 224) = ILR (1949) Nag 581 (DB).

(3) Where the parties agree to enter into a contract such an agreement is not a contract in law at all. AIR 1956 Cal 280 (281).

(4) A contract of lease which satisfies all the necessary requirements of Section 2 would not be rendered incomplete merely because there is a stipulation in it to the effect that the rent was to be fixed according to the market rate. AIR 1953 Sau 91 (91).

(5) Under Andhra Pradesh Sugar Cane (Regulation of Supply and Purchase) Act, 1961 and the Rules framed thereunder cane-grower in the factory Zone is free to make or not to make an offer of sale of cane to the occupier of the factory. But if he makes an offer, the occupier of the factory is bound under law to accept it. The resulting agreement is neither void nor voidable and it is freely made. AIR 1968 SC 599 (604) = (1968) 1 SCR 705.

(6) Where a lease deed stipulates sale of the land if the lessor was ever required to sell and if the lessee agreed to purchase at a reasonable price, the stipulation cannot be a completed contract. AIR 1969 Assam 43 (45).

(7) An agreement not enforceable by law is itself void and therefore, cannot be a contract at all. AIR 1936 Pat 153 (156, 157) (DB).

(8) An agreement although the promise involved cannot be specifically enforced could still be a binding contract if some relief is open to the party who is aggrieved by the breach of it. AIR 1952 All 882 (885) = ILR (1953) 1 All 494 (FB).

(9) A promise without consideration is unenforceable in a Court of law and cannot amount to a contract between the parties. AIR 1952 Trav-Co 202 (202).

(10) Where the nature of disposition by a deed was the nature of a gift although settlor purported to bind himself to do certain things which were in nature of voluntary covenants of unilateral character, the deed was a unilateral document and did not contain any contract at all. AIR 1959 Cal 434 (436) = (1959) 37 ITR 91.

(11) An agreement to pay varasulka may itself be unenforceable but the promissory note executed by the promisor for the amount would not also become unenforceable on the account. In such a case it is to be regarded that the amount, although its payment could not have been enforced by the promisee, was paid by the promisor and then reinvested by the promisee as cash and hence the promissory note executed by the promisor was supported by consideration. AIR 1954 Trav-Co 231 (232).

(12) An admission of liability for a certain amount coupled with an under-

Section 2 (h) — Note 1 (contd.)

taking to deposit the same amounts to an agreement enforceable by law and hence a contract also. 1946 Jaipur LR 386 (390).

(13) An oral agreement between two private individuals to sell or purchase immovable property can be enforced by a suit for specific performance and hence would constitute a concluded contract. AIR 1955 Mys 76 (78) ** AIR 1965 Manipur 3 (7).

[See also AIR 1964 Madh Pra 101 (106) = 1964 MPLJ 579 (DB). (AIR 1941 Bom 247, held reversed in AIR 1946 PC 97 and not good law; AIR 1962 SC 378, Rel on.)]

(14) In determining the place where a contract takes place the interpretation clauses in Section 2 which largely incorporate the substantive law of contract must be taken into account. Acceptance and intimation of acceptance are both necessary to result in a binding contract. In the case of proposal and acceptance by telephone conversation, contract is made at place where acceptance is received. AIR 1966 SC 543 (548, 550) = (1966) 1 SCR 656.

(15) It is perfectly legal for parties to a transaction to agree that their liabilities should be different from that created by statutes and a contract containing such an agreement would be given effect to provided their intention to so vary the liability is clear beyond doubt from the terms of the contract itself. AIR 1945 Pat 447 (449) = 24 Pat 438 (DB).

(16) A contract subsists till payments due thereunder are finally made. ILR (1966) 1 Punj 49 (DB).

(17) Option to repurchase reserved to a vendor under original conveyance may not by itself constitute a contract. But when the option is exercised in due conformity with the terms of the contract, that will amount to an acceptance of the offer and a binding contract for reconveyance results. AIR 1965 Mad 506 (507) = 78 Mad LW 515 (DB).

(18) Where an assessee approached the collector and came to an arrangement with him agreeing to pay the amount of Sales Tax in instalments, such arrangement was not a contract. Even otherwise, it would not bind the State Government as it did not comply with Article 299 (1) of the Constitution. (1965) 16 STC 701 (All).

(19) There can be no enforceable agreement when a manager of the Court of Wards agrees to lease a property contrary to the provisions of the statute requiring the prior sanction of the Board of Revenue and hence no binding contract. AIR 1952 Pat 139 (140).

(20) A term in mining lease giving option to Government to purchase certain quantity of ore on their demand, amounts to only an offer and did not constitute

subsisting contract within the meaning of that term in Section 7 (d). Representation of the People Act. AIR 1964 Andh Pra 77 (84) = (1963) 2 Andh WR 288 (DB).

(21) Where the parents of a minor boy and a minor girl enter into an agreement of marriage of those minors, the agreement is merely a nudum-pactum and not a contract because whether the marriage should take place or not must depend upon the will of the minors and not solely of their parents. AIR 1947 Pat 132 (134).

(22) A contract which reserves to the seller the right to vary the price fixed in the contract or which reserves to him complete liberty to deliver or not to deliver or to render the contract void is no contract at all. AIR 1949 Cal 231 (232, 233) = ILR (1945) 1 Cal 87. (Obiter.)

(23) A party to a contract is not entitled in law to cancel a concluded contract unilaterally. Having entered into an agreement, it is not open to the defendant to resile from the same on untenable grounds as he pleases. Therefore, such a cancellation has no effect in law. AIR 1958 Ker 195 (201).

(24) Non-registration of a document compulsorily registrable does not render the contract contained in it void. ILR (1954) Patiala 244 (250).

(25) Under French Civil Code, promise of sale is itself equivalent to a sale when there is the consent of both the parties over the price and over subject-matter of the sale. The promise of sale is not subject to any particular written form. It could even be an oral transaction. Even to effect a sale of immovable property no written conveyance is necessary. Under the French Law if there is a promise of sale but no sale in actuality, parallel to what might be termed an executory agreement of sale under the law familiar to our Courts, that promise would nevertheless inhibit the promisor from dealing afresh with the property. But a vendee if he be a vendee for valuable consideration without notice of the earlier contract, would be permitted to validly purchase as in our system of law. ILR (1964) 2 Mad 471 (DB).

(26) A managing director, under terms of agreement was invested with extensive powers of management but to exercise his functions subject to direction and control of Board of Directors — Company credited to his account a remuneration every month but withholding it subsequent to assessment year. Agreement was contract of service. AIR 1967 Mad 143 (145) = (1966) 2 Mad LJ 473 (DB).

(27) The word 'contract' occurring in the proviso to Section 4 (1) of C. P. and Berar Sales Tax Act, 1947 is to be interpreted according to Section 2 (b) of the Act. AIR 1967 Madh Pra 234 (237) = 1967 MPLJ 150 (DB).

(i) An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, is a voidable contract :

(j) A contract which ceases to be enforceable by law becomes void when it ceases to be enforceable.†

[†] For an exception to this see Section 25 (3) *infra*, which treats a time-barred debt as a good consideration for fresh promise to pay such a debt.

Section 2 (h) — Note 1 (contd.)

(28) The obligations in Chapter V cannot be brought within the definition of contract contained in this section. AIR 1946 Bom 216 (242, 243) = ILR (1946) Bom 517.

(29) Where a sugar-factory in compliance with directions issued by Sugar Controller of India in exercise of authority under Sugar and Sugar Product Control Order, 1946, despatches sugar to Madras Province such despatches were not result of any contract of sale. Controller did not act as agent of Province to purchase goods. No offer to purchase sugar by province and no acceptance of any offer by manufacturer is involved. AIR 1963 SC 1207 (1212) = (1963) Supp 2 SCR 459.

(30) While it is true that delivery of the actual goods by the seller to the buyer is not required under a c. i. f. contract, delivery of the goods to a ship's Master is undoubtedly required and it is also required that the goods must be of the contract description and that the relative bill of lading must not exceed or fall below the stipulated quantity even by an ounce. AIR 1959 Cal 328 (332, 333) = ILR (1959) 2 Cal 325 (DB).

(31) Saurashtra Groundnut and Groundnut Products (Forward Contract Prohibition) Order (1949), Cl. 3 — Forward contract — Essentials — Expression "against which contracts are not transferable to third parties" — To come within this exception contract need not specifically provide that it is not transferable to third parties — Such condition may be implied from its terms and surrounding circumstances — Verawal Merchants Association Rules — Contract in pursuance of — Held, not transferable to third parties and therefore not a forward contract. AIR 1964 SC 1526 (1529, 1530, 1531, 1532) = (1964) 2 SCR 686. ((1950) 1 Mad LJ 557 and ILR (1951) Mad 723 and AIR 1954 Mad 528 and AIR 1956 Andhra 9, Overruled.)

(32) Consignee entitled to damages from Railway—Payment made by insurer of goods — Insurer subrogated to right of consignee but policy requiring consignee to join in legal actions taken by insurer. — Notice of claim by consignee after being paid by insurer of goods is valid — Contract between consignee and railway not affected. AIR 1969 Bom 401 (407) = 71 Bom LR 214 (DB).

Section 2 (i) — Note 1

(1) The word 'voidable' in the contract has been used to mean that the contract

is binding on the parties unless set aside on the ground that the transaction was vitiated by fraud, undue influence, misrepresentation or any other circumstances which would entitle a party to a contract to avoid it. AIR 1928 Mad 986 (989) (DB).

(2) A one-sided contract although extremely unfavourable to one of the parties is still a valid and binding contract unless the Court can find that there is no mutuality or that there is really no obligation upon one of the parties to fulfil his part of the contract. ILR (1950) 1 Cal 550 (554) (DB).

(3) Where a contract is not binding upon one of the parties to it because it is not in the form in which it is required to be executed by the mandatory provisions of a statute and what has been done by that party is to be regarded only as a part performance under the contract, its consideration being executory, it is open to the other party to successfully claim that the contract is void on the ground of absence of mutuality and not merely voidable. AIR 1934 Bom 277 (285) = 58 Bom 660.

(4) A contract falling under Sec. 236 is a voidable contract. AIR 1933 Sind 207 (209) (DB).

(5) Transaction covered by second proviso to Section 20 of the Madras Estates (Abolition and Conversion into Ryotwari) Act is voidable at the instance of the Government. AIR 1958 Andh Pra 522 (529) = (1958) 1 Andh WR 459 (DB).

(6) A transaction covered by the second proviso to Section 20 of the Madras Estates (Abolition and Conversion into Ryotwari) Act, 26 of 1948, being enforceable by the Government but not against it is a voidable transaction. AIR 1958 Andh Pra 522 (529) = ILR (1958) Andh Pra 289.

(7) When a voidable contract is acted upon by a party as valid, the party is estopped from denying its validity. AIR 1933 Sind 207 (210) (DB).

Section 2 (j) — Note 1

(1) The words "unenforceable by law" mean unenforceable by substantive law, and not by reason of some procedural regulation. AIR 1939 PC 110 (113) = 66 Ind App 198 = 1939 Rang LR 358.

(2) Failure to sue for possession of the land within 3 years as required by Article 47, Limitation Act does not entail the contract of sale void within the meaning

CHAPTER I

OF THE COMMUNICATION, ACCEPTANCE AND REVOCATION OF PROPOSALS

3. Communication, acceptance and revocation of proposals.—The communication of proposals, the acceptance of proposals, and the revocation of proposals and acceptances, respectively, are deemed to be made by any act or omission of the party proposing, accepting or revoking by which he intends to communicate such proposal, acceptance or revocation, or which has the effect of communicating it.

Section 2 (j) — Note 1 (contd.)

of Section 65 of the Contract Act. AIR 1948 Nag 382 (384) = ILR (1948) Nag 50 (DB).

(3) A contract embodied in a document which is compulsorily registrable does not render the contract void ab initio if that document is not registered. ILR (1954) Patiala 244 (250).

Section 3 — Note 1

(1) A mere mental resolve to make an offer unless such intention is also communicated to the other party cannot bring into existence an offer which could be accepted. AIR 1949 Nag 286 (288) = ILR (1949) Nag 106.

(2) There can be an acceptance of an offer by the communication of the assent of the person to whom the offer is made or by his doing some act which he is requested by the terms of the offer to do or by his accepting performance itself of the act constituting the offer. Mere silence cannot amount to any assent. AIR 1955 Bom 419 (430).

(3) In the case of acceptance, if there is an express or implied intimation from the offerer, that a particular mode of acceptance would suffice, some overt act must be done or words spoken by the offeree which are evidence of his intention to accept and which conform to mode of acceptance indicated by the offerer. A mere tacit formation of intention cannot constitute an acceptance of an offer. AIR 1952 Cal 691 (694) (DB).

(4) In the absence of any express or implied directions from the offeror to the contrary an offer can be accepted by a letter. AIR 1952 Cal 32 (33).

(5) Where after the demand by landlord for enhancement of rent, the tenant continues to occupy the premises without any express or implied protest, he must be deemed to have accepted by conduct the proposal for enhanced rent. AIR 1940 Oudh 287 (288).

(6) Where an Insurance Company on receipt of a completed proposal and a cheque for the premium from the assured cashes the cheque and appropriates the money there is an acceptance of the proposal by the company. In such a case no communication to the assured is necessary to complete the acceptance. AIR 1952 Cal 691 (695) (DB).

(7) Where an Insurance Company offered to revive a lapsed policy if the assured remitted the premium amount

before a specified date it was held that remittance by post must have been the mode of payment which was in contemplation of the company and hence the policy became revived as soon as the assured put the money into the post office. The fact that the assured could have recalled the money from the post office did not in any way prevent the payment to it operating as an acceptance which had become effective against the company immediately. AIR 1947 Mad 122 (123).

(8) Contract of insurance when becomes binding — Acceptance of proposal does not necessarily result in a binding insurance contract — However, like other contracts, it may be concluded by offer and acceptance — If there is a stipulation that liability will attach itself under contract only if premium is paid that will be a condition precedent to policy taking effect. AIR 1963 Andh Pra 353 (355) = (1963) 1 Andh WR 124 (DB).

(9) Contract of life insurance — Contract when complete — Proposal of assured accepted subject to personal statement duly completed by doctor — Risk to commence from date of receipt issued — Held acceptance was not qualified and contract was completed by acceptance of offer. AIR 1962 Punj 125 (126, 127) = 64 Pun LR 149.

(10) Acceptance — Signing of proposal form of policy by P on behalf of X as owner of vehicle — Insurer communicating acceptance to X by post — X keeping silent and not disowning ownership of vehicle — Held, X was owner of the vehicle and vehicle was properly insured. (1967) 69 Pun LR 578.

(11) Where pending a suit in regard to certain property in possession of the Court of Wards certain interested parties had an informal discussion to explore the possibilities for a compromise and one of them who was also a member of the Court of Wards suggested to the Court of Wards, that a compromise may be agreed to on certain terms and they passed a resolution to that effect it was held that the resolution amounted to neither an offer nor an acceptance. AIR 1941 Oudh 529 (539).

(12) In a sale by auction, the auctioneer is the agent of the person whose property or rights are being auctioned. The agent invites offers and every bid is an offer and it is only binding on

4. **Communication when complete.**—The communication of a proposal is complete when it comes to the knowledge of the person to whom it is made.

The communication of an acceptance is complete,—

as against the proposer, when it is put in a course of transmission to him, so as to be out of the power of the acceptor;

as against the acceptor, when it comes to the knowledge of the proposer.*

The communication of a revocation is complete,—

as against the person who makes it, when it is put into a course of transmission to the person to whom it is made, so as to be out of the power of the person who makes it;

as against the person to whom it is made, when it comes to his knowledge.

Illustrations

(a) A proposes, by letter, to sell a house to B at a certain price.

The communication of the proposal is complete when B receives the letter.

(b) B accepts A's proposal by a letter sent by post.

The communication of the acceptance is complete,

as against A when the letter is posted;

as against B when the letter is received by A.

(c) A revokes his proposal by telegram.

The revocation is complete as against A when the telegram is despatched. It is complete as against B when B receives it.

B revokes his acceptance by telegram. B's revocation is complete as against B when the telegram is despatched, and as against A when it reaches him.

[*] See, however, clauses (b), (e) and (h) of S. 2, *supra*.

Section 3 — Note 1 (contd.)

either side when it is assented to, that is, when the hammer falls at the third bid. Sometimes the owner reserves a right as part of the conditions of auction. Before the final acceptance of the bid or before the hammer falls, it is always open to the bidder to withdraw his bid and the condition to the contrary in auction that the bid shall not be retracted has been held to be invalid. AIR 1963 Andh Pra 110 (112, 113, 114, 115) = (1962) 1 Andh WR 383.

(13) Proposal and acceptance by telephone conversation—Contract is made at place when acceptance is received and part of cause of action for suit for damages for breach arises at that place — Analogy of — Contract by Post and Telegram does not apply. AIR 1966 SC 543 (547) = (1966) 1 SCR 656.

(14) Party signing order form wherein was printed in bold letters "subject to Madras Jurisdiction" — Jurisdiction of other Courts is excluded. AIR 1963 Guj 148 (149, 150) = (1963) 4 Guj LR 540.

(15) Acceptance — What amounts to— A offering B certain terms for divorce — B obtaining decree for divorce based on those terms — Both parties acting upon the terms — B's conduct amounts to acceptance of A's terms — There is concluded contract binding on both. AIR 1964 Mad 52 (53) = (1963) 2 Mad LJ 330.

(16) Where applicant made an offer to decide the case on statement made

on special oath by P, who, apart from being father and brother of some of the opposite parties also was an advocate for all the opposite parties empowered under Vakalatnama to do all which opposite parties could have done in the case held that as soon as P accepted the offer a binding contract came into existence between applicant and opposite parties. 1969 Cri LJ 70 (73) = 1968 All LJ 457.

SECTION 4

1. **Communication of proposal.** — (1) Unless a proposal is communicated to the person to whom it is made, it is not complete and is inchoate and inconclusive. AIR 1954 Bom 491 (494) = ILR (1954) Bom 1137 (DB) ** AIR 1937 Mad 571 (573) = ILR (1937) Mad 990 (DB). [See (1964) 68 Cal WN 1109.]

(2) An offer is made not at the place where if it is made by letter is put into post but at the place where the letter is delivered. AIR 1949 Pat 270 (276) = 27 Pat 723 ** AIR 1947 All 337 (339) = ILR (1947) All 44 (DB) ** AIR 1920 Mad 177 (180) (DB).

(3) Offer made by letter is effective only when it has been received by addressee. AIR 1945 Lah 260 (263, 264) (DB).

(4) There can be no valid proposal until it comes to the knowledge of the person to whom it is made. AIR 1953 Madh B 38 (39).

Section 4 — Note 1 (contd.)

(5) Offer by letter must be deemed to have reached the addressee, when the letter ordinarily would be delivered at the addressee's residence. Any delay in addressee actually receiving it in his hands, caused owing to his failure to make proper arrangements to receive the communication, will not be considered. AIR 1927 Lah 50 (50, 51).

(6) If under Section 4 of the Contract Act the offer is not complete unless and until it is communicated to the person to whom it is made, then it follows that the offer is completed not at the place from where it was sent but where it was received. AIR 1959 Madh Pra 234 (235, 236) = 1959 MPLJ 596.

(7) The object of Sections 4 to 6 is to fix the point of time at which either party is precluded from revoking the offer or acceptance. AIR 1959 Madh Pra 234 (237) = 1959 MPLJ 596.

2. Communication of acceptance. — (1) A contract complete and absolute can come into existence when the acceptance of an offer has been communicated to the offerer. AIR 1957 Punj 261 (264) = ILR (1957) Punj 1505 (DB) ** AIR 1947 All 332 (334) (DB).

(2) Communication of acceptance is necessary to convert into a promise an offer which seeks a promise in return. AIR 1954 Pat 14 (16).

(3) The Court when communicating the offer of one party to be bound by the oath of the other acts merely as an intermediary and hence a completed agreement between the parties can arise only when the Court conveys the acceptance by the other party of the offer to the offerer. AIR 1952 All 882 (884, 885) = ILR (1953) 1 All 494 (FB).

(4) Where the acceptance of a bid in an auction sale is a conditional acceptance, and it is communicated to the bidder, there is no need for a further communication of the fulfilment of the condition. AIR 1951 Mad 322 (324).

(5) As soon as the acceptance is posted or sent by telegram, the acceptance is complete against the proposer and the contract is concluded. AIR 1954 Bom 491 (494) = ILR (1954) Bom 1137 (DB) ** AIR 1945 Lah 260 (264) (DB).

(6) Where the proposal and acceptance are made by letters, the contract is made at the time when and at the place where the letter of acceptance is posted. (1904) 27 Mad 355 (359). (DB) ** AIR 1954 Bom 491 (494, 498) = ILR (1954) Bom 1137 (DB) ** ILR (1954) 4 Raj 252 (257) ** AIR 1952 Cal 32 (33, 34) ** AIR 1952 Mys 111 (113) (DB) ** AIR 1937 Mad 571 (573) = ILR (1937) Mad 990 (DB) ** AIR 1967 Delhi 88 (91) = 1967 Cri LJ 1300 ** 1958 Andh LT 930.

(7) The actual despatch of a letter of acceptance must be established by evidence and it is not permissible to pre-

sume the fact from any course of business followed by the offeree. (1887) 9 All 366 (384) (DB).

(8) A letter of acceptance to a proposer, not correctly addressed, could not, although posted, be said to have been "put in a course of transmission" to him. (1887) 9 All 366 (385) (DB).

(9) The act of acceptance is a continuous act and it becomes effective so as to bind the acceptor completely when the acceptance comes to the knowledge of the proposer. AIR 1954 Bom 491 (494) = ILR (1954) Bom 1137 (DB) ** AIR 1949 Pat 270 (278) = 27 Pat 723 (DB).

(10) The cover note despatched by an Insurance Company on receipt of the proposal and the insurance premium, accepting the risk without any condition that a policy would be issued only if on further consideration the proposal was accepted on its receipt by the assured amounts to a binding acceptance and the non-issue of a formal policy would not affect the liability of the company in regard to the risk which it had undertaken to insure. AIR 1934 All 298 (300) = 56 All 726 (DB).

(11) The post office is the agent of the sender of letter or telegram and not the agent of the addressee and hence an acceptance becomes complete only at the place where it is communicated to the offerer. AIR 1949 Pat 270 (276) = 27 Pat 723 (DB).

(12) Where before an acceptance sent by letter reaches the offerer a telegram revoking the acceptance reaches him no concluded contract can come into existence. AIR 1949 Pat 270 (276) = 27 Pat 723 (DB).

(13) The communication of acceptance does not make any change in the place where the contract is made but only affects the time of its complete formation. 1896 Pun Re No. 76 p. 234 (238) (DB).

(14) The communication of the acceptance to the proposer cannot be said to be such an integral part of the completion as to constitute a part of the cause of action in a suit and even if the acceptance does not reach the proposer being lost or misplaced in transit, the contract would be complete. AIR 1954 Bom 491 (494) = ILR (1954) Bom 1137 (DB).

(15) In the case of an offer which seeks an act from the other party the performance of the act alone is sufficient to convert it into a promise without any further communication of an acceptance. AIR 1954 Pat 14 (16) ** AIR 1929 Lah 656 (656).

(16) Proposal and acceptance by telephone conversation — Contract is made at place when acceptance is received and part of cause of action for suit for damages for breach arises at that place — Analogy of contract by post and tele-

5. **Revocation of proposals and acceptances.**—A proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer, but not afterwards.

An acceptance may be revoked at any time before the communication of the acceptance is complete as against the acceptor, but not afterwards.

Illustrations

A proposes, by a letter sent by post, to sell his house to B.

B accepts the proposal by a letter sent by post.

A may revoke his proposal at any time before or at the moment when B posts his letter of acceptance, but not afterwards.

B may revoke his acceptance at any time before or at the moment when the letter communicating it reaches A, but not afterwards.

Section 4 — Note 2 (contd.)

gram does not apply. AIR 1966 SC 543 (547) = (1966) 1 SCR 656.

(17) When is contract concluded — Conditional acceptance — There is no concluded contract — Sale by auction — Bidder can withdraw before final acceptance — Clause 10 of Rule 10 of Proclamation of Auction Sales — Scope — Is not a statutory condition — Bidder can withdraw bid before expiry of one month mentioned in clause. AIR 1963 Andh Pra 110 (112, 113) = (1962) 1 Andh WR 383 (DB).

(18) Where an offer is made by a person to purchase a house belonging to a co-operative society it is necessary that the resolution of the society accepting the offer of the would be purchaser should be duly communicated to the latter and, unless there is such a communication of the resolution, there is no completed contract. AIR 1961 Mad 289 (291) = (1960) 2 Mad LJ 477.

(19) Acceptance — What amounts to — A offering B certain terms for divorce — B obtaining decree for divorce based on those terms — Both parties acting upon the terms — B's conduct amounts to acceptance of A's terms — There is concluded contract binding on both. AIR 1964 Mad 52 (53) = (1963) 2 Mad LJ 414.

(20) Acceptance — Signing of proposal form of policy P on behalf of X as owner of vehicle — Insurer communicating acceptance to X by post — X keeping silent and not disowning ownership of vehicle — Held, X was owner of the vehicle and vehicle was properly insured. (1967) 69 Punj LR 578.

Section 5 — Note 1

(1) An offer to sell and to keep the offer open till a certain time is nudum pactum and, can, at any time before acceptance, be recalled. AIR 1916 Low Bur 18 (19) ** (1892) 2 Mad LJ 57 (64) (DB).

(1-A) Sec. 5 must be read subject to Section 8. (1959) 10 STC 74 (81) (DB) (Pat).

(1-B) Word 'conveyance' is used in definition in Section 5 in a wide sense

so as to include sale, mortgage, charge, lease etc. While a transfer of property may take place not only in the present, but also in the future, property must be in existence at the time of transfer, for an instrument to be a deed of transfer. A purported transfer of property, not in existence at time of contract, can only operate as a contract to be performed in future. AIR 1968 Mad 319 (322) = (1968) 2 Mad LJ 1 (FB).

(1-C) There is in principle a material distinction between acceptance of an offer which asks for a promise and an offer which asks for an act on the condition of the offer becoming a promise. In the former case where the acceptance is to consist of a promise, there must be communication to the proposer. But in the latter class of cases, as for example, despatching goods ordered by post, the rule is that no further communication of acceptance is necessary than performance of proposed act. (1959) 10 STC 74 (81) (Pat) (DB).

(2) A bidder at an auction sale only makes an offer which he can withdraw before its acceptance by the fall of the hammer. AIR 1947 Mad 366 (367) = ILR (1947) Mad 837 (DB) ** (1913) 18 Cal LJ 53 (56) (DB).

(3) Where an auction sale is held under the express condition that the acceptance of the highest bid would be subject to the confirmation by a particular authority the bidder could withdraw his offer before such confirmation in spite of the bid having been provisionally accepted. AIR 1953 Punj 274 (278) ** AIR 1947 Mad 366 (368) = ILR (1947) Mad 837.

(4) After a transaction has ripened into a contract it requires the consent of both parties to revoke or modify it. AIR 1925 PC 232 (232).

(5) Once an offer to be bound by the special oath of the other party has been made by party and accepted by the other, it cannot be revoked. He cannot, therefore, be allowed to resile from his offer before the special oath has actually been taken. AIR 1952 Pat 208 (210) = 31 Pat 91 (DB) ** AIR 1952 All 882

6. Revocation how made.—A proposal is revoked—

- (1) by the communication of notice of revocation by the proposer to the other party;
- (2) by the lapse of the time prescribed in such proposal for its acceptance, or, if no time is so prescribed, by the lapse of a reasonable time, without communication of the acceptance;
- (3) by the failure of the acceptor to fulfil a condition precedent to acceptance; or
- (4) by the death or insanity of the proposer, if the fact of his death or insanity comes to the knowledge of the acceptor before acceptance.

7. Acceptance must be absolute.—In order to convert a proposal into a promise, the acceptance must—

- (1) be absolute and unqualified;
- (2) be expressed in some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be accepted. If the proposal

Section 5 — Note 1 (contd.)

(889) = ILR (1953) 1 All 494 (FB) **
 AIR 1957 Orissa 226 (227) = ILR (1957)
 Cut 402.

(6) An original proposal becomes superseded by the counter-proposal made by the other party and would not be revived even if the maker of the proposal rejects the counter offer. Quite a different result would however follow if the person making the counter proposal withdraws it before the other either accepts the counter-proposal or rejects it. ILR (1956) 1 Cal 164 (170).

(7) Sale by auction — Bidder can withdraw before final acceptance — Clause 10 of Rule 10 of proclamation of auction sales — Scope — It is not a statutory condition — Bidder can withdraw bid before expiry of one month mentioned in clause. AIR 1963 Andh Pra 110 (112, 113) = (1962) 1 Andh WR 383 (DB).

(8) Madras District Municipalities Act, Sections 68, 68-A and 69 — Public auction by Commissioner — Highest bidder withdrawing his bid before acceptance by Council, the only authority to accept offer — Effect of withdrawal — Contract concluded liability of the highest bidder for damages for breach of contract (1969) 1 Mad LJ 394.

(9) Tender notice calling for quotations — Mere offer of quotations does not create contract — Rights and duties of person calling for quotations — Distinction between Government and private person — Acceptance of lowest quotation — Not obligatory — Refusal by Government to accept lowest quotations — Writ petition not maintainable. AIR 1962 Manipur 47 (51).

(10) Displaced Persons (Compensation and Rehabilitation) Rules (1955), R. 90 (10) — Auction sale under — Provisional or conditional acceptance — Bidder held entitled to withdraw his offer and revoke bid — Displaced Persons (Compensation and Rehabilitation) Act

(1954), S. 20. AIR 1968 Pat 433 (438) = 1968 Pat LJR 310 (DB).

(11) Auction sale — Acceptance of bid subject to confirmation of Chief Commissioner — No completed contract till such confirmation — Bid can be withdrawn — Auction purchaser not liable for shortfall on resale. AIR 1963 Punj 274 (278) = 53 Pun LR 424.

(12) Revocation of communication completed at N — Court at N has jurisdiction to try suit for breach of contract. AIR 1965 Punj 107 (109, 110).

Section 6 — Note 1

(1) Where application for shares of a company was made in March and July 1933 and December 1934, but there was no allotment of shares till August 1935, no notice of allotment being given to proposer till then, and there was nothing in the conduct of the applicant amounting to waiver of revocation, held that Section 6 (2) applied and the proposals must be deemed to have been revoked. AIR 1939 Nag 225 (226) = ILR (1941) Nag 567.

(2) Acceptance of shares allotted after delay amounts to acquiescence on the part of the applicant and he cannot thereafter repudiate the allotment on the ground that as his offer became revoked by delay in allotment there could have been no valid allotment of the shares to him. 1955 Mad WN 80 (81).

(3) Auction sale — Provisional or conditional acceptance — No concluded contract — Bid can be revoked by serving a notice to that effect. AIR 1968 Pat 433 (435, 436) = 1968 Pat LJR 310 (DB).

SECTION 7 — SYNOPSIS

1. Acceptance must be unconditional and absolute.

2. Counter proposal.

3. Manner of acceptance.

1. Acceptance must be unconditional and absolute. — (1) The theory of offer and acceptance has received statutory recognition in India so that every transac-

prescribes a manner in which it is to be accepted, and the acceptance is not made in such manner, the proposer may, within a reasonable time after the acceptance is communicated to him, insist that his proposal shall be accepted in the prescribed manner, and not otherwise; but if he fails to do so, he accepts the acceptance.

Section 7 — Note 1 (contd.)

tion to be recognised as a contract must, in its ultimate analysis, resolve itself into a proposal and its absolute and unqualified acceptance. AIR 1951 All 93 (97) = ILR (1950) All 1033 (FB) ** AIR 1922 Pat 24 (26) ** (1904) 28 Bom 420 (425) (DB) ** (1900) 24 Bom 510 (523) (DB).

(2) Until there is absolute acceptance of a proposal the parties are still in the stage of negotiations and no legal obligations attach to them. (1900) 24 Bom 510 (523) (DB) ** (1956) 60 Cal WN 423 (433).

(3) An absolute and unqualified acceptance may, even when there is no express communication from the offeree, be inferred from his conduct. AIR 1919 All 7 (8, 9) = 42 All 187.

(4) An acceptance which does not extend to all the terms of a contract cannot make a binding contract. AIR 1958 Andh Pra 533 (536).

(5) An acceptance which leaves one of the conditions essential to the implementing of the acceptance to the discretion of a third person is not an unqualified acceptance and fails as an acceptance. AIR 1941 Oudh 529 (543).

(6) An acceptance which is qualified by certain conditions cannot amount to an absolute and unqualified acceptance which is capable of resulting in a completed contract. AIR 1947 All 332 (334).

(7) Where an acceptance is in substance only a provisional arrangement subject to something more being done to complete the arrangement it cannot make a binding contract. AIR 1958 Andh Pra 533 (536).

(8) Where the acceptance of the highest bid at an auction sale by the sale officer or the auctioneer is subject to the confirmation by a superior authority there is only a provisional or conditional acceptance and the bidder will be bound by his offer only after such confirmation is received. AIR 1951 Mad 322 (325) ** AIR 1953 Punj 274 (278).

(9) When an order for goods is accepted "subject to confirmation by mail" the acceptance is conditional and the contract cannot be said to have been complete on the date of such acceptance. AIR 1930 Lah 325 (326) (DB) ** AIR 1930 Lah 114 (115) (DB).

(10) An acceptance which at the same time exempts the acceptor of any obligation is not an acceptance capable of creating a binding contract. AIR 1931 Lah 260 (263) (DB).

(11) Where by the absolute and unequivocal acceptance of an offer a binding contract has come into existence between the parties the non-execution of a formal document cannot absolve the

parties of their engagement. AIR 1934 All 298 (300) = 56 All 726 (DB). (Proposal by insurance accepted by company — Non-issue of policy before happening of risk cannot absolve company of its liability.)

(12) A covenant in a sale deed that the vendee in the event of selling the property in future must sell it to the vendor or his heirs for the same price and also the price of any building he might have erected on the property amounts to a completed contract and not merely a standing offer which requires acceptance before it could become a contract. AIR 1933 Mad 322 (323) = 56 Mad 433 (FB).

(13) A condition in a concluded contract of insurance that the liability under it will attach itself only on the insured paying the premium is only a condition precedent for the policy taking effect inserted for the benefit of the insurer which can be waived by him. AIR 1954 Mad 520 (521) = ILR (1954) Mad 747 (DB).

(14) In order to decide whether there is an absolute and unqualified agreement between the parties to a contract, the entire negotiations and correspondence should be considered. AIR 1958 Andh Pra 533 (536) ** AIR 1930 Mad 654 (655, 656) (DB).

(15) A new collateral term annexed to an acceptance of a contract does not affect the original contract accepted absolutely. AIR 1958 Andh Pra 533 (536).

(16) During the course of the negotiations for the sale of a horse the seller gave a warranty that the horse was sound. The buyer accepted the bargain by telegram and later sent a letter stating that he confirmed the telegram and would take the horse if the seller had no objection to get a veterinary certificate. It was held that the warranty was not a proposal. Therefore it could not be said that by asking for the certificate the buyer had not accepted the warranty absolutely and without qualification and therefore the seller was not bound by it. (1912) 14 Ind Cas 135 (135) (DB) (All).

(17) Acceptance of offer must be absolute and unconditional — Tender for supply of oil subject to conditions of contract — Condition subsequent as to security deposit — Acceptance letter stating that contract was concluded but it was subject to making security deposit — Held there was a concluded contract. AIR 1962 SC 378 (385) = (1962) 3 SCR 769.

(18) When one party makes a composite offer, each part thereof being dependent on the other the other party can-

Section 7 — Note 1 (contd.)

not by accepting a part of the offer, compel the other to confine its dispute only to that part not accepted, unless the party offering the composite offer agrees to that course. AIR 1964 SC 892 (895) = (1964) 5 SCR 125 = (1964) 34 Com Cas 10.

(19) Agreement for sale of land — Price and area of land and time for completion of sale fixed — Mere omission to settle mode of payment does not affect the completeness of contract. AIR 1968 SC 1028 (1032) = (1968) 3 SCR 387.

(20) Oral agreement—Reference to execution of formal contract does not establish the proposition that the parties cannot be bound by previous agreement. AIR 1968 SC 1028 (1031) = (1968) 3 SCR 387.

(21) Auction sale — Provisional or conditional acceptance — No concluded contract. Bidder held entitled to withdraw his offer and revoke bid. AIR 1968 Pat 433 (435, 436) = 1968 Pat LJR 310 (DB).

(22) Offer by plaintiffs to sell certain quantity of oil at certain rate accepted by defendants without any qualification or condition — Fresh negotiations between parties regarding payment of Vidya fund which was not mentioned earlier — Further negotiations held did not affect main contract as to sale of oil which was already concluded. AIR 1962 Punj 56 (60, 61, 62) (DB).

(23) When is contract concluded — Conditional acceptance — There is no concluded contract — Sale by auction — Bidder can withdraw before final acceptance — Clause 10 of Rule 10 of Proclamation of Auction Sale — Scope is not a statutory condition — Bidder can withdraw bid before expiry of one month mentioned in clause. AIR 1963 Andh Pra 110 (114, 115) = (1962) 1 Andh WR 383 (DB).

(24) In order that acceptance of the proposal be inferred the acceptance of the consideration must be unconditional. Of course if by any action on the part of the acceptee the proposer cannot be restored to his former position, then the acceptee cannot be permitted to say that his acceptance should be treated as other than as per the original proposal. But in the absence of such estoppel being applicable the conditional acceptance cannot become absolute acceptance. AIR 1968 Bom 294 (296) = 69 Bom LR 843.

(25) Contract to purchase several tons of iron scrap belonging to Government — Is concluded on acceptance of purchaser's tender — Condition for payment of price does not make the contract conditional. AIR 1969 Bom 163 (171) = 70 Bom LR 364.

(26) A notice communicating to its constituent the decision of the bank to raise the rate of interest from a certain

date may not amount to an express proposal within the meaning of Section 2 (a) but it nevertheless contains an implied proposal to the effect that if the constituent wanted to keep alive his overdraft account with the Bank or desired to take further advances from the Bank it could be done only on the terms contained in the notice. AIR 1958 Cal 644 (646, 647, 648) = ILR (1959) 2 Cal 252 (DB).

(27) Where an oral contract for reconveyance is entered into, the question whether it would be enforceable as a completed contract notwithstanding the omission of the parties to execute a written agreement would depend on the question whether the written agreement was a term of bargain or whether it was merely an expression of desire. It is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. 1959 Ker LT 595 = 1959 Ker LJ 702.

2. Counter proposal. — (1) An acceptance with a variation in the terms of the offer or with a qualification is simply a counter proposal. (1900) 24 Bom 510 (523) (DB) ** ILR (1956) 1 Cal 164 (167) ** AIR 1938 Lah 341 (344) (DB) ** 1913 Pun Re No. 92 (DB) ** (1908) 2 Sind LR 7 (8, 9) (DB).

(2) A policy containing the condition that no insurance shall be deemed to have been effected until the premium in full is paid and accepted is only in the nature of a counter offer and not an absolute and unqualified acceptance of the proposal for insurance. AIR 1928 Bom 260 (261, 262) = 52 Bom 532 (DB).

(3) An acceptance by an insurance company of a proposal for life insurance on condition that the first premium thereunder should be paid within 30 days from the date of acceptance is in law a counter-offer to be completed thereafter into contract by the fulfilment of that condition as required thereunder. AIR 1959 Pat 540 (541) = 1959 BLJR 425 (DB).

(4) A counter offer amounts to a rejection of the original offer. AIR 1938 Lah 341 (344) (DB).

(5) If counter proposal is withdrawn before it has been either accepted or rejected, then it must be held that the original proposal stands unrejected, and capable of being accepted. ILR (1956) 1 Cal 164 (170).

(6) A counter proposal must be accepted by the original offerer before contract can result. (1900) 24 Bom 510 (523) ** ILR (1950) All 112 (115) ** AIR 1947 Cal 14 (16) (DB).

(7) The acceptance of a counter-offer results in a contract whose situs is the place where the counter-offer was re-

8. Acceptance by performing conditions, or receiving consideration.—Performance of the conditions of a proposal, or the acceptance of any consideration for a reciprocal promise* which may be offered with a proposal, is an acceptance of the proposal.

[*] See S. 2 (f) for definition.

Section 7 — Note 2 (contd.)

ceived and accepted. ILR (1954) 4 Raj 252 (257).

(8) The plaintiff while accepting the defendant's offer of a lease made a counter proposal for insertion of a clause in the lease note providing for a renewal of lease for another five years. The defendant's estate manager replied "I am making necessary arrangements." It was held that the counter offer was not accepted. AIR 1921 Bom 200 (201) = 45 Bom 8 (DB).

(9) Offer, counter-offer and acceptance — Acceptance of offer with introduction of new term — Effect of — Counter-offer. The offeree must unreservedly assent to the exact terms of the offer to bring about a concluded contract. If, while purporting to accept the offer as a whole, he introduces a new term which the offerer has had no opportunity of examining, he is in fact merely making a counter-offer. The effect of such a counter-offer in the eyes of law is to destroy the original offer. An offer once refused is dead and cannot be accepted unless renewed. The question whether the terms added are intended to be part of the contract or are merely in the nature of enquiries for further information has to be decided by the Court in individual cases by looking into the effect of the words used in particular cases and thereby gathering the intention of the parties. AIR 1961 Ker 21 (23) = 1960 Ker LT 574 (DB).

(10) Where after rejecting the counter proposal the offerer repeats his original offer and the offeree accepts the same a binding contract arises between the parties. AIR 1938 Cal 343 (346).

(11) It is not every slight variation in the acceptance that would affect the validity of a contract. It must be a material variation to bring about that result. (1908) 2 Sind LR 7 (8, 9) (DB).

3. Manner of acceptance. — (1) Where a person in an offer made by him to another person expressly or impliedly intimates a particular mode of acceptance as sufficient to make the bargain binding it is only necessary for the other person to whom such offer is made to follow the indicated mode of acceptance; and if the person making the offer expressly or impliedly intimates in his offer that it will be sufficient to act on the proposal without communicating acceptance of it to himself, performance of the conditions is a sufficient acceptance, without notification. AIR 1952 Cal 691 (695) ** AIR 1937 Bom 39 (43) = ILR (1937) Bom 763.

(2) Where a letter makes offer for sale of property, directing that purchaser should write about acceptance to a certain person and the intending purchaser instead of so writing communicates directly with the seller, there is no contravention of Section 7 as to render contract not binding on seller. AIR 1936 Cal 87 (91) (DB).

(3) Assent must be by express words or positive conduct. AIR 1927 All 407 (410) = 49 All 674 (DB) ** AIR 1914 Lah 436 (438) = 1913 Punj Re No. 92 (DB).

(4) Where a constituent of a bank after a notice enhancing the rate of interest renews his over draft account and also obtains further advances it must be taken that he has accepted the implied proposal of the bank contained in the notice to keep alive his account and to make further advances only at the higher rate of interest and therefore is bound to pay such interest. AIR 1958 Cal 644 (648).

(5) The law does not cast a duty on the person to whom an offer is made to reply to that offer and hence acceptance cannot be inferred from the silence of the offeree. AIR 1927 All 407 (410) = 49 All 674 (DB) ** AIR 1939 Cal 500 (501) ** AIR 1930 Lah 374 (375) (DB) ** AIR 1917 Mad 13 (14) (DB).

(6) There is one further case in which there may be acceptance by conduct which is not covered by Sections 7, 8 and 9. It is when trade or mercantile usage or local usage can be invoked to import into the transaction a promise by the promisee which is not made either expressly or impliedly. AIR 1927 All 407 (409) = 49 All 674 (DB).

(7) Acceptance of proposal — Can be in a form other than Sections 7 and 8. AIR 1968 All 292 (294) = ILR (1968) 1 All 60.

(8) Offer — Acceptance cannot be by serving copy of plaint in a suit for specific performance through Court. AIR 1969 SC 1157 (1159) = (1969) 2 SCJ 641.

Section 8 — Note 1

(1) In case where an offer asks for an act the performance of the desired act without any further communication of the acceptance is sufficient to render the offer a promise. AIR 1954 Pat 14 (16) (DB).

(2) Where an aunt promised to purchase and settle property on her niece if she resided with her and after the purchase also wrote a letter to that effect whereupon the niece resided with her,

9. Promises, express and implied.—In so far as the proposal or acceptance of any promise is made in words, the promise is said to be express. In so far as such proposal or acceptance is made otherwise than in words, the promise is said to be implied.

Section 8 — Note 1 (contd.)

the letter coupled with the conduct of niece constituted a binding contract which was specifically enforceable. AIR 1916 PC 9 (13) = 43 Ind App 138 = 39 Mad 509.

(3) A surety asked the creditor by letter to advance money to the debtor to certain amount and made himself responsible for the amount. The letter did not contemplate any communication of acceptance. It was held that the advancement of money amounts to acceptance of the proposal and the contract of guarantee was complete. AIR 1928 Lah 938 (939).

(4) Where a party accepts a payment offered in full satisfaction of his claim without any objection, it should be deemed that he has accepted it on the condition on which it was offered and it is not open to him to say subsequently that he accepted the payment in part satisfaction of his claim. AIR 1953 All 745 (745, 746).

(5) The acceptance of the cheque by the landlord of the tenant was the acceptance of a consideration. AIR 1953 All 745 (746).

(6) Section 5 must be read subject to provisions of Section 8. (1959) 10 STC 74 (81) (Pat) (DB).

(7) Provisions contained in Section 8 are not exhaustive but illustrative. AIR 1968 All 29 (294) = ILR (1968) 1 All 60.

(8) Section 8 is an illustration of implied acceptance of proposal. AIR 1968 All 292 (294) = ILR (1968) 1 All 60.

(9) In order that acceptance of the proposal be inferred the acceptance of the consideration must be unconditional. AIR 1968 Bom 294 (296) = 69 Bom LR 843.

(10) A notice communicating to its constituents the decision of the bank to raise the rate of interest from a certain date may not amount to an express proposal within meaning of Section 2 (a) but it nevertheless contains an implied proposal to the effect that if the constituent wanted to keep alive his overdraft account with the bank or desired to take further advance from bank it could be done only on the terms contained in the notice. This implied proposal invites from him in the words of Section 8 a 'reciprocal promise' to pay interest at the higher rate. AIR 1958 Cal 644 (646, 647) = ILR (1959) 2 Cal 252.

(11) Proceedings under Section 145 Cr. P. Code — Applicant making offer to decide the case on statement made on

special oath by P — P apart from being father and brother of some of the opposite parties also advocate for all the opposite parties empowered under Vakalatnama to do all which opposite parties could have done in the case — Held, as soon as P accepted the offer a binding contract came into existence between applicant and opposite parties. 1969 Cri LJ 70 = 1968 All LJ 457.

(12) Decree-holder agreeing under compromise to accept less than decretal amount if paid before fixed date — Delay in depositing amount — Withdrawal of deposit by decree-holder — Decree-holder must be deemed to have condoned delay and accepted payment in full satisfaction of his claim. AIR 1961 All 91 (92).

(13) Plaintiff accepting payment offered on condition that it should be in full satisfaction of his claim — Plaintiff cannot subsequently say that he accepted it in part satisfaction and sue for balance. AIR 1965 All 34 (36, 37).

(14) Condition imposed unilaterally after acceptance of offer is not valid. 1964 Raj LW 416.

(15) Company's claims against railway pending — During pendency railway sending cheque making it clear that it was in full and final settlement — Company held must be deemed to have accepted implied condition that amount was tendered in full settlement. AIR 1966 All 104 (104).

Section 9 — Note 1

(1) A contract may be either express or implied. It may also be of mixed character, that is partly express and partly implied. AIR 1942 Lah 47 (49) = ILR (1943) Lah 28 (DB).

(2) An "express contract" means the reciprocal promises contained in the words of the contract or resulting from a true construction of them and excludes stipulations which may arise out of any usage or custom or which may be inferred from the conduct or course of dealings between the parties. AIR 1958 Andh Pra 550 (554) (DB).

(3) Contract whether implied or express gives an equal cause of action. AIR 1925 Lah 174 (174) ** (1912) 16 Ind Cas 609 (610) (DB) (Mad).

(4) The question of an express contract as well as an implied contract is one of inference to be drawn from the facts. (1912) 16 Ind Cas 609 (610) (DB) (Mad).

(5) An express contract can be proved by written or spoken words which constitute an agreement between the parties while an implied promise may be proved by circumstantial evidence of an agree-

Section 9 — Note 1 (contd.)

ment. AIR 1942 Lah 47 (49) = ILR (1943) Lah 28 (DB).

(6) A covenant to repay is implied in every transaction of loan. AIR 1934 Pat 433 (435).

(7) Where a person after receiving a notice from his bank which impliedly proposes to him that it would keep his overdraft account alive and also make further advances only at a higher rate of interest, renews his overdraft account and also obtains further advances it is to be taken that he has agreed to pay the higher rate of interest stipulated by the Bank. AIR 1958 Cal 644 (646) (DB).

(8) A person accepting money for appropriation upon a certain contingency is under an implied promise to refund the same if the contingency does not arise and there is no appropriation of the amount. AIR 1957 All 799 (801) = ILR (1957) 1 All 465 (DB).

(9) Under an award made on reference to arbitration regarding disputes between A and B, C as surety of A paid the amount found due to B. On reference being discovered to be void, C filed a suit against A for the recovery of amount. Held that there was an implied contract between C and A for reimbursement of the amount paid and therefore the suit was maintainable. AIR 1939 Lah 187 (188).

(10) Wherever a contract for work is found to be invalid it is always assumed, unless the express contract excludes it, that there is an implied contract to pay the person who has to do the work reasonably for the work done by him. AIR 1941 Mad 887 (887, 888).

(11) In cases where the relationship of principal and agent subsists agent's claim for extra remuneration on implied contract is enforceable. AIR 1915 Mad 931 (934) (DB).

(12) Where the course of dealings between A and B shows that A to whom B was despatching goods on account for sale was debiting B with losses arising not only on the consignments of his own goods but also on the consignments of goods which belonged to his constituent and that B without demur sent more goods in discharge of that liability it was held that these circumstances gave rise to the inference that B had undertaken a personal liability for the losses incurred on the constituent's consignments also. AIR 1935 PC 154 (157).

(13) An implied contract to pay compound interest may be implied from long course of dealings between parties. AIR 1920 PC 61 (62, 63) = 47 Ind App 17 = 44 Bom 474.

(14) The owner whose goods have been converted by another can bring a suit against the other for the sale proceeds as for money had and received based on an implied contract of agency. AIR 1953 Madh B 38 (39).

(15) Although there may be no express contract there is an implied obligation on all persons who are in possession of land as tenants to pay the rent. ILR (1952) 2 Cal 161 (164) (DB).

(16) Nearly every contract of necessity, leaves matters which are to be implied and what matters are implied in any contract must be determined with reference to the surrounding circumstances and the parties who made them. AIR 1947 Nag 17 (24) = ILR (1946) Nag 824 (FB).

(17) Promises which although have not been made either expressly or impliedly by the offeree can be imported into transactions under trade, mercantile or local usage wherever such usage can be invoked. AIR 1927 All 407 (409) = 49 All 674 (DB).

(18) Unless there is a mercantile usage, no interest can be imported into a contract containing no stipulation to that effect either under Hindu or English law. (1863) 9 Moo Ind App 256 (266, 267) (PC).

(19) A promise which is excluded by the express terms of the contract cannot be implied into it. AIR 1941 Mad 887 (888).

(20) It is not competent to the Government to contract so as to fetter its freedom of future executive action which it must have to protect the welfare of the State and no contract which would have such effect can be implied against it. AIR 1947 PC 29 (31).

(21) Provisions do not contemplate an implied contract between Government and any other person — Forest contractor accepting the rules of the auction sales and depositing the earnest money — Contract, before it could be accepted resulted in cancellation due to failure of bidder to pay the part consideration — Re-auction by Government resulting in deficiency — Enforcement of deficiency as arrears of land revenue cannot be made — There is no implied contract and Section 155 (b) of Madhya Pradesh Land Revenue Code does not apply. AIR 1967 SC 203 (206) = (1966) 3 SCR 919.

(22) Where in a contract, it is stated that the Railway Administration will not be liable for anything that may happen to the suppliers' commodities until the same passed into the physical possession of the Railway Administration as a buyer, in the absence of any contract express or implied, that the supply of wagons by the railway would be a condition precedent to the supply of the commodities by the supplier, such an implied contract cannot be inferred. AIR 1960 Pat 87 (96).

CHAPTER II

OF CONTRACTS, VOIDABLE CONTRACTS AND VOID AGREEMENTS

10. What agreements are contracts.—All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.

Nothing herein contained shall affect any law in force in **[India]* and not hereby expressly repealed by which any contract is required to be made in writing† or in the presence of witnesses, or any law relating to the registration of documents.

[*] Substituted for "Part A States and Part C States", by the Part B States (Laws) Act, 1951 (3 of 1951), S. 3 and Sch. (1-4-1951).

[†] See e. g. Ss. 25, 28, Expl. (2) of this Act; the Copyright Act, 1957 (14 of 1957), S. 19; First Schedule; the Apprentices Act, 1961 (52 of 1961) S. 4; the Carriers Act, 1865 (3 of 1865), Ss. 6 and 7; Companies Act, 1956 (1 of 1956), Ss. 12, 29, 30, 46 and 108—T. P. Act, 1882 (4 of 1882), Ss. 54, 107.

SECTION 10 — SYNOPSIS

1. Essentials of contracts.
2. Parties' intention to execute document — Effect of.
3. Written agreements.
4. Oral contracts.
5. Parties to contract.
6. Formalities prescribed by law in force.
7. Construction of contracts.
 - (a) Nomenclature of deed — If conclusive.
8. Implied terms.

1. Essentials of contracts.— (1) An agreement is an act in the law whereby two or more persons declare their consent as to any act or thing to be done or forborne by some or one of those persons for the use of the others or other of them. (1912) 6 Sind LR 278 (280) ** AIR 1966 Mys 118 (122) = (1965) 1 Mys LJ 546 (DB) ** AIR 1960 Punj 585 (587, 588) = ILR (1960) 2 Punj 676 (DB).

(2) A contract is a consensual act the parties being free to settle any terms they please. AIR 1956 Mad 695 (701) = ILR (1957) Mad 212 (DB) ** AIR 1961 Punj 314 (316) = 63 Pun LR 302 (DB).

(3) Fair rent not fixed — Agreement for enhancing rent is valid. AIR 1969 Mad 473 (476, 477) = (1969) 1 Mad LJ 122.

(4) A promise which is voluntary and by which the parties do not intend to create any legal obligation cannot amount to a contract. AIR 1953 Pat 231 (233) = 32 Pat 152 (DB).

(5) In spite of the fact that an agreement is embodied in a document the parties could show even by oral evidence that when the document was signed they intended that it should not operate as an agreement and therefore there is no contract at all. AIR 1936 PC 70 (74) = 63 Ind App 126 = 59 Mad 446.

[See also (1969) 1 Comp LJ 153 (Cal). (Contract of Insurance — Nature of evidence to show that terms of policy do

not represent true intention can be adduced — Section 92, Evidence Act is no bar.)]

[See however AIR 1965 Punj 25 (26, 27) = 66 Pun LR 1141 (DB).]

(6) It is upon the party who pleads that the contract upon which he is sued was not intended to be acted upon to prove the allegation. ILR (1950) All 32 (45) (DB).

(7) So long as one of the parties to the transaction could back out of it at his choice there can be no concluded or binding contract between the parties although they may have agreed upon many of the material terms. AIR 1955 Cal 210 (215) (DB).

(8) A clause in a concluded contract which is in no sense continuing one giving an option to one party to cancel the contract is void and unenforceable. AIR 1957 Mad 82 (86) = ILR (1957) Mad 315 (DB).

(9) Any stipulation unilaterally introduced by a party into an instrument handed over by him to the other would not constitute a contract unless agreed to by the other. AIR 1957 J and K 7 (7) ** AIR 1961 Mad 281 (282) = (1961) 1 Mad LJ 244 ** AIR 1961 Punj 66 (70) = 63 Pun LR 152 (DB).

[See however AIR 1964 Mad 474 (476) = 77 Mad LW 115.]

(10) In commercial contracts, time is ordinarily of the essence of the contract. AIR 1961 SC 1295 (1296) = (1961) 3 SCR 845 = 63 Bom LR 962.

(11) Where two adults enter into a valid contract the default of one to do something as undertaken by him under the contract is not sufficient to deprive the other of the right to specific performance of the contract. AIR 1951 Mad 612 (615, 616).

(12) The persons designated in the contract as parties to it cannot show by evidence that in reality some other persons and not they intended to incur obligations under the contract. AIR 1956

Section 10 — Note 1 (contd.)

Bom 165 (167) ** AIR 1963 Punj 538 (545) = ILR (1963) 2 Punj 463 (DB).

[See also AIR 1968 Bom 156 (167) = 69 Bom LR 186 (DB). (Terms of contract express or implied are only binding on the parties to the contract.)]

(13) An agreement between man and woman both sui juris, to marry is a contract the promise of each being the consideration for the promise of the other. AIR 1947 Pat 132 (134).

(14) In a Hindu family a betrothal is in the nature of a contract to which the Contract Act is applicable. AIR 1950 All 592 (594) = ILR (1952) 2 All 681 (DB).

(15) An agreement between the parents of a minor boy and a minor girl to arrange for the marriage between the minors is a mere nudum pactum and not a contract. AIR 1947 Pat 132 (134).

(16) An arbitration agreement which satisfies the requirements of the section is a contract. AIR 1947 All 406 (407) (DB).

[See also AIR 1959 Cal 603 (606) = 63 Cal WN 128. (Agreement that disputes to be settled by arbitration in New York according to Rules of American Arbitration Association — Not vague.)]

(17) A settlement in a conciliation proceeding after it has received the assent of the conciliator does not retain the character of a contract as between the original parties to the dispute. AIR 1965 Bom 146 (150) = 67 Bom LR 1 (DB).

(18) A compromise decree is creature of agreement on which it is based and is subject to all incidents of such agreement, that it is but a contract with the command of a judge superadded to it and in construing its provisions fundamental principles governing construction of contract are applicable. AIR 1969 All 296 (303) = 1968 All LJ 225 (FB).

(19) A partition arrangement which contains a stipulation that the co-sharer who wishes to sell his share must offer the option of purchase to other co-sharers at price to be determined by respectable persons is a completed contract which is capable of being enforced. 1956 Andh WR 801 (803, 804).

(20) Although a permit-holder for a stage carriage, by reason of a condition in the permit, is under an obligation to carry for remuneration mails when called upon to do so by the postal authorities yet the agreement entered into by him with the postal authorities is nonetheless a contract inasmuch as it is an agreement between two competent parties with their free consent and is supported by lawful consideration. AIR 1955 SC 459 (463) = 1955-2 SCR 83.

(21) A control regulation which requires the owner of goods to sell it at a certain price and in certain quantities only to the quota holders as directed by

an authority no doubt places restrictions on the freedom of contract of the owners but that does not mean that when the owner agrees to sell a quota holder at the specified price the quantity fixed by the authority there is no consensus ad idem between them and therefore no contract. ILR (1956) Andhra 502 (507, 509).

(22) Incidence of any insurance contracts in India are on the same footing as in England and the agreement is not enforceable by law if the basis of the agreement is broken. AIR 1959 Pat 102 (106) (DB).

(23) An undertaking executed to the Court by a person whereby he agreed that if the decree-holder who was given possession of the property decreed did not restore it in the event of his failure in the appeal he would make compensation to the Court to the extent of a certain amount is an agreement which satisfies all the requirements of Section 10 of the Act and is therefore a contract. In the intrinsic nature of the agreement there is nothing which would make it unenforceable. AIR 1931 Oudh 99 (102) = 6 Luck 601 (SB). (AIR 1931 All 189, Dissented from.)

(24) An agreement by a party to do something can be proved by evidence of his conduct even if there is no oral evidence of the agreement itself. AIR 1944 Nag 124 (126) = ILR (1944) Nag 101 (DB).

(25) The admission of the defendant that he received earnest money from plaintiff is evidence against him to show that there was a concluded contract of sale between them. AIR 1957 Madh B 190 (191).

(26) In contracts for sale of immovable property, time is generally not of the essence of the agreement. The proper criterion is to ascertain whether agreement goes to show that it was the intention of the parties that time should be of the essence of the contract for the sale of immovable property. 1967 Raj LW 498 = ILR (1967) 17 Raj 917.

(27) Courts cannot absolve a party from liability to perform his part of the contract on grounds of hardship. (1969) 1 SCWR 765. (AIR 1960 SC 588 (594, Rel. on.)

(28) If for amicable settlement parties agreed to abide by certain terms it cannot be said that such an agreement is without consideration. (1966) All WR (HC) 134.

(29) A contract entered into in defiance of a legal provision continues to be illegal even after the legal provision ceases to be effective and a plea that the contract, when it was to be enforced, was not hit by any subsisting law is not open to the party seeking to enforce it. AIR 1963 All 206 (209) = 1962 All LJ 767 (DB).

Section 10 — Note 1 (contd.)

(30) The core of the doctrine of privity of contract is that consideration must move from promisee. AIR 1969 Cal 496 (509) (DB).

2. Parties' intention to execute document — Effect of.— (1) Where parties enter into an executory agreement which is to be carried out by a deed afterwards to be executed the real completed contract is to be found in the deed. The contract is merged in the deed. (1938) 173 Ind Cas 88 (89, 90) (PC).

(2) There is only a provisional agreement and not a concluded contract between the parties where in order to make the agreement a binding contract one of them should take certain steps and those steps have not been taken. AIR 1954 Nag 142 (148) = ILR (1953) Nag 746 (DB).

(3) Whether intention to have formal document drawn up postpones formation of contract depends on circumstances of each case. AIR 1936 Mad 752 (755) (DB) ** AIR 1968 SC 1028 (1031) = (1968) 3 SCR 387.

(4) Where the execution of a further document containing the contract between the parties is a condition or the term of their bargain then unless such a document is executed there can be no enforceable contract between the parties because either the condition is unfulfilled or because the law does not recognise a contract to enter into a contract. AIR 1933 PC 29 (31) = 60 Cal 980 = 60 Ind App 297 ** AIR 1947 Sind 6 (11) ** AIR 1946 Bom 149 (153) (DB) ** AIR 1942 Pesh 33 (34, 35) (DB).

(5) Where the parties to a bargain contemplate the execution of a further contract merely as an expression of their desire as to the manner in which the transaction already agreed to will in fact go through, the non-execution of such a document will not affect the finality and the binding character of the contract already concluded between them. AIR 1933 PC 29 (31) = 60 Cal 980 = 60 Ind App 297 ** (1911) 9 Ind Cas 104 (105) (FB) (Mad) ** AIR 1946 Bom 149 (153) (DB) ** AIR 1967 Mys 156 (158, 159).

(6) Unregistered document — Executants agreeing to sell properties and execute a document of conveyance whenever demanded — Document held, merely an agreement to sell and a suit for specific performance could be based on it — Mere fact that the document mentioned that executants had received sale consideration or that possession had been handed over did not mean that it was a deed of conveyance — Agreement to execute formal deed of conveyance could be specifically enforced. AIR 1969 Mad 418 (419, 421) = (1969) 2 Mad LJ 151. (AIR 1934 Mad 418 and AIR 1937 Mad 22 held overruled by AIR 1943 Mad

761 (FB). AIR 1929 PC 362 held no longer good law.)

Evidence of concluded contract.

(7) Where it is a point in issue in a case whether negotiations started with the object of forming a contract were still open to bargaining or had resulted in the formation of a contract the decision should depend on the intention of the parties to be ascertained from all the facts and circumstances of that particular case. AIR 1951 All 93 (97) = ILR (1950) All 1033 (FB) ** AIR 1969 SC 9 (12) = (1968) 2 SCR 565 ** AIR 1959 SC 633 (637) = (1959) (2) SCR (Supp) 136 ** AIR 1968 Delhi 68 (70, 71) (DB) ** AIR 1968 Raj 278 (282) = 1968 Raj LW 163 ** AIR 1966 Mys 118 (122) = (1965) 1 Mys LJ 546 (DB) ** AIR 1962 Mad 369 (371, 372) = (1962) 2 Mad LJ 25 (DB) ** AIR 1962 Pat 28 (30) (DB) ** AIR 1960 Cal 752 (758, 759, 760) = ILR (1961) 1 Cal 799 (DB).

(8) When words of contract are clear and unambiguous there is no scope for drawing upon hypothetical considerations or supposed intentions of the parties. AIR 1959 SC 1362 (1368) = (1960) 1 SCR 493.

(9) Whether an agreement is a completed bargain or merely a provisional agreement depends on the intention of the parties as deducible from the language used while negotiations take a concrete shape. AIR 1941 All 377 (383) = ILR (1941) All 741 (DB) ** AIR 1968 Raj 129 (135) = 66 ITR 1 (DB) ** AIR 1962 All 147 (148) = 1961 All LJ 831 (FB).

(10) In order to find out whether the parties have concluded a binding contract or not the negotiations and the correspondence should be looked at as a whole. AIR 1939 Rang 423 (423) (DB) ** AIR 1921 Nag 42 (44) = 17 Nag LR 1 ** AIR 1920 Mad 177 (179) (DB).

(11) Whether a concluded contract has been made or not is a question of fact to be determined in each case by a consideration of all the relevant circumstances and facts and cannot be concluded by the parties' or the solicitors' description of the situation either as a contract or negotiation. AIR 1960 Cal 752 (754) = ILR (1961) 1 Cal 799 (DB).

(12) The conduct of the parties in acting upon the contract before the formal agreement is drawn up is clear evidence of the fact that they did not intend the execution of a further contract as a condition or a term of the bargain. AIR 1942 Pesh 33 (34, 35) (DB) ** (1969) 1 Mad LJ 557 = 82 Mad LW 379 ** AIR 1964 Mad 52 (53) = (1963) 2 Mad LJ 330 ** (1964) 68 Cal WN 611.

(13) The subsequent waiver by a party of any of his rights is irrelevant to the question whether a binding contract came into existence between the parties

Section 10 — Note 2 (contd.)

on the day on which it is alleged to have been entered into. AIR 1955 Cal 210 (215) (DB).

(14) Where a lease deed stipulates sale of land if lessor was ever required to sell and if lessee agreed to purchase at a reasonable price, the stipulation cannot be a completed contract. AIR 1969 Assam 43 (45).

3. Written agreements.— (1) A written agreement is an instrument whereby parties perform the act declaring their consent as to any act or thing to be done or forborne by some or one of those persons for the use of the others or other of them through the process of writing. (1912) 6 Sind LR 278 (280).

(2) There is an essential difference between a written agreement and a document which merely embodies the terms of an agreement. Such document may be evidence of the agreement but is not the agreement itself; unless it be also the instrument whereby the assent of each party has been expressed. (1912) 6 Sind LR 278 (280).

(3) It is not necessary for the existence of a written agreement that the parties should put their signatures to the document embodying the terms of the agreement because the plain acceptance of a document containing all the terms is sufficient. AIR 1956 All 725 (728) = ILR (1957) 1 All 232 (DB) ** AIR 1968 Raj 89 (92-93) = 1967 Raj LW 129 ** AIR 1965 Cal 404 (406) (DB).

(4) Where it is definitely ascertained that a party who has signed an instrument intended to be bound by it as a concluded contract the fact that his signature is not at the end of the document as is usual but at some other place in it will not render the execution of it ineffective. AIR 1955 Raj 91 (92, 93) = ILR (1955) 5 Raj 427 (DB).

(5) Contract in writing does not require signature of both parties. A bond executed by a party and delivered to the other party and accepted by him completes the agreement between the parties and in law this amounts to a contract in writing. AIR 1916 Cal 771 (773) (DB) ** AIR 1963 Pat 160 (162) = 1962 BLJR 942 (DB).

(6) When a contract is reduced into writing the previous negotiations, whether they resulted in a binding agreement or not is presumptively merged in the writing. AIR 1945 Lah 35 (40) = ILR (1944) Lah 578 (DB) ** (1968) 9 Guj LR 1082.

4. Oral contracts.— (1) An oral contract by which itself the parties intended to be bound is valid and enforceable. AIR 1946 PC 97 (99) = 73 Ind App 98 = ILR (1946) Kar (PC) 94 = ILR (1946) Bom 694.

(2) An agreement of re-sale is not required by law to be reduced to the form

of a document. ILR (1950) All 32 (38) (DB).

(3) A contract to pay does not require a writing. AIR 1944 Nag 124 (126) = ILR (1944) Nag 101 (DB) ** AIR 1968 Raj 278 (280) = 1968 Raj LW 163.

(4) Where the owner of a premises accepted only orally the proposal made to him by another to take on lease the premises it was held that there was only an oral contract to lease and not a lease in writing. AIR 1938 Cal 136 (138) = ILR (1938) 1 Cal 563 (DB).

(5) Oral agreements require clearest and most satisfactory evidence. (1941) 43 Pun LR 97 (103) (DB).

(6) A mere reference to a future formal contract in an oral agreement does not prevent a binding bargain between the parties. AIR 1968 SC 1028 (1031) = (1968) 3 SCR 387.

5. Parties to contract.— (1) A contract implies two parties. AIR 1916 Cal 771 (2) (773) ** 1958 MPLJ 410 = 1958 Jab LJ 464.

(2) A contract can only be bilateral. The same party cannot be a party to a contract on both sides and hence there can hardly be a contract between A on the one side and A and B on other side. AIR 1958 Bom 467 (468) = ILR (1958) Bom 428 (DB) ** (1968) 9 Guj LR 1082.

(3) In an ordinary contract to sell immovable property the personality of the party is not usually material. It is sufficient if the identity of the purchaser is ascertainable. It is not necessary to utter the actual name unless the personality is an essential part of the contract. AIR 1960 Cal 752 (757, 758) = ILR (1961) 1 Cal 799 (DB).

(4) Contract — 'A' contracting with 'B' for purchase of goods from 'B' — 'B' independently arranging with 'C' for supply — There is no contract between 'A' and 'C' for want of privity — Yet if goods are not supplied, C bound to return money to A for 'prevention of unjust enrichment.' AIR 1969 Cal 496 (509, 510, 514) (DB).

Devolution on death of party.

(5) Where there is no express or implied condition in a contract that the contracting party should continue to live for its continued subsistence the contract survives the maker of it and devolves on his personal representatives both in respect of the benefit and the burden of it. ILR (1952) 2 Cal 161 (165) (DB).

Competency to contract.

(6) In the case of a statutory person who is incompetent to make any contract except in compliance with the formalities prescribed by statutes there is no inherent disqualification or incompetency to make a contract as in the case of a minor or a lunatic. AIR 1955 Assam 33 (44) (DB).

Section 10 — Note 5 (contd.)

(7) A minor cannot enter into a contract of partnership. Fact that the minor was represented by his guardian would not make the agreement valid, as a minor can only be admitted to benefits of partnership under the law and cannot be made a partner even by his guardian. (1962) 45 ITR 170 (Cal) (DB).

(8) A contract to be specifically enforced by Court must, as a general rule, be mutual, that is to say such that it might at the time it was entered into, have been enforced by either of the parties against the other of them. The relevant date on which this test of mutuality is to be applied is the date of contract itself and not the date on which it is sought to be enforced. Where an infant plaintiff claims under a party who himself could have obtained specific performance, such infancy is no ground for refusing specific performance. AIR 1969 Mad 470 (473) = (1969) 1 Mad LJ 427.

6. Formalities prescribed by law in force.— (1) Where the law has prescribed certain formalities those formalities should be complied with to create a contract capable of attaching liability. AIR 1930 All 118 (120) (DB).

(2) A party acting upon a contract required by law to be executed in a particular manner but not so executed cannot sue for breach of such contract. AIR 1937 Rang 378 (380).

(3) Where the law prescribes that a valid contract could be executed only in a certain form and no other the Court cannot look at the terms of a contract which has not been executed in that form even to determine the nature of transaction entered into between the parties. AIR 1956 Punj 181 (184) = ILR (1956) Punj 1279 (DB).

(4) Where a statute requires an agreement to be 'in the form' or 'in accordance with the form' prescribed by it, then unless the contrary is clearly expressed, it is a sufficient compliance with the statute if the agreement is substantially in the form. An immaterial variation in such a case does not amount to a violation or non-compliance with the provisions of the statute. AIR 1956 All 725 (728) = ILR (1957) 1 All 232 (DB).

(5) The failure to conclude a contract in accordance with the provisions of a special law which are not mandatory does not render the contract unenforceable. AIR 1957 Madh B 190 (191).

(6) Where the bought and the sold notes have by the Bye-laws to be in writing and in the prescribed form and if there be any discrepancy between the two, there is no concluded contract. AIR 1968 SC 1308 (1310) = (1968) 3 SCR 450.

Government contracts.

(7) Under Sec. 30 of the Government of India Act of 1919 a contract to be

enforceable by or against the Secretary of State for India had to comply with its provisions and as sub-section (2) of that section implied the execution of a document oral contracts were completely excluded by the section and therefore could not be enforced. AIR 1941 All 377 (384) = ILR (1941) All 741 (DB). ** AIR 1952 Pat 393 (403) (DB).

(8) Considering Section 175 (3) of Government of India Act (1935), a contract may be validly made by correspondence or by tender and its acceptance or by informal documents. AIR 1958 Andh Pra 533 (538) (DB) ** AIR 1957 Assam 159 (160, 161) = ILR (1956) 8 Assam 1 (DB) ** AIR 1941 All 377 (384) = ILR (1941) All 741 (DB) ** AIR 1969 Bom 163 (171) = 70 Bom LR 364 ** AIR 1967 Mys 156 (158, 159) ** AIR 1964 Punj 230 (231) ** AIR 1962 Manipur 47 (51).

[See however AIR 1966 SC 1724 (1726, 1728) = (1964) 3 SCR 774 ** AIR 1968 Mys 279 (282, 283) = (1967) 1 Mys LJ 533 (DB).]

(9) A contract executed by a person who was not authorised by the Governor-General under sub-section (3) of Section 175 of the Government of India Act, 1935 was held to be not capable of binding the Government. AIR 1955 Assam 33 (41) (DB) ** AIR 1965 Cal 191 (194, 195) ** AIR 1959 Bom 56 (58) = 1958 Nag LJ 142.

(10) Where a contract is not in strict conformity with the provision of Section 175 (3) of the Government of India Act (1935), such contract though unenforceable against the Government, is binding upon the officer, who actually made the contract under Section 230 (3) of the Contract Act. AIR 1954 SC 236 and AIR 1962 SC 113 Followed. AIR 1962 Pat 372 (375) = 1962 BLJR 480.

(11) See also Article 299, Constitution of India.

7. Construction of contracts.— (1) A contract should be construed as a whole in order to determine the rights of the parties thereto. AIR 1958 Cal 21 (23) (DB) ** AIR 1956 Bom 151 (153, 155) ** 1955 BLJR 93 (94, 95) (DB). ** AIR 1964 SC 1526 (1531). (The question whether the impugned contract is transferable must depend upon the language of the contract interpreted in the light of surrounding circumstances.) ** AIR 1962 SC 378 (385) = (1962) 3 SCR 769 ** AIR 1969 All 296 (303) = 1968 All LJ 225 (FB). (Entire contract must be taken as constituting an organic synthesis, embodying provisions which balance in the sum of reciprocal rights and obligations. It is through the prism of that principle that the terms of compromise decree must be analysed). ** (1969) 23 STC 374 (377) (Mad) (DB) ** AIR 1968 Cal 496 (499) = 69 ITR 139 (DB) ** AIR 1967 Cal 99 (104) = 70 Cal WN

Section 10 — Note 7 (contd.)

623 (DB) ** (1966) 2 ITJ 697 = 64 ITR 45 (Guj) (DB) ** AIR 1966 Punj 436 (440) = 68 Pun LR 522 (FB) ** 1969 MPLJ 911 = 1960 Jab LJ 827 (FB) ** AIR 1964 Raj 184 (189, 190) = ILR (1964) 14 Raj 107 (DB) ** AIR 1960 Mad 480 (481) = 1960 Mad WN 489 (DB) ** AIR 1959 Madh Pra 151 (161) = 1960 MPLJ 334 (FB) ** AIR 1958 Cal 21 (23) = 61 Cal WN 472 (DB).

(2) For correct interpretation of contract Courts have to look primarily to the document itself, but must also take into consideration circumstances in which it was written, drafting ability of parties, intention which writing was to convey and how parties acted under it. AIR 1959 All 29 (32) (DB).

(3) The terms and conditions and the nature of the contract between the parties have to be ascertained from all the facts and circumstances of the case. AIR 1959 Assam 75 (90).

(4) A contract must be interpreted by itself and without reference to another contract unless the expressions used in both and the facts and surrounding circumstances also are the same or identical. AIR 1916 Cal 548 (550) = 42 Cal 1050 (DB) ** AIR 1956 Bom 151 (152).

[See also AIR 1959 Andh Pra 370 (374) (DB). (Decision on similar contract — However similar contracts may appear, decision as to each must depend on consideration of the language of the particular contract.)]

(5) Where the question is what exactly were the terms and conditions of the contract of carriage by sea in a particular case, reference to other bills of lading, issued by the shipping company in connection with the same voyage cannot be made. AIR 1957 Trav-Co. 133 (134) = ILR (1956) Trav-Co 348 (DB).

(6) If a letter of credit authorises payment against bills of lading such payment should be made only against clean bills of lading. The recognised practice is to interpret the letter of credit as authorising payment only against clean bills of lading. (1961) 2 Mad LJ 88 = 74 Mad LW 281 (DB).

(7) A contract must be construed according to its own terms and not explained or interpreted by any antecedent contract. AIR 1949 Cal 174 (176) ** AIR 1959 Madh Pra 151 (161) = 1960 MPLJ 334 (FB) ** (1969) 23 STC 374 (377) (Mad) (DB) ** (1962) 4 Orissa JD 349 ** AIR 1962 Punj 383 (384) = 64 Punj LR 199.

(8) Power-of-attorney should be construed strictly — Document contains the words "to put his (agent's) signature" — Document not empowering execution of sale-deeds — Fact that the agent had hitherto been selling, held, could not

alter the legal position. 1969 BLJR 593 (609) = 1969 Pat LJ 156 (DB).

(9) A preliminary written contract is entirely governed by the subsequent deed, where there is any difference between them. AIR 1938 Mad 81 (82).

[See AIR 1962 All 425 (431) (DB). (The two agreements have to be read together in order to find out what was the intention of the parties and the final contract between them.)]

(10) The Court while construing the whole document embodying a contract can give preference to an earlier recital over a later one if it finds that the recital is the most important one to convey the actual intention of the parties. 1955 BLJR 93 (94, 95) (DB) ** AIR 1968 Cal 496 (499) = 69 ITR 139 (DB).

(11) In construing provisions of an agreement, it is not a rigid rule that the same meaning ought to be given to an expression in every part of the document in which it appears. AIR 1928 PC 115, Rel. on. AIR 1966 Mad 60 (63) = (1966) 1 Mad LJ 181.

(12) Contracts ought to be construed according to the primary and natural meaning of the language in which the contracting parties have chosen to express the terms of their mutual agreement. 1955 BLJR 93 (94) (DB) ** AIR 1968 Cal 496 (499) = 69 ITR 139 (DB) ** AIR 1967 Cal 168 (170) (DB) ** AIR 1967 Cal 119 (125) (DB) ** AIR 1964 All 526 (526) ** AIR 1962 Cal 12 (18) = ILR (1961) 2 Cal 558 (DB) ** AIR 1961 Assam 173 (175) = ILR (1961) 13 Assam 351. (If the language is vague, the surrounding circumstances may be looked into to interpret the contract.) ** AIR 1966 Him Pra 54 (56).

(13) The grammatical or the natural and usual meaning should be imputed to the words in a contract. AIR 1954 Cal 179 (182) ** AIR 1961 SC 1295 (1296) = (1961) 3 SCR 845 = 63 Bom LR 962 ** AIR 1960 Cal 320 (322, 323) ** AIR 1960 Orissa 199 (202) = 26 Cut LT 346 (DB).

(14) In construing contracts the Courts cannot give the words of the contract an entirely different sense from their natural and grammatical meaning even to avoid a superfluity. AIR 1949 Bom 356 (357) = ILR (1950) Bom 144 (DB).

(15) Where in a contract there exists an apparent inconsistency according to the literal construction of the words used, and if by any other reasonably possible construction that inconsistency can be reconciled, that construction should be adopted. AIR 1940 PC 151 (152, 153) = ILR (1940) Kar PC 361 ** AIR 1964 Raj 72 (75) = 1963 Raj LW 351. (Deed capable of two interpretations — One favouring right to sue and other hampering it — Construction advancing right to sue should be preferred.)

Section 10 — Note 7 (contd.)

(16) *Prima facie* printed clauses and type-written clauses in a contract have to be given equal effect unless there is an inconsistency between the two in which case greater force may be given to the type-written clause. (1950) 85 Cal L Jour 136 (142) ** AIR 1943 Bom 229 (236) ** AIR 1942 Mad 139 (141) = ILR (1942) Mad 33 (DB).

(17) Where there is inconsistency between the printed and the written provisions print cannot be discarded but the real meaning is to be discovered from the printed as well as from written words. (1906) 30 Bom 1 (14) (DB).

(18) Greater force must be given to the written clauses in a contract on a printed form when there is inconsistency between these clauses and the printed clauses in the contract. AIR 1949 Cal 231 (233) = ILR (1945) 1 Cal 87 ** AIR 1943 Bom 229 (236) ** AIR 1917 Bom 246 (248) ** AIR 1961 SC 1295 (1297) = (1961) 3 SCR 845 = 63 Bom LR 962 ** AIR 1962 Cal 325 (330) = (1963) 33 Com Cas 1 (DB).

(19) In construing written contracts Courts ought not to resort to evidence of negotiation except to the extent necessary for clarifying what is ambiguous in the contract. AIR 1946 PC 50 (50, 51) ** AIR 1965 SC 1288 (1290, 1291) = (1965) 1 SCJ 498 ** AIR 1969 Andh Pra 88 (90) = (1968) 2 Andh WR 287 (DB).

(20) When there is ambiguity in the sale deed as to what exactly was agreed to be sold, the contract of sale can be looked into. AIR 1958 Andh Pra 278 (280).

(21) The subsequent conduct of the parties in the performance of a contract cannot change the true effect of the clear and unambiguous words of the contract. AIR 1938 PC 26 (29) ** AIR 1959 SC 1362 (1368) = (1960) 1 SCR 493 ** AIR 1964 Orissa 73 (74, 75) = 29 Cut LT 548 (DB) ** AIR 1959 J & K 24 (25) (DB).

(22) An illustration can in no event override an express provision in the contract. 1946 Nag L Jour 128 (136).

(23) When conditions of a contract are separately printed, and the very sentence (not to speak of the paragraph) speaking of it refers to a particular class of orders and there is nothing in that paragraph showing that part of it is of general application, one has to hold that the condition is a self-contained one applying to that particular class only. 1964 Jab LJ 342.

(24) Rules of construction which are only aids for ascertaining intention of the parties, cannot be relied on to override declared intention of the parties unequivocally expressed. AIR 1966 Ker 303 (305) = 1966 Ker LT 1145 (DB).

(25) The terms of a contract should be interpreted on two well-established principles. Firstly, there must be a clear intention, which is beyond the

possibility of any dispute. Secondly, the construction to be placed on a deed ought to be such as to make it just to both the parties rather than unjust to one of them. AIR 1969 Tripura 19 (21).

(26) Where terms of memorandum of Association of Company are ambiguous or silent, it has to be read together with the Articles of Association. AIR 1963 SC 1185 (1191) = (1963) Supp 2 SCR 887.

(27) Power of attorney which gives the power to the *mokhtar-am* to present for registration documents such as sale deeds can be interpreted to give the *mokhtar-am* the authority to present a deed of mortgage for such registration. AIR 1958 Pat 63 (65) = 1957 BLJR 641 (DB).

(28) Arbitration Clause of agreement between Electricity Board and consumers excluding from its purview a dispute regarding recovery of charges for energy consumed and any other charges such as minimum charges, miscellaneous or other charges — Dispute whether Board is entitled to recover surcharge and fuel adjustment charge is 'a dispute regarding recovery of other charges' within words of exclusion in clause — Arbitration clause held not attracted. AIR 1969 MP 105 (110) = 1969 MPLJ 374 (DB).

(29) Contract for supply of meat to military authorities — Condition providing for increase or decrease of rates by reviewing Tribunal according to rise or fall in the market rates—On application by contractor, one member of Tribunal recommending enhancement — Held in view of plain language of condition and on facts, that condition for enhanced rate was complied with. AIR 1970 SC 479 (483) = 1970 SCD 131.

7 (a). Nomenclature of deed—If conclusive.— (1) Court has, unless prohibited by statute, power to go behind the documents and to determine the nature of the transaction, whatever may be the form of the documents. AIR 1966 SC 1178 (1185) = (1966) 2 SCR 828 ** (1967) 1 Mad LJ 352 = 80 Mad LW 160.

(2) For the purpose of determining as to which category a particular contract comes under, Court will look at the substance of the agreement and not at the mere words describing the category. AIR 1961 SC 440 (446) = (1961) 2 SCR 522.

(3) Name given by parties to a document is not conclusive as to its real legal nature and effect. Where language used in the document is unambiguous and clear real nature of the document is to be determined by its contents, uninfluenced by any intention of the parties. AIR 1967 Him Pra 29 (31-32).

(4) Name is *prima facie* a valuable indication of the purport of a deed,

11. Who are competent to contract.—Every person is competent to contract who is of the age of majority according to the law to which he is subject,* and who is of sound mind, and is not disqualified from contracting by any law to which he is subject.

[*] See the Indian Majority Act, 1875 (9 of 1875).

Section 10 — Note 7 (contd.)

especially when the transaction named is a well known transaction carrying with it certain well-defined legal incidents and, when the terms themselves are equivocal the name may be conclusive. 1961 Ker LT 1033 = 1961 Ker LJ 1491.

(5) The question whether a contract is of apprenticeship or of employment ultimately depends on a construction of the terms of agreement between the person concerned and the employer and not on the description of the person either as apprentice or as workman. AIR 1966 Pat 445 (448) = 1967 BLJR 582 (DB).

(6) The real criterion to test whether a particular agreement is an agreement to sell or a hire-purchase agreement is to find out whether the purchaser has any option to return the chattel and determine the contract. If such an option is given then it is a hire-purchase agreement. But if the purchaser is under an obligation to purchase and has no option to return it, then it is an agreement of sale and not an agreement of hire-purchase. (1965) 1 Andh WR 229 = ILR (1967) Andh Pra 1377.

8. Implied terms.— (1) In a written contract, which can be fulfilled as it stands, no term can be imported merely on the ground that such a term should reasonably have been there in the contract. AIR 1956 Bom 151 (153) ** ILR (1966) 1 Punj 49 (DB) ** (1960) 1 Lab LJ 628 (Mad).

(2) All the conditions of a contract need not be expressed in words and there are conditions which may be implied from the nature of the transaction. AIR 1949 East Punj 301 (304) (DB).

(3) Every contract, of necessity, leaves matters which are to be implied and hence they have to be construed with reference to the surrounding circumstances and the parties who made them. AIR 1947 Nag 17 (24) = ILR (1946) Nag 824 (FB).

(4) A term which is necessary to give the transaction such efficacy as both parties must have in all reason intended it to have can be considered to be implied in a written contract. AIR 1956 Bom 151 (153) ** AIR 1969 Bom 163 (171) = 70 Bom LR 364 ** AIR 1964 Guj 30 (33) = (1964) 5 Guj LR 82 ** (1961) 2 Mad LJ 349 = ILR (1961) Mad 955 (DB) ** AIR 1959 Bom 143 (147) = 59 Bom LR 985 (DB) ** AIR 1959 Madh Pra 151 (162) = 1960 MPLJ 334 (FB).

(5) Price is no doubt a material term of a contract of sale but if the price is

not expressed it might be necessary in appropriate cases to imply a term that a fair and reasonable price was intended by the parties. 1956 Andh WR 801 (804) ** AIR 1959 Madh Pra 151 (161) = 1960 MPLJ 334 (FB).

(6) The doctrine of implied terms can only be invoked to give business efficacy to the transaction as must have been intended; if an obligation is not clearly intended as such, it must fail to take effect unless some obvious oversight is remedied; or it is something so obvious that it goes without saying. AIR 1958 Punj 83 (101): ILR (1956) Punj 311 (DB) ** AIR 1962 Andh Pra 249 (252, 253) (DB) ** AIR 1958 Punj 93 (96) = 59 Pun LR 435 (DB).

(7) Vendee was charged on behalf of vendor with duty of redeeming mortgage, but had not been left with sufficient amount to redeem — Suit by mortgage — Held, that vendee was liable for costs. So long as the mortgagee was not paid in full, the costs of the suit by the mortgagee to enforce the mortgage were such as may reasonably be supposed to have been in the contemplation of both the parties at the time they made the contract as the probable result of the breach of it. 1967 Ker LJ 101 (102, 104) = 1967 Ker LT 1126 (DB).

(8) No term can be imported into a contract by reference to custom where that term would contradict the written contract and compel a party to do something at the instance of the other, which was not stipulated for. AIR 1916 Bom 4 (7) = 41 Bom 518 (DB) ** (1962) 66 Bom LR 113 = 1962 Nag LJ 709 ** AIR 1961 Mad 281 (283) = (1961) 1 Mad LJ 244.

[See also AIR 1949 Cal 472 (478).]

(9) The power of the employer to suspend an employee under the ordinary law of master and servant in the sense of a right to forbid a servant to work, is not an implied term in an ordinary contract between master and servant, and such a power can only be the creature either of a statute governing the contract, or of an express term in the contract itself. AIR 1960 SC 1342 (1345) = (1960) 1 SCR 476.

SECTION 11 — SYNOPSIS

1. Scope.
2. "Person".
3. "Who is of sound mind."
4. Age of majority.
5. Contract by minor.
6. Sale, purchase and partition.

Section 11 — Synopsis (contd.)**7. Mortgage.****8. Lease.****9. Marriage contracts.****10. Partnership.****11. Relinquishment.****12. Service contracts.****13. Compromise.****14. Joint promise****15. Ratification.****✓16. Restitution.****✓17. Specific performance and doctrine of mutuality.****✓18. Burden of proof and estoppel.****19. Contract by adult persons in favour of infants.****✓20. Restrictions on power to contract does not relate to competency.****21. Disqualification under any other law.**

1. Scope. — (1) Section 11 does not destroy the force of Section 247 (now Section 30 of the Partnership Act). (1910) 34 Bom 72 (88) (DB).

(2) Section 37 of the Court of Wards Act, has to be read with Sections 11 and 68 of the Contract Act. AIR 1943 Oudh 119 (121) = 18 Luck 318.

2. "Person". — (1) Subordinate Judge is a "person" and is capable of entering into a contract. AIR 1931 All 189 (191) = 52 All 844 (FB).

3. "Who is of sound mind". — (1) Contract by lunatic is void. (1907) 17 Mad L Jour 78 (78) (DB) ** 1955-1 Mad L Jour 310 (312).

(2) Persons insane and persons disqualified by law are treated in the section ejusdem generis with minors without reservation, modification or qualification of any kind. AIR 1917 Nag 215 (223) = 13 Nag LR 130 (DB).

(3) Adult pardanashin women of sound mind are sui juris and must not be treated as though they were minors and were incapable through mental deficiency in conducting their own business. AIR 1946 All 127 (131) = ILR (1945) All 465 (DB).

(4) Illness may prevent a person from executing an agreement but does not prevent a transfer by others in his favour as he is a passive party. AIR 1963 All 194 (199).

(5) See also Section 12.

4. Age of majority. — (1) The capacity to contract will be determined by the law of the domicile. (1895) 19 Bom 697 (699) (DB).

[See however AIR 1933 Mad 756 (761) = 57 Mad 398 (DB).]

(2) When the age of majority has been provided by law to be 18 years, any person less than that age, even by a day, would be a minor in law. AIR 1961 Pat 21 (27).

(3) As a woman carries the domicile of her husband and should, in the absence of proof to the contrary, be considered to do so even after his death her age of majority for the purpose of considering her competency to enter into a contract would have to be determined in accordance with the Indian Majority Act alone and not any other law which is in force in the place where the contract is executed. (1895) 19 Bom 697 (699) (DB).

[See however AIR 1933 Mad 756 (761) = 57 Mad 398 (DB).]

(4) Under Section 3, Indian Majority Act, 1875, where a guardian is once appointed by Court, the minority continues till the minor's age is 21 years, and a contract entered into by the minor before he attained the age of 21 is void. AIR 1931 Lah 394 (395) (DB) ** AIR 1920 Mad 661 (662).

(5) A Hindu who has not attained the age of 18 is not sui juris even though having passed the age of 16 he is a major according to the Hindu law. 1887 All WN 71 (71).

(6) A Burmese Buddhist is governed by the Majority Act and the Buddhist law has no application to any question which involves his competency on the ground of age to enter into a contract. AIR 1939 Rang 86 (88) = 1938 Rang LR 667 (DB).

(7) The contractual capacity of persons temporarily residing, but not domiciled in British India, is left to be governed by the personal law of their personal domicile and such law in the case of European British Subjects is the common law of England which recognises 21 as the age of majority. The Indian Majority Act does not apply to their cases. (1885) 7 All 490 (500, 502) (FB).

(8) A contract entered into by a Muhammadan major under law, before the Majority Act came into force did not fail on the ground of his not having competency after the Majority Act came into force. (1885) 7 All 763 (765) (DB).

5. Contract by minor. — (1) A contract by a minor is void ab initio and not merely voidable and hence cannot be sued upon. AIR 1919 PC 129 (132). (30 Cal 539 = 30 Ind App 114 (PC), Followed.) ** AIR 1935 Lah 561 (565) = 16 Lah 546 (FB) ** AIR 1928 All 440 (440) = 51 All 164 (FB) ** AIR 1956 Andhra 182 (186) (DB) ** AIR 1952 Cal 306 (309, 310).

(2) A minor who is not capable of entering into contract cannot give up his rights in law and if he does so that contract is not binding on him being void. (1960) 62 Punj LR 691.

(3) A person for whom a guardian has been appointed by the Court continues to be a minor till the age of 21 and any consent given by him to a transaction

Section 10 — Note 5 (contd.)

would be absolutely valueless. AIR 1931 Lah 394 (395) (DB). (Sale.)

(4) A contract by a minor is void and has no existence in the eye of law. It entails no liability. AIR 1927 Lah 24 (25, 26) (DB).

(5) A contract by a minor is void, and when it is void the party dealing with him is not entitled to claim any refund of the consideration money paid by him to the minor with full knowledge of his infancy. AIR 1961 Pat 21 (27).

(6) In spite of the fraudulent representation as to his age by means of which a minor obtained money on a promissory note the creditor cannot enforce the liability through a suit and recover the money from the minor. AIR 1956 Andhra 182 (186) (DB) ** AIR 1934 Mad 560 (560) ** (1911) 8 Ind Cas 888 (889) (DB) (All).

(7) As the minor's contract is a nullity a person who parts with goods under it does not lose his title to them and can therefore trace them in the hand of the minor and recover them in specie. AIR 1956 Andhra 182 (188) (DB).

(8) A minor has no legal competency even to authorise another to enter into a contract on his behalf. AIR 1956 Andhra 33 (37) = ILR (1955) Andhra 311 (FB).

(9) A promise of the minor being itself void cannot constitute a valid consideration for a contract. AIR 1927 Lah 24 (25, 26) (DB) ** AIR 1953 Sau 177 (179) ** AIR 1949 Bom 215 (217).

(10) The purchase of a property to be held in trust for the minor is not an invalid transaction and the minor's right under the trust would be given effect to by Courts. (1913) 18 Ind Cas 963 (964) (DB) (Mad) ** AIR 1954 Bom 347 (351) ** AIR 1935 Bom 353 (355) = 59 Bom 656.

(11) It is only where a contract by the minor is an essential part of a transaction that the transaction is rendered void, where to uphold the rights of a minor under a transaction it is not necessary to depend upon any contract entered into by him his rights should be maintained by the Courts. AIR 1915 Mad 412 (414) = 37 Mad 390.

(12) A minor after obtaining a declaration that a contract entered into by him is void cannot enforce the contract subsequently by making a claim under a provision in that which is beneficial to him. AIR 1953 All 134 (135).

(13) An award to which a minor is a party is not in itself void but is voidable at the instance of the minor. Major parties are bound by it. (1964) 2 Andh WR 12 (DB).

(14) A minor has an independent right to sue for pre-emption and the consent to the sale by his natural guardian will

not amount to consent by the minor and debar him from bringing a suit for pre-emption. (1960) 62 Punj LR 691.

(15) If a defendant claims to be a minor, the trial Court must first satisfy itself as to his minority. ILR (1967) Guj 604 (606).

Contracts by guardian on behalf of minor.

(16) Guardians of minors are competent to contract on behalf of the minors. AIR 1939 Nag 301 (301) ** AIR 1960 Cal 65 (66) = 63 Cal WN 436.

(17) The powers of a Hindu father as the natural guardian of his minor son are the same whether he is dealing with the coparcenary or separate property of the minor. Under certain circumstances, a Hindu father has a right to enter into a contract for and on behalf of the son with respect to all the property of the minor son. (1966) 68 Bom LR 891 = 1966 Mah LJ 446.

(18) A guardian steps in to fill in the lack of capacity in a minor to enter into contracts. But he can function only within the doctrine of legal necessity or benefit. AIR 1956 Andhra 33 (37) = ILR (1955) Andhra 311 (FB).

(19) Where contracting party is a minor represented by a guardian and the contract is clearly for benefit of minor and was made at the request of the guardian for benefit of minor, it binds minor. AIR 1923 All 17 (17, 18) ** (1966) 1 Andh LT 233 = (1966) 1 Andh WR 368.

(20) Where an agreement for purchase of certain property entered into by a Hindu father on behalf of his minor son provides for the forfeiture of earnest money and for penalty in case of breach of contract by either party, the possibility of a loss or penalty in the event of non-performance of the agreement by the minor himself cannot amount to want of benefit on the completion of the agreement by the minor. 1966 Mah LJ 446 = 68 Bom LR 891.

(21) A contract entered into by the guardian on behalf of the minor ward which is to the benefit of the minor can be specifically enforced against him. (1912) 13 Ind Cas 673 (677) (DB) (Cal) ** 66 Mah LJ 446 = 68 Bom LR 891. (Contract by manager or guardian can be specifically enforced by or against the minor.) ** AIR 1960 Cal 65 (66) = 63 Cal WN 436 ** AIR 1958 Bom 202 (203) = 59 Bom LR 1123.

(22) An executory contract to sell entered into by the guardian of the minor is void and not binding on the minor. AIR 1949 Pat 405 (407) = 27 Pat 143 (DB).

(23) A guardian has no power to bind the minor or the minor's estate by contract for purchase of immovable property. AIR 1920 Mad 423 (423) (DB)

Section 11 — Note 5 (contd.)

** (1912) 39 Cal 232 (237) = 39 Ind App 1 (PC) ** AIR 1956 Bom 566 (569) ** (1964) 2 Andh WR 183 (DB) ** AIR 1968 Madh Pra 150 (155) = 1968 MPLJ 476 (DB). (Contract entered into by minor's guardian for sale or purchase of property — Cannot specially be enforced either by the minor or other party.)

[See also (1966) 1 Andh WR 110 = (1966) 2 Andh LT 331.]

(24) Where property is purchased by manager subject to agreement to resell it at the option of seller, the transaction is not an agreement of transfer of property by manager but purchase of property subject to an agreement to resell it at the option of the seller. Question whether purchase is for benefit of minor is irrelevant. If agreement is for minor's benefit he is bound by it and if not for his benefit he can reconvey the property and claim return of the sale price. AIR 1963 All 194 (199).

(25) A Muslim 'de jure' guardian is competent to bind the minor with a contract for purchase of property and the minor can sue to obtain the benefit by asking for specific performance. AIR 1952 Hyd 120 (133) = ILR (1952) Hyd 392 (FB).

(26) A sale of his property by a guardian to his minor wards in satisfaction of the money that is due from him to the minors is valid and enforceable if it is bona fide and for the benefit of the minors. (1911) 33 All 657 (658, 659).

(27) Under a contract entered into by the guardian the minor personally incurs no contractual obligations. AIR 1916 All 366 (369) = 38 Pat 154 (DB).

(28) Personal liability arising out of guardian's contract entered on behalf of a minor is the liability of the minor's estate only. AIR 1956 Andhra 33 (37) = ILR (1955) Andhra 311 (FB).

(29) In case of purchase by a guardian with a covenant to pay, the minor's property can be proceeded against for the debt due under the personal covenant. The minor cannot approbate the bargain by retaining the property and reprobate it by the plea that the guardian had no authority to acquire it by making a promise on his behalf to pay the cash consideration so as to bind him. AIR 1931 Mad 140 (143, 144) = 54 Mad 163 (DB).

(30) A minor may not be answerable for the fraud of his guardian, but he cannot take advantage of it. AIR 1921 Low Bur 63 (66) = 11 Low Bur Rul 83 (DB).

(31) It is open to a minor to take up and carry on an arrangement of lease entered into on his behalf by a person without authority in such a way after he attains majority so as to bind himself by the transaction as to the whole period during which the arrangement

was in existence. AIR 1937 Sind 310 (311) = 31 Sind LR 502 (DB).

(32) Where a minor, on attaining majority, approves of a mining lease of his land, granted by his guardians during his minority, and strikes his own bargain with the lessee by a patta, this patta and the kabuliyat as executed by the parties, alone govern the rights of the parties and not the original agreement. AIR 1942 PC 1 (3).

(33) A minor can avoid on attaining majority a voidable transaction entered into by his guardian by diverse ways, by acts and omission, and not necessarily by a suit. AIR 1938 Pat 337 (349) = 17 Pat 460 (DB) ** AIR 1940 Cal 589 (591) ** AIR 1938 Mad 822 (823) (DB).

(34) In Kutch, a minor cannot avoid a contract entered into by his guardian on behalf of the minor, after attaining majority, when it is for his good, and therefore it is binding. AIR 1949 Kutch 23 (24).

(35) Where a person was neither a natural guardian nor a de facto guardian, nor a guardian appointed by any Court, but was a self-appointed guardian presumably for the particular transaction, he having no authority to create a mortgage on behalf of the minor, the mortgage bond must be held to be a void transaction as against the minor. AIR 1958 Pat 79 (80).

6. Sale, purchase and partition. — (1) An agreement by the minor to purchase property cannot be enforced against him because in law he is incompetent to contract. AIR 1916 Low Bur 91 (92, 93). (Sale.)

(2) All that the law does is to prevent the seller of goods to a minor from enforcing the minor's promise to pay for them if he fails to pay. It does not however bar the minor himself from making the payment and render the payment lawful. (1907) 11 Cal WN 135 (139). (Bond executed by minor after attaining majority to pay for goods supplied to him during minority is not void as being one executed for an unlawful object.)

(3) A sale by a minor is void. (1910) 32 All 25 (26) (DB) ** AIR 1958 Pat 79 (80) ** AIR 1959 Mys 188 (189, 190) = 37 Mys LJ 496.

(4) Partition agreement between father and his minor children is not valid. AIR 1934 Rang 2 (4) (DB).

(5) Possession of mortgagee if and when can become adverse against mortgagor — Mortgagee cannot by unilateral act change character of his possession. AIR 1963 SC 70 (73) = (1963) 3 SCR 229. (Sale of mortgaged property by minor owner to mortgagee — Ineffective in law to change character of possession of mortgagee.) ** AIR 1967 Raj 258 (261) = 1961 Raj LW 519.

Section 11 (contd.)

7. Mortgage. — (1) A mortgage executed by minor is not merely voidable but void. (1904) 26 All 342 (344) (DB) (Mortgage.)

(2) A mortgage executed by a person who at the time was still a minor because a guardian for his person and property had been appointed is void. AIR 1931 Cal 393 (396) = 58 Cal 224.

(3) Execution of English mortgage in favour of minor advancing whole money is not a nullity. (1965) 69 Cal WN 593.

8. Lease. — (1) Lease by minor is void and confers no rights to possession in the lessee. AIR 1924 Rang 288 (288) (Lease.)

9. Marriage contracts. — (1) A contract to marry in future entered into by a minor is void. AIR 1939 Rang 86 (88) = 1938 Rang LR 667 ** AIR 1941 Rang 179 (180).

(2) A Muhammadan who is a major according to Muhammadan law is entitled to enter into contracts of marriage and dower despite the fact that he is not a major according to the provisions of the Majority Act. AIR 1925 Cal 322 (323, 324) (DB).

(3) An agreement for marriage made for a daughter under age by her guardian, such being the custom of the parties' community, is an exception to the general rule that an infant's contract under Indian law is altogether void. AIR 1951 Mad 466 (469).

(4) According to personal law, where the parties are Hindus or Muhammadans, a father is the legal guardian for contracting them into marriage. When a contract of marriage is, therefore, entered into by him for the benefit of his children he makes the contract as their legal guardian and the real parties to the contract are the children and not their fathers. 1909 Pun Re No. 3, page 5 (5) ** AIR 1925 Cal 1255 (1256) (DB).

(5) Minor can maintain suit for damages for breach of contract of marriage entered into, on his behalf, by his natural guardian. AIR 1925 Bom 97 (103) = 48 Bom 673 (DB) ** 1909 Pun Re No. 3, page 5 (6).

10. Partnership. — (1) A minor cannot become a partner in his own right as he is incapable of contracting under Section 11 and hence he cannot sue as a partner for dissolution of the partnership. AIR 1917 Mad 63 (64) (DB) ** AIR 1951 Nag 448 (449) = ILR (1951) Nag 480 (DB).

(2) A contract by the guardian of a minor under which he lends money belonging to the minor to another who required the same for business on the condition that the latter would pay instead of interest a half share of the profits of the business is neither void nor invalid because it is within the

power of the guardian to enter into such contracts and the effect of it is also not to make the minor a partner. AIR 1956 All 136 (136).

(3) Even though the original agreement of partnership between the parties was void because one of them was a minor yet when the parties continued the relationship on the terms of that void agreement even after the minor attained majority and carried on business under that relationship it was held that there was a fresh partnership between the parties as from the date on which the minor became a major. AIR 1943 Bom 362 (365).

(4) Where an agreement of partnership is void as against some of the partners on the ground that they are minors it cannot survive even as regards the rest who are major partners. AIR 1949 Cal 617 (621) (DB) ** AIR 1960 Punj 84 (86) = 69 Pun LR (D) 1 (DB).

11. Relinquishment. — (1) A release by a minor of his rights in a property is absolutely infructuous in law. AIR 1954 SC 263 (265).

12. Service contracts. — (1) A contract for personal service by minor is void under the Indian law and the mere fact that it is for the benefit would not entitle the minor to sue under the contract. AIR 1949 Bom 215 (220, 221).

(2) A minor may bind himself by contract of apprenticeship, if it be for his benefit but he cannot be sued for failing to serve as such. (1910) 33 Ma 288 (290).

(3) Contract with minor does not create legal contractual relationship between the parties. Minor girl entering into a contract of service with a person can leave the service at any time without committing any actionable wrong. AIR 1939 Rang 266 (268, 270) = 19 Rang LR 121.

13. Compromise. — (1) A compromise entered into by minors settling disputes as regards inheritance between themselves and their father's collaterals is void and not binding on them. Such transaction cannot be upheld as a family settlement because a party cannot describe a contract as a family settlement claim for it an exemption from the law governing the capacity of a person to make a valid contract. AIR 1913 PC 181 (182, 183) = 65 Ind App 213 ILR (1938) Lah 313.

(2) A consent decree against a minor stands on no higher footing than a contract and cannot be given effect to by a Court of law. AIR 1927 Pat 271 (280) = 6 Pat 388 (DB).

14. Joint promise. — (1) A promise note executed by a minor, for himself and another person jointly, is void against both. (1909) 3 Ind Cas 403 (4) (All).

Section 11 — Note 14 (contd.)

(2) If a contract is void only in so far as some of the joint and several promisors are concerned, it can still be valid with regard to the rest. There would still be consideration for their promises. 1963 Ker LJ 125.

15. Ratification.— (1) Minor's contract being void ab initio cannot be ratified by the minor on attaining majority. AIR 1927 All 242 (242) = 49 All 137 (DB) ** AIR 1935 Lah 561 (565) = 16 Lah 546 (FB) ** 1941 Nag L Jour 363 (364) ** AIR 1931 Bom 178 (182) (DB) ** (1930) 128 Ind Cas 312 (312) (Lah) ** AIR 1919 Cal 875 (883) (DB).

[See also AIR 1953 Sau 177 (178).]

(2) A person, after attaining majority, can elect to pay a debt, incurred by him, during minority. No question of ratification of a contract, entered into by a person, during minority, arises in such a case. AIR 1940 All 12 (14, 15) (DB).

(3) Contract entered into on behalf of a minor by a person who is not his legal guardian and who has no authority in that behalf is void in its inception and is incapable of being ratified by the minor on attaining majority. AIR 1937 Nag 390 (391) = ILR (1937) Nag 458.

(4) Officer having no authority to enter into contracts entering into works contract — Work done to property of which the Government not the owner — Government sanctioning work for certain limited purposes — Act of sanctioning does not amount to ratification. AIR 1959 Bom 56 (59, 60) = 1958 Nag LJ 142.

16. Restitution.— (1) Where a minor, representing to be major, enters into a contract, the contract is void and unenforceable against him. The minor cannot, in a suit against him on the contract be compelled under Section 65, or any equitable principle, to refund the money, received by him under the contract. AIR 1937 All 610 (618) = ILR (1937) All 860 (FB) ** AIR 1956 Andhra 182 (186) (DB).

[But see AIR 1928 Lah 609 (612) = 9 Lah 701 (FB) ** AIR 1914 Mad 641 (642) = 38 Mad 1071 (DB) ** AIR 1936 Cal 567 (570) = ILR (1937) 1 Cal 283.]

(2) A contract by a minor is void. He cannot, in a suit to avoid such contract, be made to repay the moneys received under such contract, except, in the exercise of discretion under Section 41, Specific Relief Act. (1903) 30 Cal 539 (547, 550) = 30 Ind App 114 (PC).

(3) Equity requires a minor who seeks to avoid a contract which he induced the opposite party to enter into with him by a fraudulent misrepresentation as to his age to return the consideration which he received under it and this equitable principle is also found statutorily embodied in Sections 41 and 39

of the Specific Relief Act. Therefore Court should not grant the relief to the minor without at the same time imposing a condition that he should return what he received under the contract. AIR 1956 Andhra 182 (188) (DB). (AIR 1928 Lah 609 (FB), Dissented from.)

(4) The Court has while cancelling a bond at the suit of its executant on the ground of his minority has a discretion under Section 41, Specific Relief Act to order him, if the circumstances of the case justify it, to repay the money received by him under the bond. AIR 1922 Oudh 271 (273) = 25 Oudh Cas 237.

(5) A minor, who sues to set aside a contract, which he by fraudulent representation as to his age induced the other party to enter into with him, should be ordered by the Court to restore the benefit received by him before it sets aside the contract. AIR 1933 All 372 (373) (DB). (AIR 1931 All 371, Affirmed.)

(6) A person who seeks to obtain a declaration that a mortgage is not binding on him on the ground that it was executed by him during his minority must refund the amount if at the time of its execution he induced the mortgagee to enter into the transaction by a fraudulent representation that he was a major. AIR 1921 All 326 (327). (Suit for declaration that mortgage is void.)

(7) Where a minor by false representation as to his contractual capacity induced another to purchase his property and subsequently sued to recover the property on the ground that the sale was not valid because of his minority, it was held that he was bound in equity to restore the consideration received by him to the purchaser. (1909) 31 All 21 (30) (DB) ** AIR 1930 Mad 945 (951, 954) = 54 Mad 112 (DB).

(8) In the absence of fraudulent misrepresentation on the part of a vendor and also proper enquiry as to his true age by the vendee the Court which has in equity a discretion to order the plaintiff vendor seeking to avoid the sale on the ground of his minority to refund the consideration to the vendee will not exercise that discretion in favour of negligent vendee. AIR 1924 All 156 (157) = 45 All 644 (DB) ** AIR 1934 Lah 304 (1) (304) (DB).

(9) Where a sale by a minor was set aside as null and void and there was no misrepresentation by the minor as to his age and the vendee was aware of the age of the minor it was held that the vendee was not entitled to be paid any compensation. AIR 1937 Oudh 521 (523).

(10) Mere non-disclosure of minority is not misrepresentation or fraud. AIR 1937 Lah 598 (598).

(11) Where a person who purchased goods from the minor resisted the suit

Section 11 — Note 16 (contd.)

of the minor for price on the ground that the contract was void on the ground of the minority of the plaintiff it was held that he was bound under the provisions of Section 65 of the Act to return the goods or pay compensation for it. *Madh BLJ (1954) HCR 1749 (1750), 1751*.

17. Specific performance and doctrine of mutuality.— (1) In a suit by a promisee for enforcement of specific performance of a contract it is necessary that the parties should have the capacity to contract. *AIR 1950 Pat 535 (538) = 29 Pat 912 (DB) ** AIR 1941 Nag 105 (106) = ILR (1942) Nag 281 (DB)*.

(2) A contract which is beyond the powers of the guardian and therefore cannot bind the minor ward does not bind even the other party on the principle of mutuality. Hence the minor cannot enforce such contract. *AIR 1956 Bom 566 (569) ** (1912) 39 Cal 232 (237) = 39 Ind App 1 (PC) ** AIR 1920 Mad 423 (423) (DB) ** AIR 1918 Nag 110 (111) ** AIR 1917 Nag 213 (213) = 13 Nag LR 98*.

(3) A suit by a minor after his majority on a contract entered into by the karta on behalf of the Hindu joint family of which he is a member cannot be rejected on the ground of want of mutuality. *AIR 1937 Mad 869 (870, 872)*.

(4) Where the major brother when purchasing property jointly in his and his minor brother's name entered into an agreement both for himself and on behalf of his minor brother to reconvey the property after the latter become a major it was held that as the property belonged to the brothers as tenants-in-common the agreement for reconveyance could be enforced against the minor on his attaining majority without the doctrine of mutuality interfering with the same. *AIR 1956 Mad 261 (264) = ILR (1956) Mad 99 (FB)*.

(5) Where the plaintiff-purchaser was a minor, at the time of the agreement, there is want of mutuality because the agreement could not have been enforced against the plaintiff by the defendant. This defect disentitles the plaintiff to enforce the agreement for specific performance against the defendant irrespective of whether the defendant was of sound or unsound mind, when he made the agreement. *AIR 1964 All 527 (528) = 1964 All LJ 494 (DB). (ILR 39 Cal 232 (PC) and AIR 1933 Mad 322 (FB), Foll.)*

(6) Where father of minor plaintiffs sold his property to defendant and on the same date the defendant executed a registered deed of agreement for resale in favour of plaintiff's father who assigned his rights under the agreement of resale to the plaintiffs, there can be no valid legal objection to granting de-

cree for specific performance in favour of plaintiffs. *AIR 1969 Mad 470 (473)*.

18. Burden of proof and estoppel.— (1) Where in a suit upon contract the defendant denies the validity of the contract on the ground that he was not of full age at the time of its execution the burden lies in the first instance on the plaintiff to establish by prima facie evidence that the contract is not invalid and that the defendant when he executed it was a competent party. *(1909) 2 Ind Cas 839 (840) (DB) (All) ** (1910) 4 Sind LR 250 (254, 255)*.

(2) The burden of proving minority lies on the party, who alleges that he was a minor, at the date of the contract. *AIR 1925 Oudh 487 (487) (DB) ** AIR 1925 All 399 (399)*.

(3) Where a minor enters into a contract by representing that he was of full age he is not estopped from pleading his minority in avoidance of the contract. *AIR 1928 PC 152 (156)*. (Deed executed by minor is nullity and incapable of founding a plea of estoppel.) *** AIR 1931 Bom 561 (569) = 55 Bom 741 (FB). (Overruling AIR 1923 Bom 169 = 21 Bom 198 (DB); AIR 1917 Bom 221 (DB).) ** AIR 1928 Lah 609 (615) = 9 Lah 701 (FB). (Overruling AIR 1921 Lah 312 and 60 Ind Cas 267 (1) (Lah).) ** AIR 1940 Nag 327 (328) = ILR (1940) Nag 632 ** AIR 1933 Mad 94 (95) ** AIR 1929 Bom 201 (202) (DB) ** AIR 1926 Nag 491 (492) ** AIR 1920 Bom 269 (269) = 44 Bom 175 ** AIR 1920 Mad 661 (662) ** AIR 1914 Mad 641 (2) (642) = 38 Mad 1071 (DB)*.

(4) Deed executed by minor is nullity and incapable of founding a plea of estoppel. *AIR 1928 PC 152 (156) ** AIR 1920 Mad 661 (662)*. (Estoppel cannot form basis of cause of action where contract itself is void.)

(5) Where a minor after alleging himself to be a major when the contract was executed by him seeks to plead his minority in avoidance of the contract a very heavy burden rests upon him to prove his defence. *AIR 1928 PC 152 (156)*.

(6) Where a Kobala is executed by the Hindu mother on behalf of minor on the footing that she is competent to transfer the property of the minor and this position is accepted by the alienee who has obtained an advantage by the transaction of sale and got the entire property, including the share of the minor and has agreed to reconvey the property in its entirety, the alienee cannot turn round and repudiate the authority of the mother to effect the sale on behalf of the minor or to repurchase the property of the minor upon refund of the consideration money. He will be estopped by his conduct from doing so. *AIR 1960 Cal 65 (66) = 63 Cal WN 436*.

Section 11 (contd.)

19. Contract by adult persons in favour of infants.— (1) A contract between an adult person and a minor cannot be void where the consideration for the promise of the adult is not a reciprocal promise by the minor but is something which had actually been done by the minor. AIR 1936 Pat 153 (157) (DB).

(2) A minor can enforce a contract made in his favour for a valuable consideration, as while no liability can be incurred by a minor, he is not debarred from acquiring a title to anything valuable. AIR 1927 Lah 24 (27) (DB).

(3) An executory contract cannot be entered into by a minor. But a minor or a lunatic is not disqualified as such from being the transferee of immovable property as purchaser or mortgagee under an executed contract. AIR 1945 All 156 (157) = ILR (1945) All 204 (DB) ** AIR 1922 Nag 239 (241).

(4) Merely because the conveyance of property is made in favour of a minor, there is no defective title passed. (1913) 18 Ind Cas 451 (451) (DB) (Cal). (Sale.)

(5) Where a sale-deed was taken in the name of the mother she paying the consideration from the monies belonging to her major and minor sons it was held that it was in no sense a sale to the minors themselves but a sale either to the mother herself as a trustee for her sons or a purchase by the major son with the family funds in the name of the mother. AIR 1914 Mad 666 (667).

(6) A mortgage in favour of a minor who has advanced the whole of the mortgage money is a valid transaction and is enforceable by him or by other persons on his behalf. AIR 1917 Mad 630 (635) = 40 Mad 308 (FB). (**Overruling** 33 Mad 312.) ** AIR 1936 Pat 153 (157) (DB) ** AIR 1928 All 102 (103) (DB) ** AIR 1919 Pat 561 (563) = 4 Pat L Jour 682 (DB) ** AIR 1918 Cal 1027 (1028) (DB).

(7) Where the defendants have received goods from the minor plaintiff there is no reason why they should not pay the price. AIR 1934 Lah 480 (480) = 16 Lah 1.

(8) A pronote executed in favour of a minor is valid and can be sued upon when the minor did not subject himself to any detriment by accepting it. (1913) 18 Ind Cas 968 (969) (Mad) ** AIR 1924 Rang 136 (136, 137) = 2 Rang 1.

(9) A money bond executed in favour of a minor is good in law and may be sued upon. (1889) 13 Bom 50 (51) (DB).

(10) A lease in a minor's favour imposing a liability on him is null and void. AIR 1918 Pat 626 (627) = 3 Pat L Jour 518 (DB).

(11) Purchase of property for the benefit of a minor by his maternal uncle is valid and if the property is

alienated by a minor's father, the minor is entitled to recover it back. AIR 1915 Mad 412 (414) = 37 Mad 390 (DB).

(12) A minor, although not competent to contract, can accept a gift through his natural guardian. There is no principle forbidding a natural guardian to accept a gift subject to a condition, and then perform that condition, if the whole transaction is for the minor's benefit. ILR (1947) 2 Cal 1 (13).

20. Restrictions on power to contract does not relate to competency.— (1) A statutory person is not on the same footing with a minor in the matter of his capacity to contract. While a minor's incapacity is an inherent one the statutory person suffers from no such incapacity. No doubt he can exercise the power only subject to his complying with the formalities imposed by the statute but that restriction on the exercise of power does not amount to inherent disqualification or incapacity. AIR 1952 Cal 306 (309) ** AIR 1955 Assam 86 (93) (DB) ** (1952) 89 Cal L Jour 342 (372).

21. Disqualification under any other law.— (1) There is no disability attached to a female, married or unmarried, to preclude her from entering into a contract either on the ground of sex or coverture. AIR 1947 Nag 84 (85) = ILR (1947) Nag 154.

(2) The law of England which prohibits a barrister from entering into any contract of fees with his client does not operate in India and hence he is entitled, while practising as an advocate of a High Court in India, to enter into contracts of fees with his clients. AIR 1933 All 417 (420) = 55 All 570 (FB). (25 All 509, **Overruled.**)

(3) It cannot be said that the Governor General of India, except in respect of contracts complying with Section 175 (3), Government of India Act of 1935, was a disqualified person without any contractual capacity. (1952) 89 Cal L Jour 342 (375).

(4) Government cannot by contract fetter its future executive action which may concern welfare of State. AIR 1947 PC 29 (31).

(5) A person whose estate is under the Court of Wards is under Section 31, C. P. Court of Wards Act, incompetent to enter into any kind of contract involving pecuniary liability. AIR 1936 Nag 15 (15) = 31 Nag LR (Sup) 62 (DB).

(6) A ward of Court loses his power to contract affecting property which goes under the control of the Court of Wards but does not become absolutely incapacitated from contracting. (1882) 8 Cal 620 (629) (DB).

(7) Judgment debtor to whom Schedule III, Paragraph 11, Civil P. C., applies is person disqualified within the meaning of Section 11. AIR 1917 Nag 215 (223, 224) = 13 Nag LR 130 (FB).

12. What is a sound mind for the purposes of contracting.—A person is said to be of sound mind for the purpose of making a contract if, at the time when he makes it, he is capable of understanding it and of forming a rational judgment as to its effect upon his interests.

A person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind.

A person who is usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind.*

Illustrations

(a) A patient in a lunatic asylum, who is at intervals of sound mind, may contract during those intervals.

(b) A same man, who is delirious from fever or who is so drunk that he cannot understand the terms of a contract or form a rational judgment as to its effect on his interests, cannot contract whilst such delirium or drunkenness lasts.†

[*] However, see S. 65 and S. 68 infra.

[†] In England such contracts are only voidable.

Section 11 — Note 21 (contd.)

(8) Agreements by disqualified persons or by minors are void. AIR 1924 Oudh 438 (441) = 28 Oudh Cas 34 (DB) ** AIR 1917 Nag 215 (223, 224) = 13 Nag LR 130 (FB) ** AIR 1953 Sau 177 (177) ** AIR 1936 Nag 15 (16) = 31 Nag LR (Sup) 62 (DB).

(9) Where a person entered into an agreement to sell while he was under a statutory disability to sell and in pursuance of that void agreement he executed the sale deed after his disability ceased it was held that the sale also could not be enforced. AIR 1928 All 112 (114) (DB).

(10) A person whose estate is under Court of Wards is in no better position than a minor and any contract made by him is void. But when he contracts a debt, though he is not liable for it and it cannot be enforced against him still a debt comes into existence and if his son renders himself liable for repayment of the same by the execution of a bond, the bond can be enforced against him. AIR 1918 Lah 109 (110) (DB).

(11) Evacuee is competent to enter into any agreement in respect of evacuee property though he cannot transfer his right or interest in it — Administration of Evacuee Property Ordinance (1949), Section 38 or Section 40 of the Act of 1950 operates only on transfers creating right or interest in immovable property and not on agreements to transfer. AIR 1970 Guj 12 (20) (DB).

Section 12

1. Unsoundness of mind.— (1) A contract entered into by a person who at the time was of unsound mind is void. (1908) 10 Bom LR 1004 (1006) ** AIR 1957 Pat 491 (492) (DB).

(2) The test of unsoundness of mind is, whether the person is incapable of understanding the business concerned, and its implications. AIR 1944 Nag

232 (234) = ILR (1944) Nag 698 ** AIR 1932 PC 69 (72) ** AIR 1957 Pat 491 (493) (DB) ** AIR 1927 Cal 889 (899) = 55 Cal 285 (DB) ** AIR 1923 Pat 187 (192) (DB).

(3) Even a person who by appearance behaves normally would be protected by the law if in reality he is one incapable of forming a judgment as to what is to his interest. AIR 1957 Pat 491 (493) (DB).

(4) Mere weakness of mind does not amount to unsoundness of mind. AIR 1944 Nag 232 (234) = ILR (1944) Nag 698 ** AIR 1923 Pat 187 (192) (DB).

(5) In case of a person who is illiterate or who is not in a position to read contents of a document, the contract cannot be imposed upon him simply because he has endorsed his signature thereon unless further it is proved that he did that after understanding the contents of the same. AIR 1959 Pat 540 (546-547) = 1959 BLJR 425 (DB).

(6) Mere loss of memory does not make a person unfit for the management of his own affair in his lifetime. AIR 1932 PC 69 (72).

(7) A person who being subject to undue influence is unable to exercise freely his judgment cannot be brought within the category of persons of unsound mind contemplated by Section 12. AIR 1927 Cal 889 (896) = 55 Cal 285 (DB).

(8) Idiocy is the most extreme form of mental unsoundness. AIR 1944 Nag 232 (233) = ILR (1944) Nag 698.

(9) An idiot is one who has been of unsound mind since birth and hence is subject to all the legal disabilities and incapacities which attach to a person of unsound mind. (1863) 1 Mad HCR 214 (215) (DB).

(9-A) An order in lunacy though not a judgment which under Section 41,

13. "Consent" defined.—Two or more persons are said to consent when they agree upon the same thing in the same sense.

Section 12 — Note 1 (contd.)

Evidence Act, is conclusive against the whole world is relevant and binding upon the parties and those who claim under them. AIR 1933 Mad 624 (625) = 56 Mad 904.

(10) If a party to a contract seeks to enforce a contract which is void under Section 12, it is not permissible to give equitable relief. However, statutory relief can be given under Sections 38 and 41 of the Specific Relief Act when decision is asked for on the ground that the contract is void under Section 12. (1908) 10 Bom LR 1004 (1006, 1007).

2. Evidence and proof.— (1) The question whether a person is of unsound mind at the time of execution of a document is a question of fact. AIR 1953 Assam 94 (95) = ILR (1951) 3 Assam 515.

(2) Pleadings and evidence must be scrutinized before deciding issue of mental condition. AIR 1938 Nag 204 (208).

(3) Circumstances evincing insanity have to be considered together and not individually and their cumulative effect gauged. AIR 1941 Nag 251 (254) = ILR (1942) Nag 236 (DB).

(4) Question whether contract is invalidated by unsoundness of mind does not depend merely on belief or disbelief of the witnesses before Court but largely upon inference to be drawn from evidence. AIR 1956 Cal 213 (214) (DB) ** AIR 1953 Assam 94 (95) = ILR (1951) 3 Assam 515 ** AIR 1941 Nag 251 (252) = ILR (1942) Nag 236 (DB).

(5) In the case of a registered document, in deciding the question relating to the mental condition of the executant, the Registrar's endorsement on the deed cannot be discarded. AIR 1938 Nag 204 (209).

(6) Once it has been established that a person is usually of unsound mind, the burden of proof is on the party who alleges that the document was executed during a lucid interval. AIR 1941 Nag 251 (252) = ILR (1942) Nag 236 (DB) ** AIR 1958 Andh Pra 22 (27) (DB).

(7) It is doubtful whether it could be held that any person was by reason of unsoundness of mind incapable of entering into a contract in the absence of any medical evidence. AIR 1953 Assam 94 (95) = ILR (1951) 3 Assam 515.

(8) When it is shown that a person suffered from senile dementia on a particular day a presumption of its continuance would arise and it would then be on the party who tries to uphold the subsequent transaction of that person

to show that at the time of the transaction there was no incapacity. AIR 1940 Mad 73 (74, 75) (DB) ** AIR 1956 Cal 213 (214) (DB).

(9) An allegation of the unsoundness of mind of a person should be established by proof which shows that he was incapable of understanding business and forming a rational judgment as to the effect of his transaction upon his interest. AIR 1957 Pat 491 (492) (DB) ** AIR 1927 Cal 889 (899) = 55 Cal 285 (DB) ** AIR 1923 Pat 187 (192) (DB).

(10) In order to avoid a contract on the ground of unsoundness of mind, the all important question to be decided is whether that person was of unsound mind when the contract was made. AIR 1927 Cal 889 (892) = 55 Cal 285 (DB) ** AIR 1933 Lah 458 (460).

[See however AIR 1932 Rang 24.]

(11) The executant of a deed might be a hard drunkard who might frequently be unsound but to hold that his deed is not binding it must be established that he was unsound when the deed was executed. AIR 1926 Oudh 470 (472) = 2 Luck 226 (DB).

(12) Proof that a person was suffering from delusions by itself is not sufficient to set aside his transaction but it must be established that the delusions influenced the disposition or the contract. (1908) 10 Bom LR 1004 (1016).

(13) A case of lucid interval cannot be established by the solitary fact that on the day on which the transaction took place the person in question did not show any instability or insanity. AIR 1956 Cal 213 (214) (DB).

(14) Where unsoundness of mind has been proved by definite medical evidence lucid intervals should also be proved by as strong and as much demonstrative evidence. AIR 1932 Rang 24 (25).

(15) It is not legitimate for a Court to commute an insufficient case of insanity into a complete case of weakness, when the type of insanity connoted in the evidence is something quite different. (1905) 27 All 1 (10) = 7 Oudh Cas 287 = 31 Ind App 285 (PC).

Burden of proof.

(16) Normal presumption is in favour of sanity. The onus of proving insanity is on person who alleges it. AIR 1923 Pat 187 (192) (DB) ** (1908) 10 Bom LR 1004 (1007) ** AIR 1967 J & K 85 (88) = 1967 Kash LJ 44 ** (1960) 2 Orissa JD 492. (Mere endorsement in the document to the effect that it was read over to the lady and understood by her, cannot be relied upon, when the writer of the endorsement has not been examined as a witness.)

Section 13

1. Consent.— (1) 'Consent' is a legal term of wide import which would include both express and implied consent. Tacit consent and connivance would also fall within that legal import of the term. AIR 1958 Raj 324 (332) = ILR (1958) 8 Raj 1024 (DB).

(2) A consent induced by false representation may not be 'free' within the meaning of Section 14, but it can nevertheless be real, and ordinarily the effect of fraud or misrepresentation is to render a transaction voidable only and not void. AIR 1954 SC 181 (184) = 1954 SCR 391.

(3) Whether there is consent or not has to be proved as a fact in accordance with the principles of the law of contract. AIR 1954 SC 181 (185) = 1954 SCR 391.

(4) For a deed to be binding on its executant it is necessary that there should be not only the physical act of execution but also the mental act in the sense that the mind accompanied the act of execution. AIR 1933 Pat 306 (335) = 12 Pat 359 (DB) ** AIR 1925 PC 204 (209) = 52 Ind App 342 = 47 All 703.

(5) Where a person is induced to execute a deed of one kind under the belief that he is signing an instrument of a wholly different kind the transaction is void and not only voidable. AIR 1921 Cal 786 (788) (DB) ** AIR 1956 Cal 575 (577) (DB) ** AIR 1939 Lah 439 (451) = ILR (1939) Lah 433 (DB) ** (1879) 3 Bom 242 (266, 267).

(6) Where there is error either in regard to the identity of the party or the subject-matter of the contract there is no consent within the meaning of the section. AIR 1954 SC 181 (184) = 1954 SCR 391 ** AIR 1932 Bom 151 (153) = 56 Bom 180 (DB).

(7) When there is mutual misapprehension between both parties to a sale of a bill of exchange as to the particular kind of bill wanted by the purchaser their minds cannot be said to have met, or in the words of this section there would be no consent. (1882) 4 All 334 (336, 337) (DB).

(8) A person who entered into an agreement to compound an offence under the Forest Act of 1926 by payment of 'price' of forest produce as assessed by the Forest Officer and also paid the same cannot turn round and say that as there was no consensus ad idem on the meaning of the word 'price' there was no contract at all and therefore a part of the amount which was paid by him according to the assessed value should be paid back to him as being an amount which is in excess of what could be taken from him if the officer had estimated the value according to certain executive instructions issu-

ed by the department. AIR 1957 Madh Pra 169 (170, 171) = 1957 Cri L Jour 1146.

(9) Where a policy of insurance is issued by a company, subject to the regulations and conditions comprised in the prospectus, it is unnecessary to prove that the company's prospectus had been read by or specially brought to the notice of the assured, apart from the reference made to it in the policy. (1902) 25 Mad 183 (205) (DB).

(10) It would not avail a party seeking to avoid any condition in a contract executed by him on a printed form to plead either that he did not read the contract or that it was in a language not understood by him. In the latter case it would be for him to ask for and obtain an explanation of the terms. He can avoid a condition, especially one which is usually found in such contracts, only by showing that he signed the contract on the assurance given to him that he would not be bound by it. AIR 1921 Sind 121 (123) = 16 Sind LR 235.

(11) The fact that a document is in a language which is not known to its executant does not necessarily lead to the conclusion that he did not understand its contents. AIR 1949 FC 78 (80, 81).

(12) A passenger, who has sufficient notice from the passage-ticket itself that he and his luggage are being carried subject to certain conditions printed on the back of it, must, if he is ignorant of the language in which these conditions are printed, get them explained and translated to him before he goes on board. If he negligently omits to do so he will be bound by these conditions and his ignorance of the language will not help him to avoid them. (1881) 6 Cal 227 (234) (DB).

(13) A person who is not illiterate cannot escape a document executed by him on the plea that he did not read it. AIR 1930 Pat 601 (602) (DB).

(14) Persons signing a printed form of contract without studying its terms is bound thereby. (1938) 40 Pun LR 701 (705).

(15) No effective contract can come into existence unless the parties are ad idem on all the essential terms of the transaction. AIR 1958 Andh Pra 533 (536).

(16) If a party to an agreement embodied in a document is told that any stipulation in the agreement would not be enforced, he cannot be held to have assented to it. AIR 1936 PC 70 (74) = 63 Ind App 126 = 59 Mad 446.

(17) The person who sets up and relies upon a document executed by a person of disability like the purdanashin lady has to prove that she executed it after fully understanding the nature of

Section 13 — Note 1 (contd.)

the disposition freely and willingly. AIR 1925 PC 204 (209) = 47 All 703 = 28 Oudh Cas 338 = 52 Ind App 342 ** AIR 1953 Madh B 32 (34) ** AIR 1939 All 348 (361) (DB).

(18) Where the contents of the document were merely read out but not explained to and understood by the executant who has an illiterate man it must be held that there is no consensus ad idem and hence the executant is not bound by it. AIR 1918 Cal 546 (547) (DB). (Per Chatterjee J.)

(19) In the case of a person who is sui juris and not under any disability, the mental act of intending the execution is, also, presumed, where there is admission of execution, or where the execution is proved. AIR 1933 Pat 306 (335) = 12 Pat 359 (DB).

(20) An agent's consent on behalf of his principal is as effective and binding on the latter as when the same is given by himself. AIR 1954 SC 181 (185) = 1954 SCR 391.

(21) The definition of the word 'consent' given in this section applies to that word as used in Section 30 (2) of the Sale of Goods Act. AIR 1954 SC 181 (184) = 1954 SCR 391.

2. Transactions of purdanashin women.— (1) A purdanashin lady, in the true sense of that term is a lady living in seclusion that is, the "zanana," and having no communication with any male strangers except from behind a screen. AIR 1930 Lah 985 (987) = 12 Lah 239 (DB).

(2) Merely because a woman lives in some degree of seclusion it will not entitle her to be treated as a purdanashin woman when as a matter of fact she is found to have appeared before the registrar and also in Courts and transacted her business herself. (1902) 4 Bom LR 146 (149) (DB) ** AIR 1947 Lah 54 (67) ** AIR 1935 Lah 184 (188) (DB) ** AIR 1933 All 955 (956).

(3) Where a deed is executed by a purdanashin lady, it must be reasonably established that the deed was the free and intelligent act of the executant. AIR 1925 PC 204 (210) = 47 All 703 = 52 Ind App 342 = 28 Oudh Cas 338 ** AIR 1931 PC 100 (104) ** AIR 1946 All 121 (125) ** AIR 1944 All 42 (54) = ILR (1947) All 81 ** AIR 1943 Mad 677 (680) = ILR (1944) Mad 181 (DB) ** AIR 1939 All 348 (362) (DB) ** AIR 1939 Cal 569 (577) (DB) ** AIR 1939 Nag 159 (161) = ILR (1941) Nag 418 (DB) ** AIR 1937 Lah 353 (358) (DB) ** AIR 1934 All 179 (182) (DB).

(4) The disposition of a purdanashin lady must be substantially understood by her. Its execution must not merely

be her physical act but also her mental act. AIR 1925 PC 204 (209) = 47 All 703 = 52 Ind App 342 = 28 Oudh Cas 338 ** AIR 1938 PC 38 (40) = 32 Sind LR 285 ** AIR 1931 PC 303 (305) = 58 Ind App 450 = 11 Pat 227 ** AIR 1931 PC 100 (104) ** (1912) 34 All 455 (462) = 39 Ind App 156 = 15 Oudh Cas 271 (PC) ** AIR 1955 Cal 17 (19) (DB) ** AIR 1954 Nag 11 (15) = ILR (1953) Nag 281 (DB) ** (1954) 94 Cal L Jour 39 (42) ** AIR 1952 Pat 19 (20) (DB) ** AIR 1946 All 178 (180) (DB) ** AIR 1939 Nag 159 (160, 161) = ILR (1941) Nag 418 (DB). (The document executed must be bona fide.) ** (1909) 1 Ind Cas 573 (585) (DB) (Cal) ** (1907) 31 Bom 165 (180) (DB).

(5) A purdanashin woman would be bound by her disposition when she had executed it with a substantial understanding of its nature. AIR 1940 PC 134 (136) = 67 Ind App 309 = ILR (1940) Kar (PC) 271 = ILR (1940) 2 Cal 436 ** AIR 1919 PC 24 (26) = 47 Cal 175 = 46 Ind App 272 ** AIR 1948 Cal 84 (87).

(6) The question whether a disposition by a purdanashin woman can be sustained as her free and intelligent act will depend upon whether it had been explained to her so as to make her understand it. AIR 1931 PC 303 (305) = 58 Ind App 450 = 11 Pat 227 ** AIR 1938 PC 276 (277) = 32 Sind LR 947 ** (1877) 3 Cal 324 (327) (PC) ** (1869-70) 13 Moo Ind App 419 (419) (PC) ** AIR 1954 Nag 11 (15) = ILR (1953) Nag 281 (DB).

(7) If, for want of explanation a purdanashin lady did not understand an important feature of the transaction it cannot be held that her mind and free consent went with her act in executing the deed. AIR 1940 PC 134 (135) = ILR (1940) 2 Cal 436 = ILR (1940) Kar (PC) 271 = 67 Ind App 309.

(8) A mere reading of the document to the purdanashin lady is not sufficient to show that which is necessary, namely that she has understood its nature and effect. AIR 1934 PC 208 (209) ** (1901) 28 Cal 546 (556) = 28 Ind App 71 (PC) ** AIR 1950 Pat 247 (250) (DB) ** AIR 1935 Cal 495 (497) ** AIR 1935 Lah 184 (187) (DB).

(9) The explanation given to the purdanashin lady to be sufficient must be such that it must be able to make her understand the full bearing of the transaction upon her interest and the nature of the liabilities it throws upon her. AIR 1931 Oudh 146 (155) = 6 Luck 619 (DB).

(10) The extent and character of the explanation required must depend on the circumstances. length, intricacy, the number and complexity of the disposi-

14. "Free consent" defined.—Consent is said to be free when it is not caused by—

- (1) coercion, as defined in Section 15, or
- (2) undue influence, as defined in Section 16, or

Section 13 — Note 2 (contd.)

tions, or the unfamiliarity of the subject matter, are all reasons for requiring an increased amount and efficiency of explanation. AIR 1925 PC 208 (209) = 47 All 703 = 52 Ind App 342 = 28 Oudh Cas 338 ** AIR 1931 PC 100 (104) ** AIR 1936 Oudh 196 (199) (DB).

(11) The essential requisite for sustaining a deed of a pardanashin lady being her understanding of its terms, it is immaterial, when there is such understanding, that there is no independent advice. AIR 1938 PC 38 (40) = 32 Sind LR 285 ** AIR 1936 PC 207 (210, 211) = 11 Luck 346 = 63 Ind App 326 ** AIR 1931 PC 100 (104) ** AIR 1925 PC 204 (209) = 47 All 703 = 52 Ind App 342 = 28 Oudh Cas 338 ** AIR 1958 Orissa 62 (63, 64) = ILR (1958) Cut 67 ** AIR 1954 Nag 11 (15) = ILR (1953) Nag 281 (DB) ** AIR 1952 Pat 19 (20) (DB) ** AIR 1944 All 42 (54) = ILR (1947) All 81.

[See however AIR 1959 Pat 540 (546, 547) = 1959 BLJR 425 (DB).]

(12) There is no absolute rule of law that in every case of pardanashin lady a transaction entered into by her without independent advice should be declared void. (1914) 36 All 81 (91, 92) = 41 Ind App 23 (PC) ** AIR 1943 Mad 677 (680) = ILR (1944) Mad 118 (DB).

(13) Where upon the nature of the thing done, and the training and habit of the mind of the grantor as well as the proximate circumstances, affecting the execution the conclusion is reached that the independent advice could not have altered the results then the absence of it does not detract from the valid nature of the consent. AIR 1943 Mad 677 (680) = ILR (1944) Mad 118 (DB) ** AIR 1936 PC 207 (210) = 63 Ind App 326 = 11 Luck 346.

(14) Where a pardanashin lady is intelligent to understand the nature and effect of transaction and has got intelligent relations to assist her it cannot be said that she had no independent advice. AIR 1935 Cal 234 (237).

(15) The independent advice which might have become necessary in any case should have been given before and not after the event. AIR 1934 PC 210 (212).

(16) The burden of proving the intelligent execution of the document by the pardanashin woman lies on the party who relies upon it. ILR (1955) 1 All 772 (778) ** (1902) 29 Cal 749 (757) = 29 Ind App 127 (PC) ** (1881) 7 Cal 245 (250) = 8 Ind App 39 (PC) ** AIR 1955 Cal 17 (19) (DB) ** AIR 1952 Pat 19 (20) (DB) ** AIR 1946 All 178 (180) (DB) ** AIR

1946 Mad 353 (364) = ILR (1946) Mad 599 (DB) ** AIR 1914 Cal 223 (227).

(17) Whether there is enough proof of intelligent execution in any particular case would depend upon the facts of that case. While the knowledge alone of the pardanashin woman of the nature of the document would be sufficient to infer intelligent execution in cases where no special connection subsists between her and the beneficiary no such inference would readily follow when there is a fiduciary relationship between them. AIR 1952 Pat 19 (20) (DB).

[See also AIR 1951 Nag 379 (380) = ILR (1951) Nag 516 ** AIR 1961 Orissa 100 (101) = 26 Cut LT 304.]

(18) The absence of duress, protest of want of comprehension is not by itself a proof of a true understanding mind in the pardanashin lady who executed a document. AIR 1925 PC 204 (209) = 47 All 703 = 52 Ind App 342 = 28 Oudh Cas 338 ** AIR 1955 Cal 17 (20) (DB) ** AIR 1935 Cal 671 (673, 674) (DB).

(19) The mere fact that the woman lives in seclusion or sits behind a pardah does not necessarily show that she is weak-minded, ignorant or incapable of understanding her affairs. AIR 1934 PC 208 (209) ** AIR 1935 Lah 184 (187) (DB).

[See also (1938) 32 Sind LR 262 (264) (PC).]

(20) Although it is for the party who relies upon a document executed by the agent of a pardanashin lady to show that the power of attorney under which the agent acted was executed by the lady upon a full understanding of its meaning yet where there is prima facie evidence of her having consented to its terms it is she who has to rebut it by her own evidence. AIR 1932 PC 134 (135).

(21) Where vendor's letter to vendee indicated that an agreement of conditional sale was settled upon but the sale deed was referred as unconditional sale deed in an application for registration, it cannot be said that there was no consideration or consent on account of such discrepancy. AIR 1965 Madh Pra 275 (283) = 1967 MPLJ 711 (DB).

Section 14 — Note 1

(1) That definition of coercion in Section 15 is expressly inserted for the special object of applying to Section 14 i.e. to define what is the criterion whether an agreement was made by means of a consent extorted by coercion and does not control the interpretation of coercion when the word is used in other surroundings. AIR 1970 Guj 59 (64).

(3) fraud, as defined in Section 17, or

(4) misrepresentation, as defined in Section 18, or

(5) mistake, subject to the provisions of Sections 20, 21 and 22.

Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation or mistake.

15. "Coercion" defined.—"Coercion" is the committing, or threatening to commit, any act forbidden by the Indian Penal Code, or the unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.

Explanation.—It is immaterial whether the Indian Penal Code is or is not in force in the place where the coercion is employed.

Illustration

A, on board an English ship on the high seas, causes B to enter into an agreement by an act amounting to criminal intimidation under the Indian Penal Code.

A afterwards sues B for breach of contract at Calcutta.

A has employed coercion, although his act is not an offence by the law of England, and although Section 506 of the Indian Penal Code was not in force at the time when or place where the act was done.

Section 14 — Note 1 (contd.)

(2) Consent is free, when the activity of man, by which it is effective, works without obstacles to impede its exercise. AIR 1945 Cal 218 (238) (DB).

(3) General averment that consent was not freely obtained is not enough to set up the plea that there was one of the vitiating elements enumerated under Section 14. AIR 1915 PC 7 (13) = 39 Bom 441 = 42 Ind App 135.

(4) The law upon the question of free consent is given in the statute itself, and therefore, the Court has to administer the law to a case when it comes within its provisions irrespective of the consideration whether the application of the provisions would or would not disfavour the abuse of moral influence or encourage moral cowardice. AIR 1945 Cal 218 (235) (DB).

(5) Consent obtained under duress, whether the duress is physical or moral, is not free. But the fear caused by the duress must be real — non metus vani hominis — and must be such as would induce a reasonable man to enter into a contract. AIR 1945 Cal 218 (235) (DB). [See also AIR 1939 All 348 (361) (DB).]

(6) Where one of the parties enters into a contract, as a result of the deception practised upon him by the other, the consent is not free. 1866 Punj Re No. 21, p. 28 (29).

(7) Where by a special law regulating the production, supply and distribution of certain essential commodities representative dealers could sell them only to certain quota holders and at the price fixed by the Government there is only a restriction on the freedom of contract of the person who chooses to become

a representative dealer in those commodities. Thereby it cannot be said that when he becomes such a dealer and sells to the quota holder the contract is not freely entered into because he has not the freedom to choose the purchaser or fix his own price as he could have if he dealt in the open market. In such a case no question can arise at all of there being force, or threat of force or fear of personal suffering or abuse of legal proceeding merely because of the restrictions imposed on him. ILR (1956) Andhra 502 (509).

(8) While absence of consent would render the transaction void a consent which is not free would only render it voidable. AIR 1954 SC 181 (184) = 1954 SCR 391.

(9) Offer by canegrower to sell his cane, to occupier of sugar factory — Occupier has to accept offer and enter into agreement with can-grower under provisions of A. P. Sugar-cane (Regulation of Supply and Purchase) Act and Rules thereunder — Consent of occupier to agreement is free within the contemplation of Section 14 and not under undue influence. AIR 1968 SC 599 (603) = (1968) 1 SCR 705.

(10) Where agreement reached by parties is accepted by the Court, under the provisions of O. 23, R. 3-A of Civil P. C. (Kerala Amendment), party can resile from such agreement only on grounds contemplated by Contract Act. AIR 1967 Ker 15 (16) = 1966 Ker LT 494.

SECTION 15 — SYNOPSIS

1. Scope.
2. "Act forbidden by the Penal Code."
3. Detention of property.

Section 15 — Synopsis (contd.)**4. "Prejudice."****5. Proof.**

1. Scope. — (1) In India, the English Common law doctrine relating to duress is not the law which is to be applied where a plaintiff seeks to avoid a contract on a plea of coercion. The law which governs such plea is to be sought in this section and it is much wider than anything to be found in English authorities. (1912) 15 Oudh Cas 192 (197).

(2) Coercion as defined in Section 15 implies committing or threatening to commit some act, which is contrary to law. (1900) 22 All 224 (225) (DB).

(3) Coercion means every kind of compulsion even if it does not measure up to definition under Section 15. AIR 1969 Mys 230 (235) = 11 Law Rep 237 (DB).

(4) The mere need for raising a loan is not by itself sufficient to enable the debtor to avoid his agreement on the ground of coercion. 1936 All WR 84 (84) (DB).

(5) Where the Government in order to realise fine, due from the son, has attached the property belonging both to son and father and the father pays the fine in order to save property from being sold, payment made by the father is under coercion in view of the definition in Section 15 of the Act. AIR 1939 All 373 (374, 375).

(6) Refusal to withdraw prosecution, already launched, unless a bond for the amount due is executed would not be covered by Section 15. AIR 1926 Cal 455 (456, 457) (DB).

(7) "Coercion" need not proceed from party to contract or be immediately directed against the party whom, it is intended to coerce, to enter into the contract. AIR 1917 Mad 288 (290) (DB) ** (1912) 15 Oudh Cas 192 (197).

(8) The definition contained in Section 15 is solely intended for the purpose of considering whether the consent in any particular case is a free consent falling within Section 14 and it does not govern the meaning of the word coercion as used in Section 72 of the Act. (1913) 40 Cal 598 (612) = 40 Ind App 56 (PC) ** AIR 1954 Mad 213 (213) ** (1888) 15 Cal 656 (665) (DB) ** AIR 1970 Guj 59 (64).

(9) The threat of strike is neither a threat to commit any offence under the Penal Code nor is it unlawful detaining or threatening to detain any property. Hence it does not come under the definition of "coercion". AIR 1966 Assam 115 (118) = (1967) 2 Lab LJ 371 (DB).

(10) Though the occupier of the factory is obliged to enter into agreement under Andhra Pradesh Sugar-cane (Regulation of Supply and Purchase) Act, 45 of 1961 and Rules framed thereunder,

the compulsion of law is not coercion. In spite of the compulsion, the agreement is neither void nor voidable. AIR 1968 SC 599 (604) = (1968) 1 SCR 705.

(11) Where it was alleged in written statement that when there was state of emergency in country on account of Qabaili raids, defendant was forced to affix his thumb impression on some paper where it was written that the land in question belonged to a mosque and that what was written on paper was contrary to facts, held that this was an all too inadequate and unsatisfactory form of pleading coercion. AIR 1960 J & K 132 (135).

(12) Illegal loan transaction — Third person having no knowledge of illegality of transaction executing deed in favour of creditor and taking sale chit from debtor for 10 of his bulls and an agreement allowing debtor to keep the bulls for a period of six months — Held, that there was no coercion. (1967) 2 Andh WR 80.

(13) By conjoint operation of Section 25, Cl. (iii) of the Special Marriage Act, 1954 and S. 15 coercion would mean threatening to commit any act forbidden by the Penal Code. AIR 1969 Cal 293 (299) = 72 Cal WN 905 (DB).

2. "Act forbidden by the Penal Code."

— (1) In dealing with a case of coercion the Court should decide, whether the alleged act of coercion amounts to an offence under the Indian Penal Code. AIR 1917 Mad 288 (290) (DB).

(2) In England the law is that duress always avoids a contract except in certain cases where the imprisonment is lawful. But that exception does not apply to a case where a man is in custody upon a criminal charge in a country where there is no settled system of law and Judges have arbitrary power and the person suffering imprisonment made an agreement to give benefit to another to get release from that charge. Such a contract is void in England. (1876) 1 Cal 330 (334, 335) = 3 Ind App 61 (PC).

(3) Where a person who had been taken in arrest in execution of a decree passed by a Court having no jurisdiction executed a bond for the decretal amount while under duress to obtain his release it was held that the bond had been obtained by coercion within the meaning of this section. (1882) 4 All 352 (354) (DB).

(4) A threat of bringing a false charge with the object of making another do a thing amounts to blackmail or coercion. AIR 1936 Lah 6 (7).

(5) To threaten another with criminal prosecution is not per se forbidden by the Penal Code. Such act could be forbidden by the Penal Code only when it amounts to a false charge. (1912) 15 Oudh Cas 192 (197, 198) ** 1927 Mad WN 761 (762) (DB).

*[16. "Undue influence" defined.—(1) A contract is said to be induced by "undue influence" where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.

(2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another—

(a) where he holds a real or apparent authority over the other or where he stands in a fiduciary relation to the other; or

(b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.

(3) Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other.

Section 15 — Note 2 (contd.)

(6) Where a criminal prosecution is instituted against a person, and such person, fearing the result of the prosecution, entered into an agreement in favour of the complainant in consideration of his abandoning the prosecution: **Held**, that it cannot be held simply on these grounds that the consent of such person was caused by coercion. 1882 Pun Re No. 135, p. 398 (399, 400) (DB).

(7) Where consequent to the accused entering into an agreement to refer the dispute to arbitration the pending prosecution against him was withdrawn and even after such withdrawal he attended the arbitration proceedings it was held that there was no substance in his contention that he entered into the agreement under coercion. (1901) 25 Bom 10 (12) (SB).

(8) A threat to commit suicide in consequence of which a document is executed by a person, is a threat to commit an "act forbidden by the Penal Code" and amounts to coercion. AIR 1918 Mad 414 (416) = 41 Mad 33 (SB) ** AIR 1917 Mad 288 (289) (DB) ** AIR 1969 Cal 293 (299) = 72 Cal WN 905 (DB). (Threat to commit murder.)

3. Detention of property. — (1) Seizure and detention of property even if the person who does that has a colour of right amounts to unlawful detention of property within the meaning of Section 15. AIR 1920 Low Bur 38 (40) (DB).

(2) Where a dismissed agent detained the accounts in order to obtain his release deed it was held that the release deed obtained was the result of coercion. AIR 1927 Mad 852 (855) = 50 Mad 786 (DB).

4. "Prejudice". — (1) The word 'prejudice' in Section 15 does not mean mere sentimental prejudice. Some legal injury must flow before a person can be said to be 'prejudiced' under the section. AIR 1918 Mad 414 (416) = 41 Mad 33 (SB).

5. Proof. — (1) The question of coercion is one of fact depending upon the circumstances of each case. AIR 1953 Sau 53 (55) ** AIR 1954 Mad 213 (214).

(2) To establish coercion a person must prove (1) utterance of threat (2) of an act forbidden by Penal Code (3) with the intention of compelling the plaintiff to make the agreement complained of. (1912) 15 Oudh Cas 192 (197, 198) (DB).

(3) Where coercion is alleged the allegation must by law be supported by particulars. It is only after due proof of those particulars that the Court can find that the alleged coercion is proved. AIR 1915 Bom 68 (71) = 39 Bom 149 (DB).

(4) Coercion under the Contract Act can be pleaded only where the end arrived at was achieved by the use of something in the nature of unlawful force, or the threat of unlawful force, against the person or the mind of the contracting party. AIR 1945 Cal 218 (238) (DB).

(5) Suspicion or probability of the existence of coercion cannot take the place of proof. There must be actual proof to support the plea of coercion. AIR 1915 Bom 68 (70) = 39 Bom 149 (DB).

SECTION 16 — SYNOPSIS

1. Undue influence — General.

2. Position to dominate.

- (a) General.
- (b) Husband and wife.
- (c) Master and servant.
- (d) Uncle and nephew.
- (e) Creditor and debtor.
- (f) Landlord and tenant.
- (g) Other relationship.

3. Fiduciary relationship.

- (a) General.
- (b) Next friend and minor party.
- (c) Trustee and cestui que trust.
- (d) Counsel and client.
- (e) Parent and child.
- (f) Guardian and ward.
- (g) Principal and agent.

Nothing in this sub-section shall affect the provisions of Section 111 of the Indian Evidence Act, 1872.

Illustrations

(a) A having advanced money to his son, B, during his minority, upon B's coming of age obtains, by misuse of parental influence, a bond from B for a greater amount than the sum due in respect of the advance. A employs undue influence.

(b) A, a man enfeebled by disease or age, is induced, by B's influence over him as his medical attendant, to agree to pay B an unreasonable sum for his professional services. B employs undue influence.

(c) A, being in debt to B, the money-lender of his village, contracts a fresh loan on terms which appear to be unconscionable. It lies on B to prove that the contract was not induced by undue influence.

(d) A applies to a banker for a loan at a time when there is stringency in the money market. The banker declines to make the loan except at an unusually high rate of interest. A accepts the loan on these terms. This is a transaction in the ordinary course of business, and the contract is not induced by undue influence.]

[*] Substituted for the original Section 16, by the Indian Contract Act Amendment Act, 1899 (6 of 1899), S. 2.

Section 16 — Synopsis (contd.)

4. Mental incapacity.

(a) General.

(b) Ignorant persons.

(c) Fear of punishment.

5. Unfair advantage.

6. Inadequacy of consideration.

7. Unconscionable bargains.

8. High rate of interest.

9. Persons entitled to raise plea of undue influence.

10. Pleadings.

11. Proof of undue influence.

(a) General.

(b) Presumption.

(c) Burden of proof.

12. Transactions of purdanashin ladies.

1. Undue influence — General. — (1) Influence will be deemed "undue" when a person, in a dominant position uses that position to obtain unfair advantage for himself at the cost of a person relying upon his authority or aid. AIR 1950 Nag 71 (75) = ILR (1950) Nag 105 ** AIR 1961 All 295 (297).

(2) According to the definition of undue influence in Section 16 there are three ingredients: (1) that the relation subsisting between the parties should be such that one of the parties is in a position to dominate the will of the other; (2) that the dominant party obtains an unfair advantage over the other and (3) that the dominant party uses his dominant position to obtain that unfair advantage. AIR 1963 SC 1279 (1290) = (1964) 1 SCR 270.

(3) To constitute undue influence there must be either confidence reposed in the person charged or dominating influence with him over the other such as to render the latter to stand in some res-

pect, in awe or fear of the former. AIR 1921 Mad 394 (397) (DB).

(4) Undue influence means the domination of a weak mind by a strong mind to an extent which causes the behaviour of the weaker person to assume an unnatural character. AIR 1937 Pat 362 (363) (DB) ** AIR 1961 Punj 383 (386) = 63 Pun LR 212 (DB).

(5) Undue influence is any influence brought to bear upon a person entering into an agreement or consenting to a disposal of property which in the circumstances of the case appears to have been such as to preclude the exercise of free and deliberate judgment. AIR 1956 Hyd 114 (117) = ILR (1956) Hyd 328 (DB) ** AIR 1947 Oudh 89 (91).

(6) The essence of "undue influence" is that a person is constrained to do against his will, but for the influence he would have refused to do if left to exercise his own judgment. AIR 1961 Punj 383 (386) = 63 Pun LR 212 (DB).

(7) Undue influence does not connote 'excessive, inordinate or disproportionate' influence but something wrongful. It is an influence which acts to the injury of a person who is swayed by it and which compels that person to do something which he would not have done if he had been a free agent. AIR 1958 Punj 190 (203) = ILR (1958) Punj 481 (DB) ** (1890) 13 Mad 214 (223, 224) (DB) ** AIR 1961 Punj 383 (386) = 63 Pun LR 212 (DB).

(8) A friendly advice or influence arising from gratitude or esteem is not undue influence unless thereby the functioning of a free mind is destroyed. Mere suggestions or appeals cannot have such an effect. An influence which exists from attachment or respect or

Section 16 — Note 1 (contd.)

which results from arguments or appeals to the reason and judgment is not undue. AIR 1961 Punj 383 (386) = 63 Punj LR 212 (DB).

(9) Although mere advice or persuasion is legitimate and would not constitute undue influence, pressure of whatever character, whether acting on the fears or hopes, so exerted as to overpower the volition of the person who is under domination, would fall within the definition of undue influence. AIR 1938 Bom 97 (107) ** AIR 1939 Pat 477 (482) (DB) ** 1908 Pun Re No. 51. p. 259 (261) ** 1901 Pun Re No. 36 p. 107 (110) (DB).

(10) Undue influence is clearly distinguishable from fraud and like fraud it assumes myriad forms. AIR 1947 All 180 (181) ** AIR 1932 Pat 105 (117) = 11 Pat 50 (DB).

(10-A) Acts of undue influence must range themselves under either coercion or fraud. AIR 1934 PC 130 (133, 134) = 61 Ind App 224 = 9 Luck 178 ** AIR 1929 Oudh 44 (49) (DB) ** AIR 1922 Oudh 59 (63) (DB) ** (1908) 32 Bom 37 (44) ** AIR 1962 Pat 168 (173, 174) (DB) ** AIR 1964 Raj 250 (252) = 1964 Raj LW 302.

(11) Undue influence is a species of fraud whereby mastery is obtained over the mind of the victim by insidious approaches and seductive artifices. Sometimes the result is brought about by fear, coercion, importunity or other domination calculated to prevent expression of the victim's true mind. AIR 1958 Punj 190 (203, 204) = ILR (1958) Punj 481 ** AIR 1964 Raj 250 (252) = 1964 Raj LW 302.

(12) Undue influence consists in some coercion almost amounting to fraud, whereby the will of one party was dominated by the other, so that the resulting transaction cannot be regarded as expressing the real intention of the party coerced. AIR 1928 Pat 441 (444) = 7 Pat 426 (DB).

(13) Undue influence and incapacity to enter into a contract are totally different things. AIR 1927 Cal 889 (896) = 55 Cal 285 (DB) ** AIR 1965 Ker 189 (194) = 1964 Ker LT 497 (DB).

(14) Undue influence may be exercised by a party to the contract in conspiracy with or through the agency of others. But such a conspiracy must be clearly established by evidence. AIR 1920 PC 65 (66, 67) = 43 Mad 566 = 47 Ind App 1.

(15) The fact that a party enters into a contract for the purpose of satisfying the demands of a third party to whose undue influence he is amenable cannot defeat the rights of the other party to the contract when there is neither an allegation of undue influence against him

nor are the terms of the contract exorbitant. AIR 1925 Lah 430 (431) (DB).

(16) When a third party who benefits by a transaction has notice of the facts which raise the presumption of undue influence, he is in no better position than the person who exercises the influence. ILR (1955) 2 Cal 214 (220) ** AIR 1945 PC 8 (9, 10) = 71 Ind App 184 = ILR (1945) Bom 189 = ILR (1945) Kar (PC) 56 ** AIR 1940 Mad 285 (289) (DB) ** AIR 1938 Bom 97 (106) (DB).

(17) A plea of undue influence is totally different from a plea that the transaction is fictitious. AIR 1937 Lah 437 (439) (DB).

(18) Questions as to undue influence must be decided under the Contract Act; principles of English equity do not apply. AIR 1918 PC 249 (250) = 1918 Pun Re No. 124 ** (1906) 28 All 570 (583) = 33 Ind App 118 = 9 Oudh Cas 188 (PC) ** AIR 1925 Oudh 535 (535) ** (1911) 34 Mad 7 (10) (DB).

2. Position to dominate — (a) General.— (1) The question whether a party was in a position to dominate the will of the other is largely a question of fact. AIR 1927 All 44 (45) = 48 All 666 (DB).

(2) Owing to the complexities of human nature relations between parties to a transaction which would place one of them in a position of dominance over the other may arise in various ways and therefore it is impossible to lay down any general law regarding the same. (1908) 11 Oudh Cas 295 (299).

(3) Any person who holds real or apparent authority over another or who stands in a fiduciary relation to the other would be deemed to be in a position to dominate his will. AIR 1958 Punj 190 (201) = ILR (1958) Punj 481 (DB) ** AIR 1937 Cal 492 (494) (DB).

(4) No strict or technical fiduciary relationship is needed to establish that one person is in a position to dominate the will of the other. 1949 Trav-Co LR 172 (176) (DB).

(5) The position of a person to dominate the will of another may arise not merely because of his personal relationship with him but also as a result of the circumstances in which the contract was entered into. (1911) 34 Mad 7 (10) (DB) ** AIR 1945 Cal 218 (239).

(6) Where the donor is not only an old lady of feeble health but is also entirely dependant upon the donee her nephew, even for food and cloth, there is sufficient relation between them to presume undue influence being responsible for bringing about the gift. AIR 1929 PC 3 (5, 6).

(7) A donee who was intimate with the donor, a very old man of 100 years of age, and had lent him money was

Section 16 — Note 2 (a) (contd.)

held to be in a position to dominate the donor. AIR 1930 Sind 25 (29).

(8) The mere fact that the transferee was a near relation of the transferor's husband is not sufficient to hold that the former was in a position to dominate the will of the transferor when the finding is that there was no association between them and that they knew each other by appearance. AIR 1935 Cal 234 (237).

(9) The mere fact that the relationship between the parties is such that one of them relies upon the other for advice would not suffice to show that the latter is in a position to dominate the former exercising his influence unduly. AIR 1938 Mad 426 (423) (DB).

(9A) Mere fact that bequest is in favour of persons who were looking after testator at or about time of will does not by itself indicate that will was executed under undue influence. ILR (1966) 1 Cal 408 (413) (DB).

(10) A mere allegation of relationship between the parties without any suggestion even that one of them was in a position to dominate the other will not justify the Court in assuming that undue influence must have been exercised in the case. AIR 1956 Bom 569 (571).

(11) The relationship which gives the position of dominance must have commenced anterior to the transaction that is claimed to be tainted by undue influence. (1908) 11 Oudh Cas 295 (299).

2 (b). Husband and wife.— (1) There is no presumption of undue influence in every case where a wife confers benefit on her husband without consideration. AIR 1945 PC 8 (9, 10) = 71 Ind App 184 = ILR (1945) Bom 189 = ILR (1945) Kar (PC) 56 ** AIR 1934 PC 210 (212) ** ILR (1955) 2 Cal 214 (221) (DB).

(2) Where the wife is very much younger than the husband, there is no legal presumption that she is in a position to dominate the will of her husband. AIR 1930 All 169 (171) = 52 All 368 (DB).

(3) The facts that the grantee is a second wife and she is in the habit of remonstrating with her husband in a loud voice do not necessarily indicate that she has her husband in her grip. AIR 1944 All 104 (110) = ILR (1944) All 141 (DB).

2 (c). Master and servant.— (1) An ordinary servant, dependant on his master, cannot, in the usual course of things, be in a position to dominate the will of his master and hence it follows that unless there is evidence to the contrary it cannot be found that he has exercised undue influence over his master. AIR 1921 Mad 394 (397) (DB) ** AIR 1925 Nag 369 (370) ** AIR 1918 Oudh 313 (314).

(2) The mere fact that a person had been doing odd and sundry job to another for a few years would hardly suffice to reach a conclusion that he would have gained a position to dominate the will of the other who though an illiterate woman is found to be quite capable of managing her business. AIR 1952 Him Pra & B 20 (22).

(3) An official superior is in a position to dominate the will of his subordinate. If he obtains by the use of that position an undertaking from the subordinate it must be held that the undertaking was given under inducement by undue influence. AIR 1956 All 439 (443, 444) = ILR (1956) 1 All 24 (DB).

(4) An agent looking after litigations and also securing loans for his employer can justifiably be inferred to be in a position to dominate the will of the employer especially when he is in embarrassed circumstances. AIR 1946 Oudh 129 (138) = 21 Luck 194 (DB).

2 (d). Uncle and nephew.— (1) Where a Buddhist lady made a gift of some land to her nephew who was also acting as her agent, it was held that although there was, what may be called, a fiduciary relationship between the parties, it was not such as to lead the Court to infer undue influence. AIR 1918 Low Bur 67 (68) (DB).

(2) Where a niece living with her uncle executed a conveyance of her property to him for an apparent consideration of one dollar under an arrangement between them to the effect that the uncle should manage the property during her lifetime paying her only the rent and thereafter convey it back to her heirs their Lordships of the Privy Council expressed the opinion that the transaction was probably avoidable in a Court of equity when the relationship between the parties is taken into consideration. AIR 1915 PC 168 (169).

2 (e). Creditor and debtor.— (1) The relation between a debtor and a creditor is not necessarily one in which the former is to be taken as being situated in a position in which his will is bound to be dominated by the latter. AIR 1926 Cal 455 (457) (DB).

(2) The mere fact that a person is previously indebted to the creditor is not by itself sufficient to say that he is in the position of a person dominated by the creditor. (1910) 7 Ind Cas 286 (287) (DB) (All) ** AIR 1927 All 315 (316) (DB) ** AIR 1924 Oudh 118 (119) ** AIR 1922 Nag 219 (220) ** AIR 1914 Lah 63 (64) (DB).

(3) Urgent need of money on the part of the borrower is not, in itself, sufficient to place the lender in a position to dominate the will of the borrower. (1907) 34 Cal 150 (156) = 34 Ind App 9 (PC) ** AIR 1927 PC 84 (86) ** AIR 1927

Section 16 — Note 2 (e) (contd.)

All 315 (316) (DB) ** AIR 1925 Pat 326 (328) (DB) ** AIR 1922 Pat 491 (492) = 1 Pat 263 (DB) ** AIR 1919 Cal 414 (416) (DB) ** 42 Cal 652 (DB) ** (1912) 16 Ind Cas 119 (120) (Lah) ** (1911) 34 Mad 7 (10) (DB) ** (1908) 32 Bom 37 (43) (DB).

(4) Plaintiff lending money at an unusually high rate of interest to the defendant who was imbecile and spendthrift to the knowledge of the plaintiff was held to be in a position to dominate the will of the latter. (1910) 5 Ind Cas 486 (486) (Cal).

(5) Creditor lending money to expectant heir on the strength of that expectancy is in a position to dominate the debtor's will. AIR 1918 PC 249 (254) = 1918 Pun Re No. 124.

(6) A money lender who has knowledge that the person who requires money is helpless because his estate is under the Court of wards must be taken to be prima facie in a position to dominate will of the borrower within the meaning of this section. (1909) 31 All 386 (393) = 36 Ind App 96 = 12 Oudh Cas 300 (PC) ** (1906) 28 All 570 (576) = 33 Ind App 118 = 9 Oudh Cas 188 (PC).

(7) Where the lender is in a position to dominate the will of the borrower and the transaction on the face of it appears to be unconscionable a presumption arises that the transaction was induced by undue influence. (1910) 32 All 589 (593) (DB) ** AIR 1931 Nag 63 (65) = 27 Nag LR 19 ** (1910) 32 All 590n (593n) ** (1909) 36 Cal 493 (502) ** (1909) 4 Ind Cas 1143 (1146) (DB) (Lah) ** (1902) 5 Oudh Cas 256 (264) ** 1959 Raj LW 540 = ILR (1959) 9 Raj 319.

(8) When a person, who is already indebted to a money-lender, contracts a fresh debt, on unconscionable terms, undue influence must be presumed. AIR 1927 Lah 536 (537) (DB) ** AIR 1925 Pat 326 (329) (DB) ** (1911) 11 Ind Cas 198 (199) (DB) (Lah).

(9) Where a money-lender has admittedly lent money to a dissolute young minor and supplied him with large quantities of jewellery in presence of his touts and dependants and obviously gave a false colour to the transaction, undue influence is clearly to be presumed. 1902 Pun Re No. 2, p. 2 (4) (DB).

(10) Where an immoral young man, some of whose properties were already under mortgage, appointed the mortgagee to manage his property and liquidate the debts and gave possession of all his properties to the mortgagee and the mortgagee did not render any account and did not also discharge the debts but ultimately sold the properties on behalf of the mortgagor and bought them himself it was held that these cir-

cumstances showed that the mortgagor was completely under the control of the mortgagee and that the latter had used his influence unscrupulously to his own advantage. AIR 1920 PC 8 (11) = 16 Nag LR 94.

(11) The fact that in accounts between money-lenders and agriculturists balances are struck or bonds are executed periodically adding each time the interest due to the principal no doubt amounts to the charging of compound interest on the loan but that would not necessarily mean that undue influence is brought to bear upon the debtor. AIR 1914 Lah 63 (64) (DB).

(12) The mere fact that a man is indebted to another's brother does not put the other in a position to dominate the will of the debtor. AIR 1925 Oudh 535 (536) (DB).

2 (f). Landlord and tenant. — (1) Where a harsh unconscionable agreement is entered into by a tenant the presumption is that undue influence was brought to bear upon him by the landlord as he is in a position to exercise it. AIR 1916 Pat 107 (108) = 1 Pat L Jour 604 (DB).

[But see (1909) 4 Ind Cas 495 (499) (DB) (Cal).]

2 (g). Other relationship. — (1) The elder brother who is also the manager of the joint Hindu family is in a very strong fiduciary relation to his weak-witted younger brother and hence in a position to dominate his will. AIR 1931 Oudh 34 (37) (DB).

(2) Relationship of grandson to his grandfather — No presumption of undue influence on that count. AIR 1965 Ker 189 (193) = 1964 Ker LJ 724 (DB).

(3) The fact that a person has for over twenty years illicit connection with a woman as her paramour justifies the conclusion that he is in a position to dominate the will of that woman. (1955) 21 Cut L Tim 364 (368).

(4) Where the donee, the paramour of the only surviving daughter of the donor, gave up both his house and people and lived with the donor it was held that both he and the daughter were in a position to dominate the will of the donor. AIR 1948 Pat 130 (133) (DB).

(5) Where the father who was in the prime of his life and in full possession of his faculties executed, while living with his first wife's daughters, a deed settling some properties on them it was held that the fact that merely because he was found to be amenable to persuasion could not lead to the inference that the deed was obtained by the daughters by undue influence. AIR 1946 Mad 391 (2) (394) (DB).

(6) The mere fact that the plaintiff was at the time of executing a lease deed the subject of the Ruler does not

Section 16 — Note 2 (g) (contd.)

lead to inference that the defendant, who is a daughter-in-law of the Ruler, was in a position to dominate over the will of the plaintiff. AIR 1953 Sau 53 (55).

3. Fiduciary relationship — (a) General.— (1) A fiduciary relationship arises between two parties when one of them stands in a position of trust to the other. AIR 1946 Oudh 129 (138) = 21 Luck 194 (DB).

(2) Where one of two persons stands in fiduciary relationship to another confidence is naturally reposed in him by the other and the influence which grows out of that confidence is possessed by him. If he abuses that confidence and exercises his influence to gain an advantage at the expense of the other that constitutes fraud of the gravest character. AIR 1947 Oudh 89 (91).

(3) A fiduciary relationship can exist regardless of the origin of the confidence and the source of influence. It is not necessary to constitute a fiduciary relationship between two that one of them should be in loco parentis to the other. It is enough if the one places his trust in the other and relies upon him even though the relation between the two cannot be classified under the category of technical fiduciary relations. AIR 1958 Punj 190 (202) = ILR (1958) Punj 481 (DB) ** AIR 1938 Bom 304 (306, 307) (DB) ** AIR 1928 Mad 6 (13) ** (1961) 2 Mad LJ 367 = 74 Mad LW 608. (Gift of complete property by brother to his sister who had brought him from childhood and managed his property during his minority — Presumption that gift is not result of free will arises.)

(4) Relationship such as that which exists between a guardian and his ward, father and son, patient and his medical adviser, the solicitor and his client, trustee and the cestui que trust and like other persons would plainly fall within the ambit of sub-section (1) of the section. (1908) 32 Bom 37 (44) (DB) ** AIR 1961 All 295 (297) ** AIR 1967 SC 878 (881) = (1967) 1 SCR 331.

(5) A trustee, and executor, a partner, an agent, a director of a company, legal advisers are all instances of persons occupying a fiduciary character. 1956 Andh WR 911 (914).

(6) The existence of a fiduciary relationship does not necessarily preclude a transaction in which some advantage is given to the person holding the fiduciary position. All that the equity requires is that if he wants to hold the benefit he must make it clear that the intention on the part of the transferor was not the result of his influence. AIR 1927 PC 148 (150).

3(b). Next friend and minor party. — (1) The relationship between the next

friend and the minor is a fiduciary one. Where he, even before the suit land was delivered to the minor, obtained from the guardian of the minor, who was his own dependant daughter, the sale of the land in lieu of the amount claimed to have been spent by him for the litigation and there was no independent advice to the guardian it was held that the next friend had used his fiduciary position to derive an advantage to himself. 1956 Andh WR 911 (913, 914).

3(c). Trustee and cestui que trust. — (1) The fact that two persons stand to each other in the relation of trustee and cestui que trust does not affect a dealing between them which is unconnected with the subject of the trust. (1906) 30 Bom 578 (582, 589) (DB).

3(d). Counsel and client. — (1) The relationship between an attorney and his client being one of confidence in which the attorney is in the position of a dominating party the law has always regarded that relationship as being unusually susceptible to undue influence and prone to breed unconscionable transactions. AIR 1955 Cal 319 (328) ** AIR 1962 Punj 325 (329, 330) = 1962 (2) Cri LJ 92 = ILR (1962) 2 Punj 201 (SB).

(2) Presumption of solicitor's influence over his client, making gift to the solicitor, is rebuttable. AIR 1969 Cal 111 (124) (DB).

(3) A pleader who has no permanent professional relationship with a party does not fill in a position of active confidence with him merely because he had appeared for him in one or two cases. AIR 1929 Oudh 67 (69) = 4 Luck 270.

(4) Spontaneous and voluntary gift by client to his counsel's wife is not void. AIR 1969 Cal 111 (117) (DB).

3 (e). Parent and child.— (1) In considering what is or is not a "dominating position" the well known equitable principles which are applicable to the same relationship in England between the parties in question, cannot be ignored. It is well established under the English law that a special relationship of confidence exists between a parent and child notwithstanding that the latter is actually of age at the time the transaction takes place. AIR 1939 Rang 278 (283) = 1940 Rang LR 35 (DB) ** AIR 1961 Mad 190 (193) = (1960) 2 Mad LJ 355 (DB).

(2) In ascertaining whether at the time of the transaction the child was independent from the influence of the father it is not its being of full age at that time that matters. That will on the other hand depend on whether the child was on that day completely emancipated from the special relationship of confidence which exists between a parent and child. AIR 1928 Mad 6 (13).

Section 16 — Note 3 (e) (contd.)

(3) The adoptive mother with whom the adopted son lives and upon whom he is entirely dependent for his maintenance and education is in a position to dominate the will of the adopted son. AIR 1938 Bom 97 (106) (DB).

(4) The mere relation of daughter to mother, in itself suggests nothing in the way of special influence or control. (1906) 33 Cal 773 (784) = 33 Ind App 86 (PC) ** AIR 1956 Bom 404 (407) (DB).

3 (f). Guardian and ward.— (1) From the mere fact that a person ratified a debt incurred by his guardian immediately on attaining majority cannot raise the presumption that the ratification was due to the undue influence of the guardian. AIR 1937 Oudh 56 (57) (DB).

3 (g). Principal and agent.— (1) A person who is in charge of the estate of a purdanashin lady as her am-mukhtar and looks after her property and litigations including certain criminal proceedings between her and her husband is in some sort of fiduciary relationship with her and is in a position to dominate her will. AIR 1956 Cal 584 (586) (DB).

(2) There is nothing in law to prevent a gift being made to an agent and, therefore, where the agent is able to show that the gift was made in his favour by his principal exercising his free and unfettered judgment and with full knowledge of what he was doing the gift will be upheld. AIR 1923 Oudh 254 (263) (DB).

4. Mental incapacity.— (a) **General.**— (1) The law stated in Section 16 (2) (b) is based on the principle of equity that where a purchase is made from a poor and ignorant man at considerable under-value, the vendor having no independent advice, a Court of Equity would relieve against the transaction. (1935) 158 Ind Cas 973 (974) (Nag).

(2) Mere physical infirmity does not necessarily carry with it mental incapacity. AIR 1938 Nag 391 (393) = ILR (1940) Nag 149 (DB) ** AIR 1946 All 85 (86) = ILR (1946) All 89 (DB) ** AIR 1935 Rang 174 (177) (DB) ** AIR 1923 Pat 187 (194) (DB).

(3) The facts that the mortgagor is a simpleton besides being an opium eater and the mortgagee is the father of the pleader who had assisted him on many occasions and who may be useful to him in future are not sufficient to find that there was undue influence at work inducing the execution of the mortgage. AIR 1928 Lah 601 (603) (DB).

(4) Incapacity to manage an estate for the purpose of declaring its proprietor unfit and placing the estate under the control of the Court of Wards is not sufficient for presuming for the purposes

of this section a weakness or impairment of his intelligence sufficient to assume that he had been imposed upon. (1905) 8 Oudh Cas 210 (216) (DB).

(5) Where a young widow in recent bereavement and ill at the time consented to an agreement of partition the terms of which were unfair and prejudicial to her minor sons and there was no independent advice to her and the other party was her step-son who was dominating and keeping her under restraint it was held that undue influence was to be presumed. AIR 1956 Sau 89 (93) (DB).

(6) Where a lady during the pendency of the proceedings for the appointment of a guardian for her entered into an agreement with the applicant, without competent advice, and which was favourable to him it was held that the agreement was obviously induced by undue influence. (1910) 6 Ind Cas 1005 (1006) (DB) (Lah).

(7) The mere distressed state of the mind of the party to a contract cannot raise a presumption of undue influence unless the opposite party had taken opportunity to use it to gain an unfair advantage to himself. (1909) 4 Ind Cas 359 (360, 361) (DB) (Sind) ** AIR 1924 Lah 337 (339) (DB).

4 (b). Ignorant persons.— (1) In transactions between an ignorant and illiterate villager and a shrewd businessman of town the latter is in a position to dominate the will of the former. AIR 1953 Madh B 32 (34).

(2) Where a gift of his entire property is made by a person of weak intelligence and incapable of understanding the nature of the transaction, to a person who is presumably in a position to dominate him, the gift must be held to be obtained by undue influence by the donee. AIR 1931 Oudh 34 (38, 39) (DB).

(3) A strong presumption of undue influence arises where a gift of her entire property is made by an old and illiterate woman to her only relative. AIR 1951 Him Pra 54 (54, 55).

(4) Where a congenital cripple, weak in intellect, entered into a compromise, the terms of which were unfavourable to him, and his maternal uncle who was representing his interest was himself interested in the terms, it was held that the agreement was vitiated by undue influence. AIR 1927 Lah 546 (2) (549) (DB).

(5) A petition writer is not incapable of understanding the legal consequences of his acts on the true import of a transaction and is not a person upon whom undue influence can be exercised. AIR 1914 Oudh 299 (301) (DB).

(6) Mere illiteracy without ignorance will not be sufficient to consider the person as being likely to be dominated by another. AIR 1953 Madh B 32 (34).

Section 16 (contd.)

4 (c). Fear of punishment.— (1) A state of fear caused by a threat of criminal prosecution by itself does not constitute undue influence. Assuming a state of fear amounts to mental distress which enfeebles the mind, still, there must be further action of some kind, the employment of pressure or influence by or on behalf of the other party to the agreement. (1900) 22 All 224 (229) (DB) ** AIR 1945 Cal 218 (239) ** AIR 1940 Pat 573 (576) = 19 Pat 424 (DB) ** AIR 1918 Nag 181 (184) ** AIR 1916 Cal 74 (74) = 42 Cal 286 (DB) ** 1959 Ker LT 777 = 1959 Ker LJ 733 (DB).

(2) Where a person in fiduciary relation with another induced the latter, by falsely putting him in fear of criminal prosecution by a third party, to enter into an agreement divesting his estate in favour of a certain person and increasing the monthly allowances to another it was held that the agreement was brought by undue influence and fraud. AIR 1929 Oudh 44 (53) (DB).

(3) The fact that the prosecutor was ready to compound offence and withdraw charge if a kabuliyat was executed and the accused executed the kabuliyat on condition of the withdrawal of the charge would not lead to the inference that the prosecution was in a position to dominate the will of the executant and used that position to obtain unfair advantage. AIR 1915 All 174 (175) ** 1882 Pun Re No. 135 p. 398 (400) (DB).

[But see (1904) 28 Bom 639 (643) (DB).]

5. Unfair advantage.— (1) The expression "unfair advantage" is used as meaning an advantage obtained by unrighteous means. (1908) 32 Bom 37 (45) (DB).

(2) Under Section 16 one person being in a position to dominate another's will is not enough. Use of such position must be proved and bargain must be in favour of influencer and unfair to the other. AIR 1920 PC 65 (66) = 43 Mad 546 = 47 Ind App 1 ** AIR 1937 Oudh 254 (256) (DB) ** AIR 1931 Nag 63 (65) = 27 Nag LR 19 ** AIR 1926 Cal 171 (172) ** AIR 1925 Nag 369 (369).

(3) In the absence of a finding that promisee was in a position to dominate the will of promisor, a finding that promisee had obtained an unfair advantage over promisor is not sufficient to establish a case of undue influence. AIR 1935 PC 146 (148) ** AIR 1959 Mys 102 (105) = 36 Mys LJ 868 (DB).

(4) Where landlord agrees not to eject tenant for one more year on payment of enhanced rate and after expiry of that period seeks ejectment, it cannot

be said that he obtains unfair advantage over the tenant. AIR 1961 All 295 (297).

(5) Where it was shown that the vendor who was old, poor and ignorant and in mental distress at the time of sale owing to the bereavement of his son and the consideration for the sale was so absurdly low it was held that the case clearly came within the requirements of the section. (1938) 158 Ind Cas 973 (974) (Nag).

6. Inadequacy of consideration.— (1) Inadequacy of consideration alone is not a ground to hold that a contract was influenced by undue influence. AIR 1938 Mad 426 (428) (DB) ** ILR (1955) 2 Cal 214 (219) ** AIR 1919 Cal 414 (416) (DB) ** AIR 1915 Mad 561 (563) = 38 Mad 850 (DB).

(2) In deciding the question whether a transaction is unconscionable inadequacy of consideration is necessarily an ingredient which must weigh with Courts. 1946 Marwar LR (Civ) 11 (14, 15).

(3) Inadequacy of consideration in conjunction with circumstances of indebtedness and ignorance of plaintiff are facts from which Courts may infer undue influence. (1901) 25 Bom 126 (128) (DB).

(4) Inadequacy of consideration where it is very gross is sufficient to raise a presumption that the party either did not understand what he was doing or was the victim of some imposition. AIR 1938 Mad 426 (428) (DB) ** AIR 1937 PC 14 (18) ** AIR 1955 Cal 17 (21) (DB) ** 1946 Marwar LR (Civil) 11 (14, 15) ** AIR 1926 Pat 539 (541) (DB) ** 1882 Pun Re No. 148 p. 449 (452) (DB).

(5) Where an immature young man whose mental faculties were clouded owing to hemp-smoking had parted with his property to his guru who had a great control over him for a very inadequate consideration it was held that the transfer could be set aside on the ground of undue influence. AIR 1936 All 672 (673).

(6) A sale by an illiterate woman of her property for an inadequate consideration should be set aside when not only she did not have any independent advice but the vendee was also one who had some influence over her. (1880) 5 Bom 450 (458).

7. Unconscionable bargains.— (1) In considering whether an unconscionable bargain should be relieved against, only the terms of Section 16 must be considered. English equitable doctrine cannot be applied. (1906) 28 All 570 (573) = 33 Ind App 118 = 9 Oudh Cas 219 (PC) ** AIR 1920 Cal 334 (335) (DB) ** (1911) 10 Ind Cas 249 (250) (DB) (All) ** (1910) 32 All 589 (592) (DB).

(2) In the absence of undue influence the Court has no power to give relief

Section 16 — Note 7 (contd.)

under Section 16 even if the bargain is hard and unconscionable. AIR 1918 PC 48 (49) = 1918 Pun Re No. 101 ** AIR 1930 Cal 547 (552) (DB) ** AIR 1915 Cal 383 (384) = 42 Cal 690 (DB) ** (1913) 20 Ind Cas 812 (814) (DB) (Lah) ** (1912) 15 Ind Cas 377 (377) (DB) (Mad) ** (1911) 34 Mad 7 (11) (DB).

(3) Whether a transaction was unconscionable or not depends upon the facts of each case. (1909) 3 Ind Cas 818 (818, 819) (DB) (Mad) ** AIR 1946 Oudh 129 (139) = 21 Luck 194 (DB).

[See also (1950) 54 Cal WN 878 (880) (PC).]

(4) A transaction may be unconscionable in many ways and Court should see in each case according to its sense of justice if it is really so. (1913) 18 Ind Cas 965 (967) (DB) (Cal).

(5) The nature of the bargain, namely whether it is an unconscionable one or not, will depend upon the answers to the question, whether it is righteous one, whether it is improvident, whether it is one which required legal advice to the party entering into it and whether the intention to enter into it originated with the party himself. 1949 Trav-Co LR 172 (176).

(6) In order to see whether a bargain is unconscionable the state of affairs at the time when the bargain was struck should be considered and not the ultimate claim made. AIR 1918 PC 249 (251) = 1918 Pun Re No. 124 ** AIR 1935 Cal 234 (238) ** AIR 1927 Lah 748 (751) (DB) ** AIR 1920 Lah 123 (125) = 1 Lah 124 (DB) ** (1913) 20 Ind Cas 812 (814) (DB) (Lah).

(7) Something unconscionable either in original dealing or in subsequent transaction is necessary to establish undue influence. AIR 1919 Pat 566 (567) (DB) ** AIR 1936 All 611 (613) (DB).

(8) A gift by which the donor not only disinherited his wife but also stripped himself bare of his property was held to be an unconscionable transaction. AIR 1930 Sind 25 (29) (DB).

(9) An alleged gift by a young widow with still many more years to live of all her husband's property is highly improbable and apparently an unconscionable transaction. (1949) 54 Mys HCR 451 (478) (DB).

(10) Where the creditor with the knowledge that the debtor is seeking to raise money to pay off the revenue due to the Government and for the non-payment of which he was under arrest but temporarily released, made him agree to pay compound interest at an enormous rate in spite of the security of the family property given to him, it was held that the creditor was in a position to dominate and the transaction itself was

unconscionable. (1910) 7 All L Jour 591 (596).

(11) Where a Government servant facing the risk of summary dismissal from service because a warrant of attachment on his pay has issued, and therefore, in grievous necessity for money, executed a promissory note carrying a high rate of interest and it was also found that the consideration he had received was actually very much below the amount for which the note was executed and that the creditor was one to whom he was already indebted it was held that the bargain was an oppressive and unconscionable one. 1908 Pun Re No. 115, p. 522 (526).

(12) Where the tenants executed an agreement to their landlord by which they gave up their status of inamdars and bound themselves to pay as rent double the amount they were until then paying and there was no consideration for the transaction it was held that the transaction was apparently an unconscionable one. (1909) 4 Ind Cas 1114 (1115) (DB) (Mad).

(13) Kabuliyat providing that in case of acquisition of lease hold land lessor to get entire compensation — Transaction is not unconscionable. AIR 1960 Pat 194 (195) = 1960 BLJR 415 (FB).

8. High rate of interest.— (1) A debtor in order to obtain relief against high rate of interest charged to him must bring his case within the provisions of Section 16. AIR 1924 Pat 71 (74) = 2 Pat 488 (DB) ** AIR 1917 Pat 536 (537) = 2 Pat L Jour 212 (DB) ** (1910) 4 Sind LR 276 (277) (DB).

(2) The penal and excessive nature of the rate of interest charged to a borrower would not by itself attract the provisions of Section 16 so as to enable the Court to reduce the contractual rate agreed to by the parties. AIR 1950 Pat 379 (382) = 29 Pat 545 ** AIR 1927 All 538 (538) (DB).

(3) Mere fact that the rate of interest is high is not sufficient to justify Court in holding that the bargain is unconscionable one, and relieving the parties who entered into it from the liability incurred. (1911) 10 Ind Cas 14 (14) (DB) (All) ** AIR 1936 All 611 (612) (DB) ** AIR 1929 Lah 242 (244) ** AIR 1927 Mad 620 (620) = 50 Mad 614 (DB).

[See also AIR 1928 PC 80 (82) = 55 Ind App 107 = 7 Pat 305 ** (1908) 32 Bom 208 (211).]

(4) In order to obtain relief against the high rate of interest contracted for, the party seeking relief must show that he had to consent to the rate either under coercion or undue influence. AIR 1920 Cal 334 (335) (DB) ** AIR 1928 Oudh 330 (333) (DB) ** AIR 1927 Lah 536 (537) ** AIR 1921 Cal 199 (201) = 48 Cal 93 (DB) ** AIR 1920 Cal 863 (863)

Section 16 — Note 8 (contd.)

(DB) ** AIR 1920 Cal 314 (315) (DB) ** AIR 1919 Cal 994 (995) (DB).

(5) Where a contract expressly provides for interest the Court can reduce interest only if exercise of undue influence is positively pleaded or proved or if circumstances raise the presumption of undue influence. AIR 1914 Lah 344 (345) (DB).

(6) To enable the Court to give relief against excessive interest it must be shown that the creditor was in a position to dominate the will of the borrower and that he had unduly used the influence arising out of his dominating position to his own advantage. AIR 1950 Pat 379 (382) = 29 Pat 545 ** AIR 1936 All 611 (612) (DB) ** AIR 1931 Nag 91 (92) ** AIR 1928 Lah 949 (950, 951) (DB) ** AIR 1927 All 315 (316) (DB) ** AIR 1925 Cal 722 (723) (DB) ** AIR 1920 Cal 529 (529) (DB) ** AIR 1919 Cal 1033 (1033) (DB) ** (1911) 10 Ind Cas 249 (250) (DB) (All) ** (1911) 10 Ind Cas 37 (38) (Lah) ** (1908) 32 Bom 208 (211) ** (1907) 31 Bom 348 (352) ** 1901 Pun Re No. 96 p. 324 (326).

[But see AIR 1925 Nag 211 (215) ** (1913) 18 IC 965 (967) (DB) (Cal).]

(7) Even when there is ample security, the exaction of excessive and usurious interest does not raise a presumption of undue influence unless it is shown that the lender was in a position to dominate the borrower's will. AIR 1924 PC 60 (65) = 51 Ind App 101 = 3 Pat 279. (AIR 1915 Cal 383 = 42 Cal 690 (DB), Overruled.) ** AIR 1928 Oudh 330 (333) (DB) ** AIR 1915 Cal 796 (800) = 42 Cal 652 (DB).

(8) Excessive interest in itself may not be ground for relief, but it may be evidence of the very helpless condition of the borrower and of the unfair advantage obtained over him if the circumstances show that the debtor would not otherwise have accepted those terms. AIR 1914 Mad 131 (135) = 36 Mad 533 (DB).

(9) Where a creditor, who had already lent money to another, exacted harsher terms from him in regard to the further loans made to him it was held that in regard to the later transactions the creditor was in a position to dominate the will of the borrower and hence the harsh terms could be interfered with by the Court. AIR 1934 All 938 (939) (DB).

(10) High rate of interest in cases of mortgages which stipulate against redemption for a long period of years is unconscionable. (1911) 11 Ind Cas 519 (521) (DB) (Lah).

(11) Charging higher rate of interest under a mortgage executed for a larger amount than advanced with the object to ensure the prompt execution of a

mortgage deed is unconscionable. (1909) 3 Ind Cas 818 (819) (DB) (Mad).

(12) A contract of debt under which the debtor not only agrees to pay a very high rate of interest but also to pay the interest for a stipulated period even if he repaid the debt before the expiry of that period is an unconscionable bargain. (1907) 29 All 303 (305) (DB).

(13) A transaction is not unconscionable merely because it is in lieu of earlier loans carrying very high rate of interest. AIR 1927 All 44 (45) = 48 All 666 (DB).

(14) Prior dealings of short duration, resulting in a small indebtedness at the time the suit debt was incurred cannot by themselves raise any inference of undue influence, on the ground of which relief can be given against the stipulated rate of interest. AIR 1930 Lah 65 (67) (DB).

(15) Debtor consenting freely and willingly to pay high rate of interest — There can be no question of undue influence. AIR 1926 Bom 65 (66) = 50 Bom 107 (DB).

Compound interest.

(16) The question whether the charging of compound interest renders the transaction unconscionable would depend on the circumstances of the case. (1906) 28 All 570 (573) = 33 Ind App 118 = 9 Oudh Cas 188 (PC) ** AIR 1946 Mad 56 (56) (DB) ** AIR 1926 Oudh 273 (275) = 1 Luck 160 (DB) ** AIR 1925 All 31 (32) ** (1911) 34 Mad 188 (196) (DB) ** (1911) 10 Ind Cas 37 (38) (Lah).

(17) The conditions and terms of lending must be looked at when the loan carries compound interest with frequent rests. Compound interest at a moderate rate may not necessarily be oppressive, and similarly compound interest with infrequent rests may not be oppressive. AIR 1928 PC 64 (67) = 55 Ind App 85 = 7 Pat 294 ** (1911) 34 Mad 7 (10) (DB).

(18) Agreement to pay interest at stipulated rate does not become unconscionable merely because there is stipulation to pay compound interest at same rate in default of payment of simple interest. AIR 1920 Lah 238 (239) (DB).

9. Persons entitled to raise plea of undue influence.— (1) A legal representative of the executant of a document can bring a suit to set it aside on the ground that it had been obtained by the practice of fraud or undue influence. AIR 1927 Bom 384 (387) = 51 Bom 133 (DB).

(2) Where two sisters who were being brought up by their uncle executed a sale deed in his favour for an inadequate consideration and they were influenced by the uncle to do so it was held that the surviving sister was entitled to sue to set aside the sale in the exercise of her own right in regard

Section 16 — Note 9 (contd.)

to a moiety and as the heir of the deceased sister in regard to other half. AIR 1918 Bom 93 (94) = 43 Bom 173 (DB).

(3) Transferee of a bond is invested with all the rights of the transferor in respect of the bond, including the right to avoid it under Section 19-A on the ground of undue influence. AIR 1936 Oudh 105 (106) (DB).

(4) A defendant may raise plea of undue influence by way of defence and it is not necessary for him to take steps to set aside the agreement. AIR 1936 All 672 (674).

[See also AIR 1934 Cal 762 (763) (DB).]

(5) Plea of undue influence can be raised only by executant of document or his representative in estate, but not by a third party, claiming adversely to such executant. AIR 1931 Sind 78 (80) (DB).

(6) Where a widow executed a mortgage of her right to future maintenance under circumstances which justified the inference that the mortgagee was in a position to dominate her will she is not precluded from pleading undue influence by the fact that she acted under legal advice when she executed the same. (1911) 34 Mad 7 (10) (DB).

(7) Donee from mortgagor's widow cannot plead that the mortgage is bad for undue influence as he is not entitled to the equities which exist in favour of the mortgagor. AIR 1923 Lah 634 (635) (DB).

(8) A third party to a deed of gift cannot plead that the deed of gift should not be given effect to as it was obtained by fraud or undue influence. AIR 1956 Andhra 195 (197) ** AIR 1949 East Punj 277 (280) (DB).

(9) Transferees of some portions of the mortgaged property cannot plead undue influence to avoid the mortgage when the mortgagor himself did not seek to do so either before or in the suit on the mortgage. AIR 1925 Cal 94 (96) (DB).

(10) Whether transaction is unfair and unconscionable bargain for inadequate price is a question entirely between assignor and the assignee. (1909) 2 Ind Cas 385 (390) (DB) (Cal).

(11) Party claiming adversely to assignor and assignee cannot plead Section 16 to defeat assignment. AIR 1929 Lah 295 (304) = 10 Lah 613 (DB).

(12) Speculator, who purchases equity of redemption on the chance of getting redemption on easy terms cannot be allowed to set up plea of undue influence. 1913 Pun LR No. 305 page 1027 (1031) (DB).

10. Pleadings.— (1) To avoid a transaction as being unfair, specific plea to

that effect ought to be made in the plaint. AIR 1935 Cal 234 (238).

(2) It is incumbent on a party, be he plaintiff or defendant, who seeks to set aside a contract on the ground of undue influence to give in his pleadings full particulars of the circumstances on which he relies as the basis of his plea. It is not enough to baldly assert that undue influence has vitiated the transaction. (1905) 8 Oudh Cas 210 (222) (DB) ** AIR 1928 Oudh 330 (333) (DB) ** AIR 1965 Ker 189 = 1964 Ker LJ 724 (DB).

(3) Court must scrutinise pleadings to find out that a plea of undue influence has been made out and full particulars thereof have been given before examining whether undue influence was exercised or not. AIR 1967 SC 878 (881) = (1967) 1 SCR 331.

(4) If facts, on record, justify the inference of undue influence, the Court can administer relief though pleadings are inartistic. AIR 1931 Nag 63 (64) = 27 Nag LR 19 ** AIR 1958 Punj 190 (201) = ILR (1958) Punj 481 (DB) ** AIR 1928 Nag 322 (324).

(5) In the absence of any plea of the contract having been brought about by the exercise of undue influence, the Court has no jurisdiction to interfere with the contract and substitute a new one in lieu thereof. AIR 1936 All 712 (715) (DB).

11. Proof of undue influence — (a) General.— (1) Courts in dealing with cases of undue influence has to consider four different questions connected with each other, namely (1) whether it is a transaction which a right minded person could be expected to enter into; (2) whether it shows so much improvidence as to suggest that the donor was not in a state of mind to weigh what he was doing; (3) whether it was a matter which required legal advice and (4) whether the intention of making the transfer originated with the transferor. (1888) 15 Cal 684 (698, 701) = 15 Ind App 81 (PC) ** AIR 1951 Trav-Co 42 (43) (DB) ** 1949 Trav-Co LR 172 (179) (DB) ** AIR 1937 Cal 492 (494) (DB) ** AIR 1966 Andh Pra 104 (106) = 1964) 2 Andh LT 405.

(2) The question whether a document was executed under undue influence is a question of fact. AIR 1927 Mad 255 (256) ** AIR 1958 Punj 190 (199) = ILR (1958) Punj 481 (DB) ** AIR 1950 Nag 71 (75) = ILR (1950) Nag 105 ** AIR 1963 Andh Pra 72 (74) (DB).

(3) A finding of undue influence cannot be based on mere conjecture, but must be supported by evidence. AIR 1932 PC 202 (207) ** (1896) 23 Cal 15 (25, 26) = 22 Ind App 153 (PC) ** AIR 1950 Pat 379 (382) = 29 Pat 545 ** AIR 1938

Section 16 — Note 11 (a) (contd.)

Lah 333 (334) ** AIR 1935 Lah 479 (480) (DB).

[See also (1914) 36 All 81 (91) = 41 Ind App 23 (PC) ** AIR 1938 Mad 426 (428) (DB).]

(4) Not only should there be evidence of general undue influence but there should be specific evidence that undue influence was exercised. AIR 1927 Mad 255 (259).

(5) When there is evidence of overpowering influence, and the transaction brought about is immoderate and irrational proof of undue influence is complete. AIR 1940 Mad 285 (289) (DB).

(6) No admissions of plaintiff made while under undue influence, could be taken as proof that he had full knowledge of facts. AIR 1931 Oudh 34 (38) (DB).

(7) In a case of undue influence, the mere fact that on one or two matters, the Court does not accept a party's evidence will not disentitle him to relief. AIR 1935 Mad 726 (729) = 58 Mad 454 (DB).

(8) A charge of undue influence must be substantially proved as laid. AIR 1928 Oudh 330 (333) (DB).

11 (b). Presumption.— (1) It is open to a Court to presume the exercise of undue influence in any case where the facts and circumstances can justify the presumption. AIR 1958 Punj 190 (206) = ILR (1958) Punj 481 (DB) ** AIR 1927 Mad 255 (257).

(2) Undue influence is not a matter always capable of direct proof and must depend on conclusion to be drawn from the nature of the transaction itself and the circumstances in which it had its origin. 1946 Marwar LR (Civ) 11 (14, 15) ** AIR 1925 PC 101 (102) = 27 Oudh Cas 346 ** AIR 1921 PC 43 (45) = 42 All 422 = 47 Ind App 116 = 23 Oudh Cas 54 ** (1955) 21 Cut L Tim 364 (370, 371) ** AIR 1943 All 184 (185) = ILR (1943) All 295 (DB) ** AIR 1933 Lah 885 (888) (DB) ** AIR 1927 Mad 255 (257) ** AIR 1919 All 1 (4) = 42 All 230 (DB) ** AIR 1918 Mad 194 (195) (DB) ** (1967) 2 Andh WR 80. (A having money dealing with C — Dispute about exact amount due — Reference to Panchayat — Panchayat holding that A owed Rs. 1,400 to C — On A's request B executing 'ankada' in favour of C — A executing agreement bond in this regard — Agreement, held not vitiated by coercion or undue influence — Illegality of loan transaction between A and C held not material B having no knowledge about it.) ** AIR 1963 Andh Pra 72 (74, 76) (DB).

(3) Relationship, which renders fraud possible, when it exists between the parties to a deed would justify the presumption that the deed had been obtain-

ed through undue influence. AIR 1951 Him Pra 54 (54, 55).

(4) Where the person setting up the plea of undue influence proves the facts of the other party's dominant position and the unfair advantage secured to him by the transaction a presumption that the other party had by use of his dominant position exercised undue influence will be made. AIR 1952 Him Pra 20 (21) ** AIR 1947 Oudh 89 (91).

(5) A presumption of undue influence will arise in every case where the facts are such that they will fairly lead to an inference of such influence even though the parties do not fall within any particular category of relationship such as parent and infant child, solicitor and client or spiritual adviser and the penitent. The only significance of the existence of such relationship is that in these cases undue influence may be more easily established and even assumed. AIR 1945 PC 8 (9) = 71 Ind App 184 = ILR (1945) Bom 189 = ILR (1945) Kar (PC) 56 ** AIR 1966 Andh Pra 104 (106) = (1964) 2 Andh LT 405. (Gift of whole property while under mental distress — Transaction appearing unconscionable on its face — Presumption under Section 16 (3) arises.)

(6) The mere existence of the fiduciary relationship between the donee and the donor raises a presumption of undue influence and it is on the donee to rebut the presumption. AIR 1961 Mad 190 (194) = (1960) 2 Mad LJ 355 (DB).

(7) There is no presumption of undue influence in India as well as in England in the case of a gift to a son, grandson or son-in-law made during the donor's last illness a few days before his death. AIR 1914 Low Bur 278 (280) = 8 Low Bur Rul 235 ** AIR 1967 SC 878 (881) = (1967) 1 SCR 331.

(8) Merely because the parties were nearly related to each other or merely because the donor was old or of weak character, no presumption of undue influence can arise. AIR 1967 SC 878 (880) = (1967) 1 SCR 331. (A. F. O. D. No. 193 of 1954, dated 12-8-1960 (Cal), Reversed.)

(9) A presumption that the general influence and dominance which one party possesses over another had been used would be applied to every transaction between them until the relationship of confidence continues to subsist and for that purpose the dominance will be deemed to continue until the contrary is shown. AIR 1958 Punj 190 (204) = ILR (1958) Punj 481.

(10) The Court will not presume "undue influence" where it is not pleaded by the parties. (1910) 7 All L Jour 591 (595) (DB) ** AIR 1925 Lah 430 (431) (DB) ** AIR 1965 Ker 189 (193, 194) =

Section 16 — Note 11 (b) (contd.)
 1964 Ker LT 497 (DB). (Particulars of undue influence must be set forth in plaint in sufficient detail.)

11 (e). Burden of proof.— (1) The onus of proving undue influence ordinarily rests on the party who sets up that plea, but the circumstances of a case may make it an exception to the general rule. AIR 1937 PC 50 (50, 51) ** AIR 1956 Bom 404 (407) (DB) ** AIR 1946 All 121 (124) (DB) ** AIR 1945 Cal 218 (238) ** AIR 1939 Pat 477 (479) (DB) ** AIR 1927 All 44 (44, 45) = 48 All 666 (DB) ** AIR 1927 Mad 255 (258) ** 1882 Pun Re No. 148, page 449 (452) (DB) ** AIR 1960 Bom 404 (407) (DB).

(2) Before the question of onus probandi can arise in any case, two matters have got to be determined namely whether the relations between the parties were such that one is in a position to dominate the will of the other and then whether the contract had been induced by undue influence. These questions have to be approached in the above order only, as to change the order would surely result in error. AIR 1924 PC 60 (63) = 51 Ind App 101 = 3 Pat 279 ** AIR 1958 Punj 190 (201) = ILR (1958) Punj 481 (DB) ** 1949 Trav-Co LR 172 (177) (DB) ** AIR 1938 Mad 426 (428) (DB) ** AIR 1967 SC 878 (880) = (1967) 1 SCR 331. (A. F. O. D. No. 193 of 1954, D/- 12-8-1960 (Cal), Reversed.) ** AIR 1963 SC 1279 (1290) = (1964) 1 SCR 270 ** AIR 1965 Ker 189 (193) = 1964 Ker LT 497 (DB) ** AIR 1963 Andh Pra 72 (74, 76) (DB).

(3) Even though a bargain is unconscionable a remedy under the Contract Act does not come into view until the initial fact of a position to dominate the will has been established. AIR 1924 PC 60 (64, 65) = 3 Pat 279 = 51 Ind App 101 ** AIR 1932 PC 202 (206) ** AIR 1956 Hyd 114 (117) = ILR (1956) Hyd 328 ** AIR 1952 Him Pra 20 (22) ** 1946 Marwar LR (Civ) 11 (14) ** AIR 1933 Lah 682 (684) (DB) ** AIR 1921 Oudh 207 (208) = 24 Oudh Cas 313 ** AIR 1965 Ker 189 (193) = 1964 Ker LT 497 (DB) ** 1964 Ker LT 497 = 1964 Ker LJ 724 (DB) ** 18 Law Rep 104 = (1969) 1 Mys LJ 507.

(4) In some cases the question of domination and the question of unconscionableness of the bargain may so overlap each other that it may be necessary to consider them together and not separately. AIR 1952 Him Pra 20 (22).

(5) The burden of proving, that the relationship between the parties was such that one of them was in a position to dominate the will of the other and that the transaction secured unfair advantage to him is on the party who pleads undue influence and on proof of these two facts exercise of undue influ-

ence will be presumed. AIR 1952 Him Pra 20 (21) ** AIR 1920 PC 65 (66) = 43 Mad 546 = 47 Ind App 1 ** AIR 1948 Pat 130 (133) (DB) ** AIR 1938 Nag 470 (472) = ILR (1938) Nag 535 ** AIR 1938 Nag 391 (392) = ILR (1940) Nag 149 ** AIR 1920 Mad 982 (982) (DB) ** AIR 1963 SC 1279 (1290) = (1964) 1 SCR 270. (AIR 1958 Punj 190, Reversed.) ** AIR 1962 Pat 168 (171, 172, 173) (DB) ** AIR 1963 Andh Pra 72 (74, 76) (DB) ** AIR 1959 Mys 102 (105) = 36 Mys LJ 868 (DB).

(6) It is necessary to prove the existence of both a dominating position and the unconscionable nature of the bargain: Proof of one without the other will not be sufficient. 1946 Marwar LR (Civ) 11 (14) ** AIR 1931 Sind 78 (80) (DB) ** AIR 1928 Lah 224 (229) = 9 Lah 470 (DB) ** AIR 1925 Oudh 535 (536) (DB) ** AIR 1925 Pat 326 (329) (DB) ** AIR 1963 Andh Pra 72 (74, 76) (DB) ** AIR 1959 Mys 102 (105) = 36 Mys LJ 868 (DB).

(7) Where circumstances which would warrant a presumption of undue influence being made, are shown to exist the burden of proving that the contract was not induced by such influence lies, in view of the combined effect of this section and Section 111 of the Evidence Act, on the party against whom the presumption has arisen. AIR 1958 Punj 190 (203) = ILR (1958) Punj 481 (DB) ** AIR 1937 PC 50 (51, 52) ** AIR 1937 PC 14 (17, 18) ** AIR 1930 PC 139 (139) ** AIR 1927 PC 148 (150) ** AIR 1924 PC 60 (63) = 51 Ind App 101 = 3 Pat 279 ** AIR 1920 PC 65 (66) = 43 Mad 546 = 47 Ind App 1 ** (1907) 30 Mad 169 (174) (FB) ** AIR 1918 Pat 680 (682) = 2 Pat L Jour 663 (SB) ** AIR 1956 Hyd 114 (117) = ILR (1956) Hyd 328 (DB) ** AIR 1951 Him Pra 54 (54, 55) ** ILR (1951) Mys 158 (160) (DB) ** AIR 1950 Nag 71 (75) = ILR (1950) Nag 105 ** AIR 1937 Cal 492 (494) (DB) ** AIR 1936 Pat 78 (78) (DB) ** AIR 1934 All 507 (509) (DB) ** AIR 1931 Nag 63 (65) = 27 Nag LR 19 ** AIR 1930 Cal 547 (552) (DB) ** AIR 1928 Mad 6 (11) ** AIR 1927 Mad 255 (257, 258, 259) ** AIR 1925 Nag 211 (215) ** (1911) 34 Mad 7 (10) (DB) ** (1909) 4 Ind Cas 1114 (1115) (DB) (Mad) ** (1902) 5 Oudh Cas 307 (311, 312) ** 1901 Pun Re No. 36. page 107 (110) (DB) ** (1890) 12 All 523 (529, 530) (DB) ** (1888) 10 All 535 (550) (DB) ** AIR 1966 All 438 (439, 440) ** AIR 1964 Raj 250 (253) = 1964 Raj LW 302.

(8) Even though the person accepting a promise which is for the benefit of another has not exercised any undue influence yet when he is aware that the person benefited is in a position of active confidence with the promisor he must prove that no undue influence had been used by the person benefited on the

Section 16 — Note 11 (c) (contd.)
promisor. AIR 1935 Mad 726 (731) = 58 Mad 454 (DB) ** AIR 1928 Mad 6(11).

(9) Onus lies heavily on a person in a dominating position to prove affirmatively that no domination was practised and that the other party was separately advised in the independence of a free agent. AIR 1920 PC 65 (66) = 43 Mad 546 = 47 Ind App 1 ** (1907) 30 Mad 169 (174) (FB) ** AIR 1958 Punj 190 (206) = ILR (1958) Punj 481 (DB) ** 1956 Andh WR 911 (914) ** AIR 1950 Nag 71 (75) = ILR (1950) Nag 105 ** AIR 1946 All 121 (124) ** AIR 1938 Mad 919 (920) (DB) ** (1906) 30 Bom 578 (589) (DB) ** AIR 1966 All 438 (439) ** AIR 1962 Pat 168 (171, 172, 173) (DB) ** AIR 1961 Mad 190 (193) = (1960) 2 Mad LJ 355 (DB) ** AIR 1959 Mys 102 (105) = 36 Mys LJ 868 (DB) ** (1959) 1 Orissa JD 458.

(10) Where a gift is challenged on the ground of undue influence, the donee has to prove that the deed was the result of free exercise of independent will. The most obvious way to prove it is by establishing that the gift was made after the nature and effect of the transaction had been fully explained to the donor by some independent and qualified person. AIR 1954 Trav-Co 407 (413, 414, 415) (DB) ** AIR 1964 Raj 250 (253) = 1964 Raj LW 302.

(11) Where a transaction was finished through an attorney and the borrower had also another advice, held that undue influence was not proved. AIR 1930 Cal 547 (552) (DB).

(12) The independent legal advice which would suffice to rebut a presumption of undue influence must be one given with a knowledge of all relevant circumstances and must be such as a competent and honest adviser would give if acting solely in the interests of the party who is in need of it. AIR 1929 PC 3 (7).

(13) Proof of independent legal advice is not the only way by which a person, who is in a dominant position and on whom the burden of proof lies, could rebut the presumption of undue influence which arises out of his relation with the other party. AIR 1929 PC 3 (7) ** AIR 1969 Cal 111 (117) (DB) ** AIR 1964 Raj 250 (253) = 1964 Raj LW 302 ** AIR 1961 Mad 190 (193) = (1960) 2 Mad LJ 355 (DB) ** AIR 1960 Mad 447 (449) = (1960) 2 Mad LJ 110 (DB).

(14) In the absence of a permanent professional relationship between a pleader and a party the pleader cannot be considered to stand in a position of active confidence with the party merely because he appeared for him in one or two cases. AIR 1929 Oudh 67 (69) = 4 Luck 270.

(15) The fact that the mortgagor was indebted in a small sum of Rs. 134 while the amount borrowed at the time of the mortgage was Rs. 2000 does not shift the burden of proving undue influence from mortgagor to the mortgagee. AIR 1924 Oudh 118 (119).

(16) Where both parties have adduced evidence the question of onus loses its significance. 54 Mys HCR 451 (479) (DB).

12. Transactions of pardanashin ladies.— (1) In the case of transactions of pardanashin ladies the principles which are applied to determine the question whether these transactions are to be supported or discharged are not merely deductions from the law as to undue influence found in Section 16 of the Contract Act but are founded upon the wider basis of equity and good conscience which guide the Courts in the administration of justice in India. AIR 1931 PC 303 (305) = 58 Ind App 450 = 11 Pat 227.

(2) The law gives to "pardanashin" ladies protection which is analogous to that always given by Courts to persons who are weak, ignorant and infirm and hence incapable of protecting themselves and presumes, unlike in the case of others, that they are incapable of protecting themselves. AIR 1933 Pat 306 (331) = 12 Pat 359 (DB) ** AIR 1963 SC 1203 (1205) = (1963) 1 SCR 456. (F. A. No. 791 of 1953 dt/- 2-12-1957 (Pat), Reversed.) ** ILR (1965) Cut 695.

(3) The ground on which protection is given to a pardanashin lady is that she can be easily influenced and is very likely to be over-reached in her dealings. AIR 1939 Lah 439 (450) = ILR (1939) Lah 433 (DB).

(3-A) In case of pardanashin lady it is necessary to satisfy the Court that she executed the document with full understanding of execution and of the nature and effect of the transaction, and even in cases where she had independent advice, Court will scrutinise the transaction very closely to see that it is a fair one. AIR 1960 Madh Pra 60 (62) = 1959 MPLJ 917. (Where the document is not in her mother language, the law requires that she understood and not merely heard what was read. AIR 1939 Nag 159, Foll.)

(4) In cases of gratuitous transfers of property by a pardanashin lady to a person standing in a fiduciary relation to her there is a presumption of undue influence and hence the burden of substantiating the bona fides of the transaction would lie on the party who relies on the transfer. AIR 1916 Oudh 10 (13) (DB) ** AIR 1956 Cal 584 (586) (DB) ** AIR 1946 All 121 (124) ** AIR 1931 Oudh 146 (155) = 6 Luck 619 (DB) ** (1912) 39 Cal 933 (937) ** ILR (1905)

Section 16 — Note 12 (contd.)

Cut 695 ** AIR 1958 Orissa 62 (63, 64) = 24 Cut LT 157 (DB). (Ordinarily the Courts insist on proof that the lady had independent legal advice.)

(5) Even when intelligent understanding by a pardanashin lady has been established it is possible to presume undue influence where the relationship of the donee to her is such as to justify the presumption. AIR 1948 Cal 84 (87) (DB).

(6) In the case of a document executed by a pardanashin lady, the question is not whether the lady knew what she was doing, had done, or proposed to do, but how her intention to act was produced, whether all that care and providence was placed round her as against those who advised her which from their situation and relation to her, they were bound to exert on her behalf. AIR 1916 PC 172 (179) ** AIR 1960 Mad 447 (449) = (1960) 2 Mad LJ 110 (DB) ** AIR 1958 Orissa 62 (63, 64) = 24 Cut LT 157 (DB).

(7) The rule that person who rely upon a deed executed by a pardanashin woman should prove that the deed had been explained to and understood by her applies with greater force where a power of attorney had been executed by a pardanashin lady to her brother and who by reason of her illiteracy, youth and inexperience was more likely to have been influenced by him. AIR 1936 Cal 721 (722) (DB).

[See also AIR 1963 SC 1203 (1206) = (1963) 1 SCR 456.]

(8) The rule of strict proof which generally applies where claim is made under a sale or gift by a pardanashin lady does not apply where the lady in question is one capable of carrying out monetary transactions and has no hesitation to appear before comparative strangers. AIR 1925 Lah 196 (198) = 5 Lah 465 (DB) ** AIR 1960 Mad 447 (449, 450) = (1960) 2 Mad LJ 110 (DB). (Muslim lady of advanced age in Tamil district — Rule of strict proof does not apply.)

(8-A) Where there is nothing on the record to show that the pardanashin lady who executed the mortgage bond was weak-minded, ignorant or incapable of understanding her affairs, though she lived in seclusion and observed pardah from outsiders, the mortgage-deed executed by her is not void. 1962 BLJR 68 (DB).

(9) Where in a case of pardanashin lady undue influence is alleged it would require to consider the questions (1) whether the transaction was one which any right minded person would contract, (2) whether the nature of the transaction suggests that the lady was not in a state of mind to weigh what she was doing, (3) whether it required a legal adviser for her and (4) whether the idea

relating to it originated with her. AIR 1948 Cal 84 (93) (DB) ** (1888) 15 Cal 684 (698, 701) (DB).

(10) The mere fact that person had enjoyed the confidence of the deceased husband of a pardanashin lady is not sufficient to say that he is also in a position of confidence with her or in a position to exercise undue influence. (1932) 15 Nag L Jour 101 (103).

(11) Exercise of advice by a close friend or relative of the beneficiary under the will executed by a pardanashin lady cannot amount to an exercise of undue influence by him. AIR 1937 Pat 362 (363) (DB).

(12) Bargain with pardanashin lady cannot be divided into parts or otherwise reformed by Courts so as to uphold certain portions while rejecting others. AIR 1940 PC 134 (136) = ILR (1940) 2 Cal 436 = ILR (1940) Kar (PC) 271 = 67 Ind App 309 ** AIR 1939 Nag 159 (160) = ILR (1940) Nag 418 (DB) ** AIR 1966 Pat 342 (345). (Person executing a deed of gift of some property in favour of widow of his predeceased son, believing that he was solely entitled to the property, while in law widow was entitled to a share only — Widow, a pardanashin lady not aware of her rights — The fact that the deed was read over to her and accepted by her, will not make it binding on her — Deed of gift will not curtail her rights which she had in law.)

(13) Every case has to be fairly judged on its own facts and no undue stress should be laid either on the fact that the executant complaining is a pardanashin lady or on the mere circumstance that the transaction apparently benefited persons other than the executant. A similar cautious approach is necessary when dealing with the theory of undue influence also. ILR (1955) 2 Cal 214 (225).

(14) Whilst it is the duty of the Courts to see that pardanashin women are not imposed upon they must at the same time be careful not to apply the rules intended for their protection so strictly as to deprive them of freedom of contract and reduce them on a level with persons like minors who because of their mental deficiency are incapable of contracting. AIR 1946 All 127 (131) = ILR (1945) All 465 (DB).

(15) Where it is proved that the pardanashin lady knew the implication and effect of the documents that she was executing and that she was scrupulously kept separately advised in the independence of a free agent, the document executed by her is not void. (1965) 7 OJD 42.

[See also AIR 1964 Pat 284 (285, 286). (Disposition is valid when it was substantially understood by pardanashin

17. "Fraud" defined.—"Fraud" means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent,* with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:—

- (1) the suggestion, as a fact, of that which is not true, by one who does not believe it to be true;
- (2) the active concealment of a fact by one having knowledge or belief of the fact;
- (3) a promise made without any intention of performing it;
- (4) any other act fitted to deceive;
- (5) any such act or omission as the law specially declares to be fraudulent.

Explanation.—Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case

Section 16 — Note 12 (contd.)

lady and it was as much her mental act as physical act.)]

(16) The protection offered to pardanashin ladies in respect of their transactions can be claimed only by them or persons claiming through their title to any property affected by the transaction and not by third parties. AIR 1939 Pat 477 (487) (DB) ** AIR 1930 Oudh 131 (140) (DB).

(17) Protection given by law to pardanashin ladies cannot be withheld from other women on the ground that the person concerned is not a pardanashin in the technical sense of the term. AIR 1955 Cal 17 (19) (DB) ** AIR 1948 Cal 84 (87) (DB) ** AIR 1930 Cal 591 (592) (DB) ** 1965 All LJ 1080. (Protection equally extends to illiterate and ignorant woman though she may not be pardanashin.)

(18) The rule giving protection to pardanashin lady is not strictly applicable to cases where the pardanashin lady is not a contracting party and the case is one of fraud and not of undue influence. AIR 1932 Pat 105 (117) = 11 Pat 50 (DB).

(19) A woman who is herself not a pardanashin woman is not entitled to a like amount of protection which the law gives to pardanashin lady merely because she is close in kinship and habits to them and is similarly secluded from ordinary social intercourse. (1901) 23 All 137 (140) = 27 Ind App 168 (PC).

(20) The principles of law applicable to a pardanashin lady will not be extended to a man on the ground that he is old and not in robust health. AIR 1923 Oudh 254 (263) (DB) ** (1962) 66 Cal WN 254.

(21) It is only when the document executed by a pardanashin lady is prima facie valid, proof having been given of intelligent execution that the question of undue influence arises. AIR 1941 Oudh 172 (177) (DB).

(22) Extracting harsher terms than first agreed to from a pardanashin lady just before impending sale of her property is covered by Section 16. AIR

1924 Oudh 423 (424) = 27 Oudh Cas 374 (DB).

(23) See also Notes under Section 13.

SECTION 17 — SYNOPSIS

1. Scope.
2. Constructive fraud.
3. False representation of facts — Clause (1).
4. Active concealment — Clause (2).
5. Promise without intention to perform — Clause (3).
6. Other acts intended to deceive — Clause (4).
7. Act or omission declared by law to be fraudulent — Clause (5).
8. Silence amounting to fraud — Explanation.
9. Pleading and proof.

1. Scope. — (1) The illustrations to Sections 17 and 19 indicate that their principle is meant to extend to contracts which include an element of transfer, such as sales or mortgages. AIR 1940 Lah 505 (508) (DB).

(2) "Fraud" in equity has a far wider meaning than it has been given by the definition in this section and when the Court is called upon to exercise its jurisdiction in equity to set aside a decree on the ground of fraud or collusion it will not be limited by the narrow definition contained in this section in considering the question whether there is fraud sufficient for it to act. AIR 1914 Sind 28 (30) = 8 Sind LR 3 (DB).

(3) The distinction between fraud and misrepresentation is that in the case of the former the person making the suggestion does not believe it to be true while in the other case he believes it to be true — But in both cases it is the misrepresentation of fact which misleads the promisor. AIR 1931 All 154 (156) = 53 All 374 (DB).

(4) Considerations of Section 17 of the Contract Act which defines "fraud", will not be available to the parties to the Hindu Marriage. A fraud said to have been practised at the time of an agree-

are such that, regard being had to them, it is the duty of the person keeping silence to speak,[†] or unless his silence is, in itself, equivalent to speech.

Illustrations

(a) A sells, by auction, to B, a horse which A knows to be unsound. A says nothing to B about the horse's unsoundness. This is not fraud in A.

(b) B is A's daughter and has just come of age. Here, the relation between the parties would make it A's duty to tell B if the horse is unsound.

(c) B says to A — "If you do not deny it, I shall assume that the horse is sound." A says nothing. Here A's silence is equivalent to speech.

(d) A and B, being traders, enter upon a contract. A has private information of a change in prices which would affect B's willingness to proceed with the contract. A is not bound to inform B.

[*] Cf. Section 238.

[†] See Section 143.

Section 17 — Note 1 (contd.)

ment to marry, which would include also a betrothal or an engagement, would not ipso facto be a ground available to an aggrieved party to avoid a marriage. ILR (1967) Guj 822 (850, 851) = 8 Guj LR 918.

(5) The word 'fraud' as a ground for annulment of marriage under Hindu Law is limited only to those cases where consent of any of the spouses at time of solemnization of marriage was obtained by some sort of deception. On every misrepresentation or concealment, marriage cannot be dissolved. AIR 1964 Punj 359 (362) = 66 Pun LR 204 ** AIR 1968 Pat 190 (192). (Misrepresentation as to age of the bridegroom made to mother acting as agent — Consent by daughter believing it — Consent is vitiated by fraud.)

[See also AIR 1959 Madh Pra 8 (10) = 1968 MPLJ 356. (Illegitimate son represented as 'son' — Marriage with such son can be set aside.)]

(6) Concealed unchastity of a spouse before marriage, is not, and cannot be fraud within the meaning of S. 12 (1) (c) of Hindu Marriage Act, 1955. 'Fraud, spoken of as a ground for avoiding a marriage, does not include such fraud as induces a consent but is limited to such fraud as procures the appearance without the reality of consent. The simplest instance is persuasion. (1969) 73 Cal WN 751 (780, 782) (DB).

2. Constructive fraud. — (1) Merely from the fact of an exproprietary tenant executing a deed of relinquishment to the landlord, it cannot be said that there is constructive fraud on the part of the landlord where there is not even the slightest evidence of any fraud either direct or indirect, practised by him upon the tenant. AIR 1923 All 113 (114).

(2) Where a party discovering that a document already executed by him does not take effect according to his rights, executes another document in respect of

the same property it cannot be said that he had thereby acted fraudulently. AIR 1954 Mad 681 (685) = ILR (1954) Mad 775 (DB).

(3) Fraud does not mean deceit or circumvention; it means an unconscientious use of the power arising out of circumstances and conditions where in respect of one contract presumption of foul play arises from position of parties, the contract can be rescinded. 1969 MPWR 485 = 1969 Jab LJ 589.

3. False representation of facts — Clause (1). — (1) Where for securing the policy the insured gives wilfully untrue answers, he commits fraud. AIR 1942 Cal 412 (414) = ILR (1942) 1 Cal 100 (DB).

(2) In order to constitute fraud the person making the statement must be aware of the falsity of the statement. AIR 1964 Ker 109 (112, 113) = 1964 Ker LT 102. ((1889)14 AC 337, Rel. on.)

(3) Deliberately giving false replies by withholding material information, in answering questions of the insurance company during its enquiry into one's proposal amounts to fraud. AIR 1939 Sind 254 (255, 256) = ILR (1939) Kar 611 (DB) ** AIR 1959 Pat 102 (106) (DB).

(4) If in his honest judgment there was no illness or any change of health but only an ordinary disorder the mere non-communication of that event to the company cannot be ground for the insurer to avoid the policy. AIR 1959 Pat 413 (415, 416, 417) = ILR 37 Pat 1336 (DB).

(5) Insurance policy — Declaration made by proponent in the form of proposal — Proposer can be said to have made a wilfully untrue statement only if he knew that what he was stating was untrue — He can be said to have fraudulently concealed any circumstance or fact only if he knew the existence of the same. (1967) 1 Mys LJ 563 (565) = 10 Law Rep 691.

Section 17 — Note 3 (contd.)

(6) A vendor who makes reckless or grossly negligent representations regarding his title in the property commits fraud. AIR 1958 Ker 322 (324) = ILR (1958) Ker 27.

4. Active concealment — Clause (2). —

(1) The concealment of the true nature and effect of an arbitration agreement by the person who stands in a fiduciary position to another for obtaining the consent of the latter to it amounts to fraud and renders the award given in the arbitration a nullity. AIR 1916 PC 172 (179).

(2) Deliberate concealment of fact that proposer had been treated by doctor few months before policy was taken for serious ailment vitiates the policy. AIR 1962 SC 814 (820) = 1962 Supp (2) SCR 571.

(3) When the statements made in proposal by an insured were found to be false to the knowledge of the deceased insured, it was held that there was a fraudulent suppression of facts. AIR 1954 Mys 134 (137) = ILR (1953) Mys 554.

(4) A person who in his proposal for insurance states against truth of which he has knowledge that none of his near relatives had died of consumption is guilty of fraudulent concealment. AIR 1939 Cal 8 (12) (DB).

(5) Where a minor whose period of minority has been extended to 21 years states that he is of 20 years of age, his suppression of the fact that a guardian was appointed amounts to fraudulent representation as to his age. AIR 1929 Lah 880 (881, 882) = 11 Lah 167 (DB).

(6) A person who under his contract of employment has no liberty to engage in business either by himself or in association with any other firm commits fraud if he joins another in business and induces his employer to enter into contracts with that other by concealing from him the fact that he is associated, in contravention of his contract, with that other person. (1922) 66 Ind Cas 441 (442) (DB) (Lah).

(7) Where a person, although he knew that a certain decree belonging to an insolvent was secured, represented to the official assignee that it was unsecured and persuaded the official assignee to assign it to him at a very much reduced value it was held that there was active concealment of a fact which amounted to a fraud within the meaning of Section 17. AIR 1931 Mad 603 (605) (DB).

(8) Where the seller of a property who knowing full well that he has no title to dispose it of induces a purchaser to buy it from him by concealment of the fact from him, it is a case of fraud covered by Section 17. AIR 1927 All 693 (694) (DB).

(9) If a vendor has been guilty of fraud by actively concealing a fact which it was material for the purchaser to know, and the vendee was induced thereby to purchase, the fact that the purchaser by exercise of any diligence might have ascertained the truth is no defence to a suit to recover purchase money. (1888) 11 Mad 419 (436) (DB).

(10) Where a sale deed bound the vendor to remove any claim or dispute about the property it was held that the mere concealment by the vendor of the existence of a mortgage on the property was not sufficient to draw an inference of fraud. (1896) 20 Bom 522 (534) (DB).

(11) It is the duty of every adult person dealing with the minor through his guardian to take care that the transaction is a fair one and does not prejudice the minor in any way by his act or omission. AIR 1923 Mad 96 (102, 103).

(12) Omission to disclose facts which are known to exist, cannot furnish a ground for an action on the basis of fraud. AIR 1962 Punj 543 (547).

5. Promise without intention to perform — Clause (3). — (1) Every breach of contract does not amount to a fraud within the meaning of Section 17. AIR 1949 Assam 6 (7) (DB) ** AIR 1918 Low Bur 142 (143) ** AIR 1916 Bom 239 (244).

(2) To bring case within Section 17 (3) promisee must be shown to have no intention of performing promise, at time of making it. (1911) 35 Bom 93 (96) (DB).

(3) The initial intention not to perform the promise that is being made is a necessary element to constitute fraud and the existence of such an intention cannot be inferred. AIR 1953 Hyd 179 (180) = ILR (1952) Hyd 373 (DB) ** AIR 1918 Low Bur 142 (143).

(4) The fraud that is contemplated by the sub-section is a fraud which is at the very inception a fraud vitiating the transaction itself and not any subsequent conduct or representation on the part of the party or his representative. AIR 1952 Bom 425 (433, 434) (DB).

(5) Where a man and a woman went through a ceremony of marriage without the former ever having an intention to regard it as a real marriage it was held that the consent of the woman had been obtained by fraud. AIR 1952 Punj 277 (279, 280).

(6) Where person orders and obtains possession of goods with intention of not paying for them he commits fraud. He must then be considered as agent of vendor and his possession is that of vendor. If vendee tries to dispose of goods before payment by transfer of invoices to third party's name, third party gets no title to goods. AIR 1917 Lah 421 (423) (DB).

Section 17 — Note 5 (contd.)

(7) Mere delay in the payment or the retention of money which should have been paid out by itself does not constitute fraud. AIR 1963 Mys 39 (47) = 1962 Mys LJ (Sup) 377.

6. Other acts intended to deceive — Clause (4). — (1) A party who by false personation induces another to enter into a contract with him under the belief that he is somebody else commits fraud. 1886 Pun Re. No. 21 p. 37 (38).

(2) Where the owner of a horse, in order to sell it, concealed cleverly by artificial means a crack in its hoof and rendered it difficult for any one, except an expert, to discover the defect on ordinary inspection it was held that there was fraud which entitled the purchaser to repudiate his bargain. 1904 Pun Re No. 49, p. 149 (151).

(3) Abuse of confidence resulting from fiduciary relationship by unconscionable use of it to gain an advantage over the confiding party constitutes fraud of gravest character. AIR 1947 Oudh 89 (91).

(4) It is a fraud on the part of a plaintiff to claim beneficial title under a deed in respect of which he was merely a benamidar. AIR 1941 Bom 274 (275) = ILR (1941) Bom 575 (FB). (31 Bom 405, Overruled.)

7. Act or omission declared by law to be fraudulent — Clause (5). — (1) Omissions to make disclosures mentioned in Section 55, para (1) (a) and para (5) (a) of the Transfer of Property Act by the seller and buyer respectively are declared to be fraudulent by last para of that section. (1896) 20 Bom 522 (534) (DB).

8. Silence amounting to fraud — Explanation. — (1) The duty referred to in the Explanation to the section is a legal duty and not merely a moral duty to speak. AIR 1937 Lah 598 (598) ** AIR 1923 Sind 25 (27).

(2) In certain defined types of transactions and relation known as contracts uberrima fides there is a legal and equitable duty on the parties, not merely to state truly whatever is stated but also to divulge with candour and completeness facts regarding which there is no obligation to disclose at all in transactions which do not fall within that recognised class. A contract to marry is one of such transactions. AIR 1937 Nag 270 (272) = ILR (1937) Nag 299.

(3) Purchaser occupies no fiduciary position and is under no obligation to disclose facts. There is in such case no duty to speak and silence does not amount to fraud. Intentional misleading communication would be fraudulent. Equal means of knowledge is immaterial where there is a misrepresentation or any thing lulling suspicion. AIR 1931 Mad 603 (605) (DB).

9. Pleading and proof. — (1) The party alleging fraud must furnish specific details. AIR 1937 PC 146 (148) = 64 Ind App 143 = 31 Sind LR 306 = ILR (1937) All 566 ** AIR 1952 Bom 425 (433) ** AIR 1933 Cal 366 (371) = 60 Cal 262 ** (1911) 10 Ind Cas 922 (923) (Low Bur) ** (1841) 2 Moo Ind App 181 (244) (PC).

(2) A party who relies upon fraud can succeed only upon proof of fraud as alleged by him. (1911) 10 Ind Cas 922 (923) (Low Bur) ** AIR 1925 Cal 555 (556) ** (1841) 2 Moo Ind App 181 (244) (PC).

(3) Pleas such as misrepresentation and fraud must be examined with the utmost rigour. AIR 1923 Sind 25 (28).

(4) A charge of fraud whether made in civil or criminal proceedings must be established beyond reasonable doubt. AIR 1941 PC 93 (95).

(5) To prove fraud it must be proved that representations made were false to the knowledge of party making them, or were such, that the party could have no reasonable belief that they were true; that they were made for the purpose of being acted upon and that they were believed and acted upon and caused the actual damage alleged. AIR 1924 All 17 (19) = 45 All 624 (DB) ** AIR 1962 Punj 543 (547). (The absence of any one of these elements is fatal to an action based on fraud.)

[See also AIR 1959 Madh Pra 8 (10) = 1958 MPLJ 356. (It is no defence that the person to whom false representations were made has been guilty of negligence. (1881) 20 Ch D 1, Ref.)]

(6) Fraud cannot be directly proved but has to be inferred from the surrounding circumstances and the conduct of the parties. AIR 1946 Nag 419 (423) (DB) ** AIR 1958 Madh Pra 417 (422) ** AIR 1957 Mad 194 (197) ** AIR 1939 Lah 439 (451) = ILR (1939) Lah 489 (DB) ** AIR 1926 Cal 73 (77) (DB).

[See also AIR 1955 Assam 177 (181) = ILR (1955) 7 Assam 53.]

(7) An inference of fraud cannot be based on mere speculation or surmises. There must be some positive materials on record to draw an inference of fraud. AIR 1958 Madh Pra 417 (422) ** AIR 1954 Assam 94 (95).

(8) Circumstances of mere suspicion should not be taken as proof of fraud, but the evidence must be sufficient to overcome the natural presumption of honesty and fair dealing. Fraud is not to be presumed or inferred lightly. AIR 1926 Cal 73 (77) (DB).

(9) Evidence of unfairness of transaction may be taken to assist the Court to come to a conclusion whether there was fraud or not. But that evidence alone is not sufficient to find fraud.

18. "Misrepresentation" defined.—"Misrepresentation" means and includes—

- (1) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;
- (2) any breach of duty which, without an intent to deceive, gains an advantage to the person committing it, or any one claiming under him, by misleading another to his prejudice or to the prejudice of any one claiming under him;
- (3) causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement.*

[*] See S. 13 and Explanation to S. 17 supra.

Section 17 — Note 9 (contd.)

where the direct evidence on the question of fraud is unreliable. AIR 1941 Pat 83 (90) = 19 Pat 669 (DB).

(10) When the parties to a transaction do not stand upon an equal footing the law raises in a suitable case a presumption of fraud. AIR 1947 Oudh 89 (91).

SECTION 18 — SYNOPSIS

1. Sub-section (1).

2. Sub-section (2).

3. Sub-section (3).

4. Onus.

1. Sub-section (1). — (1) The principal difference between fraud and misrepresentation is that, in the one case, the person, making the suggestion, does not believe it to be true, and in the other he believes it to be true, though in both cases it is a misstatement of fact which misleads the promisor. AIR 1931 All 154 (156) = 53 All 374 (DB).

(2) Where one party induces the other to contract on the faith of representations made to him any one of which is untrue, the whole contract is in a Court of Equity, considered as having been obtained fraudulently. (1890) 17 Cal 291 (297) = 16 Ind App 233 (PC).

(3) Where a person induced another, by making a representation which was not true and which was not warranted by any information he had at the time, that the ship was of a particular size, to enter into a charterparty, it was held that the party so induced was entitled to avoid the contract on the ground of misrepresentation. (1890) 14 Bom 241 (248).

(4) A representation as to title made recklessly or with gross negligence amounts to fraudulent misrepresentation. AIR 1958 Ker 322 (324) = ILR (1958) Ker 27 (DB).

(5) Seller professing to be owner, though merely lease-holder, is guilty of misrepresentation. AIR 1929 All 837 (839) (DB).

(6) Where a Hindu father agrees to sell family property without necessity, alleging that he is the only owner thereof he is guilty of misrepresentation. AIR 1927 Sind 219 (222) = 20 Sind LR 220 (DB).

(7) False information given by the vendor, whether upon enquiry or otherwise, about the income or rental of the property amounts to misrepresentation. AIR 1932 Nag 148 (149) = 28 Nag LR 184.

(8) A positive assertion by the seller of a horse, made in the absence of information which would warrant it, that the horse is sound and free from vice would, in spite of a recommendation added by the seller to the purchasers to get him self satisfied on the point, amounts to a misrepresentation where the horse is in fact otherwise. 1886 Pun Re No. 41 p. 73 (79, 80) (DB).

(9) Misrepresentation made by a salesman of one of the contracting parties is misrepresentation made by one contracting party to other. AIR 1940 Oudh 35 (41) = 15 Luck 191 (DB).

(10) Where a person deliberately made a false statement to his sister to the effect, that their father while he was alive, had created a wakf to persuade her to execute a deed accepting a partition made during her minority it was held that his action amounted to both fraud and misrepresentation. AIR 1938 Rang 264 (266, 267) (DB).

(11) An endorsement containing an acknowledgment of full satisfaction of the mortgage, when it is not so satisfied, amounts in law to misrepresentation. AIR 1934 Nag 29 (30, 31) = 30 Nag LR 196.

(12) Where B, an agent of a company, relying upon information given to him by C, that a certain person would be a director of the company, induced certain persons to buy shares — Held that, B was not warranted in making the positive assertion relying upon the second-hand information given to him and, therefore, there was misrepresentation within Section 18 (1). (1900) 4 Cal WN 369 (388) (DB).

(13) Where the landlord who had been informed by the prospective tenant that he required only a house which had a certain number of be-rooms sent the plan of a house in which it was marked contrary to the truth that it had the required number of bed-rooms it was held that the tenant who entered

Section 18 — Note 1 (contd.)

into the contract on the faith of the plan was entitled to plead misrepresentation and avoid it on that ground. AIR 1917 Lah 173 (174).

(14) If a blind, or an illiterate man signs a document on the representation that it contains something, which it does not contain in reality, then he can plead that, there was no consent as contemplated by the Contract Act. If that plea fails, it is still open to him to plead misrepresentation and ask for relief. AIR 1925 Pat 140 (141) (DB).

(15) Where a person in whom a widow had implicit confidence induced her to sign a deed of gift on the representation that it was a power of attorney it was held that the execution of the deed was obtained by misrepresentation. (1949) 54 Mys HCR 451 (479).

(16) Where at the time an agreement for a mining lease was executed the Government insisted on being paid a higher rate of royalty on the ground that it was their intention to increase the rates and the fact that such was their intention was evident from the draft rules which they had already published the subsequent relinquishment by the Government of their idea to increase will not entitle the lessee to repudiate his liability to pay the higher rate on the ground of any misrepresentation of a material fact. AIR 1965 SC 470 (472) = 1963 Supp (2) SCR 235. (AIR 1957 Madh Pra 135 (138), Affirmed.)

(17) Statements in a company prospectus which are in the nature of puffing do not amount to misrepresentations of fact. AIR 1950 All 508 (512) = ILR (1951) 2 All 228 (DB).

(18) Plaintiff was induced to enter into partnership agreement by false representation — **Held**, that the assent given by the plaintiff on such false representation was not binding on the plaintiff. (1965) 2 Mad LJ 65.

2. Sub-section (2). — (1) The second clause of S. 18 is probably intended to meet all those cases which are called in the Courts of Equity, cases of 'constructive fraud' in which there is no intention to deceive, but where the circumstances are such as to make the party, who derives a benefit from the transaction, equally answerable in effect as if he had been actuated by motives of fraud or deceit. (1879) 3 Bom 242 (267).

(2) A concealment of any material fact is just as serious as a misrepresentation of it. AIR 1938 PC 103 (109).

(3) Where vendor of lease-hold property is informed by vendee of object of his purchase and knows that the lease contains covenants, which will defeat that object, and yet remains silent such silence will in equity be equivalent to

misrepresentation. AIR 1914 Cal 661 (662) = 42 Cal 28 (DB).

(4) At the time of an auction of liquor shops in a district a statement was circulated among the proposed bidders showing the names of the places of the liquor shops and the average quantity sold therein. Plaintiff was a purchaser of one of such shops. Near the place of the plaintiff, there was another shop which prior to the auction was allowed to be brought still nearer but no mention was made of this change in the statement. In a suit by the plaintiff for a declaration that the Secretary of State had no right to make a demand on the plaintiffs for money until the loss which the plaintiff had suffered owing to the neglect of the defendant was made good. **Held**, there was an omission to state material fact and the plaintiff could proceed under Section 19, on the ground of misrepresentation. AIR 1928 Bom 17 (17) (DB).

(5) A contract of life insurance is one uberrima fides which entitles the insurer to be put in possession by the insured of all material facts regarding himself. AIR 1954 Mad 636 (637) = ILR (1955) Mad 285 (DB).

(6) In the case of insurance contracts it is the duty of the assured to disclose to the insurer, before the contract is concluded, every material circumstance known to him, and which in the ordinary course of business ought to be known to him. If the assured fails to make such a disclosure the insurer may avoid the contract. AIR 1954 Bom 347 (350).

3. Sub-section (3). — (1) Where the company, by their Directors, acting within their authority, and in perfect assurance, sold a bill to the bank on behalf of the company as a bill upon which the company was liable, which, however, turned out to be one, upon which the company was not liable, **Held**, there was misrepresentation within the meaning of Clause (3) of Section 18. ('81) 5 Bom 92 (97, 98).

(2) Where a party executes a document under a mistake as to the subject of the contract on an innocent misrepresentation by the other party that the document contained all the terms agreed upon, while in fact it did not contain all the terms, held that the mistake was sufficient to justify repudiation of the contract. AIR 1932 Bom 151 (153) = 56 Bom 180 (DB).

(3) A sale in execution cannot be set aside in a suit by the auction-purchaser on the ground of a mistake in the sale proclamation as to the extent of the judgment-debtor's share in the property where it is not proved that any misrepresentation was intentionally made by

19. Voidability of agreements without free consent.—When consent to an agreement is caused by coercion, [* * *] fraud† or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.

A party to a contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representations made had been true.‡

Exception.—If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of Section 17, the contract, nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.

Explanation.—A fraud or misrepresentation which did not cause the consent to a contract of the party on whom such fraud was practised, or to whom such misrepresentation was made, does not render a contract voidable.

Section 18 — Note 3 (contd.)

or on behalf of the decree-holders. AIR 1921 All 223 (224) (DB).

(4) Although the vendor of land makes a wrong statement as to the nature of the tenure upon which the land was held innocently and out of a mistaken impression it would amount to a misrepresentation. (1954) 20 Cut Tim 591 (593).

(5) Guarantee obtained by misrepresentation is invalid. See S. 142.

(6) Misrepresentation may be innocent and not wilful but such innocent misrepresentation does not cause avoiding a contract unless it is made without reasonable ground. AIR 1963 Orissa 217 (220) = (1963) 5 Orissa JD 361.

4. Onus. — (1) A alleging that deed executed by him was vitiated by misrepresentation — Onus is upon A to establish plea of misrepresentation. AIR 1967 SC 1395 (1396) = (1967) 1 SCR 275 ** AIR 1968 All 224 (228).

SECTION 19 — SYNOPSIS

1. Scope.
2. "Consent caused by coercion, fraud or misrepresentation."
3. Inadequacy of consideration.
4. Exception.
5. Explanation.
6. Person entitled to avoid contract.
7. Remedies under the section.
8. Rescission of contract — Effect.
9. Plea of fraud.

1. Scope. — (1) Section 17 read with Section 19 extends to contracts, which include an element of transfer, such as sales and mortgages. AIR 1940 Lah 505 (508) (DB).

(2) Section 17, read with Section 19, permits a contract to be avoided, when based on representations known to be false by the person making them. AIR 1940 Lah 505 (508) (DB).

(3) Where there was a misrepresentation as to the nature of the document and not merely as to its contents, there

was no real execution and the document was void ab initio and not merely voidable. AIR 1940 Pat 201 (203) (DB) ** AIR 1956 Cal 575 (577) (DB) ** AIR 1968 SC 956 (958) = (1968) 2 SCR 797.

(4) Where there is no consent at all within the meaning of Section 19 the document is ab initio void and need not be set aside. AIR 1922 Pat 514 (525) = 2 Pat 52 (DB).

(5) Person induced to execute deed under belief that he is signing deed of different nature by promisee's fraud — Contract is void ab initio. AIR 1921 Cal 786 (788) (DB).

(6) Section 19 of the Contract Act cannot apply to the case, where the contract itself contains a defeasance clause. AIR 1942 Cal 412 (417) = ILR (1942) 1 Cal 100 (DB).

(7) A contract, which is neither illegal nor fraudulent as between the parties, cannot be refused enforcement merely because a third person has a right to refuse to give effect to that contract, as regards himself. 1913 Pun LR No. 48, p. 182 (189) = 1913 Pun Re No. 58 (DB).

(8) As to consequences of rescission of voidable contract, see Section 64. As to pledge by person in possession under voidable contract, see Section 178A. As to sale by person in possession under voidable contract, see Section 29, Sale of Goods Act, 1930.

2. "Consent caused by coercion, fraud or misrepresentation." — (1) Under Sections 19 and 19A of the Contract Act, an agreement entered into as a result of coercion, fraud or undue influence is not void but only voidable at the option of the aggrieved party. AIR 1952 Punj 224 (225) = ILR (1951) Punj 298 (DB) ** AIR 1952 Cal 73 (74) ** (1910) 37 Cal 81 (89) (DB) ** (1904) 28 Bom 639 (642) (DB) ** AIR 1962 SC 1893 (1907) = (1963) 3 SCR 338 ** AIR 1967 Ker 15 (16) = 1966 Ker LT 494 ** 1964 Ker LJ 275 ** AIR 1962 Cal 48 (52) = 65 Cal

Illustrations

(a) A, intending to deceive B, falsely represents that five hundred maunds of indigo are made annually at A's factory, and thereby induces B to buy the factory. The contract is violable at the option of B.

(b) A, by a misrepresentation, leads B erroneously to believe that five hundred maunds of indigo are made annually at A's factory. B examines the accounts of the factory, which show that only four hundred maunds of indigo have been made. After this B buys the factory. The contract is not voidable on account of A's misrepresentation.

(c) A fraudulently informs B that A's estate is free from incumbrance. B thereupon buys the estate. The estate is subject to a mortgage. B may either avoid the contract, or may insist on its being carried out and the mortgage debt redeemed.

Section 19 — Note 2 (contd.)

WN 727 (DB) ** AIR 1960 J & K 132 (134).

(2) Fraud referred to in Section 19 is fraud as defined in Section 17 and does not include the infringement of a condition in a contract to transfer a tenancy, requiring previous consent of a third party to the transfer of tenancy. 1913 Pun LR No. 48, p. 182 (188) = 1913 Pun Re No. 58 (DB).

(3) Secrecy prima facie implies fraud. (1909) 32 Mad 242 (253) (SB) ** ILR (1965) 44 Pat 917 (DB).

[See also (1946) 36 Trav LJ 516 (523, 524) (DB).

(4) A contract to purchase shares, if it had been induced by any misrepresentation in the prospectus, becomes only voidable and not void. But the share-holder must rescind the contract promptly, that is within a reasonable time of his becoming aware of the fraud. AIR 1950 All 508 (513) = ILR (1951) 2 All 228 (DB).

(5) Where a creditor obtained in lieu of a time-barred debt a pronote from his debtor's widow by misrepresenting to her that it was in renewal of a pronote which never existed it was held that the widow was not liable. AIR 1935 Oudh 12 (13).

(6) Where a person, against whom a decree with costs for possession was made, and whose right of appeal was time barred, made an offer to decree-holder that he would not file an appeal from decree if costs were given up and the decree-holder accepted it, it was held that the agreement was void under S. 20, if the judgment-debtor had honestly believed that he had right to appeal when he made the representation as both the parties were under mistake of fact, but if the judgment-debtor had acted dishonestly, the agreement was voidable under Section 19 as brought about by misrepresentation. AIR 1939 Lah 511 (512) = ILR (1940) Lah 392.

(7) Even a mistake induced by innocent misrepresentation is sufficient to justify repudiation of the contract. AIR 1932 Bom 151 (153) = 56 Bom 180 (DB)

** AIR 1963 Orissa 217 (220) = (1963) 5 Orissa JD 361.

(8) Where the agreement between the insurer and the insured is that the truth of the statements made by the latter in the proposal shall be foundational to the enforceability of the contract the insurer can avoid the contract on the ground of any inaccuracy whether it was a material one which would influence his decision in accepting the risk or fixing the amount of premium or was otherwise. AIR 1958 Mys 53 (60) = ILR (1957) Mys 304 (DB) ** AIR 1968 J and K 39 (45) = 1967 Kash LJ 144.

(9) Where one of the contracting parties says: "I am well known to the National Bank in your city," it is not a statement of fact, but only his own opinion as to the state of his credit, though it may be false; such statement is not one of fact, and even if false, does not avoid the contract under Section 19. AIR 1916 Mad 830 (831) (DB).

(10) Mortgage brought about by concealing, fraudulently from mortgagee the existence of prior mortgage is voidable at option of mortgagee. AIR 1915 Mad 1059 (1059) (DB).

(11) In entering into a contract or inducing another person to act, if one should misrepresent a fact, then the contract between him and the person so deceived shall be based in law upon the ground that the fact so misrepresented must be made good by the party misrepresenting it. AIR 1915 Bom 124 (128).

(12) Where both the plaintiff and the defendant are parties to the fraud, and the fraud has been successfully committed, the plaintiff is not entitled to any relief from the Court on the maxim in pari delicto potior est conditio possidentis. AIR 1933 Oudh 124 (127) = 8 Luck 233 (DB).

(13) Misrepresentation inducing consent to marry cannot upset a marriage. The position in law is that the party imposed upon must be deceived to such an extent that there is in reality, no consent at all to the marriage. AIR 1933 All 122 (126, 127) = 55 All 185.

(d) B, having discovered a vein of ore on the estate of A, adopts means to conceal, and does conceal, the existence of the ore from A. Through A's ignorance B is enabled to buy the estate at an under-value. The contract is voidable at the option of A.

(e) A is entitled to succeed to an estate at the death of B; B dies; C, having received intelligence of B's death, prevents the intelligence reaching A, and thus induces A to sell him his interest in the estate. The sale is voidable at the option of A.

[°] The words "undue influence" were repealed by the Indian Contract Act Amendment Act, 1899 (6 of 1899), S. 3.

[†] As to causing consent by fraud, see S. 14, last para, supra.

[‡] For circumstances under which specific performance can be obtained, see the Specific Relief Act (1963), Ss. 10 to 13 and as to circumstances under which the Court can refuse specific performance, though there may be no fraud or misrepresentation, see Ss. 18-20, *ibid*.

Section 19 — Note 2 (contd.)

(14) One party to agreement in strong bargaining position — Inference of coercion, fraud or misrepresentation not warranted — Contract cannot be avoided. AIR 1959 All 639 (642).

(15) In a case where a party seeking to avoid a bond on the ground of misrepresentation, fraud and deceit practised by the other party, failed to prove either the existence of a fiduciary relationship or that he was ignorant of the accounts, it was held that the same could not be avoided. This is so notwithstanding the fact that the fraud in equity has a broader meaning than at law. (1966) 68 Pun LR 955 (DB).

(16) Acceptance to pay bonus in pursuance of demand of workers is not rendered unenforceable merely because the demand was backed by threat of strike. AIR 1966 Assam 115 (118) = (1967) 2 Lab LJ 371 (DB).

3. Inadequacy of consideration. — (1) Inadequate consideration may lead to an inference of fraud or undue influence. But the inadequacy must be apparent and not merely inferential. AIR 1926 Pat 539 (542) (DB) ** AIR 1940 Lah 505 (508) (DB).

4. Exception. — (1) Exception to Section 19 applies when contracting party might, with due diligence, have discovered misrepresentation before he entered into contract. AIR 1917 Lah 173 (174).

(2) The exception to Section 19, Contract Act, applies to all cases of misrepresentation as distinguished from fraud and should not be restricted to misrepresentation, which is "fraudulent within the meaning of S. 17." AIR 1939 Cal 473 (475) = ILR (1939) 1 Cal 389 (DB) ** (1888) 11 Mad 419 (439) (DB).

(3) If the executants had not the means of discovering truth with ordinary diligence, the exception to Section 19 is not applicable. (1879) 4 Bom 242 (269).

(4) There is no misrepresentation, if there are means of discovering truth

with ordinary diligence. AIR 1916 Lah 151 (153) ** AIR 1958 Andh Pra 533 (539) = (1958) 2 Andh WR 153 (DB).

(5) A person, who had the means of discovering the truth, with ordinary diligence, cannot avoid the contract on the ground that he was deceived by the misrepresentation. AIR 1932 Nag 148 (151) = 28 Nag LR 184 ** AIR 1958 Andh Pra 533 (539) (DB) ** AIR 1918 Lah 94 (95) = 1918 Pun Re No 42 ** (1900) 4 Cal WN 369 (382) (DB) ** 1886 Pun Re No 41 P 73 (77) (DB) ** (1879) 4 Cal 801 (807) (DB) ** AIR 1963 Orissa 217 (220) = (1963) 5 Orissa JD 361.

(6) Failure to make such inquiries, as an ordinary prudent man would make, may be evidence that the person, to whom misrepresentation was made, was not actually deceived. AIR 1923 Sind 5 (14) = 16 Sind LR 112 (FB).

(7) There can be no estoppel where the truth of the matter is known to both parties. (1903) 30 Cal 539 (546) = 30 Ind App 114 (PC).

(8) Where there is no reason to suspect the representation as untrue, but the statement turns out to be such, the party who makes the misrepresentation cannot be heard to plead that the right to relief is gone, because the other party had the means to discover the truth by due diligence. (1900) 4 Cal WN 369 (381) (DB).

(9) Cases of fraud by active misrepresentation as defined in S. 17, Cl. 3 will not be covered by the exception. AIR 1956 Orissa 81 (83) = ILR (1955) Cut 95 (DB) ** AIR 1939 Cal 473 (476) = ILR (1939) 1 Cal 389 (DB) ** 1886 Pun Re No 41, p 73 (77) (DB) ** AIR 1962 Madh Pra 144 (145) = 1962 MPLJ 40 (DB).

(10) In the case of active misrepresentation, to get relief under S. 19, party defrauded, need not establish that he had no means of discovering truth with ordinary diligence. AIR 1939 Cal 473 (476) = ILR (1939) 1 Cal 389 (DB) ** AIR 1940 Mad 560 (561) (DB) ** AIR 1931 All 154 (157) = 53 All 374 (DB) **

Section 19 — Note 4 (contd.)

(1888) 11 Mad 419 (430) (DB) **
AIR 1963 Orissa 217 (220) = (1963) 5
OJD 361.

(11) The phrase "fraudulent within the meaning of Sec. 17" in the Exception applies to word "Silence" exclusively and not to the word "Misrepresentation". AIR 1939 Cal 473 (475) = ILR (1939) 1 Cal 389 (DB) ** AIR 1956 Orissa 81 (83) = ILR (1955) Cut 95 (DB) ** AIR 1931 All 154 (157) = 53 All 374 (DB) ** (1900) 4 Cal WN 369 (384) (DB).

(12) Where execution sale is sought to be set aside on ground of misrepresentation by the officer conducting sale, exception to S. 19 does not apply. (1909) 36 Cal 323 (333) = 36 Ind App 32 (PC).

5. Explanation. — (1) Misrepresentation or fraud must have in fact materially induced contract, in order to give the right of avoidance, and such plea ought to be specifically taken in the plaint. AIR 1920 Cal 908 (909) (FB) ** AIR 1932 Nag 148 (150) = 28 Nag LR 184 ** AIR 1915 Mad 1152 (1154) (DB).

(2) Whether a particular misrepresentation was of such a nature, that it did cause the consent of the person, to whom it was made, or whether it was of such a nature that his consent was, in no way, affected by the misrepresentation is a question of fact. AIR 1921 Mad 198 (198) (DB).

(3) Illustration (b) to Section 19 is not exhaustive of the class of cases which could come under that explanation. AIR 1921 Mad 198 (198) (DB).

(4) Where the fact of minority of one of the parties to a contract is known to the other, the misrepresentation by the minor as to his age is not such a fraud as would vitiate the contract, and the explanation would cover such a case, irrespective of the consideration whether the principles of estoppel as laid down in Section 115, Evidence Act, would apply to minors or not. (1903) 30 Cal 539 (546) = 30 Ind App 114 (PC).

(5) Explanation to the section must not be taken as meaning that any subsequent fraud will not affect the validity of the original contract as it deals with fraud only so far as it affects the free will of the parties at the time of entering into contract. AIR 1915 Mad 1152 (1154) (DB) ** (1913) 37 Bom 158 (169).

(6) Where the terms of policy show that the averments made as to the state of health of the insured in the proposal form were the basis of the issue of policy, the insured person, who deliberately concealed the fact that he had been treated for serious illness few months before the policy was taken, cannot take advantage of Explanation to Section 19 in view of Section 45 of

Insurance Act (1938). AIR 1962 SC 814 (820) = 1962 Supp (2) SCR 571.

(7) See also Notes on Section 17.

6. Person entitled to avoid contract. —

(1) If a transaction which is voidable is admitted by the person, who is entitled to avoid it, it cannot be questioned by a third party. AIR 1916 Cal 924 (925) (DB) ** AIR 1956 Andhra 195 (197) ** AIR 1949 East Punj 277 (280) (DB) ** (1912) 36 Bom 37 (41) (DB) ** (1904) 28 Bom 639 (642) (DB).

[See also AIR 1929 Nag 254 (257) = 25 Nag LR 187 (FB).]

(2) The right to avoid a transfer or conveyance is not a mere personal right but can be exercised by heirs or legal representatives of person unduly influenced or defrauded, unless the person has indicated his election to stand by transaction. AIR 1918 Bom 93 (94) = 43 Bom 173 (DB).

[See also AIR 1955 Tripura 23 (25).]

(3) The person who claims a right in the property transferred, only as the successor of the transferor cannot challenge the transfer on any other ground except fraud committed on the transferor. AIR 1954 Ajmer 64 (65).

7. Remedies under the section. —

(1) There are only two remedies open to the party to a contract under the section. They are (i) to avoid the contract before the expiry of its term and (ii) to enforce it as represented. AIR 1928 Bom 17 (18) (DB) ** AIR 1929 Nag 254 (257) = 25 Nag LR 187 (FB) ** AIR 1957 Raj 167 (170) = ILR (1956) 6 Raj 445 (DB) ** AIR 1941 Nag 111 (113, 114) (DB) ** AIR 1932 Nag 148 (150, 151) = 28 Nag LR 184 ** AIR 1918 All 74 (76) = 40 All 619 (DB) ** AIR 1917 Lah 173 (175) ** (1881) 5 Bom 92 (98) ** AIR 1963 All 459 (463) = 1963 All LJ 152 (FB). (It is only when the deceived party insists on the performance of the contract by the defrauding party that the latter can insist on its rights in the contract and not otherwise.)

[See also AIR 1958 Andh-Pra 605 (606, 607) (DB).]

(2) Where a party to a contract treats it as voidable and exercises his option, he cannot go back to the agreement to enforce it. When he not only states that he treats the document incorporating the agreement in suit as void but proceeds on that footing to make his demands on the other party, though the latter does not admit that the former could do so and the former party does not, at any time, give up the attitude taken by him, he cannot afterwards be permitted to enforce the agreement as a subsisting contract. AIR 1943 Sind 197 (212) = ILR (1943) Kar 49 (DB) ** AIR 1962 Cal 12 (19) = ILR (1961) 2 Cal 558 (DB).

Section 19 — Note 7 (contd.)

(3) Section 19 does not entitle a party to insist on the performance of different contract from the one entered into by him. AIR 1929 Nag 254 (257) = 25 Nag LR 187 (FB).

(4) Where a person is induced by the false representations of others to become a partner with them, the Court will rescind the contract of partnership at his instance and will reimburse him with amount paid. AIR 1921 Lah 130 (131) (DB).

[See also ILR (1964) 1 Mad 872 (880, 894). (The assent of the plaintiff to the partnership was not binding on him as it was obtained by false representation.)]

(5) Relief cannot be granted when fraudulent or illegal object has been carried out and both parties are in pari delicto. (1911) 15 Cal WN 408 (409) (DB).

(6) Where the parties have made an agreement and one party records it erroneously, the other party, if he knows at the time that there is an error, acts fraudulently, if he seeks to take advantage of that error, and cannot be allowed to enforce it. AIR 1934 Cal 778 (779) = 61 Cal 548.

(7) After commencement of winding up proceedings of a company, a shareholder cannot have his contract to take shares set aside on the ground of fraud or misrepresentation unless he has not only repudiated his shares, but also taken proceedings to have his name removed or asserted his right to repudiate them in an action by company to enforce calls upon him before liquidation. Even if the contract was voidable on the ground of fraud or misrepresentation if the applicant had ratified it he was debarred from questioning it. AIR 1918 Lah 94 (95) = 1918 Pun Re No. 42.

(8) A person induced by fraud to enter into a contract can obtain remedy by rescission only when restoration of the parties to status quo is possible. Otherwise he has a remedy by way of a suit for damages. (1910) 37 Cal 81 (88, 89) (DB).

(9) Misrepresentation about subject-matter of contract made not in the contract but collaterally — Remedy is claim for damages for breach of the collateral contract, if any. AIR 1915 PC 113 (114).

(10) Where both the parties to a sale and purchase of car was under a bona fide mistake that the price which was then paid was the correct controlled price, there is no question of the purchaser having been induced to buy the car by any misrepresentation. Hence, it is not necessary for the purchaser to avoid the contract, return the car and claim back the entire amount. The case would be covered by Section 72 and he

can get back the excess paid. AIR 1952 Mad 779 (780, 781).

(11) The law has made a distinction between voidable transactions and void transactions based on the reason, that while in the case of the former a decree of Court rescinding the contract on the ground of fraud, coercion or undue influence is necessary to revest the title to the properties which passes to the transferee on the execution of the deed, such a procedure is not necessary in the case of void transactions because they do not vest any title at all in the transferee. AIR 1953 Mad 611 (612) = ILR (1955) Mad 398 (DB).

8. Rescission of contract — Effect.—

(1) When a voidable transaction is avoided, the avoidance is effective not from that date but from the date of the original transaction itself. One effect of the avoidance is to get rid of the transaction, with the result that in law it is as if the transaction had never taken place. AIR 1957 Mad 451 (452) (DB) ** AIR 1963 All 459 (463) = 1963 All LJ 152 (FB).

(2) Section 19 does not require that an agreement shall be rescinded in a particular form. Notice of rescission of contract by the defrauded party to a bank, acting as the agent of the defrauding party, in course of its business is notice to defrauding party. AIR 1963 All 459 (462) = 1963 All LJ 152 (FB).

(3) See also under Section 64.

9. Plea of fraud.— (1) In cases of accomplished fraud if only one party acts fraudulently, he cannot be allowed, as plaintiff or defendant, to plead his own fraud. AIR 1941 Bom 274 (278) = ILR (1941) Bom 575 (FB) ** AIR 1941 Nag 357 (361) = ILR (1942) Nag 564 (DB) ** AIR 1936 Mad 630 (631) ** AIR 1926 Mad 631 (632) ** (1871) 15 Suth WR 273 (274) (DB).

[But see AIR 1959 Pat 505 (507, 508) = 1959 Pat LR 171.]

(2) Where both parties are equally fraudulent, the Courts will refuse to enforce the fraudulent transaction, with the result that — (a) where the plaintiff seeks relief on the allegation and on the basis of joint fraud, his suit will be dismissed; and (b) where he seeks relief by suppressing the fraud, the defendant can plead and prove the common fraud to defeat the plaintiff's claim. AIR 1941 Bom 274 (278) = ILR (1941) Bom 575 (FB) ** AIR 1940 Pat 379 (380) (DB) ** AIR 1935 All 799 (801) ** AIR 1926 Nag 259 (260).

(3) A fraud cannot be pleaded successfully against an innocent person. It is only where the attempted fraud has been wholly or partially carried into effect that the Court will give effect to the fraudulent transaction as between transferor and transferee. AIR 1923 All

*[19A. Power to set aside contract induced by undue
sent to an agreement is caused by undue influence, the a
voidable at the option of the party whose consent was so

Any such contract may be set aside either absolutely
was entitled to avoid it has received any benefit thereunde
conditions as to the Court may seem just.

Illustrations

(a) A's son has forged B's name to a promissory note. B, ^{undue}
of prosecuting A's son, obtains a bond from A for the amount of the
forged note. If B sues on this bond, the Court may set the bond aside.

(b) A, a money-lender, advances Rs. 100 to B, an agriculturist, and,
by undue influence, induces B to execute a bond for Rs. 200 with interest

Section 19 — Note 9 (contd.)

164 (164) ** AIR 1960 Madh Pra 323
(329) = 1960 MPLJ 865 (DB).

(4) A person whose consent has been
brought about by fraud is entitled to
resist the claim under the contract by
pleading fraud even though he may not
have himself sued to set aside the trans-
action, and is not precluded from urging
the plea in defence by the lapse of
time. (1904) 28 Bom 639 (642) (DB).

(5) In cases of fraud as in cases of
undue influence and coercion the par-
ties' pleadings must set forth full parti-
culars and the cases can be decided only
on the particulars as laid. There can
be no departure from them in evidence.
AIR 1955 Tripura 23 (24) ** AIR 1969
SC 552 (554) = (1969) 2 SCJ 105. (Plea
under Section 19 cannot be raised as
new plea in appeal filed under Art. 133.)

(6) Although the plaintiff fails to sub-
stantiate his plea of misrepresentation,
still that will not disentitle him from
getting such relief as under the circum-
stances proved, he is entitled to. The
suit need not be dismissed on account
of such failure. AIR 1931 Nag 63 (65) =
27 Nag LR 19.

(7) If an illiterate person who is other-
wise worldly-wise proves that the deed
was not at all read out to him in case
where he is acquainted with the langu-
age of the deed or was not properly ex-
plained to him when he is unacquainted
with the language of the deed and
as such alleges that he did not
know what the deed was about
then the onus shifts to the person who
procures the execution of the deed to
prove that the executant knew of the
contents of the deed or were explain-
ed to him. (1962) 66 Cal WN 254 (260).

SECTION 19A — SYNOPSIS

1. Scope.

2. C. P. and Berar Amendment — Champerious agreements.

1. Scope.— (1) Court has power to
interfere and relieve a defendant against
unconscionable transactions under this
Section. (1907) 31 Bom 348 (352).

(2) No contract can be avoided merely
on the ground that it embodies an un-
conscionable bargain unless undue influ-
ence can be proved by the plaintiff. 1913
Punj LR No. 305, p. 1027 (1031) (DB).

(3) Where a transaction is made be-
tween two parties under circumstances,
giving an unfair advantage to the domi-
nating party, that transaction cannot be
upheld in a Court of law. AIR 1931 Nag
63 (65) = 27 Nag LR 19. (Sale.) ** AIR
1956 All 439 (443, 444) = ILR (1956) 1
All 24 (DB) ** AIR 1947 Oudh 89 (91)
** AIR 1938 Rang 264 (266, 267) (DB) **
(1902) 5 Oudh Cas 256 (264, 265) ** AIR
1966 Andh Pra 104 (107) = (1964) 2
Andh LT 405 ** AIR 1961 Mad 190
(194) = (1960) 2 Mad LJ 355.

(4) Acknowledgment of liability to pay
certain sum is not binding, when the
executant signed it under intimidation.
AIR 1921 Lah 362 (363).

(5) The Court interferes to set aside
gifts both where undue influence had
been expressly used and also where a
presumption of such influence arises from
the relations between the parties but on
the ground of different principles. AIR
1954 Trav-Co 407 (413) (DB).

(6) Any person who has derived from
another an interest which had been
obtained by the other person by undue
influence cannot retain it. But where
he is a transferee for value without notice
he will not be affected by the rule. AIR
1948 Cal 84 (95) ** AIR 1961 Mad 190
(194) = (1960) 2 Mad LJ 355.

(7) In the proceeding under Order 23,
Rule 3 of the Civil P. C. for recording
the compromise of the suit the Court
cannot set aside the agreement on the
ground of undue influence raised by a
party to it, his remedy is to file a
regular suit. AIR 1953 Hyd 62 (63) =
ILR (1952) Hyd 706 (DB).

(8) It is not open to a lessor to contend
in the proceeding under the Land Acquisi-
tion Act for the apportionment of the
compensation between him and the lessee
that the lease having been executed by
him under undue influence is not valid.
He must avoid the lease by separate pro-
ceedings. AIR 1958 Cal 56 (64).

at 6 per cent. per month. The Court may set the bond aside, ordering B to repay the Rs. 100 with such interest as may seem just.]

[*] Inserted by the Indian Contract Act Amendment Act, 1899 (6 of 1899), S. 3.

STATE AMENDMENT

Section 19-B

Madhya Pradesh :

After Section 19A of the Indian Contract Act, 1872 (9 of 1872), insert the following sections :—

“19-B. Definitions of maintainer and champertous agreement.—(a) ‘Maintainer’ means a person who gives assistance or encouragement to one of the parties to a suit or proceeding and who has neither an interest in such suit or proceeding nor any other motive recognized by law as justifying his interference.

(b) ‘Champertous agreement’ means an agreement whereby the nominal plaintiff agrees with the maintainer to share with or give to him a part of whatever is gained as the result of the suit maintained.

19-C. Power to set aside champertous agreement.—A champertous agreement may be set aside upon such terms and conditions as the Court may deem fit to impose”.

—C. P. and Berar Indian Contract (Amendment) Act (15 of 1938), Section 2. (Note: This Act has been extended to the whole State of M. P. by M. P. Act 23 of 1958. In its application to Vidarbha area of Maharashtra State, it has been repealed by Maharashtra Repealing and Amending Act (26 of 1963), Section 2 and First Schedule (4-6-1963).

Section 19-A — Note 1 (contd.)

(9) A plea under the second clause of Section 19A may be allowed to be raised in second appeal and second appellate Court may impose such terms and conditions as may seem just to any order for the contract being set aside. AIR 1925 All 783 (784) = 47 All 932 (DB).

(10) ‘Undue influence’, though separately treated in Contract Act, is only a branch of a fraud in equity and invites same relief as fraud. AIR 1916 Bom 275 (277) (DB).

(11) Contract procured by undue influence is only a voidable one and only gives the person, under undue influence, a right of choice or election. AIR 1943 Cal 162 (165).

(12) The right which a party to a bond has under Section 19A of the Contract Act to avoid it on the ground of undue influence is also transferred under Section 130, Transfer of Property Act to a transferee of the bond from him. AIR 1936 Oudh 105 (106) (DB).

(12-A) Section 19A lays down the general law and even though a party may be a Muhammadan, he can avoid the contract on the ground of undue influence. AIR 1964 Raj 250 (254) = 1964 Raj LW 302.

(12-B) Question of validity of lease on ground of undue influence — Cannot be raised in land acquisition proceedings. AIR 1958 Cal 56 (64).

(13) See also under Section 16.

Limitation.

(14) Suits under Section 19A to avoid contracts on the ground of undue influence are governed by Article 91 of the Limitation Act. AIR 1934 All 507 (511) (DB) ** AIR 1952 Punj 224 (226) = ILR (1951) Punj 298.

(15) A gift deed executed by an old and illiterate widow on the representation of the only near relation who has been living with her that it is only a deed of management in his favour is void and need not be set aside by her. AIR 1951 Him Pra 54 (54, 55)

(16) Where the suit is really one for avoiding a contract on the ground of undue influence, the plaintiff cannot evade the provisions of the law of limitation by framing the suit as one for possession alone. AIR 1934 All 507 (511) (DB).

(17) Suit in ejectment by donees — Defence that gift was not valid and did not pass any title to the donees — Held, S. 19-A of the Contract Act or Art. 91 of the Limitation Act did not apply to the defence. AIR 1962 Pat 168 (176) (DB).

2. C. P. and Berar Amendment — Champertous agreements.—(1) A champertous agreement unless it can be avoided on the ground of public policy because it is extortionate or unconscionable or inequitable is not void under the laws in India. AIR 1952 Nag 195 (196) = ILR (1949) Nag 663.

(2) After Sections 19B and 19C were added to the Act in Central Provinces and Berar by the C. P. and Berar Indian Contract (Amendment) Act of 1938 the Courts in those Provinces got the power to set aside a champertous agreement on such terms and conditions as it may deem fit to impose. AIR 1952 Nag 195 (196) = ILR (1949) Nag 663.

(3) Section 19C does not render the champertous agreements void or voidable. It only confers a power on the Courts to be judicially exercised to set aside

20. Agreement void where both parties are under mistake as to matter of fact.—Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void.

Explanation.—An erroneous opinion as to the value of the thing which forms the subject-matter of the agreement is not to be deemed a mistake as to a matter of fact.

Illustrations

(a) A agrees to sell to B a specific cargo of goods supposed to be on its way from England to Bombay. It turns out that, before the day of the bargain, the ship conveying the cargo had been cast away and the goods lost. Neither party was aware of the facts. The agreement is void.

(b) A agrees to buy from B a certain horse. It turns out that the horse was dead at the time of the bargain, though neither party was aware of the fact. The agreement is void.

(c) A, being entitled to an estate for the life of B, agrees to sell it to C. B was dead at the time of the agreement, but both parties were ignorant of the fact. The agreement is void.

Section 19-A — Note 2 (contd.)

such agreements. AIR 1952 Nag 195 (197) = ILR (1949) Nag 663.

[But see AIR 1958 Madh Pra 417 (422).]

(4) Where a money-lender enters into an agreement to render assistance not because he has any common interest with the party nor because he is related to the party but only with the object of monetary gain the agreement is only a champertous agreement. AIR 1952 Nag 195 (197) = ILR (1949) Nag 663 ** AIR 1958 Madh Pra 417 (422) = 1957 MPLJ 769.

SECTION 20 — SYNOPSIS

1. Applicability and scope.

2. Mutual mistake of fact renders contract void.

3. Mistake must be of material fact.

4. Mistake must be about existing fact.

5. Mistake of fact.

1. Applicability and scope.— (1) A plaintiff seeking the equitable remedy of rectification or cancellation or a defendant against whom an equitable remedy is sought can plead mutual mistake. AIR 1931 Mad 785 (786) = 54 Mad 973 (DB).

(2) Mistake of fact should be pleaded in the written statement and in the absence of any plea the question cannot be allowed to be raised. AIR 1943 Pat 327 (337) = 22 Pat 220 (DB).

(3) A plea of mutual mistake cannot be raised for the first time in appeal. AIR 1940 Pat 516 (533) = 19 Pat 433 (DB) ** AIR 1963 Orissa 217 (219) = (1963) 5 Orissa JD 361.

(3-A) When there has been a conveyance, the plea is not available to a vendee, bound by the rule of caveat emptor, that the vendor was labouring under a mistake regarding the quantum of his rights over the property conveyed. 1963 Ker LJ 400 (DB).

(4) Where the subject-matter of the contract is substantially obtained, Sec-

tion 20 will not apply. AIR 1927 Rang 90 (91).

(5) A compromise decree can be set aside under Section 20 if the agreement embodied therein was brought about by the mistake of both parties and the Court as regards its subject-matter. (1881) 6 Cal 687 (705, 706) (DB).

[But see AIR 1937 All 731 (735) (DB).]

(6) Mortgage suit — Compromise — Mortgagee agreeing to take 25 bighas of land — Commissioner by mistake induced by mortgagor giving only 10 bighas to mortgagee in partition — Suit by mortgagee to set aside decree — Decree held could be modified. AIR 1930 Pat 155 (157) = 8 Pat 726 (DB).

(7) The question whether a contract is void ab initio on the ground of mutual mistake as to a matter essential to the contract cannot be referred to arbitration by invoking an ordinary arbitration clause contained in the contract. ILR (1948) 2 Cal 171 (188).

(8) There are two types of mistakes in a contract (i) those which prevent there being a binding consent to a particular transaction; and (ii) those which consist in a failure to express correctly in a written document the intention of the parties with regard to a particular transaction. If the mistake is unilateral no relief can be granted. But in cases where one party has committed the error or mistake in reducing such terms and conditions in the written document itself, the defendant would be allowed to take the point of mutual mistake in the document in its written statement. Under such circumstances, the Courts have granted equitable relief by way of rectification of the written document without vitiating the whole contract. (1969) 1 Comp LJ 153 (Cal).

(9) A contract can certainly be avoided on the ground of mistake of fact but the same principle does not apply to a decree.

Section 20 — Note 1 (contd.)

AIR 1966 J & K 45 (51) = 1966 Kash LJ 8.

(10) Mistakes in the formation of contracts may be of three kinds, namely, unilateral mistake, mutual mistake and common mistake. In a case of unilateral mistake, the contract is void. In a case of mutual mistake, the contract is void. In a case of common mistake both the contracting parties make the same mistake. AIR 1960 All 420 (422, 423) = 1960 All LJ 193 (DB).

2. Mutual mistake of fact renders contract void.— (1) In order to make agreement void both parties must be under mistake of fact. AIR 1923 Sind 25 (28).

(2) Unilateral mistake does not enable party to avoid contract. ILR (1955) Mys 154 (158) ** AIR 1958 Andh Pra 533 (539) (DB) ** (1948) 52 Cal WN 858 (860) ** (1904) 28 Bom 421 (426) (DB) ** AIR 1966 J & K 45 (50) = 1966 Kash LJ 8 ** AIR 1958 Andh Pra 533 (539) = (1958) 2 Andh WR 153 (DB).

(3) Where the absence of knowledge is all on one side and the other party is aware of the true position but refrains from communicating his knowledge to the other that is not a case which would be covered by Section 20. AIR 1950 Lah 106 (116, 117) = Pak LR (1950) Lah 1 (DB) ** AIR 1936 Oudh 97 (100) (DB) ** AIR 1933 Rang 79 (81) = 11 Rang 201 (DB).

(4) Where both parties are aware of the true position no question of mistake can arise. 1893 Pun Re No. 62 p. 279 (283) (DB).

(5) Where the parties to a contract for sale with full knowledge of the right of the lessee to receive value of improvements deliberately omit to provide for the same in their contract it cannot be said that the contract is vitiated by the mistake of parties. AIR 1954 Trav-Co 10 (24) (DB).

(6) An agreement entered into under a mistake and misapprehension as to the relative and respective rights of the parties thereto is an agreement which has proceeded on a common mistake. AIR 1917 Cal 786 (789) (DB) ** AIR 1952 Nag 2 (3) = ILR (1952) Nag 99 ** AIR 1952 Pat 393 (402, 403) (DB). (Reversed in AIR 1954 SC 165 on another point.) ** AIR 1937 Pat 65 (71) = 16 Pat 159 (SB) ** AIR 1918 Mad 395 (395) (DB).

(7) Where a car was sold and purchased at a certain price both the seller and the purchaser believing that price to be the proper controlled price it was held that the purchaser could treat the transaction as void on the ground of mutual mistake, return the car and recover the money paid by him as its price. AIR 1955 Mad 662 (663) = ILR (1956) Mad 712 (DB). (AIR 1952 Mad 779. Reversed.)

(8) The party who complains that the price mentioned in the written agreement of sale does not represent the price which was agreed to by him may bring a suit under Section 20 to avoid the contract on the ground of mistake as to the price. AIR 1930 Rang 12 (12).

(9) Agreement whereby the lessee of a mining lease agreed to pay enhanced royalty on basis of market price is void when there was a mutual mistake in ascertaining the basis of the market price. 1960 BLJR 105 = ILR 38 Pat 1160.

(10) A compromise based on mutual mistake of facts between Government and government servant is clearly vitiated by mutual mistakes. AIR 1965 Mys 244 (248) = (1964) 2 Mys LJ 451 (DB).

3. Mistake must be of material fact.—

(1) Where there is a mutual mistake as to a fact, which goes to the root of the contract, and frustrates the object of the agreement, Section 20 will apply and the agreement is void. AIR 1933 Rang 79 (81) = 11 Rang 201 (DB) ** AIR 1950 Lah 106 (116, 117) = Pak LR (1950) Lah 1 (DB) ** AIR 1950 Mad 146 (148) ** AIR 1936 Oudh 97 (100) (DB) ** AIR 1935 Mad 287 (287) ** AIR 1926 Nag 435 (439) ** AIR 1920 Oudh 31 (33) ** AIR 1918 Sind 41 (44) = 12 Sind LR 41 (DB) ** (1963) 65 Punj LR 307.

[But see AIR 1960 All 420 (422, 423) = 1960 All LJ 193 (DB).]

(2) Where terms of contract are understood by parties in different sense, contract is void. AIR 1926 Nag 435 (439) ** AIR 1933 Pat 579 (581) ** 1904 28 Bom 421 (425) (DB).

(3) A contract of sale and purchase of land for building purposes is void under Section 20 on the ground of mutual mistake on an essential matter where both the parties have proceeded in the belief that the land in point of its area satisfied the requirements of the municipal bye-laws while in fact it was not so. AIR 1947 All 332 (334) (DB).

(4) Where a person impersonating the real owner forged his signature to mortgage and also in the deed of transfer by mortgagee by a similar forgery covenanting good title, it was held that the transferee and mortgagee were under a mistake as to the essential fact that the real owner had executed the mortgage. AIR 1916 Bom 209 (210) = 40 Bom 638 (DB).

(5) Where parties agree to purchase or sell a specific article and it happens that at the time of the agreement the article is not in existence, there is a common mistake as to an essential fact and the agreement is void. AIR 1921 Bom 49 (51) = 45 Bom 1222 (DB) ** AIR 1948 Pat 345 (348, 349) = 27 Pat 151 (DB).

(6) Where a lease is taken and granted on the wrong assumption that the land was at the disposal of the grantor it was held that lease attracted the provisions of

Section 20 — Note 3 (contd.)

Section 20, Contract Act. 1949 Bur LR (HC) 625 (631) (DB).

(7) Wrong assumption of the parties as to the character of the subject-matter leading them to enter into a contract by which one of them relinquishes his claim thereto is a common mistake as to an essential matter of the agreement. (1950) 8 J & K LR 204 (211, 212) (DB).

(8) Where the parties entered into a settlement under Bombay Act 7 of 1863 under the mistaken belief that one of them was a superior holder of all lands in the village the agreement is void on the ground of common mistake on a matter essential to the agreement. (1892) 17 Bom 407 (412, 413) (DB).

(9) For an agreement between two parties that one of them would not file an appeal if the other would give up his cost the existence of the right of appeal on the date of the agreement is matter essential to the agreement. Hence if the parties enter into such an agreement in ignorance of the fact that the right had become barred by limitation there is a mutual mistake of fact as to a matter essential to the agreement. AIR 1939 Lah 511 (512).

(10) A compromise entered into without knowing that the suit had already been decided in favour of one of the parties is void under Section 20. AIR 1919 Cal 330 (330) (DB).

(11) If the parties are at mistake as to the subject-matter which is dealt with by their contract they are not *ad idem* as to the subject-matter and hence there can be no real agreement between them. AIR 1930 Pat 155 (157) = 8 Pat 726 (DB).

(12) A mistake not as to the subject-matter of the contract but only as to its quality does not render the contract *ab initio* void (1948) 52 Cal WN 858 (864).

(13) Where there is no mistake in the minds of the parties as to the identity of the subject-matter of the contract a mere misdescription of the same in the deed will not render the contract void. AIR 1924 Pat 359 (361) (DB).

(14) The subject-matter of a separate warranty in a contract is not an essential part of the contract. (1907) 30 Mad 284 (290) (DB).

(15) The existence of a notification for the acquisition of the land under the Town Improvement Act is not a material defect either in the property or the seller's title therein that the parties' ignorance of the same would in any way affect the enforceability of the contract of sale. AIR 1950 Lah 106 (115) = Pak LR (1950) Lah 1 (DB).

[But see AIR 1923 Cal 641 (643, 644) = 50 Cal 615 (DB).]

(16) In a lease of land for colliery purposes the exact extent of the land is not an essential element and therefore the fact that the parties relying on reputa-

tion wrongly assumed its extent to be greater than it really was cannot vitiate the contract. AIR 1929 Cal 547 (548) (DB).

(17) Where a loan was taken after a ship had sailed out on a voyage on the risk or security of the ship and its repayment was fixed on a date after the expiry of certain months from the date of its setting sail, it was held that the loss of the ship after a few days of its sailing and some time prior to the date of the transaction did not attract Section 20. (1902) 25 Mad 561 (566) (DB).

(18) The non-existence of the goods on the date of insurance would attract the provisions of this section only when the parties intend to cover the risk prospectively. AIR 1954 Bom 148 (151) = ILR (1954) Bom 296 (DB).

(19) Parties to a compromise cannot be said to be under a mistake of fact essential to the agreement because the *muafi* had been forfeited by the State before the compromise was arrived at and parties were unaware of it, when the existence or otherwise of the *muafi* was not a condition precedent to the execution of the compromise or otherwise essential to it. AIR 1957 Him Pra 11 (14).

(20) The essence of a compromise by which one party abandoning his plea of title agrees to hold the land as lessee from the other is the recognition of an antecedent title in the latter and the actual existence of such title in the other is not a fact essential to the agreement. Hence mistake in respect of the title would not make the agreement void. AIR 1927 Oudh 198 (199) (DB).

(21) Where the seller sold certain goods to the purchaser to be delivered at the latter's place and handed over to him a note ordering his agent at the purchaser's town to deliver the goods to the purchaser the fact that they were not aware then that the agent had already despatched all the goods back by rail to the seller was held would not amount to a mutual mistake which would entitle the seller to repudiate the contract. AIR 1927 Bom 514 (515) (DB).

4. Mistake must be about existing fact.

— (1) A contract will be rendered void only when the mistake is as to an existing fact and not if it is as to a future event. AIR 1948 Cal 257 (261) = ILR (1948) 2 Cal 297 (DB) ** (1879) 3 Bom 154 (158) (DB).

(2) Where on the representation made by the Government that it had the right to cancel an existing lease and grant a fresh lease to another a party entered into a contract with it the fact that subsequently it was judicially decided that the Government had no right to cancel the prior lease would not entitle the Government to plead that the contract was void on the ground of mistake and refuse to perform that which was possible still.

21. **Effect of mistakes as to law.**—A contract is not voidable because it was caused by a mistake as to any law in force in [* * *] India; but a mistake as to a law not in force in [* * *] India has the same effect as a mistake of fact.

†[* * * * *]

Illustration

A and B make a contract grounded on the erroneous belief that a particular debt is barred by the Indian Law of Limitation: the contract is not voidable.

‡[* * * * *]

[*] Words 'any province of' which were substituted for 'British', by A. C. A. O., 1948, omitted by A. L. O. 1950.

[†] Para. 2 which was inserted by the A. O., 1937 and amended by the A. C. A. O., 1948 was omitted by A. L. O., 1950.

[‡] The second illustration was repealed by the Repealing and Amending Act, 1917 (24 of 1917), S. 3 and Sch. II.

Section 20 — Note 4 (contd.)

AIR 1954 SC 165 (168) = 1954 SCR 958.
(AIR 1952 Pat 393, Reversed.)

(3) Where on the date a compromise was effected between the parties on the assumption that a particular right belonged to one of them and there was every justification for that belief the compromise would not attract the provisions of Section 20. AIR 1934 Oudh 442 (444) ** AIR 1948 Oudh 54 (63) = 22 Luck 93 (DB) ** AIR 1927 Oudh 198 (199) (DB).

(4) Though Section 20 deals only with common mistake, as to a matter of fact essential to the agreement and does not cover cases of frustration yet the general principle of frustration may be imported into by construction so as to cover such cases also. AIR 1921 Cal 509 (514) (DB).

5. **Mistake of fact.** — (1) A mistake regarding the title of the contracting party is a mistake of fact. AIR 1952 Pat 393 (403) (DB). (Reversed on another point in AIR 1954 SC 165.)

(2) The question whether a particular property is liable to pay cess or not is not a pure question of law but one of fact and law. AIR 1947 Cal 70 (73) = ILR (1946) 2 Cal 420 (DB).

(3) An error arising upon the construction and meaning of a contract is a mistake of law and not fact. AIR 1943 Pat 327 (338) = 22 Pat 220 (DB).

(4) The mistake with regard to the effect of the law of registration upon the validity of an assignment deed would at the most be a mistake of law and not of a fact rendering the contract void under Section 20. AIR 1954 SC 165 (168) = 1954 SCR 958. (AIR 1952 Pat 393, Reversed on another point.)

(5) Where the position is too notorious and well known to all concerned in the locality that the tenants are entitled, as a matter of law, to pluck, gather and sell the leaves of the Kendu trees standing on their tenanted lands to whomsoever they please, it cannot be said that either

party to a lease of forest produce of that area was under a misconception as to the rights of the tenants in respect of those lands. AIR 1961 Orissa 75 (78) = (1960) 2 Orissa JD 481 (DB).

(6) Mistake of law is not covered by Section 20. AIR 1959 Madh Pra 221 (222) = 1959 MPLJ 368 (DB).

SECTION 21 — SYNOPSIS

1. Scope.
2. Mistake as to any law.
3. Mistake as to mutual rights.
4. Compromise made in ignorance of law.
5. Payment made under mistake of law — See S. 72.

1. **Scope.** — (1) Section deals only with mistakes of law which cause a contract or give birth to a contract. AIR 1946 Cal 245 (249) = ILR (1945) 2 Cal 41.

(2) Section 21 is not intended to give validity to any apparent agreement which does not satisfy the conditions of real consent as laid down in Sections 10 to 13, Contract Act. AIR 1952 Nag 2 (3) = ILR (1952) Nag 99.

(3) An innocent mistake of law also is governed by Section 21. 1907 All WN 197 (198) (DB).

(4) Section 72 applies even when there is mistake of law. AIR 1956 All 383 (384) (DB) ** AIR 1949 PC 297 (301) = 76 Ind App 244 = 28 Pat 913 ** AIR 1957 Pat 112 (115) = 35 Pat 1055.

(5) English common law rule that payment made under mistake of law is not recoverable does not apply to India. AIR 1946 Cal 245 (249) = ILR (1945) 2 Cal 41. (39 Cal WN 174, Dissent.)

2. **Mistake as to any law.** — (1) If a mistake of law leads to a formation of a contract, Section 21 enacts that the contract is not voidable for that reason. AIR 1949 PC 297 (302) = 76 Ind App 244 = 28 Pat 913 ** AIR 1967 Cal 310 (313) ** AIR 1966 J and K 45 (54) =

Section 21 — Note 2 (contd.)

1986 Kash LJ 8 ** AIR 1961 Orissa 75 (79) = (1960) 2 Orissa JD 481 (DB).

(2) The construction of a contract is a matter of law — If a party acts under a mistaken view of his rights under a contract, he is not entitled to any relief. AIR 1943 Pat 327 (338, 341) = 22 Pat 220 (DB).

(3) A mortgagee took a mortgage with notice of a previous but unregistered mortgage and got it registered, under the belief that the latter mortgage would get precedence over the first mortgage being registered first— Held that this was mistake as to law in force in British India, that Section 21, Contract Act, applied and that the contract was not voidable. AIR 1933 Lah 836 (838) (DB).

(4) The mistake with regard to the law of registration upon the validity of the assignment deed would be a mistake of law and under Section 21 the contract would not be void on that ground. AIR 1954 SC 165 (168) = 1954 SCR 958.

(5) Mortgage for an indefinite period— Provision as to period contravening Section 8 (2), Punjab Alienation of Land Act — Whole mortgage held not void by reason of Section 21. AIR 1932 Lah 630 (632) = 13 Lah 508 (DB).

(6) Where by a contract a plaintiff agreed to sell certain quantity of meste to the defendant under the common assumption that Jute Price Control Order was applicable to meste, which was erroneous held that mistake was of law and could not make the contract voidable. ILR (1948) 2 Cal 171 (177).

(7) There is neither any provision of statutory law nor any principle of equity which furnishes a cause of action to a person who enters into a partition of family property under erroneous impression of law for getting rid of that agreement. AIR 1950 FC 142 (164) = 1949 FCR 715.

(8) In certain cases, English Courts of Equity relieve against agreements induced by an error of law, but the Indian Contract Act specifically lays down that error of law does not vitiate the contract. (1887) 11 Bom 174 (176, 177) (DB).

(9) Where the mistake is so fundamental as to prevent any real agreement upon the same thing in the same sense from being formed, it is immaterial of what kind the mistake was or how it was brought about. AIR 1952 Nag 2 (3) = ILR (1952) Nag 99 ** (1950) 8 J and K LR 204 (211) (DB).

(10) Where a consumer of electricity pays the bill to the Electricity Supply Company under mistake that the Company had made rules, after all necessary legal preliminaries had been gone through, this is not a mistake as to any law in force in India and the consumer can recover the amount back. AIR 1939 Pesh 8 (9).

(11) If under a mutual mistake of law, one party suffered a detriment and the other derived a benefit, which would not have happened, but for the mistake, the latter cannot subsequently claim to dispel the mistake and claim a benefit thereby, unless he is prepared to surrender the benefit he already obtained under the mistake. AIR 1967 Kerala 190 (192) = 1966 Ker LT 1151.

(12) Lease of forest produce — Misconception as to whether tenants could be compelled to sell Kendu leaves from out of tenanted lands to lessee of forest produce — Position that they could not be so compelled too notorious and well known — Mistake is one of law. AIR 1961 Orissa 75 (78) = (1960) 2 Orissa JD 481 (DB).

3. Mistake as to mutual rights. — (1) Where mutual mistake is one of law as to the legal rights of any party. S. 21 would apply. AIR 1921 Bom 93 (102).

(2) The existence of particular private rights is a matter of fact though depending on rules of law, and for most civil purposes ignorance of civil rights is ignorance of fact. (1950) 8 J and K LR 204 (211) (DB).

(3) Ignorance of particular rights however, excusable, is on the same footing as ignorance of general law — Money paid voluntarily with a full knowledge of all the facts, cannot be recovered. (1936) 164 Ind Cas 732 (739) (DB) (Cal).

(4) If the mistake of law which is common to both the parties to an agreement is of such a kind that it is mixed up with certain specific facts relating to a particular individual so much so that it may be said that as the combined effect of the parties' view of law and facts they made a mistake at the time of entering into the transaction as to the nature of their pre-existing private rights, it may be said that such a mistake is not a pure mistake of law and the agreement is liable to be set aside as having proceeded upon a common mistake. AIR 1950 Mad 146 (148, 149).

(5) Where certain property is included in a partition under a mistaken view that the cosharers were entitled to inherit it and it is claimed by the lawful heir, the partition can be set aside and shares re-adjusted as private right of ownership is a matter of fact though it may be result of law and the parties were under a mutual mistake and misapprehension as regards their respective and relative rights in effecting the partition. AIR 1952 Nag 2 (3, 4) = ILR (1952) Nag 99.

(6) Mistakes of parties about right of the defendant municipality to acquire land under Section 92, Bombay District Municipalities Act, is one of fact and not of law. AIR 1920 Sind 59 (60) = 14 Sind LR 22 (DB).

(7) Where widows in a joint Hindu family agreed to share estate equally on

22. Contract caused by mistake of one party as to matter of fact.—A contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact.

23. What considerations and objects are lawful and what not.—The consideration or object of an agreement is lawful, unless—

it is forbidden by law;* or

is of such a nature that, if permitted, it would defeat the provisions of any law; or

is fraudulent; or

involves or implies injury to the person or property of another; or the Court regards it as immoral, or opposed to public policy.

Section 21 — Note 3 (contd.)

the basis of erroneous view of law, it was held that the agreement was liable to be set aside on the ground of common mistake. AIR 1918 All 74 (76) = 40 All 619 (DB).

4. **Compromise made in ignorance of law.** — (1) A compromise made by party cannot be set aside on the ground that he made it in ignorance of law in force in India. AIR 1936 Sind 99 (105) = 29 Sind LR 445 (DB).

(2) Though mistake in law is not a ground for setting aside a compromise, there must be an absence of all fraud and misrepresentation to make the compromise stand. (1909) 1 Ind Cas 573 (582) (DB) (Cal).

5. **Payment made under mistake of law** — See S. 72.

Section 22 — Note 1

(1) A mistake made by a party to a contract or by his counsel would be unilateral and would fall under S. 22 and cannot be used to avoid the contract. ILR (1955) Mys 154 (158) ** AIR 1970 Manipur 16 ** AIR 1967 Ker 15 (16) = 1966 Ker LT 494 ** AIR 1963 Orissa 217 (220) = (1963) 5 OJD 361.

(2) The mere circumstance that the contract was caused by one of the parties to it being under a mistake as to a matter of fact, will not make the contract voidable. (1885) 9 Bom 358 (361) (DB).

(3) Any proceeding or order cannot be reopened on the ground of mistake of fact of one of the parties to it. AIR 1929 Cal 670 (672) (DB).

(4) The mistake due to negligence of one of the parties is not sufficient to relieve that party of his own agreement. AIR 1929 Cal 670 (672) (DB).

(5) When a written contract has been signed by the parties, the party alleging that it has been erroneously recorded and that he signed it under a mistake, must establish that fact beyond all doubt. AIR 1934 Cal 778 (779) = 61 Cal 548.

(6) Contract cannot be avoided on the ground that it became more onerous than what the seller considered it to be, on account of an increase in duty. AIR 1925 Sind 80 (82) = 18 Sind LR 265 (DB).

(7) The plaintiffs required a steamer to sail from Jedda 'fifteen days after the Haj' to convey pilgrims to Bombay. They chartered steamer from the defendants. The defendants contracted only with respect to English date. The plaintiffs were under the belief that the date corresponded with fifteenth day after the Haj. On finding the mistake, the plaintiff brought a suit to rectify an alleged mistake — **Held** that as the mistake was on the plaintiff's part there could not be rectification. (1892) 16 Bom 561 (566).

(8) A kabuliat, at an enhanced rate of rent was executed under a mistake of fact as to the title of the executant. It was acted upon and on the basis of it a claim for ejectment was resisted successfully — **Held**, as there was no fraud or misrepresentation the kabuliat was binding upon the heir of the executant. (1911) 10 Ind Cas 343 (344) (All).

(9) Party signing a contract written in unknown language cannot plead ignorance of its terms. AIR 1928 Sind 97 (98) = 22 Sind LR 286.

(10) Where one of the parties to an agreement knows a fact which makes his bargain an advantageous one and that fact is unknown to the other party, the latter remains bound by the contract unless the former is obliged to disclose it. AIR 1933 Rang 79 (81) = 11 Rang 201 (DB).

(11) Where the party assailing the contract does not seriously suggest that it was vitiated by mutual mistake but alleges that he was labouring under mistake as to the nature of work to be done under the contract that would not under the section entitle him to avoid the contract. AIR 1958 Andh Pra 533 (539).

SECTION 23 — SYNOPSIS

1. Scope and applicability.
2. Unlawful consideration or object.
3. "Forbidden by law."
4. Excise Contracts.
5. "Defeat the provisions of any law".
6. Agreements opposed to personal law of parties.
7. Fraudulent agreements.
8. Injury to the person or property.
9. Immoral agreements.

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

Illustrations

(a) A agrees to sell his house to B for 10,000 rupees. Here B's promise to pay the sum of 10,000 rupees is the consideration for A's promise to sell the house, and A's promise to sell the house is the consideration for B's promise to pay the 10,000 rupees. These are lawful considerations.

(b) A promises to pay B 1,000 rupees at the end of six months, if C, who owes that sum to B, fails to pay it. B promises to grant time to C accordingly. Here the promise of each party is the consideration for the promise of the other party and they are lawful considerations.

(c) A promises, for a certain sum paid to him by B, to make good to B the value of his ship if it is wrecked on a certain voyage. Here A's promise is the consideration for B's payment and B's payment is the consideration for A's promise and these are lawful considerations.

(d) A promises to maintain B's child and B promises to pay A 1,000 rupees yearly for the purpose. Here the promise of each party is the consideration for the promise of the other party. They are lawful considerations.

(e) A, B and C enter into an agreement for the division among them of gains acquired, or to be acquired, by them by fraud. The agreement is void, as its object is unlawful.

(f) A promises to obtain for B an employment in the public service, and B promises to pay 1,000 rupees to A. The agreement is void, as the consideration for it is unlawful.

(g) A, being agent for a landed proprietor, agrees for money, without the knowledge of his principal, to obtain for B a lease of land belonging to his principal. The agreement between A and B is void, as it implies a fraud by concealment, by A, on his principal.

Section 23 — Synopsis (contd.)

10. Past and future cohabitation.

11. Prostitution.

12. Public policy.

13. Champerty and maintenance.

14. Agreements to stifle prosecution.

15. Marriage Contracts.

16. Adoption Contracts.

17. Religious Contracts.

18. Agreement to indemnify surety.

19. Office brokerage Contracts.

20. Interference with course of justice.

21. Agreements creating interest against duty.

22. Agreement between client and his pleader.

23. Benami transactions.

24. Agreement against bidding.

25. Monopoly.

26. Trade combines.

27. Service Contracts.

28. Contract of agency.

29. Partnership.

30. Void Contracts — Enforcement of.

1. Scope and applicability. — (1) The section would apply only if the consideration or object of the agreement is unlawful or is fraudulent or involves or

implies injury to the person or property of another or in the opinion of the Court is immoral or opposed to public policy. 1958 Andh LT 960.

(1-A) The section imposes a restriction on the absolute freedom of the citizen in the matter of entering into contracts and subjects his rights to the overriding considerations of public policy and the others enunciated under it. AIR 1954 Bom 478 (483) = ILR (1955) Bom 11 = 1954 Cri LJ 1531 (DB).

(1-B) Section 23, speaks of three matters: it speaks of consideration for the agreement, the object for the agreement and the agreement. AIR 1966 Mys 154 (162) = (1965) 1 Mys LJ 442 (DB).

(2) Section 23, Contract Act, deals with contracts which are illegal in the strict sense and which would be affected by the doctrine of *ex turpi causa oritur non actio*. 1957-2 Andh WR 226 (231).

(3) Anything which is not lawful within Section 23 is unlawful for the purposes of an agreement or compromise and a decree incorporating such an agreement or compromise is a nullity. (1909) 2 Ind Cas 865 (873, 874) (All).

(4) The provisions of Section 23 would apply to all contracts, even to those entered into by a person in the sphere of

(h) A promises B to drop a prosecution which he has instituted against B for robbery, and B promises to restore the value of the things taken. The agreement is void, as its object is unlawful.

(i) A's estate is sold for arrears of revenue under the provisions of an Act of the Legislature, by which the defaulter is prohibited from purchasing the estate. B, upon an understanding with A, becomes the purchaser, and agrees to convey the estate to A upon receiving from him the price which B has paid. The agreement is void, as it renders the transaction, in effect, a purchase by the defaulter, and would so defeat the object of the law.

(j) A, who is B's mukhtar, promises to exercise his influence, as such, with B in favour of C, and C promises to pay 1,000 rupees to A. The agreement is void, because it is immoral.

(k) A agrees to let her daughter to hire to B for concubinage. The agreement is void, because it is immoral, though the letting may not be punishable under the Indian Penal Code.†

[*] See Ss. 26 and 30, *infra*.

[†] As to partial illegality see Ss. 27, 28, 57 and 58 *infra*.

[‡] But see new Act 104 of 1956.

Section 23 — Note 1 (contd.)

professional activity governed by a special statute which has not expressly imported the provisions of this section into it. AIR 1954 Bom 478 (483) = ILR (1955) Bom 11 = 1954 Cri LJ 1531 (DB).

(5) A voidable transaction does not fall within Section 23. AIR 1936 Nag 268 (269) = ILR (1937) Nag 94.

(6) Section does not apply to claims founded on tort. AIR 1931 All 83 (85) = 53 All 316 (DB).

(7) Where a statute prohibits a thing not merely for the purpose of revenue but also for protection of the public, a contract in contravention of such prohibition shall be void. AIR 1968 Cal 146 (150) (DB) ** AIR 1968 Andh Pra 315 (319) = (1968) 2 Andh WR 267 ** AIR 1960 Andh Pra 39 (42) = (1959) 2 Andh WR 550 (DB).

(8) The fact that a contract is not enforced by a Court of equity on equitable ground does not make the contract illegal. AIR 1959 Cal 715 (728) = (1960) 30 Com Cas 582.

(9) Section does not apply to a contract entered into by the Managing Director of a public company with another private company in which the said Director has interest. AIR 1959 Cal 715 (728) = (1960) 30 Com Cas 582.

(10) Where a statute seeks to control contractual obligations such a statute must always be strictly construed. Courts will not be astute to construe an Act so as to avoid a contract, or a contract so as to bring it within the prohibition of a statute. AIR 1959 Andh Pra 108 (110) = 1958 Andh LT 870 (DB).

2. Unlawful consideration or object. —

(1) To bring a case within the purview of Section 23, it is necessary to show that the object or consideration of the agreement is unlawful. AIR 1938 Cal 840 (850, 851) = ILR (1939) 1 Cal 241 (DB) ** AIR 1960 Andh Pra 32 (34) = 1959 Andh LT 216.

(2) The onus of establishing that a particular consideration is illegal as a matter of fact is on the person who asserts so. AIR 1925 Nag 111 (113) ** AIR 1950 Kutch 24 (27) ** AIR 1937 Mad 223 (226) (DB).

(3) The word "object" in Section 23 is distinct from "consideration" and means something aimed at. It means "purpose or design". AIR 1933 Bom 209 (212) (DB) ** (1906) 33 Cal 702 (710) ** AIR 1963 Him Pra 3 (5).

(4) Section 23 is not concerned with motive. It confines the Court to the object of the transaction and not to the reasons or motives which prompted it. AIR 1940 Nag 305 (311, 312) = ILR (1940) Nag 573 (FB) ** 1946 Jaipur LR 327 (329) (DB) ** AIR 1930 All 357 (360, 362) = 52 All 406 (DB) ** AIR 1959 Madh Pra 151 (165) = 1960 MPLJ 334 (FB) ** 1960 Raj LW 23 = ILR (1959) 9 Raj 905.

(5) In determining validity of contract the object of the agreement and not action actually taken under the agreement should be considered. AIR 1941 Pat 349 (350).

(6) Where the object of a contract is illegal, the whole contract is illegal, and no right of action exists in respect of it. AIR 1938 Oudh 24 (25).

(7) When plaintiff proves lawful object and consideration to the promise, defendant cannot set up that he acted illegally by giving his promise in particular manner. (1910) 4 Sind LR 44 (47) (DB).

(8) The threat to bring a false suit is a form of blackmail and hence cannot be considered as good consideration for the contract. AIR 1936 Lah 6 (7).

(9) B, a Hindu, borrowing money from A and bribing certain officer therewith — To pay off A, B obtaining loan from C and executing mortgage in his favour — Purpose of mortgage loan held was

Section 23 — Note 2 (contd.)

not to effect illegal purpose. AIR 1940 Nag 305 (312) = ILR (1940) Nag 573 (FB).

(10) Preventing estate by legal means from being taken over by Court of Wards is not unlawful purpose. AIR 1941 Oudh 529 (555).

(11) Pronote executed by ward of Court though void is lawful consideration for bond executed by his son after his death and after estate had ceased to be under the Court of Wards. AIR 1923 All 590 (590) (DB).

(12) Where a cantonment board contracts to confer "old grant" tenure upon a person in the cantonment land the consideration or object of the agreement, even if it is in excess of the powers of the board under the Cantonment Act and the rules thereunder, cannot be said to be unlawful. AIR 1943 Oudh 99 (104) (DB).

(13) Where a judgment-debtor executed a bond in consideration of decree-holder refraining from executing decree for arrears of rent before passing of U. P. Stay of Proceedings (Revenue Courts) Act of 1937 and U. P. Stayed Arrears of Rent (Remission) Act of 1939, it was held that neither consideration nor object of agreement was unlawful. AIR 1941 All 193 (194) = ILR (1941) All 367.

(14) A mortgage of lands granted Kabzadari without right of transfer is not transfer for unlawful object or consideration. (1911) 14 Oudh Cas 144 (146).

(15) A loan advanced for gambling does not necessarily become a loan advanced for an illegal purpose and irrecoverable. AIR 1927 Nag 155 (155).

(16) Where the consideration for a contract to pay enhanced rent by tenant to his landlord is the settlement of disputes as to rate of rent and abandonment of still higher claims on the part of landlord, the contract is valid and enforceable. 11 Ind Cas 699 (700) (DB) (Mad).

(17) Where a pronote is executed by a tenant in return for the withdrawal of the suit for ejectment by the landlord under compromise the consideration for the pronote is not an unlawful one. AIR 1914 All 533 (533).

(18) Promise of pension for giving up practice as a lawyer and payments to various persons to use their influence with Government in connection with private or quasipolitical concerns are not illegal or immoral considerations. AIR 1917 Pat 92 (98) (DB).

(19) Contracts whose consideration becomes void have to be distinguished from other contracts where the consideration is unlawful or illegal. In the former class of contracts the mere fact that the earlier or the collateral contracts might be void cannot preclude a plaintiff from maintaining an action on a novated contract which is perfectly legal. But this princi-

ple would not apply to the latter class of contracts. AIR 1963 Madh Pra 329 (328, 329) = 1963 MPLJ 325 (DB).

(20) The condition in a laundry-receipt that only half value of garment is to be refunded in case garment is lost is unlawful. AIR 1966 Mad 13 (14) = (1965) 2 Mad LJ 7.

(21) Contract that A, the registered dealer, should take delivery of goods ordered by B and sell them, on certain commission — Suit by A to recover certain balance of transaction — Defence that contract was unlawful because it was intended to evade payment of tax as B was not a registered dealer — B not carrying on any business during year preceding contract — Question of registration and of evasion of tax held did not arise — Contract held was not unlawful. 1964 BLJR 483.

(22) In proceeding under Section 488, Criminal P. C., A was ordered to pay to Mst. B Rs. 10 for maintenance of illegitimate child — During pendency of revision against the order A entered into an agreement with B to pay Rs. 8 instead of Rs. 10 and did not press revision — A's acceptance to pay Rs. 8 instead of Rs. 10 held constituted a valid consideration. AIR 1966 Raj 163 (164) = 1966 Raj LW 195.

(23) The word "lawful" in Order 23, Rule 1, Civil P. C. means lawful within meaning of contract Act. AIR 1959 Pat 17 (20) = 1958 Pat LR 343 (DB) ** AIR 1963 Raj 63 (68, 69) = 1962 Raj LW 651 (DB).

(24) Though a wager is void and unenforceable it is not forbidden by law and therefore the object of a collateral agreement is not unlawful under S. 23. AIR 1959 SC 781 (792) = (1959) 2 SCR (Supp) 406.

3. "Forbidden by law."— (1) The word "law" in Clause (1) of Section 23 means judicial law, that is, the law enacted by any competent Legislature. AIR 1939 Rang 305 (312) = 1939 Rang LR 311 (FB).

(1-A) It is not permissible to any person to rely upon a contract, the making of which the law prohibits. AIR 1959 SC 689 (692) = (1959) Supp (2) SCR 217 = 61 Bom LR 1011.

(2) The question whether a particular transaction is forbidden by an Act or tends to defeat its provisions is always one of construction of the Act, the rule for which is that it should be construed according to the intention of the persons passing it and such intention should be gathered from what they have said in the Act. (1902) 5 Oudh Cas 256 (260) (DB) ** AIR 1962 Madh Pra 117 (125) = 1962 MPLJ 78 (FB).

(2-A) It is always a question of construction whether the punishment is intended by the Legislature to make the act expensive or to prohibit it. If inten-

Section 23 — Note 3 (contd.)

tion is to prohibit the act the contract to do it would be void. AIR 1960 Ker 276 (278) = 1960 Ker LT 122 (DB).

(3) There is a clear distinction between an agreement which may be forbidden by law and which is merely declared to be void. In the former case the Legislature penalises it or prohibits it. In the latter case it merely refuses to give effect to it. AIR 1930 All 1 (3) = 52 All 338 (FB).

(4) Where a statute prescribes no penalties, an agreement in breach of a condition imposed under powers given by it does not fall under Section 23, and when a condition is imposed under statute purely for administrative purposes, an agreement in violation thereof is not void. AIR 1943 Oudh 99 (104) (DB) ** AIR 1927 Lah 333 (334) = 8 Lah 310.

(5) A contract which is void as being forbidden by law cannot become valid even if the parties act according to the contract. AIR 1929 All 394 (395).

(6) A deed must appear on its face to be a transfer before it can be condemned as a transfer forbidden by law. AIR 1926 Mad 218 (221).

(7) A transfer which is not forbidden by law and which is not opposed to public policy is not void merely because it is prohibited by a term of the contract by which the right transferred has been conferred upon the transferor. AIR 1957 Him Pra 70 (71) ** AIR 1940 Bom 369 (372) = ILR (1941) Bom 71 (DB) ** 24 Bom 622 (625) (DB) ** 2 All 411 (414, 415) (FB) ** AIR 1967 Mad 449 (450) = (1967) 1 MLJ 168 (DB) ** 1961 Raj LW 141 = ILR (1961) 11 Raj 802.

(8) A contract which is ultra vires the powers of a company under its memorandum of association is not necessarily illegal. AIR 1930 Mad 512 (513) = 53 Mad 771 (DB).

(9) When persons enter into a contract which is declared invalid by statute, no party can recover any compensation for breach of it. 33 All 695 (701) (DB).

(10) Where a contract or transaction is illegal there need be no pleading of the parties raising the issue of illegality and the Court is bound to take judicial notice of it. AIR 1965 SC 1364 (1370) = (1965) 1 SCR 861.

(11) An amount deposited in furtherance of a contract contravening the provisions of Foodgrains (Futures and Options) (Prohibition) Order, 1942, cannot be recovered. ILR (1953) 3 Raj 45 (48).

(12) The word "forbidden by law" is not synonymous with the word 'void' and hence it is not necessary that whatever is void is also "forbidden by law". AIR 1958 Cal 703 (706, 707) = ILR (1958) 1 Cal 297 (DB).

(13) Where a contract is void as being forbidden by law every ancillary agreement connected with the contract would

also be invalidated. AIR 1953 Cal 450 (453) (DB) ** AIR 1962 SC 1810 (1814, 1820) ** AIR 1960 Cal 90 (91, 92) = ILR (1960) 2 Cal 407 (DB) ** (1962) 64 Bom LR 113.

Instances of contracts forbidden by law.

(14) A contract made in contravention of Section 75, C. P. Local Self-Government Act, is illegal and void and attracts the provisions of Section 23, Contract Act. AIR 1941 Nag 273 (276) = ILR (1942) Nag 294.

(15) A promissory note or hundi which is against the provisions of the Paper Currency Act of 1923 (Now repealed) is void. AIR 1928 All 371 (376) = 50 All 839 (SB) ** AIR 1955 Hyd 69 (80) = ILR (1955) Hyd 101 (FB) ** AIR 1914 Upp Bur 3 (4) = 2 Upp Bur Rul 13 ** (1910) 5 Low Bur Rul 191 (191, 192) ** (1910) 5 Low Bur Rul 182 (183) (DB).

[But see (1910) 4 Sind LR 44 (46, 47).]

(15-A) Mortgage by deposit of title deeds — Mortgage in contravention of Rule 94-A (2) of Defence of India Rules 1939 — Transaction is illegal and mortgagee cannot recover money from mortgagor. AIR 1969 Cal 578 (589) = (1969) 1 Com LJ 55 (DB).

(16) Transfers of subjects declared by Section 6 of the Transfer of Property Act as untransferable is void. AIR 1925 Oudh 16 (18) (DB) ** AIR 1931 All 589 (591) (DB) ** AIR 1924 Oudh 234 (236, 237) = 26 Oudh Cas 368 ** AIR 1916 Mad 579 (579, 580) = 39 Mad 554 (DB).

[But see AIR 1927 Rang 157 (158) (DB).]

(17) Transfer of actionable claims in contravention of Section 136, T. P. Act, is void under Section 23, Contract Act. AIR 1936 Oudh 275 (276, 277) = 12 Luck 150 (DB).

(18) A lease by Municipality of its right of farming out slaughtering fees is void as being opposed to law. (1913) 36 Mad 113 (114, 115) (DB) ** AIR 1963 All 206 (208) = 1962 All LJ 767 (DB).

(19) A contract involving the contravention of the provisions of the Motor Vehicles Act or the Rules made thereunder is illegal. AIR 1926 Nag 259 (259). (Contravention of Rules.) ** AIR 1957 Mad 620 (620) ** AIR 1964 Andh Pra 256 (260) = (1964) 1 Andh LT 103 (DB).

[See also AIR 1969 SC 493 (495). (AIR 1967 Mad 100, Reversed; AIR 1963 Mad 413 and AIR 1962 Andh Pra 14, Overruled.)]

[But see (1967) 1 MLJ 449 = 80 Mad LW 240 ** (1967) 2 Andh LT 405 = (1968) 1 Andh WR 101 ** AIR 1966 Madh Pra 13 (17) = 1965 MPLJ 644 (DB) ** AIR 1969 Raj 155 (158) = 1969 Raj LW 377.]

(20) Where in temporarily settled estates Government has prohibited sub-letting at rate higher than that fixed by temporary settlement under S. 172 of Bengal

Section 23 — Note 3 (contd.)

Tenancy Act, contract to sublet at a higher rent cannot be enforced. AIR 1928 Cal 763 (765).

(21) Agreement to surrender cultivation of sir lands after partition is void as it is forbidden by law. 1886 All WN 88 (88) (DB).

(22) Transfer of land to Patwari in contravention of rules under Punjab Land Revenue Act is void. AIR 1927 Lah 18 (19) = 7 Lah 463 (DB).

(23) Agreement by Government tenant with his brother to share whatever might accrue to him with him is forbidden by S. 8, Punjab Government Tenants Act, 1893. AIR 1922 Lah 287 (289) = 3 Lah 92.

(24) Agreement that the tenant will not be able to make any improvements without the consent of the Zamindar, and that he will not be entitled to any compensation at the time of eviction is contrary to law (S. 90 of the Tenancy Act) and is void. (1911) 10 Ind Cas 465 (466) (All).

(25) Mortgage by one who was disqualified under Section 8 of the Jhansi Encumbered Estates Act, is void, being forbidden by law. (1908) 30 All 38 (39) (DB).

(26) Contract for possessory mortgage of occupancy holding being against Tenancy Law is void under Section 23 and covenant empowering mortgagee to recover money if possession was not delivered is also illegal. AIR 1931 All 461 (461) ** AIR 1937 Oudh 150 (151) = 12 Luck 679 (DB) ** AIR 1935 All 256 (257) ** AIR 1931 Oudh 309 (310) = 6 Luck 689 (DB) ** AIR 1924 All 668 (668) = 46 All 622.

(27) Agreements in contravention of Agra Tenancy Act are void. AIR 1923 All 453 (454) ** 1947 All WR (HC) 11 (12).

(28) A contract of sub-letting without the written permission of the landlord is not only prohibited by Section 12A of the C. P. and Berar Rent Control Order, 1949, but is also punished as an offence under Section 8, C. P. and Berar Regulation of Letting of Accommodation Act, 1946, hence it is void. AIR 1955 Vindh Pra 31 (32).

(29) A contract to deliver grain in discharge of money advanced, was held to be a contract in contravention of Food Grains Control Order (1942) and was therefore unenforceable. AIR 1945 Mad 512 (512).

(30) Contract made in contravention of Yarn (Dealers) Control Order is illegal and cannot be enforced. AIR 1944 Mad 387 (387).

(31) A contract which is in violation of the Foodgrains (Futures and Options) (Prohibition) Order of 1942 is illegal. ILR (1953) 3 Raj 45 (48).

(32) A contract for purchase of bullion at a date later than 12 days from the date of the contract was held to be void

on the ground that it was clearly hit by the provisions of Rule 90 of the Defence of India Rules, as applied to Jodhpur by a notification of the Government. 1953 Raj LW 220 (222) (DB).

(33) A settlement contract the basis of which is a forward contract falling within the mischief of the West Bengal Jute Goods Act, 5 of 1950, is also void. AIR 1953 Cal 618 (619).

(33-A) Agreement to sell certain bales of cotton before 25-11-1955 entered into on 10-11-1955 — Payment to be made after weighment of bales — Parties carrying on business of buying and selling ginned Cotton but not members of any recognised association — Contract, held, was not a ready delivery contract and was hit by Section 15 read with Section 2 (c) of Forward Contract (Regulation) Act, 1952. AIR 1969 Andh Pra 88 = (1968) 2 Andh LT 291 (DB).

(34) Transactions by an unlicensed money lender on and after the date of amendment of S. 9, Hyderabad Money Lenders Act are void but transactions that took place are not affected. AIR 1955 Hyd 113 (127) = ILR (1955) Hyd 169 (FB). (AIR 1952 Hyd 58 (FB), Overruled.) ** AIR 1952 Hyd 43 (44) ** AIR 1951 Hyd 44 (44) (DB).

(34-A) Suit for damages for breach of contracts in respect of goods purchased by plaintiff on behalf of defendant — Defendant refusing to take delivery on due dates — Contracts entered into in February 1952 — Section 3 of the Act found to be valid — Relevant Prohibition Order prohibiting forward contracts continued to remain in force under Proviso to Section 17 (4) of Essential Supplies (Temporary Powers) Act (1946) — Contracts held to be against law — Suit for damages for breach of those contracts held to be not maintainable. AIR 1960 SC 504 (508, 512).

(35) Partnership entered into in contravention of Cochin Tobacco Act (1922) is illegal. AIR 1960 Ker 276 (278) = 1960 Ker LT 122 (DB).

(36) Forward contract, the object of which was to give delivery of groundnuts on a future date is prohibited under Notification issued under Rule 72, Defence of Hyderabad Regulation and is void. (1962) 40 Mys LJ 483 (DB).

(37) Contract by Director with Company is prohibited by law. AIR 1964 Raj 237 = ILR (1964) 14 Raj 135 = 1964 (2) Cri LJ 581.

(38) An agreement between parties to file award in a different Court is against the statute. AIR 1966 Andh Pra 134 (136).

(39) Transfer of right to collect fees on the sale of cattle under C. P. and Berar, Municipalities Act (2 of 1922) is illegal. AIR 1963 Madh Pra 240 (241) = 1963 MPLJ 261 (DB).

Section 23 — Note 3 (contd.)

(40) Permanent alienation or transfer of any agricultural land is prohibited under Hyderabad Tenancy and Agricultural Lands Act (1950). AIR 1963 Andh Pra 232 (236) = (1962) 2 Andh WR 462. (Partly overruled on another point in AIR 1970 Andh Pra 19.)

(41-42) Sub-letting of phone in contravention of conditions is forbidden by law. AIR 1968 Andh Pra 315 (318) = (1968) 2 Andh WR 267.

(43) Alienation under Hyderabad Prevention of Agricultural land Alienation Act (3 of 1349, F.) without permission of Collector. AIR 1960 Mys 59 (63) = 37 Mys LJ 358 (DB).

(44) Lease of land conferring hereditary rights in lieu of a premium is prohibited under S. 90 U. P. Tenancy Act 17 of 1939. AIR 1967 All 262 (263) = 1966 All LJ 960 (DB).

(45) Agreement under which the pawnee bank has been authorised to sell the securities pledged with it without notice to the pawner in case the credit balance of the pawner fell below the margin, would be inconsistent with the provisions of the Contract Act, and therefore, would be wholly void and unenforceable. AIR 1966 All 134 (135, 136) = 1965 All LJ 919.

(46) Contract for sale and purchase of jaggery powder at rates higher than rates fixed under U. P. Gur Control Order (1946). AIR 1963 All 206 (208) = 1962 All LJ 767 (DB).

(47) The transfer or mortgage of a property in respect of which the Collector can exercise his powers under Schedule 3, Para 11 of the Civil P. C., is a transaction forbidden by law. AIR 1933 All 468 (470) (DB).

(48) Baglas are herons which are birds which do not come within the exceptions mentioned in the Notification No. 5028 S. R., dated 19th September 1902, and a contract of partnership to trade in the feathers of Baglas is illegal and void being against public policy. AIR 1929 Lah 663 (663) = 11 Lah 8 (DB).

(49) The Foodgrains Control Order, 1942 is a statute which prohibits transactions in the interest not only of revenue but also of public health or morality and therefore any contract for entering into transaction which contravenes its provisions must be taken to have been impliedly prohibited by it. AIR 1955 Orissa 49 (52) = ILR (1955) Cut 1(DB).

(50) A chity transaction to which Section 6 of the Travancore Chitties Act 26 of 1120 applies is forbidden by law and therefore void. AIR 1953 Trav-Co 44 (45).

(50-A) Trav. Chitties Act (20 of 1120), Section 6 — Chitti for more than Rs. 100 — Chitti not registered — The transaction of subscription illegal — Subscriber is not in pari delicto with foreman. 1969 Ker LR 659.

Instances of contracts not forbidden by law.

(51) A lease granted contrary to the provisions of a Robkar issued by the Ruler of a State cannot be held to be illegal or void under the section even if the Robkar is to be regarded as law, when it does not declare that such leases are illegal or unlawful. AIR 1958 Madh Pra 88 (90) = 1967 MPLJ 644 (DB).

(52) It is not forbidden by law to make an agreement to substitute a mortgage for a judgment debt if it is done with the sanction of the Court. (1907) 31 Bom 552 (559) (DB).

(53) Order 23, Rule 3, Civil P. C. does not stand in the way of parties to a suit coming to an agreement that the defendant should deposit the money claimed by the plaintiff in a temple and that the latter should take it in the presence of the deity. AIR 1957 Andh Pra 69 (70).

(54) A contract to pay future rent for a period beyond three years from the date of the decree is perfectly lawful. AIR 1955 Trav-Co 233 (234) = ILR (1955) Trav-Co 331.

(55) Subsequent mortgage of property against which there is a temporary injunction by a Civil Court is not void as it is not forbidden by law. (1887) 9 All 497 (500) (DB).

[See also (1903) 25 All 431 (434) (DB).]

(56) An agreement to allow another person to occupy a house and pay compensation for use and occupation is a perfectly legal contract and it is not prohibited by law. AIR 1952 All 344 (345).

(57) Assignment of his share in the profits to a stranger by a co-sharer in a mahal is not within the prohibition of this section. 1894 All WN 140 (140) (DB).

(58) A person who according to the terms of a grant is not qualified to be a transferee of the subject of the grant is not a person who is "legally disqualified" within Section 6 (h) (3) of the Transfer of Property Act and therefore a transfer to him is not affected by Section 23 of the Contract Act. AIR 1928 Rang 136 (137) = 6 Rang 423 (DB).

(59) A bequest contingent upon consent of heirs is not forbidden by law. AIR 1928 All 494 (496) = 50 All 748 (DB).

(60) Agreement by pre-emptor to sell property to third person entered into prior to suit for pre-emption is valid and does not contravene provisions of Punjab Pre-emption Act. (1950) 52 Punj LR 387 (390).

(61) A family settlement by which disputes are compromised is not a transfer and hence a restriction against alienation imposed by the compromise is not invalid as offending the provisions of Section 10 of the Transfer of Property Act. AIR 1953 Punj 282 (283, 284) = ILR (1954) Punj 165 (DB).

(62) A provision for pre-emption in a deed of transfer does not offend against

Section 28 — Note 3 (contd.)

the rule against perpetuities and therefore is enforceable. AIR 1927 All 170 (172) = 49 All 527 (FB). (AIR 1923 All 511 and AIR 1923 All 514, Overruled.)

[But see AIR 1922 Bom 84 (94) = 47 Bom 191 (DB).]

(63) A covenant in a sale deed that the vendor would not claim ex-proprietary rights is neither forbidden by any law nor does it defeat the provisions of Section 7A (5), Oudh Rent Act or any other law and is not, therefore, unlawful within the meaning of Section 23. AIR 1942 Oudh 1 (6) = 17 Luck 249 (DB).

(64) Bond executed by a disqualified proprietor is not void as it does not infringe Sections 173 and 174 of Oudh Land Revenue Act, 1876. (1902) 5 Oudh 256 (261) (DB).

(65) Agreement in Santhal Parganas to pay compound interest is not prohibited and hence not unlawful. AIR 1930 Pat 442 (450) = 10 Pat 63 (DB) ** (1899) 26 Cal 238 (240) (DB).

(66) The Cantonments Act does not contain any prohibition against a transfer by an owner of his right to continue in occupation of the house. AIR 1924 Bom 258 (259).

(67) Transfers of occupancy and ordinary tenant rights when they are not forbidden but are only made voidable by the Tenancy Acts, are not unlawful within the meaning of Section 23 of the Contract Act. AIR 1925 Nag 375 (375) ** AIR 1949 All 637 (638) ** AIR 1917 Nag 125 (126).

(68) The surrender of an occupancy tenancy when it does not comply with the provisions of Section 12, C. P. Tenancy Act is only voidable. It is therefore not illegal within the meaning of Section 23 of the Contract Act. AIR 1926 Nag 345 (346) = 22 Nag LR 86 ** AIR 1918 Nag 178 (179) = 14 Nag LR 125.

(69) Bye-law of Co-operative Society that the Society shall not sell goods on credit to a non-member cannot have force of law and it cannot be brought against the Society suing for recovery of balance standing against non-member. AIR 1926 Nag 463 (464).

(70) A contract entered into by a legal practitioner in the course of a business or trade in which he is engaged in contravention of R. 26 of the Rules of the Allahabad High Court Rules framed under the Bar Councils Act is not void. AIR 1953 All 276 (281) = ILR (1951) 1 All 690 (DB).

(71) In the absence of any statutory bar positively prohibiting a legal practitioner from being engaged in trade or business, a mortgage by a legal practitioner is valid and enforceable. AIR 1928 Nag 273 (275).

(72) A sale of property which provides for the discharge of the debts of the vendor is not a sale which contravenes the provisions of Section 15 (2) of the

Relief of Indebtedness Act and therefore is a valid sale. AIR 1951 Nag 187 (187, 188) = ILR (1951) Nag 235.

(73) Budla or forward contracts in shares are by themselves not illegal and Rule 94C of the Defence of India Rules, which contained a prohibition only against the authorities of stock exchange from assisting its members in entering into such contracts or settling the accounts, did not render these contracts between the members themselves invalid. AIR 1953 Mad 296 (299, 300) = ILR (1953) Mad 1016 (DB).

(74) A person seeking to construct a building involving the encroachment on the street is bound by the conditions which were imposed by the municipal committee while sanctioning the construction and to which he has agreed. The fact that the municipal committee could not have enforced these conditions under the Municipal Act itself because of the absence of certain conditions precedent required under the Act cannot render either the contract or the enforcement of it illegal. AIR 1931 Lah 634 (636).

(75) A contract between two parties cannot be held to be void or illegal merely because one of the parties is a member of an association which has not been registered as a company under Section 4 of the Companies Act although it is liable to be so registered. AIR 1953 Sau 141 (142).

(76) An agreement of partnership between two persons for starting a filature or silk business is not forbidden by law in Bengal inasmuch as the Bengal Silk Control Order, 1945 did not prohibit such partnership. AIR 1957 Cal 336 (341) (DB).

(77) A loan advanced by unregistered money-lender is not impliedly prohibited by Section 11-F of C. P. and Berar Money-lenders Act (13 of 1934). AIR 1962 Madh Pra 117 (125) = 1962 MPLJ 78 (FB).

(78) Jute Goods (Export Control) Order 1949, does not prohibit or render unlawful a contract for the sale and purchase of Jute goods for export to a place outside India at a price in excess of the ceiling price. AIR 1960 Cal 590 (591, 592) (DB).

(79) Contract for sale of property which is subsequently declared as evacuee property is not void. 1961 MPLJ 791 (DB).

(80) Agreement whereby arrears of rent have been converted into a debt under a promissory note is not prohibited by law. (1966) 1 Mys LJ 37 = (1966) 5 LR 404.

(81) Where no application for the fixation of fair rent is made and no fair rent has been in fact fixed under Madras Buildings (Lease and Rent Control) Act (25 of 1949), an agreement between landlord and tenant for the enhanced rent cannot be declared null and void. AIR

Section 23 — Note 3 (contd.)

1959 Andh Pra 108 (110) = 1958 Andh LT 870 (DB).

(82) Though a wager is void and unenforceable it is not forbidden by law. AIR 1959 SC 781 (792) = (1959) Supp (2) SCR 406.

(83) Under Assam (Temporarily Settled Districts) Tenancy Act (3 of 1935), transfer of land without consent of landlord is not void ab initio. AIR 1961 Assam 173 (175) = ILR (1961) 13 Assam 351.

(84) A family settlement in which barber service inam lands are by agreement among the members allowed to be held by one of the members on an undertaking to perform the service instead of their being divided into a number of fractions could not be said to violate any law. AIR 1964 Andh Pra 465 (466) = (1964) 1 Andh WR 248.

(85) Contract by Gram Panchayats transferring right to recover taxes is not void, there being no prohibition in the C. P. and Berar Panchayat Act (1 of 1947). 1961 MPLJ 959 = 1961 Jab LJ 1476.

(86) Contract between two companies, one private and another public, with some common shareholders and common directors. AIR 1959 Cal 715 (728) = (1960) 30 Com Cas 582.

(87) Contract by managing director without consent of directors with other private company of which he is member AIR 1959 Cal 715 (727) = (1960) 30 Com Cas 582.

(88) Rule 33 (1), Forest Rules, itself shows, an assignment of any forest contract is not absolutely prohibited and cannot, for that reason, be regarded as void. AIR 1962 Madh Pra 22 (22) = 1961 MPLJ 327.

(89) There is nothing to indicate that the Legislature has prohibited a contract to transfer land between one agriculturist and another. AIR 1968 SC 1358 (1360) = (1969) 1 SCJ 279.

(90) Contract of tenancy entered into in violation of order under Section 7 (2) of U. P. (Temporary) Control of Rent and Eviction Act is not void. AIR 1964 All 1 (3, 4) = 1963 All LJ 406 (FB). (AIR 1961 All 347, Overruled.)

[But see AIR 1961 All 295 (296, 297) ** AIR 1964 All 395. (AIR 1961 All 347, Foll.)]

(91) Agreement by landlord with tenant for payment of rent in excess of the limits laid down under Section 6 of Rajasthan Premises (Control of Rent and Eviction) Act (17 of 1950). 1967 Raj LW 544 = ILR (1967) 17 Raj 720.

(91-A) An agreement entered into after the Bombay Rents Hotel and Lodging House Rates Control Act (51 of 1947) has come into force, contrary to the provisions of Section 15 would be unenforceable. AIR 1959 SC 689 (692) = (1959) Supp (2) SCR 217 = 61 Bom LR 1011.

(92) B, a merchant contracted with 'A' a pacca addathiya to purchase one wagon of groundnut oil for 1954 June delivery — 'A' then entered into contract with 'C' to purchase one wagon of groundnut oil to be delivered to 'B' in June from C's godown — Fall in prices — A paid to 'C' the difference in price — Held it was a wagering contract. AIR 1965 Andh Pra 136 (142) = (1965) 1 Andh WR 60.

(93) Amount of Chitti less than Rs. 100 — License under Section 7 not taken by foreman — Transaction of subscription not illegal under Section 7 of Trav. Chittis Act (20 of 1120), 1969 Ker LR 659.

4. Excise contracts.— (1) Contracts violating the provisions of Abkari Act are illegal within Section 23 of the Contract Act. AIR 1921 Mad 455 (456) ** AIR 1955 Hyd 28 (32) = ILR (1954) Hyd 428 (FB) ** AIR 1954 Hyd 156 (158) = ILR (1954) Hyd 338 (FB) ** AIR 1925 Sind 55 (56) = 18 Sind LR 16 (DB) ** AIR 1962 Ker 21 (23, 24) = 1961 Ker LT 620 (FB) ** AIR 1967 Andh Pra 119 (122) = (1966) 2 Andh WR 102 (DB) ** (1960) 2 Andh WR 222 (DB).

(2) The provisions of the Abkari and Opium Acts are not intended merely to protect public revenue but the provisions contained in them are based on public policy. (1912) 35 Mad 582 (586) (DB) ** AIR 1954 Hyd 156 (158) = ILR (1954) Hyd 338 (FB).

(3) A contract involving any of the mischiefs contemplated by Section 12 of Madras Abkari Act would be illegal within the meaning of Section 23 of the Contract Act. AIR 1921 Mad 455 (456).

(4) A benami purchase of toddy shop is in contravention of Section 13 of the Madras Abkari Act 1 of 1886. AIR 1949 Mad 252 (253) (DB).

(5) A promissory note given in consideration for the transfer of a right to sell toddy prohibited under Section 22 of Madras Abkari Act is illegal within Section 23 of Contract Act. AIR 1916 Mad 272 (273).

(6) A contract for the sale of fermented liquor, by a person who has not obtained a license under Bengal Act VII of 1878, is illegal and therefore void. (1889) 16 Cal 436 (442) (DB).

(7) All contracts to evade the provisions of the Excise Rules are altogether illegal and void. (1911) 12 Cri LJ 11 (12) (DB) (Cal) ** AIR 1943 Pat 374 (375) = 22 Pat 334 (DB).

(8) A sub-lease of a license to manufacture and sell country liquor given in violation of condition of such license is forbidden by law. (1888) 10 All 577 (579) (DB).

(9) Where without obtaining previous sanction of Collector, as was necessary under the rules of license to sell arrack, a license-holder agreed to sub-let and sell arrack to sub-lessee, it was held that such agreement was illegal and therefore

Section 23 — Note 4 (contd.)

unenforceable. (1903) 26 Mad 430 (433) (DB).

(10) An agreement sub-letting the right to vend ganja in contravention of license is illegal. AIR 1917 Mad 852 (853).

(11) Sub-lease of salt pans in contravention of conditions of lease is unenforceable at law. AIR 1922 Bom 78 (78) = 46 Bom 651 (DB) ** (1909) 33 Bom 636 (641) (DB).

(12) Contract to supply liquor on credit held illegal. AIR 1943 Sind 219 (221) = ILR (1943) Kar 350 (DB).

(13) The mortgage by the lessee of salt pans of his leasehold interest in infringement of the provisions of the Madras Salt Act is not void. 1954-2 Mad LJ (Andh) 127 (129).

(14) A partnership entered into to conduct business in arrack or toddy on a licence granted or to be granted to only one of the partners is void ab initio. AIR 1950 Mad 444 (449) = ILR (1950) Mad 987 (FB) ** AIR 1935 Mad 440 (442) = 58 Mad 727 (FB) ** AIR 1944 Mad 295 (298, 299) = ILR (1944) Mad 697 (DB). (AIR 1935 Mad 895, **Overruled.**) ** AIR 1941 Mad 64 (65) ** AIR 1937 Nag 250 (250, 251) = ILR (1937) Nag 376 ** AIR 1925 Sind 55 (56) = 18 Sind LR 16 (DB) ** AIR 1960 Andh Pra 444 (448) (DB) ** 1968 Cur LJ 775 (779) = 71 Pun LR 122 ** AIR 1965 Orissa 160 (161, 162) = (1965) 58 ITR 671 (DB).

(15) A license under the Central Excises and Salt Act for tobacco trade is personal to the licensee and therefore any partnership entered into by him without getting the license amended is illegal. AIR 1957 Mad 186 (189) = ILR (1957) Mad 1245 ** (1966) 60 ITR 335 = (1966) 2 ITJ 74 (All) (DB).

[But see (1960) 2 Andh WR 151 = ILR (1961) 1 Andh Pra 244 (DB). (AIR 1957 Mad 186, **Diss. from.**)]

(16) As an excise licensee enters into special obligations towards the Government, both financial as well as affecting the public morals, public policy no doubt requires that the entire control of the business should be in his hands. But as no such question of public policy is involved if the licensee takes a partner only to share the profits and the loss, contract of partnership is in no way void. (1898) 11 CPLR 62 (63) ** AIR 1929 All 210 (211) = 51 All 506 (DB) ** AIR 1926 Mad 218 (220, 222) ** AIR 1914 Oudh 399 (402) = 17 Oudh Cas 193 (DB) ** (1913) 37 Bom 320 (325, 326) (DB) ** 1906 Punj Re No. 114, p. 440 (442) ** AIR 1961 Punj 405 (408, 410, 411) (DB) ** AIR 1960 Ker 276 (278) = 1960 Ker LT 122 (DB). (Partnership entered into in contravention of Cochin Tobacco Act (1922), is illegal—AIR 1950 Mad 444 (FB), held not overruled by 1959-37 ITR 271 (276) (SC); 27 Cochin 222 and AIR 1927 Lah 333, **Dissented**

from.) ** 1969 Pat LJR 57 = 1969 BLJR 646 (DB).

(17) A licensee of salt manufacture admitting partners but manufacturing salt himself cannot be said to have contravened provision of Bombay Salt Act against alienating benefits of license. AIR 1921 PC 137 (137) ** AIR 1944 Mad 394 (395).

(18) Section 23 does not hit a partnership made in contravention of Section 6, Central Excises and Salt Act and Rr. 175 (2), 178 (4) and 210 framed thereunder. AIR 1960 Andh Pra 39 (42) = (1959) 2 Andh WR 550 (DB) ** 1968 Ker LJ 769 = 1968 Ker LR 405.

[But see AIR 1959 Andh Pra 647 (648, 649) (DB). (Trading without a licence in transgression of the provisions of Section 6, Central Excises and Salt Act is illegal and is governed by S. 23.)]

5. "Defeat the provisions of any law."

— (1) The term "law" used in the expression "defeat the provisions of any law" would include any enactment or rule of law for the time being in force in British India and hence a question as to the validity of a contract may arise on the basis whether its object or consideration would defeat (1) the provisions of any legislative enactment, or (2) the rules of Hindu or Muhammadan law, or (3) other rules of law for the time being in force in British India. AIR 1947 Sind 94 (96) = ILR (1946) Kar 380 (DB) ** AIR 1966 Mys 154 (162) = (1965) 1 Mys LJ 442 (DB).

(2) The words "any law" refer to substantive law and not to an adjectival law, such as the Civil Procedure Code. (1889) 16 Cal 504 (508) (DB).

[But see AIR 1942 Sind 47 (49) = ILR (1941) Kar 401 (DB).]

(3) A contract which seeks to exclude the application of a statutory provision to the parties is not valid. AIR 1935 All 619 (619).

[See also AIR 1920 PC 190 (195) ** AIR 1968 All 95 (99) = 1968 Lab IC 326 ** AIR 1962 Cal 311 (323, 324).]

(3A) The bankruptcy Court cannot allow proof when it is based on a contract against the policy of the bankruptcy law or is a result of secret agreement between the bankrupt and the third party. (1967) 1 Comp LJ 172 = 38 Com Cas 82 (Cal).

Instances of void agreements.

(4) The rules and regulations of a private provident fund are only in the nature of a contract between parties and they cannot affect the liability of the deposit lying to the credit of a depositor from attachment as a 'debt' due to him under law. AIR 1942 Sind 47 (49) = ILR (1941) Kar 401 (DB).

(5) Parties by contract can neither alter statutory period of limitation nor statutory starting point of limitation. Such a contract is void. AIR 1934 All

Section 23 — Note 5 (contd.)

661 (675) = 57 All 108 (FB) ** ILR (1950) 1 Cal 313 (320) ** AIR 1947 All 38 (40) = ILR (1946) All 711 ** AIR 1917 Mad 892 (894) = 40 Mad 701 (DB).

[But see AIR 1950 East Punj 352 (353) ** AIR 1949 Cal 390 (393) = ILR (1945) 1 Cal 638 ** AIR 1934 Rang 15 (16) = 11 Rang 475 ** AIR 1924 Cal 186 (187) (DB).

(6) Oral agreement to postpone registration of deed of lease would defeat the provisions of the Registration Act. AIR 1923 Nag 76(76).

(7) Agreement by vendor to relinquish exproprietary rights in sir land is void as being opposed to the policy of Agra Tenancy Act. AIR 1916 PC 59 (61) = 39 All 173 = 44 Ind App 54 ** AIR 1922 All 430 (431) (DB) ** AIR 1917 All 111 (112) = 39 All 645 (DB) ** (1910) 7 All LJ 778 (781) (DB).

(8) An agreement the consideration of which is defeating the provisions of Insolvency Act is void within the meaning of Section 23 of Contract Act. (1912) 16 Cal LJ 162 (164, 165) (DB) ** AIR 1956 SC 336 (339) ** AIR 1938 Rang 11 (13, 14) = 1938 Rang LR 19 (DB) ** AIR 1936 Lah 831 (832) ** (1936) 163 Ind Cas 858 (859) (Cal) ** AIR 1929 Mad 385 (386) ** (1906) 33 Cal 702 (709) ** (1897) 20 Mad 84 (86) (DB).

(8-A) Private agreement in respect of industrial dispute based on contracting out of statutory provisions of Industrial Disputes Act — It would be void under Section 23. 1969 Lab IC 725 (727) = 1968 MPLJ 890 (DB).

(9) A loan made to a parent or guardian for the marriage of his minor child is for a purpose which if permitted would defeat the provisions of the Child Marriage Restraint Act. AIR 1952 Mad 579 (582) ** AIR 1958 Andh Pra 145 (146) ** 1958 Andh LT 14 (19).

(10) Sale of Malguzari without reservation of occupancy without necessary sanction is void. AIR 1928 Nag 232 (236) (DB).

(11) As an agreement by the tenant to pay the landlord the costs if he has to defend against a claim seeking to set aside the surrender would defeat the provisions of the C. P. Tenancy Act by preventing the heirs from exercising their rights, it would be an unlawful agreement within the meaning of Section 23, Contract Act. AIR 1918 Nag 178 (179) = 14 Nag LR 125.

(12) Where a person before purchasing a tenancy under the Punjab Colonization of Government Lands Act, 5 of 1912, entered into an agreement with others to give them possession of one half of the lands and half the share of profits in consideration of their advancing half the purchase money and half the outgoings it was held that the agreement was void

under Section 19 of the Punjab Act. AIR 1933 Lah 291 (292) (DB).

(13) An agreement by a tenant to pay the zamindar certain dues over and above the usual was held to be void on the ground that its intention was to defeat the provisions of Sections 56 and 83, U. P. Land Revenue Act, (1913) 35 All 19 (22, 23) (DB).

(14) As the object of an agreement by the purchaser at a patni sale to re-convey the property to the defaulting patnidar is to defeat the provisions of Section 9 of the Patni Regulation of 1819 it is void. (1910) 14 Cal WN 1031 (1033) (DB).

(15) An agreement between the landlord and tenant to increase the rent by more than two annas in the rupee contravenes the provisions of Section 29 of the Bengal Tenancy Act and is void. (1897) 24 Cal 895 (896) (DB).

(16) A contract providing for the receipt of selami or premium contravenes the provisions of Section 7 of the W. B. Premises Rent Control Act 17 of 1950 is void. AIR 1955 Cal 442 (447).

(17) A lease which if permitted would have defeated the provisions of the Calcutta Rent Act was held to be void. AIR 1924 Cal 57 (60) = 50 Cal 491 (DB).

(18) A contract by a Government servant which did not comply with the provisions of Section 175 of the Government of India Act of 1935 was held void. ILR (1950) 2 Cal 431 (439).

(19) A contract the object of which is to evade the provisions of the Forward Contracts Prohibition Order of 1944 being illegal and unenforceable, damages for the breach of such an illegal contract also cannot form consideration for promise to pay them by another contract. The latter contract is also illegal and unenforceable. AIR 1953 Mad 845 (845, 846).

(20) A contract to pay commission to a broker which violates the provisions of Section 5 of the Bombay Securities Contract Control Act, 8 of 1925 is void. AIR 1953 Bom 98 (101).

(21) A contract for supply of vegetable oil and oilcakes at a future date contravenes the provisions of the Vegetable Oil and Oilcakes (Forward Contracts Prohibition) Order of 1944 and is therefore void. ILR (1951) Mad 723 (727, 728) (DB).

(22) A contract which involves the transfer of ration documents was held to contravene Madras Rationing Order of 1943 and therefore void. AIR 1954 Andhra 51 (52).

(23) A contract by a Co-operative Credit Society to lend money to a non-member is illegal and cannot be enforced. AIR 1929 Lah 330 (331) (DB).

(24) An agreement to pay a tax prohibited by an Act of Legislature is void as

Section 23 — Note 5 (contd.)

it would defeat the provisions of law if permitted. (1884) 8 Bom 398 (408) (DB).

(24-A) An agreement between a co-operative Society and one of its members that member will do life insurance business and the commission will be shared between them as calculated to defeat the provisions of Insurance Act and hence is void. AIR 1968 Cal 146 (150) (DB).

(24-B) Relinquishment or an agreement to relinquish their rights to share in their father's property by the heirs of a Mahomedan, on his death, would, if permitted, render Section 6 (a) of the T. P. Act futile. AIR 1964 Ker 200 (203) = 1963 Ker LT 1173 (DB). (AIR 1936 All 573. Dis-sented from.)

(24-C) Agreement whereby right of prior purchase is created is hit by Section 23 in that if it is permitted, it would defeat the provisions of J and K Right of Prior Purchase Act. AIR 1966 J and K 89 (94) = 1965 Kash LJ 190.

(24-D) Partnership agreement authorising one partner having licence to sell English wine to sell country liquor and others having licence to sell country liquor to sell English wine. (1968) Cur LJ 775 = 71 Pun LR 122 (Punj).

(24-E) A partnership formed by a dealer in cloth who had obtained licence under Madras Cloth (Dealers) Control Order (1947) is hit by S. 23 in that it is of such a nature that if permitted it would defeat the provisions of the Order, specially Cl. 4. AIR 1964 Andh Pra 145 (150, 151) (DB).

(24-F) Transactions under kuri security bonds in Kuries not registered if allowed to be enforced would defeat the provisions of Kuries Act (7 of 1107). 1959 Ker LJ 130.

(24-G) Where a transaction is illegal its object being of such a nature that, if permitted it would defeat the provisions of the U. P. (Temporary) Control of Rent and Eviction Act the transaction would be hit by Section 23 of the Contract Act. AIR 1959 All 440 (452).

Agreements not void.

(25) Purchase by decree-holder without the permission of the Court is not void. (1909) 32 Mad 242 (253) (DB).

(26) An agreement by the parties to a contract restricting them to have recourse only to one of several competent Courts may not be void under Section 28 but it is void under Section 23. AIR 1956 Madh B 120 (121).

[But see AIR 1944 Mad 47 (48).]

(27) Although a clause to the effect that payment should be made at a particular place is inserted in a pronote with the object of bringing a suit at that place and thus avoid the operation of the U. P. Agriculturists' Relief Act the provision cannot be held to be illegal within Section 23 of the Contract Act. AIR 1939 Lah 498 (498).

(28) Contract to be bound by oath is valid, provided Court can administer it under Section 8, Oaths Act. AIR 1923 All 443 (444).

(29) Agreement, even apart from Indian Oaths Act, by parties to a suit to abide by statement of witness, who is also party to suits, is valid unless fraud, etc., can be proved. AIR 1933 All 861 (880) = 56 All 39 (SB).

(30) A debtor has the option to waive his right to apply for restoration of possession under Section 35 of the U. P. Encumbered Estates Act and therefore a compromise by which he contracts himself out of the right cannot be void on the ground that if permitted it would necessarily defeat the provision of S. 35. 1940 Oudh WN 1246 (1248) (DB).

(31) Merely because the Public Demands Recovery Act has not expressly permitted the certificate officer to release the debtor before detention, it cannot be said that he is forbidden by law from doing so and therefore the surety bond furnished for the release of the debtor under such circumstances is supported by lawful consideration. AIR 1937 Cal 625 (628) = ILR (1937) 2 Cal 698 (DB).

(32) No question of defeating the provisions of Section 54, Transfer of Property Act will arise if a deed of mortgage executed for the consideration payable under an unregistered deed of sale is enforced when the sale is in substance only an agreement by an auction-purchaser not to enforce his rights in respect of the property against the mortgagor. (1910) 5 Ind Cas 581 (582) (DB).

(33) Although an agreement as between the parties make one of them responsible for the Government revenue payable by the other it cannot relieve the latter of his statutory liability for the Government revenue and therefore the agreement cannot be condemned as one defeating the provisions of the law. 1883 Pun Re No. 139 p. 421 (422) (DB).

(34) A contract to allow another person to occupy a house and pay compensation for use and occupation does not create any right of lessee in the other and therefore cannot be considered as a contract which defeats the provisions of Section 107, T. P. Act. AIR 1952 All 344 (345) (DB).

(35) Where a forward contract was entered into at a place which was outside the jurisdiction within which such contracts had been forbidden by a notification extending the provisions of R. 90-C of the Defence of India Rules and it was also not intended by the parties to perform it either wholly or in part within such jurisdiction, it was held that the contract could not be declared illegal merely because a suit under it had to be filed within that jurisdiction on the ground of the defendant's residence. AIR

Section 23 — Note 5 (contd.)

1954 SC 500 (502) = 1955 SCR 439. (AIR 1952 Raj 81, Reversed.)

(36) When the contractor claims payment under the several work orders under which he executed the contracts he cannot be met with the plea that the contracts defeated the provisions of the Municipal Act 15 of 1932. (1955) 59 Cal WN 762 (766).

(37) Where the object of the acquisition of share in the mahal or village in which the disputed property is situate is not to defeat the law of pre-emption but to acquire a preferential right, the acquisition does not come within the mischief of Section 23. AIR 1925 All 358 (360) = 47 All 424 (DB).

(38) The export of goods under a permit issued to another was not opposed to the provisions of the Export and Import Act of 1916 and hence the purchase of such export permits was held to be not unlawful. AIR 1930 Sind 175 (176) (DB).

(39) Contract for purchase of land entered into with full knowledge that purchaser may hold land in excess of the ceiling is not void. AIR 1968 SC 1358 (1360) = (1968) 3 SCR 706.

(40) A contract made by a tenant in respect of rent with the landlord is such that if permitted, it would defeat the purpose and policy of law. 1961 MPLJ 450 = 1961 Jab LJ 253.

6. Agreements opposed to personal law of parties. — (1) The word 'law' in Clause (2) of Section 23 means personal or customary law. AIR 1939 Rang 305 (312) = 1939 Rang LR 311 (FB) ** AIR 1947 Sind 94 (96) = ILR (1946) Kar 380. **Hindu law.**

(2) Agreement taking away absolutely the right to partition of members of joint family is unenforceable. AIR 1928 Oudh 365 (368) (DB).

(3) An agreement between joint owners that on failure of 'aurosa' son in one line impartible property of family should go to the other line where there is an aurosa son, would not bind the successors, such agreement being contrary to law. (1886) 9 Mad 499 (499) = 13 Ind App 97 (PC).

(4) A stipulation as between a husband and wife to avoid the marriage on the breach of a condition embodied in an ante-nuptial agreement between them is contrary to the policy of law. 1900 Pun Re No. 15, p. 53 (55) ** AIR 1953 Sau 88 (88) ** AIR 1937 Bom 358 (360) = ILR (1938) Bom 1 (DB).

(5) A post-nuptial agreement of separation between husband and wife providing for maintenance of wife is neither opposed to public policy nor to the spirit of Hindu law. AIR 1937 Bom 358 (360) = ILR (1938) Bom 1 (DB) ** AIR 1931 Nag 197 (198) = 27 Nag LR 281 ** AIR 1968 Mad 201 (202, 203) = (1967) 2 Mad LJ 484 ** AIR 1962 Bom 35 (37) = 63 Bom LR 595 ** (1961) 65 Cal WN

1115 ** AIR 1968 Mad 201 (202, 203) = (1967) 2 Mad LJ 484.

(6) An agreement by a Hindu bridegroom not to marry a second wife during the continuance of his marriage with his first wife, is not immoral or opposed to public policy. (1908) 4 Nag LR 86 (90).

(7) Contract by Hindu to maintain as wife a woman who is not his lawfully wedded wife, is contrary to public policy and consequently unlawful. (1912) 14 Bom LR 547 (557, 558) (DB).

(8) An agreement between husband and wife made on reconciliation, the object of which is to put an end to the present separation, is not opposed to public policy even if it contemplates a future separation and promise for maintenance in that event. AIR 1945 Mad 36 (37).

(9) Contract by a wife to suspend the operation of her maintenance decree for some time to give opportunity to husband to prove his willingness to maintain her properly is not opposed to public policy. AIR 1944 Mad 17 (18).

(10) In absence of proof of absence of custom, contract to compensate husband for expenses of his marriage upon his consenting to divorce wife is not void. AIR 1925 Nag 111 (114).

(11) Custom laying down particular mode of inheritance with regard to property held by ladies of zamindar's family and derived from the zamindar is not opposed to public policy. AIR 1916 Mad 102 (107) (DB).

Muhammadan law.

(12) In Muhammadan law marriage is a mere civil contract and an ante-nuptial agreement between the wife and her husband, that the husband would be liable to pay for her maintenance in case of dissension between them, is valid. AIR 1932 Lah 65 (66) ** AIR 1950 Cal 304 (305) = ILR (1951) 1 Cal 476 (DB) ** AIR 1939 Lah 165 (165, 166) ** AIR 1921 All 152 (153) = 43 All 650 (DB).

[But see (1913) 37 Bom 280 (282, 283) (DB).]

(13) An ante-nuptial agreement which confers a right on the wife to get divorce in the event of the husband bringing without her consent other wives to stay with her is not void. AIR 1955 Assam 153 (153) = ILR (1955) 7 Assam 1 (DB).

(14) An ante-nuptial agreement by a Muhammadan husband not to contract a second marriage is not illegal nor invalid as immoral or opposed to public policy or in restraint of marriage. AIR 1920 Low Bur 59 (60) = 10 Low Bur Rul 194.

(15) An agreement by a Muhammadan who had married two wives, to give maintenance to one of them living separately due to disagreement, is valid. AIR 1928 Oudh 303 (303, 304) = 3 Luck 603 (DB).

(16) A post-nuptial agreement between a Muhammadan couple which deprives

Section 23 — Note 6 (contd.)

the husband of his independent volition and earnings and provides for his immediate divorce and realization of denmohur from him in case of breach of agreement is void. ('75) 15 Beng LR (App) 5 (7).

(17) Agreement for desertion on husband's second marriage is opposed to Muhammadan law. AIR 1935 Lah 902 (903).

(18) An agreement by a Muhammadan husband with his wife to the effect that he would lead a respectable life and live in a house approved by wife and her parents and in case of default the wife could divorce is valid and not opposed to public policy. AIR 1936 Lah 716 (717) ** AIR 1966 Cal 465 (467) = 1966 Cri LJ 983.

(19) Even if the parties be Muhammadans whose personal law allows wife to procure a divorce an agreement to advance money to a married woman to enable her to procure a divorce in a Court of law and marry the plaintiff is void as the object and consideration of such an agreement is unlawful and opposed to public policy. (1887) 1887 Pun Re No. 46, p. 97 (99, 100).

(20) There is nothing in the Muhammadan husband's promise to pay a certain sum of money for the personal expenses of his wife during his life time which can reasonably be regarded as opposed to public policy. AIR 1929 Lah 660 (661) = 11 Lah 85 (DB).

(21) Charge created by a Muhammadan on unknown shares of one of his heirs is invalid under Section 23, as it defeats the provisions of Muhammadan law. AIR 1933 All 934 (937) (DB).

(22) It is unlawful for a Hindu to make a dedication in favour of a mosque as it is unlawful for an unbeliever to make a 'wakf' in favour of a mosque. (1912) 16 Cal WN 114 (116) (DB).

(22-A) A contract for purchase of immovable property entered on behalf of a Muhammadan minor by his guardians is not unlawful. Under the Muhammadan personal law, the guardian is not prohibited from entering into such contract. However, the minor on attaining the majority can revoke such contract by showing that the agreement was void as the vendor had obtained the money fraudulently from his guardian and can recover the money by virtue of Section 65 of the Contract Act. (1964) 2 Andh WR 183 = (1964) 2 Andh LT 180 (DB).

(22-B) Agreement to maintain illegitimate child — Consideration is not unlawful and agreement is not void. AIR 1966 Raj 163 (164) = 1966 Raj LW 195.

(22-C) A bequest to some of the heirs by a Mahomedan, if not consented to by the remaining heirs after the death of the testator is not valid under the Mahome-

dan Law. AIR 1964 Ker 200 (202) = 1963 Ker LT 1173 (DB).

(22-D) Where in a partition suit by a Muhammadan lady against her co-heirs a preliminary decree was passed defining the shares of each of them and the co-heirs transferred their interest, the transfer was not opposed to Muhammadan Law. AIR 1966 Andh Pra 361 (368) = (1966) 2 Andh WR 121.

Buddhist law.

(23) According to Buddhist law, a rahan is forbidden by his law, that is the Vinaya, to engage in trade. Therefore, purchasing or selling property by rahan is opposed to Section 23. AIR 1939 Rang 305 (312) = 1939 Rang LR 311 (FB).

(24) Neither the object nor consideration of sale to Buddhist monk is immoral within Section 23. AIR 1929 Rang 354 (363) = 7 Rang 677 (FB). (AIR 1928 Rang 3, Overruled.)

Parsi law.

(25) An agreement between a Parsi husband and wife for their living separate is lawful and binding. AIR 1921 Bom 399 (400) = 45 Bom 318 ** (1899) 23 Bom 279 (280, 281).

(26) A Parsi wife is not precluded from claiming future alimony under Section 40, Parsi Marriage and Divorce Act even if she had consented in the divorce proceedings to give up her future maintenance and that consent is embodied in the order of the Court. AIR 1945 Bom 537 (542).

Christian law.

(27) Promise by Christian to marry another when the person is already a married person is void. AIR 1926 PC 27 (27).

Jewish law.

(28) Where in a suit on contract one of the parties who are Jews allege that the contract is void under the Jewish law the Court must go into the allegation and determine what is the personal law which applies. AIR 1946 Cal 90 (107) = ILR (1944) 2 Cal 201.

7. Fraudulent agreements. — (1) To acquire gains by fraud is an essential condition for the application of illustration (e) of Section 23. AIR 1963 Him Pra 3 (6).

(1-A) Agreement between two persons to commit fraud on third party is void. AIR 1930 All 732 (733) = 52 All 1001 (DB).

(2) Where the object of agreement is to conceal actual Sivai amdani and so to reduce assessment of land revenue the agreement is fraudulent. AIR 1923 Nag 76 (76).

(3) An agreement the consideration of which is to perpetuate fraud to defeat the creditors having decree is not enforceable. AIR 1923 All 504 (505, 507) = 45 All 396 (DB). (Bond.)

(4) An agreement to prefer some creditors in order to obtain their consent to a composition between debtor and credi-

Section 23 — Note 7 (contd.)

tors, is void being fraudulent. AIR 1939 Sind 33 (33, 34) = ILR (1939) Kar 147 (DB).

(5) Creditor agreeing not to sue one co-debtor if latter helped in realization of the debt from others and to refund deposit if realization made — Agreement is unenforceable. AIR 1920 Cal 515 (516) (DB).

(6) Where A, a stranger, who advanced money to three widows to enable them to make false claim of inheritance against rightful heir B, got the entire control of suit and under threats of prosecuting the suit to his ruin, induced B to enter into compromise of suit by virtue of which the widows were to withdraw the suit on B executing a bond to A for large sum in discharge of debts alleged to be due from widows to A, it was held that the bond was invalid and fraudulent as against B. ('73-74) 1 Ind App 241 (267) (PC).

(7) A sale made by a person with the object of defeating a probable execution against him is not necessarily one made with a fraudulent and unlawful object. ('79-80) 4 Bom 70 (73) (DB).

(8) An agreement providing that the judgment-debtor should pay the decretal amount with interest subsequent to the date of decree although the decree did not award interest, is not fraudulent. ('77-78) 3 Cal 602 (609) = 5 Ind App 78 (PC).

(9) Where the intention to deceive the Court by the execution of a document, if at all there is any, is there only in a secondary sense, the primary purpose of such execution being the rightful recovery of possession, the document cannot be said to be vitiated by an intention to practise fraud upon the Court. AIR 1949 Cal 204 (206).

(10) Where the fraudulent purpose has been effected the maxim in pari delicto potior est conditio possidentis will apply and the Court will help neither party. AIR 1925 Oudh 120 (123) = 27 Oudh Cas 175 (DB) ** AIR 1957 Andh Pra 781 (784) ** (1909) 36 Cal 874 (881).

(11) Where the object of a clause in a partition deed between plaintiff and defendant on the basis of which the suit for contribution has been filed is rooted in fraud perpetrated by a plaintiff on a third person, the court would not render any assistance to the plaintiff to recover the share of money agreed to be paid by the defendant. (1951) 4 Sau LR 188 (191, 192).

(12) Where the plaintiff in apprehension that if he himself applied, he would not be granted a site by the Government set up some one else to apply for the site with the intention of appropriating the same himself: it was held, that it amounted to playing a fraud on the Government and the transaction being void the plaintiff could not succeed in getting

back the site on the ground that it was a benami transaction. AIR 1954 Mad 811 (813) = ILR (1954) Mad 1195 (DB).

(13) Omission to mention word "fraudulent" in pleading — Still it is open to the Court to examine contract as whole and see whether it falls within mischief of Section 23. AIR 1943 Nag 260 (262, 263) = ILR (1943) Nag 565 (DB).

(14) Where a case put forward in the trial Court was that the agreement in question was void as being opposed to public policy: Held that on same facts it could be attacked as fraudulent in revision. AIR 1939 Sind 33 (34) = ILR (1939) Kar 147 (DB).

(15) Where the vendor never pleaded that the bargain of sale was unfair or unrighteous, an argument on this basis is not open to a third party who has no cause to complain in this matter. AIR 1947 All 110 (114) = ILR (1947) All 321 (DB).

(16) Where the buyer himself knew full well that the seller had no title and entered into the transaction with full knowledge of want of title the contract was invalid being fraudulent involving injury to the person or property of another. AIR 1967 Mad 461 (463) = (1967) 2 Mad LJ 166.

(17) Agreement between two firms according to which Firm A is to submit tender for Government contract for higher amount and Firm B is to pay certain amount to A if B's tender is accepted is neither fraudulent nor opposed to Public Policy. AIR 1963 Him Pra 3 (4, 5).

(18) Where fraud might have been contemplated but not perpetrated, the defendants should not be allowed to perpetrate a new fraud. AIR 1960 SC 213 (217) = (1960) 1 SCR 861.

(19) Sale of property brought about with the knowledge of the prior agreement to sell it to another is fraudulent and the purchaser under the agreement can resist the claim of the transferee under such sale. (1966) 79 Mad LW 368 = ILR (1967) 3 Mad 550.

8. Injury to the person or property.—

(1) Where one of the objects of an agreement was to deal with the minor's interest in property held that it involved and implied injury to the property of the minor and consequently the agreement was unlawful. (1935) 61 Cal LJ 88 (89, 90).

(2) The case of a mortgage by a person who has only a right to half and not the whole of the property mortgaged is not governed by Section 23 at all and therefore not void on the ground that it injures any person or his property. (1908) 12 Cal WN 94 (96) (DB).

(3) A contract to give a son in adoption in consideration of the natural parents receiving an annual allowance during their lives if permitted would

Section 23 — Note 8 (contd.)

involve an injury to the person and property of the adopted son. (1874) 13 Beng LR (App) 42 (43).

(4) Agreements which are calculated to prevent a person from enjoying a fundamental right and which compel him to seek redress in a Court of law are bad and unlawful. AIR 1954 Orissa 80 (86) = ILR (1953) Cut 591 (DB).

(5) A contract to prepare and supply copies of a picture produced in England is not vitiated on the ground that it involves injury to the property of another. AIR 1920 Bom 84 (85) = 44 Bom 720 (DB).

(6) Suit raising dispute relating to right of shebait to manage endowed property — Compromise agreement dispensing with consultation of family members, providing for management by both plaintiff and defendant and for appointment of shebait after plaintiff and defendant — Compromise is not agreement causing injury to property of another. AIR 1965 Pat 33 (37, 39) (DB).

(7) There is nothing wrong in the two parties, agreeing to obtain the land in front of their respective shares of the building for the purpose of using that particular portion of the land in front of their building. AIR 1968 All 79 (81).

(8) The word "injury" as used in the fourth clause of Section 23 means criminal or wrongful harm. Loss which ensues to a trader as a result of competition by a rival trader is not "injury" within meaning of the fourth clause. AIR 1963 Him Pra 3 (9).

(9) Where the buyer himself knew full well that seller had no title and entered into transaction, the contract was invalid being fraudulent involving injury to the person or property of another. AIR 1967 Mad 461 (463) = (1967) 2 Mad LJ 166.

9. Immoral agreements. — (1) Word "immorality" is confined only to sexual immorality. AIR 1959 SC 781 (798) = (1959) Supp (2) SCR 406 ** 1969 Ker LJ 620 = 1969 Ker LR 860 ** (1921) 60 Ind Cas 727 (728) (Lah).

[But see AIR 1959 Andh Pra 370 (376) (DB) ** ('55) 1955 Raj LW 230 (231) ** 1910 Punj LR No. 189 p. 538 (539).]

(1-A) Where a transaction, though completed, was intended to be for consideration, it can be impeached if the consideration is immoral, and it makes no difference whether the transaction is executed or executory. (1905) 28 Mad 413 (418) (DB) ** AIR 1947 Bom 198 (203) = ILR (1947) Bom 206.

(2) Where object of transfer is immoral, no interest in property passes. AIR 1938 Bom 209 (212) (DB) ** AIR 1916 Cal 266 (269) = 43 Cal 115 (DB).

[See however AIR 1958 Cal 713 (719).]

(3) Court has power to dismiss a claim which is tainted with immorality, though such a plea may not be taken by

either party. AIR 1930 Mad 547 (549) ** AIR 1933 Mad 187 (189).

(4) Where the pronote under which money is borrowed for an immoral purpose contains no recital as to the purpose, proof of the knowledge of the creditor about the immorality of the purpose is necessary to hold that the pronote is vitiated. AIR 1922 Mad 181 (182, 183) = 45 Mad 778 (DB).

(5) Where the consideration for a pronote is immoral, the question whether the consideration failed or not would be immaterial, as the agreement would be void under Section 23. (1908) 13 Mad LJ 7 (8).

(6) A lease of a house for running a brothel is not only an act forbidden by statute but also an immoral act under Section 6 (h) (2) of the Transfer of Property Act read with Section 23 of the Contract Act. AIR 1958 Cal 713 (719).

(7) An amount paid by a person to the husband of a woman to make him grant her divorce is money paid for an illegal or immoral purpose and cannot be recovered from the woman. AIR 1956 Nag 160 (160) = ILR (1955) Nag 870.

10. Past and future cohabitation. —

(1) Future cohabitation is immoral consideration. Agreement having such consideration is void. AIR 1933 Bom 209 (211) (DB) ** AIR 1925 All 437 (438) = 47 All 619 (DB) ** AIR 1924 Mad 159 (159) ** (1903) 13 Mad LJ 7 (12).

(2) Although future cohabitation cannot support a promise as being immoral, yet there is nothing wrong in a promise made in consideration of past cohabitation. AIR 1943 Mad 253 (253) ** AIR 1947 Bom 198 (201) = ILR (1947) Bom 206 (DB) ** AIR 1940 All 385 (385) = ILR (1940) All 371 (DB) ** AIR 1938 Pat 502 (503, 504) = 17 Pat 308 (DB) ** AIR 1930 Mad 956 (960) (DB).

[But see AIR 1952 Punj 293 (293) ** AIR 1933 Bom 209 (211) (DB) ** AIR 1930 Mad 239 (239, 240) ** AIR 1924 Bom 135 (136) (DB) ** AIR 1920 Bom 142 (143) = 44 Bom 542 (DB) ** AIR 1968 Mad 392 = (1968) 2 MLJ 153.]

(3) Where an agreement to pay future maintenance is in consideration of the past cohabitation, the mere possibility that future cohabitation might also have been in the contemplation of the parties will not render the agreement void. AIR 1953 Mys 33 (35) = ILR (1953) Mys 117.

(4) Where a pronote is given during the continuance of cohabitation there is no presumption that the consideration is future cohabitation and is therefore, given for an immoral purpose. (1903) 13 Mad L Jour 7 (9).

(5) Where a bond executed for payment of loan is taken by creditor in name of his concubine's mother, debtor is not entitled to plead unenforceability due

Section 23 — Note 10 (contd.)

to immoral consideration. AIR 1920 Mad 198 (201) (DB).

(6) Where adultery was not without consent or connivance of the husband, a contract, for which such adultery forms the consideration, is not illegal. AIR 1928 Pat 375 (386).

11. Prostitution.— (1) Money lent for the purpose of assisting the borrower to visit brothels and bring in prostitutes cannot be recovered in a Court of law. AIR 1918 Cal 399 (399, 400) (DB).

(2) No suit would lie by an adopted daughter of a dancing girl for accounts or a share in the profits of an immoral and illegal partnership. AIR 1939 Mad 139 (142) = ILR (1938) Mad 789.

(3) Knowingly letting a house to a prostitute with the object of her carrying on therein prostitution is immoral and contrary to public policy. (1909) 31 All 58 (58) (DB) ** AIR 1921 Cal 486 (487) (DB) ** 1904 Pun Re No. 65 p. 185 (185).

[See 1898 Pun Re No. 2 (3) (DB).]

(4) Where there was no proof that the lessor let out his house with the knowledge that it was to be used by the tenant to carry on her business of prostitution and while the tenant was in possession it was purchased by a third party, it was held that the purchaser could recover possession of the house through a suit. 1955 All LJ 634 (635).

(5) A custom among the prostitutes that if one of them contracts a marriage, she forfeits all rights in her original family, in other words, that she becomes practically an outcaste, is opposed to public policy and is immoral and consequently unenforceable in the British Indian Courts. AIR 1928 Lah 516 (520) = 9 Lah 428 (DB).

12. Public policy.— (1) A contract which is opposed to public policy cannot be enforced by either of the parties to it. AIR 1923 Mad 626 (628) (DB).

(2) Public policy requires that men of full age, and competent understanding, shall have the utmost liberty of contracting and that their contracts, when entered into freely and voluntarily, shall be valid and that Court should not interfere with this freedom of contract. AIR 1925 Oudh 120 (124) = 27 Oudh Cas 175 (DB).

(3) What is for the good of the community and therefore necessary on the ground of public policy must fluctuate and vary with the circumstances of the time. AIR 1940 Bom 369 (372, 373) = ILR (1941) Bom 71 (DB) ** (1961) 3 Orissa JD 190.

(4) Rules of public policy do not belong to a fixed or customary law; they are capable on proper occasions of expansion and modification. AIR 1957 Cal 336 (341) (DB).

(5) The question whether a contract is opposed to public policy or not is to be decided on general principles only, and not by any consideration of the terms of particular contract. (1909) 32 Mad 185 (190) (DB).

(6) A contract may be invalid because its substance or purpose is contrary to public policy or because of its coercive method of procurement, which is contrary to public policy. AIR 1945 Cal 218 (239) (DB).

(7) The expression "public policy" means and includes a wide range of topics such as trading with the enemies in times of war, stifling prosecutions, champerty and maintenance and various other topics which include certain recognised matters. AIR 1947 Sind 94 (96) = ILR (1946) Kar 380 (DB) ** AIR 1959 Madh Pra 131 = 1960 MPLJ 334 (FB).

(8) The Courts ought to be very cautious in deciding a question of public policy, and though with the development of public opinion and morality, the doctrine must be applied with necessary variation, each case has to be decided on its own facts. AIR 1931 Pat 22 (24) (DB) ** AIR 1959 SC 781 (794, 795) = (1959) 2 SCR (Supp) 406 ** AIR 1959 Madh Pra 151 = 1960 MPLJ 334 (FB) ** ILR (1962) Cut 266.

(8-A) The term 'public policy' does not admit of any definition. It is equivalent to the 'policy of the law.' Whatever tends to injustice of operation, restraint of liberty, commerce and natural or legal right; whatever tends to the obstruction of justice or to the violation of a statute and whatever is against the good morals — When made the object of a contract is against a public policy and therefore void and not susceptible of enforcement. AIR 1964 Andh Pra 465 (467) = (1964) 1 Andh WR 248.

(8-B) Obiter— The question whether the doctrine should or should not be applied to harmful tendencies does not depend on Section 23. If the Courts come to regard the doctrine of public policy as extending also to harmful tendencies then if the object of any contract has harmful tendencies the contract would be void as contrary to public policy. AIR 1959 Madh Pra 151 (166, 168, 169) = 1960 MPLJ 334 (FB).

(9) Fine-spun speculations of social reformers or visionary theorists cannot constitute the ground on which the Court can reach any conclusion as to what is contrary to public policy. It is to be decided on well established principles of law. AIR 1954 Orissa 17 (20) = ILR (1953) Cut 558 (DB).

(10) The doctrine of public policy cannot be extended beyond the classes of cases already covered and the courts cannot invent a new head of public policy. AIR 1947 Sind 94 (96) = ILR (1946) Kar 380 (DB) ** AIR 1954 Orissa 17 (20) =

Section 23 — Note 12 (contd.)

ILR (1953) Cut 558 (DB) ** AIR 1934 Cal 328 (339) = 61 Cal 80 (DB) ** AIR 1931 Pat 22 (24) (DB) ** AIR 1923 Cal 154 (156) (DB) ** (1911) 6 Low Bur Rul 1 (2) (DB).

[See however ILR (1962) Cut 266 ** (1961) 3 Orissa JD 190.]

(11) A person who asks a deed to be declared invalid as being opposed to public policy must prove the grounds which would bring it under Section 23. AIR 1941 Mad 727 (730).

(12) A transaction, to be void as being against public policy, must be found as a fact, in its inception, to amount to or involve an illegality or be of such nature that, if permitted, it will defeat the provisions of the law. (1902) 4 Bom LR 948 (950) (DB).

(13) The plea that a contract is void as being opposed to public policy and illegal, may be raised for the first time in arguments though not pleaded. AIR 1923 Mad 626 (627) (DB).

(14) The question of public policy is one of law and even when the facts have not been fully pleaded by the parties, the Court will deduce them from evidence and apply the doctrine of public policy. (1910) 6 Nag LR 148 (151) ** AIR 1965 SC 166 (169, 171) = (1964) 7 SCR 745.

(15) Plea as to deed being invalid as opposed to public policy is one of mixed law and fact and cannot be raised for first time in second appeal. AIR 1941 Mad 727 (731).

(16) If in contract part of consideration is void as being opposed to public policy, or one of its essential conditions could not be complied with, then it becomes unenforceable. AIR 1918 Bom 170 (170) = 42 Bom 339 (DB).

(17) Money paid under agreement opposed to public policy can be recovered. AIR 1918 Cal 409 (410) (DB).

(18) Sections 23, 26 and 27 of the Contract Act cannot be regarded as exhausting all instances of agreements which are contrary to public policy. AIR 1924 Oudh 404 (405) = 27 Oudh Cas 100.

(19) The following agreements have been held to be opposed to public policy.

- (a) Contract for wholesale supply of rice in contravention of terms of license. AIR 1923 Mad 626 (628) (DB).
- (b) Agreement that judgment-debtor should pay Rs. 6 out of Rs. 41 of his salary to decree-holder. AIR 1941 Bom 389 (392) = ILR (1941) Bom 415.
- (c) Contract to sell not less than certain quantity of intoxicating drugs every year. (1906) 3 All LJ 802 (804) ** 1963 Ker LJ 19.
- (d) Agreement by father to give up entirely the custody and control of his child to mother. AIR 1928 Cal 600 (601) = 55 Cal 730 (DB).

- (e) Transfer of decree with object to defraud other creditors. AIR 1924 Mad 189 (191) (DB).
- (f) Alienation of swastivachanam service inam lands. AIR 1922 Mad 197 (198) = 45 Mad 620 (FB) ** (1962) 1 Andh LT 479.
- (g) Arrangement to secure one creditor advantage over others. (1906) 16 Mad LJ 418 (419) (DB) ** 1961 Ker LJ 655 = 1961 Ker LT 646.
- (h) An agreement by the partner who holds the non-transferable contract for carrying mails to transfer it to the other partner or to continue the contract for the other after dissolution of partnership. AIR 1943 Nag 260 (262, 263) = ILR (1943) Nag 565 (DB).
- (i) Agreement to appoint head of State who is not amenable to the jurisdiction of court as an arbitrator. ILR (1953) Trav-Co 974 (990).
- (j) Contract involving transfer of ration documents in contravention of Section 13, Madras Rationing Order of 1943. AIR 1954 Andhra 51 (52) ** AIR 1967 SC 744 = (1967) 1 SCR 293.
- (k) Contract to alienate that which is in the nature of a personal grant and without permission of the Tahsildar as required by a term of that grant. AIR 1954 Mad 811 (813) = ILR (1954) Mad 1195 (DB).
- (l) An agreement to confer exclusive perpetual right to perform religious services for the whole village. AIR 1951 Kutch 56 (58).
- (m) Agreement to waive benefit conferred by Section 60 (i), Civil P. C. AIR 1950 Bom 155 (157) = ILR (1950) Bom 185.
- (n) Contract of service which in substance amounts to nothing but serfdom. AIR 1958 Madh Pra 367 (368).
- (o) Transfer of a right to sue which is personal to transferor. AIR 1917 Lah 222 (223).
- (p) A contract of insurance effected by a person on the life of another when he has no insurable interest in the life. AIR 1941 Lah 33 (34) (DB).
- (q) Partnership agreement authorising one partner having licence to sell English wine, to sell country liquor and others having licence to sell country liquor to sell English wine. (1968) Cur LJ 775 = 71 Pun LR 122 (Punil).
- (r) Agreements tending to injure the public service. AIR 1964 Andh Pra 465 (467) = (1964) 1 Andh WR 248.
- (s) Formation of partnership by dealer in cloth with licence under Mad-

Section 23 — Note 12 (contd.)

ras Cloth (Dealers) Control Order (1947). AIR 1964 Andh Pra 145 (151) = (1963) 2 Andh WR 455 (DB).

- (t) Execution of decree of divorce obtained from foreign court by husband whose marriage was solemnized in Goa. AIR 1967 Goa 113 (116) (DB).
 - (u) Tenant contracting himself out of rights conferred by statute solely enacted for benefit of tenants. AIR 1965 Andh Pra 86 (90) = (1965) 1 Andh LT 132 (DB).
 - (v) Sub-letting of phone in contravention of conditions. AIR 1968 Andh Pra 315 (318) = (1968) 2 Andh WR 267.
 - (w) Compromise decree dividing amount of pension between parties to suit. AIR 1959 Pat 17 (20) = 1958 Pat LR 343 (DB).
 - (x) Contract to serve on Rs. 2 p.m. for 112 months. AIR 1958 Madh Pra 367 (368) = 1958 MPLJ 657.
- (20) The following agreements have been held to be not opposed to public policy:—
- (a) Contract whereby Government agreed to establish telegraph office in certain locality, on the merchants of locality undertaking to make good loss in its undertaking. AIR 1938 Cal 151 (153, 155) = ILR (1938) 1 Cal 463 (DB).
 - (aa) Contract entered into in violation of Rule 178 (4) of Central Excise Rules (1944). 1968 Ker LR 405 = 1968 Ker LJ 769.
 - (b) Contract for sale and purchase of sovereigns. AIR 1920 Bom 251 (254, 255) = 44 Bom 6 (DB).
 - (bb) Contract absolving party from liabilities under the contract if the claim was not enforced within certain period. AIR 1962 J and K 15 (16, 18).
 - (c) Agreement to pay remuneration for effecting settlement of civil dispute. (1912) 16 Cal WN 480 (481, 482) (DB).
 - (cc) An agreement between two firms according to which firm "A" is to submit tender for Government contract for higher amount and Firm "B" is to pay certain amount to A if B's tender is accepted. AIR 1963 Him Pra 3 (9).
 - (d) Contract by carrier, exempting himself from liability for negligence. (1909) 32 Mad 95 (107) (SB) ** AIR 1965 Cal 252 (259) (DB) ** AIR 1962 Cal 544 ** AIR 1960 Assam 71 (72, 75, 76) = ILR (1957) 9 Assam 443 (DB).
 - [But see AIR 1962 Cal 311 (323).]
 - (dd) Partnership formed to carry on Government contract which expressly prohibited assignment or sub-letting of contract — Not illegal on ground of public policy. AIR 1967 Mad 449 (450) = (1967) 1 Mad LJ 168 (DB).
 - (e) Risk note exonerating railway company from liability except for loss of complete package. AIR 1918 Cal 796 (797) (DB).
 - (ee) Partnership agreement to carry on transport business with vehicles belonging to a partner or to the firm on the authorisation of permits held by a partner. AIR 1966 Madh Pra 13 (17) = 1965 MPLJ 644 (DB) ** AIR 1969 SC 493 (495, 496). (AIR 1967 Mad 100, Reversed; AIR 1963 Mad 413 and AIR 1962 Andh Pra 14, Overruled.)
 - (f) Sale of jajmanka brit. AIR 1924 Pat 321 (322).
 - (ff) Agreement between parties to submit a single tender to Government at an agreed rate to avoid competition. ILR (1962) Cut 266.
 - (g) Insurance policy covering risk of death by suicide. AIR 1945 Oudh 152 (160) = 20 Luck 194 (DB) ** AIR 1968 J and K 39 (44) = 1967 Kash LJ 144.
 - (gg) Contract to supply jute to foreign firm — Supply dependent upon seller obtaining quota and licence from Government — Contract not subject to any term that contract was subject to quota or license — Quota and licence not obtained — Jute not supplied — Arbitration award awarding damages against sellers — Contract and award held not against public policy. AIR 1960 Cal 702 (708) = 64 Cal WN 616 (DB).
 - (h) Custom of Dhadwai charging certain percentage on commodities sold is not opposed to public policy. AIR 1927 Nag 89 (95).
 - (i) Marriage performed outside British India to evade provisions of Sarada Act. AIR 1940 Mad 901 (902).
 - (j) Partition suit among co-sharers — Award — Clause that none of such co-sharers should acquire interest in tenancy falling to share of another and on such acquiring to transfer it to such co-sharer without price — Provision held, was not opposed to public policy. (1936) 163 Ind Cas 347 (350) (Cal).
 - (k) Sale of calf for less amount reserving right of pre-emption and on condition not to castrate with provision for damages for breach. AIR 1915 Cal 53 (54) (DB).
 - (l) Promissory note executed to induce witness to give evidence in execu-

Section 23 — Note 12 (contd.)

- tant's favour. AIR 1914 Mad 366 (367) (DB).
- (m) An agreement by a widow not to claim enhancement of the maintenance. AIR 1924 Mad 687 (688) = 47 Mad 308 (DB).
- (n) Contract of pre-emption in United Provinces. AIR 1924 All 400 (403, 404) = 46 All 333 (DB).
- (o) Rule providing that on death of share-holder his legal representative should apply for transfer of shares in his name, else shares would not vest in him is reasonable. AIR 1926 Mad 785 (786).
- (p) Agreement by person appointed as deputy of minor khatib to pay money in consideration of his appointment. (1910) 8 Ind Cas 745 (745) (Mad).
- (q) Agreement to withdraw application for licence to carry mails in consideration of payment of money by a competing applicant. AIR 1946 Mad 289 (290, 291).
- (r) An agreement by an executor to receive remuneration for services rendered by him, not from the estate but from third person. (1895) 22 Cal 14 (20) (DB).
- (s) Loan of money to aid litigant not for the purpose of getting the property recovered but only with a condition for refund of money actually advanced. AIR 1954 Hyd 98 (103) = ILR (1953) Hyd 711 (DB).
- (t) Agreement by member of joint Hindu family to take a share lessened to the extent of the cost incurred on his higher education. AIR 1954 Nag 361 (364, 365) = ILR (1954) Nag 479 (DB).
- (u) Loan advanced by Government with a condition that the amount is recoverable as arrears of land revenue. AIR 1955 Bom 305 (311) = ILR (1955) Bom 654 (DB).
- (v) Chit fund not involving any risk, speculation or uncertainty. 1958-1 Andh WR 456 (457) = 1958 Andh LT 157.
- (w) Agreement to bring suit in one only out of two Courts having jurisdiction is not opposed to public policy. AIR 1946 Lah 57 (61) = ILR (1945) Lah 281 (FB). (Per Mahajan J.) ** AIR 1968 Mad 194 (194) = (1967) 1 MLJ 299 ** AIR 1968 Pat 44 (45) = 1967 BLJR 164 (DB). (AIR 1956 Madh B 120, Not foll.) ** AIR 1968 Raj 89 (93, 94) 1967 Raj LW 129. (AIR 1956 Madh B 120, Dissented from.) ** 1960 MPLJ 1359 (DB).
- (x) Agreement in a compoundable case to pay money in lieu of other party agreeing to drop prosecution. 1946 Jaipur LR 327 (331) (DB).

(y) Dealing in differences by way of forward contracts. AIR 1958 Cal 703 (706, 707) = ILR (1956) 1 Cal 297 ** AIR 1958 Cal 703 (707, 708) ILR (1956) 1 Cal 297 (DB).

(z) Agreement among the members of Senayar community to entrust all betel leaves grown in the village to a particular person — the highest bidder at the auction — and not to sell themselves to any other individual. The contract is not in restraint of trade. 79 Mad LW 676 = (1967) 1 MLJ 117 (120).

(21) The condition in a sale deed that the purchasers of the share would not partition the same without the consent of the vendor places a restriction on the right of ownership of the vendees only during the lifetime of the vendor and not permanently and therefore is not opposed to public policy. AIR 1915 All 40 (41).

(22) Where a creditor by operation of a foreign law was deprived of his claim over a debt arising in that country and at the same time discharged the debtor of his liability by the payment made to the Government in whom the property in the debt was vested, it was held that the creditor could not enforce that liability in India by attachment of the debtor's property ignoring what has happened under the foreign law which being a law of the same kind as the one existing in India itself could not be said to be opposed to public policy. AIR 1955 SC 590 (604) = 1955-2 SCR 402 = ILR (1955) Punj 1127.

(23) The common law of England and that of India have never struck down contracts of wager on the ground of public policy; indeed they have always been held to be not illegal notwithstanding the fact that the statute declared them void. There is no definite head or principle of public policy evolved by Courts or laid down by precedents which would directly apply to wagering contracts. AIR 1959 SC 781 (797) = (1959) Supp (2) SCR 406.

13. Champerty and maintenance.— (1) Champerty, under English law, is something against good policy and justice; something tending to promote unnecessary litigation; something immoral in law, and to constitute which a bad motive, in the same sense is necessary. (1863) 8 Moo Ind App 170 (187) (PC).

(2) The English law of champerty is not applicable in India. ('73-74) 1 Ind App 241 (265) (PC) ** (1893) 20 Cal 843 (847) = 20 Ind App 112 (PC) ** (1876-77) 2 Cal 233 (255) = 4 Ind App 23 (PC) ** 1955-2 Mad LJ 339 (352) (DB) ** AIR 1954 Bom 478 (482) = ILR (1955) Bom 11 (DB) ** AIR 1963 Andh Pra 370 (372) = (1962) 2 Andh WR 442 (DB) ** AIR 1962 Andh Pra 457 (458) = (1962) 2 Andh LT 340 (DB) ** AIR 1958 Andh Pra 630 (631) (DB).

Section 23 — Note 13 (contd.)

(3) There is no law in India which would make agreements, which would, under English law, be called champertous, void. (1908) 35 Cal 420 (426) = 35 Ind App 48 (PC) ** AIR 1924 PC 162 (173) = 52 Ind App 1 = 48 Mad 230 ** AIR 1945 Oudh 152 (158) = 20 Luck 194 (DB) ** AIR 1930 Lah 392 (393) (DB) ** AIR 1924 Mad 877 (879) ** AIR 1921 Oudh 207 (208) = 24 Oudh Cas 313 ** AIR 1920 Nag 69 (71).

(4) The ground, upon which agreements, which are champertous or agreements for maintenance, have been held to be void, in this country, is that they are contrary to public policy, or are considered to be immoral and against public policy. (1874) 13 Beng LR 530 (548) (DB).

[See also AIR 1937 Mad 161 (162) = ILR (1937) Mad 584 (DB).]

(5) Agreements to finance litigation in consideration of having share of property, are not per se opposed to public policy. They may be so if the object of the agreement is an improper one, such as abetting unrighteous suits or gambling in litigation. AIR 1931 PC 100 (104) ** AIR 1924 PC 162 (174) = 48 Mad 230 = 52 Ind App 1 (PC) ** (1905) 27 All 271 (290) = 32 Ind App 113 = 8 Oudh Cas 155 (PC) ** (1893) 20 Cal 843 (847) = 20 Ind App 112 (PC) ** (1876) 2 Cal 233 (257) = 4 Ind App 23 (PC) ** AIR 1963 Andh Pra 370 (372) = (1962) 2 Andh WR 442 (DB) ** AIR 1958 Andh Pra 630 (631) (DB).

(6) In deciding whether a particular transaction is vitiated under this section, the Courts are to consider whether the transaction is merely the acquisition of an interest in the subject of the litigation bona fide entered into or whether it is an unfair or illegitimate transaction, got up for the purpose merely of spoil or of litigation disturbing the peace of families, and carried on from a corrupt and improper motive. (1873-74) 1 Ind App 241 (265) (PC) ** AIR 1938 Lah 23 (28) ** AIR 1936 Rang 491 (492) = 14 Rang 392 (DB) ** AIR 1933 Rang 418 (421) (DB) ** AIR 1931 Cal 144 (149, 150) (DB).

(7) In a suit to recover money given to finance litigation, plaintiff must prove the agreement to be just and equitable. AIR 1934 All 1023 (1024).

(8) Where A who had agreed to pay B a certain sum of money, in consideration of B supplying funds to A and otherwise assisting him in a litigation, it was held, that B was entitled to recover the amount which A had agreed to pay. (1932) 138 Ind Cas 900 (902) (PC).

(9) Where an agreement to finance litigation upto the High Court is entered into, the mere fact that no appeal was lodged, as it became unnecessary to do so, does not enable the party to evade

his obligations. AIR 1934 Lah 1017 (1018).

(10) Agreement by N as agent of F, to give loan to K — K promising to grant lease of his zemindary to N — K getting loan from another person and granting him lease — N suing K for specific performance of agreement — After N's death his heir assigning his interest under agreement to F — Assignment, held, was not void for champerty. (1861) 8 Moo Ind App 170 (188) (PC).

(11) Where a claimant to property, unable to fight out his own case, engages another person to act and represent him wherever necessary and promises certain sum to him on success of suit, such agreement is not champertous or void as against public policy. AIR 1936 Rang 491 (493) = 14 Rang 392 (DB).

(12) An agreement, taken by a pleader, that he shall be given part of the property, in dispute, in the suit, in which he is engaged, must, necessarily be contrary to public policy, and therefore, unlawful. AIR 1925 Bom 470 (471) = 49 Bom 619 (DB).

(13) Where suit is not a speculative one, any agreement about it is not champertous. AIR 1922 Upp Bur 12 (14) = 4 Upp Bur Rul 104.

(14) A speculative sale is not bad on the ground of being against public policy. (1895) 18 Mad 374 (378) (DB).

(15) Transferee's claim to recover property, which he has bought by paying costs of suit, is a speculation in litigation, but it is not of such a nature as to be rendered invalid in law. AIR 1925 Oudh 71 (72).

(16) Champertous agreements are, in their essence, speculative; and fairness or otherwise of a particular bargain is to be decided regard being had to the value of property and the commercial value of claim. The proportion to be retained by the claimant is an important matter to be considered while judging the fairness of a bargain made at a time when result of litigation is problematical. AIR 1940 PC 19 (23) = ILR (1940) Lah 1 = ILR (1940) Kar (PC) 63 = 67 Ind App 50.

(17) In considering the fairness of the transaction the circumstances have to be weighed as a whole and the disparity in consideration is not the sole criterion. In doing so it is to be remembered that it is not the market value of the property which has to be taken into consideration but its commercial value of the property which is the subject-matter of the transaction. AIR 1955 All 393 (396) (DB).

(18) Where the reward stipulated was out of all proportion to the actual expenses incurred, held, that the agreement was unconscionable and, therefore illegal as against public policy. AIR 1926 Lah 43 (45) ** AIR 1938 Lah 23 (27, 28) ** AIR 1924 Rang 48 (51) = 1 Rang 565

Section 23 — Note 13 (contd.)

(DB) ** (1889) 11 All 128 (135) (DB) ** (1889) 11 All 118 (125) (DB) ** (1874) 20 Suth WR 446 (450) = 13 Beng LR 495 (DB).

[See however AIR 1928 Mad 437 (439) (DB).]

(19) In the case of a contract, to advance money to help an appeal being preferred to the Privy Council with a stipulation for reward of a size which is unconscionable a decree should be passed only for the amount actually advanced with interest. (1893) 15 All 352 (358, 359) = 20 Ind App 127 (PC) ** (1889) 11 All 128 (135) (DB) ** (1889) 11 All 118 (126) (DB).

(20) Agreement to finance litigation and receive half of decretal amount is prima facie inequitable and opposed to public policy. AIR 1934 All 1023 (1024) ** AIR 1962 Andh Pra 457 (459) = (1962) 2 Andh LT 340 (DB).

(21) Agreement by plaintiff to finance defendant's partition suit in consideration of defendant giving half of his share is an unconscionable and extortionate bargain and opposed to public policy. AIR 1940 Bom 143 (147) (DB).

(22) Agreement to finance litigation in consideration of the claimant's getting a share of property, if successful, but containing no provision for refund in case of failure, is champertous. AIR 1919 Mad 718 (724) (DB).

(23) Agreement under which Mahomedan Mooktear interfering in affairs of Hindu family advanced money to carry on suit by members of that family to set aside alienations, made by their father, on the understanding that he was to be entitled to the share of estate, recovered from purchasers in the event of success, savours of champerty. (1874) 13 Beng LR 516 (517, 518) (DB).

(24) Where the form of a contract is so adopted as to evade the effect of the transaction being stamped with the character of champerty, it will be set aside. (1869) 12 Moo Ind App 275 (309) (PC).

(25) An agreement by a Chartered Accountant to accept engagement on percentage of profits is void. AIR 1957 Cal 449 (458) (DB).

(26) An agreement to pay the agent appearing in a case before the Supreme Court his out of pocket expenses and a fixed amount in any event and the taxed cost if the case proved to be successful is not void on the ground of the latter portion of the agreement. It is not either an agreement affected by the law of maintenance or one which is champertous. AIR 1954 SC 26 (28).

(27-28) The plaintiff cannot be non-suited merely because some other person has been attending the hearings or has been helping the plaintiff in the conduct of the case. This conduct does not constitute collusion which can, in law by itself entail dismissal of the suit. AIR 1959 Punj 434 (439) = ILR (1959) Punj 794 (DB).

14. Agreements to stifle prosecution. — (1) An agreement, the object of which is to stifle a prosecution, is against public policy. AIR 1945 Cal 218 (234) (DB) ** AIR 1969 Mad 15 (17) = (1968) 1 Mad LJ 422 (DB) ** AIR 1963 Madh Pra 139 (140) = 1962 MPLJ 411 ** 1966 Ker LJ 819 ** AIR 1960 Cal 741 (748) ** 1959 Raj LW 75 = ILR (1959) 9 Raj 129.

(2) The essential element in stifling a prosecution is the tampering with the administration of justice by a private individual. AIR 1926 Cal 519 (521) (DB) ** AIR 1926 Cal 455 (456) (DB).

(3) In regard to agreements to stifle prosecutions, it is of the essence of the defence that the defendant should establish a contract, whereby the proposed or actual prosecutor agrees, as part of the consideration received or to be received by him, either not to bring or to discontinue criminal proceedings for some alleged offence. AIR 1941 PC 95 (96) = ILR (1941) Kar (PC) 141 = ILR (1942) 1 Cal 1 = 68 Ind App 144 ** AIR 1952 Bom 315 (320) = ILR (1952) Bom 715 ** AIR 1936 Mad 656 (658) = ILR (1937) Mad 471 ** AIR 1966 Orissa 228 (229) = 32 Cut LT 881 ** AIR 1965 SC 166 (169, 171) = (1964) 7 SCR 745 ** 1965 Ker LT 849.

[See also AIR 1937 Mad 223 (224) (DB).]

(4) If it be an implied term of a deed that criminal complaint would not be further proceeded with, then the consideration for the deed is unlawful, quite irrespective of the fact, whether any prosecution in law has been started or there is something for which it is to be dropped. AIR 1940 Pat 573 (575) = 19 Pat 424 (DB) ** AIR 1969 Mad 15 (17, 18) = (1968) 1 Mad LJ 422 (DB) ** AIR 1967 Ker 51 (53) = 1967 Ker LT 19.

(5) The question whether there was, or was not, an agreement to stifle prosecution is one of fact. AIR 1945 Cal 218 (245) (DB) ** 1950 All LJ 379 (381) ** AIR 1967 Ker 51 (54) = 1967 Ker LT 19 ** AIR 1961 All 173 (174) ** 1959 Ker LJ 733 = 1959 Ker LT 777 (DB).

(6) An agreement which has the object of stifling a prosecution, is from its very nature seldom set out on paper. Like many other contracts, it has to be inferred from the conduct of the parties. AIR 1950 Nag 71 (76) = ILR (1950) Nag 105 ** AIR 1967 Kerala 51 (54) = 1967 Ker LT 19.

Section 23 — Note 14 (contd.)

(7) In deciding the question as to whether the consideration for an agreement was the settlement of the pending criminal cases the Court cannot be confined to the terms of the agreement. AIR 1940 Cal 337 (342) = ILR (1940) 1 Cal 372 (DB).

(8) Transaction entered into with object of stifling criminal prosecution — Object achieved — Parties not in fiduciary relationship — Both parties in *pari delicto* — One of the parties cannot repudiate transaction. AIR 1938 Oudh 24 (26).

(9) An agreement to compound a non-compoundable offence is forbidden by law and when such an agreement will constitute the consideration for or be the object of, an agreement the latter will fail to develop into a contract. AIR 1945 Cal 218 (234) (DB).

(10) Where an offence is non-compoundable, an agreement, the purpose of which is to compound that offence, is illegal as opposed to public policy. AIR 1945 Bom 82 (84) = ILR (1945) Bom 208 ** AIR 1950 Nag 71 (76) = ILR (1950) Nag 105 ** AIR 1941 Pat 349 (350) ** AIR 1939 Lah 98 (99) (DB) ** 1963 Ker LJ 505 = 1963 Ker LT 460 ** AIR 1960 Ker 194 = 1959 Ker LT 1268 ** 1960 Raj LW 27 = ILR (1959) 9 Raj 934. (AIR 1947 All 317, Diss. from.)

(11) If, even a part of the consideration of an agreement is shown to be the stifling of a non-compoundable offence, the agreement must be held to be void. AIR 1943 Sind 197 (205) = ILR (1943) Kar 49 (DB) ** AIR 1953 Cal 415 (421, 423) ** 1950 All L Jour 379 (381) ** AIR 1942 Mad 173 (174, 176) = 43 Cri L Jour 724.

(12) Where the consideration for an agreement is a promise not to prosecute for an offence, which is non-compoundable the agreement is not enforceable. AIR 1933 Bom 413 (414, 416) = 57 Bom 678 (DB) ** AIR 1942 Mad 662 (662) = 44 Cri L Jour 29 = ILR (1943) Mad 183 (DB). (AIR 1942 Mad 173 = 43 Cri LJ 734, Reversed.) ** AIR 1940 Pat 683 (689) = 19 Pat 715 (DB).

(13) An agreement not to prosecute for a non-compoundable offence, is not enforceable only where the consideration for the agreement was clearly such an illegal promise. AIR 1938 Bom 413 (414, 416) ** AIR 1922 Pat 502 (503) = 1 Pat 164 (DB) ** AIR 1917 Pat 454 (455) = 2 Pat L Jour 630 (DB).

(14) An agreement, the consideration for which is the abandonment of criminal prosecution of a non-compoundable offence, is void. AIR 1923 Cal 292 (292) (DB) ** AIR 1957 Pat 477 (480) ** AIR 1940 Pat 573 (576) = 19 Pat 424 (DB) ** AIR 1937 All 370 (372) ** AIR 1934 Pesh 105 (106) (DB) ** AIR 1923 Lah 689 (690) ** (1912) 8 Nag LR 97 (104) ** (1905) 3 Low Bur Rul 42 (42, 43).

(15) Where the consideration for an agreement is withdrawal of a complaint for a non-compoundable offence, the bond is void. (1913) 40 Cal 113 (117, 118) (DB) ** AIR 1938 Cal 840 (850) = ILR (1939) 1 Cal 241 (DB) ** AIR 1934 All 1068 (1069) ** AIR 1931 All 128 (128) = 53 All 130 ** AIR 1924 Pat 305 (306) (DB).

(16) It is not enough that the motive which impelled the party, who undertook the liability under the agreement, was that a pending criminal case should be withdrawn. The test to be applied is whether it was an express or implied term of the bargain between the parties that a non-compoundable criminal case should not be proceeded with. AIR 1945 Bom 82 (84) = ILR (1945) Bom 208 ** (1955) 8 Sau LR 324 (326) ** (1952) 56 Cal WN (4DR) 91 (96) ** AIR 1927 All 318 (318) = 49 All 540 (DB) ** AIR 1922 Pat 502 (503) = 1 Pat 164 (DB).

(17) Contract for payment of money in respect of which a criminal prosecution is pending is not by itself opposed to public policy, where there is a civil liability. The consideration and object of such a contract is not illegal within the meaning of Section 23. AIR 1931 Cal 421 (422) (DB) ** AIR 1947 All 317 (325) (DB) ** AIR 1941 Oudh 593 (596) (DB) ** AIR 1934 Pesh 105 (106) (DB) ** AIR 1932 Lah 541 (543) = 13 Lah 356 (DB).

(18) The fact that the prosecution was actually withdrawn as a result of the execution of the bond does not necessarily show that the object or consideration of the bond was the stifling of the criminal case. AIR 1938 Cal 840 (850) = ILR (1939) 1 Cal 241 (DB).

[See also AIR 1951 All 613 (614).]

(19) Agreement between husband and wife, pending criminal case against husband by wife's brother relating to a non-compoundable offence, is valid, provided, it is made independently of the criminal case. AIR 1926 Lah 33 (34).

(20) Where security is given by an outsider, who is under no existing obligation, the consideration could be nothing else but withdrawing of the criminal case and as such, the security is not entertainable in law. AIR 1938 Cal 840 (851) = ILR (1939) 1 Cal 241 (DB).

(21) Where the withdrawal of the complaint is due to the debtor having executed a pronote in favour of the creditor, but such withdrawal is not the consideration of the pronote the pronote is not invalid. AIR 1927 Lah 530 (533).

(22) It is not necessarily unlawful to agree to withdraw a criminal complaint of a non-compoundable offence; because it may have been withdrawn because complainant had very little chance to succeed in establishing his case. AIR 1929 All 456 (457).

(23) Sale of property, for raising money to be given to third party as bribe, to

Section 23 — Note 14 (contd.)

induce him to withdraw criminal charge against vendor — Vender not party to unlawful agreement — Sale held valid. (1882) 8 Cal 24 (28) (DB) ** AIR 1955 Mad 369 (375) (DB).

(24) The advance of a loan by A to B for payment by latter to C in order to avoid the prosecution of his father for embezzlement is not hit by Section 23. AIR 1952 Bhopal 32 (33).

(25) A man, to whom a debt is due may take security for that debt from his debtor, even though the debt arises out of a non-compoundable offence, and he threatens to prosecute for that offence, provided, he does not in consideration of such security agree not to prosecute and such an agreement will not be inferred from the creditor using strong language. AIR 1933 Bom 413 (416) = 57 Bom 678 (DB) ** AIR 1945 Cal 218 (224) ** AIR 1940 Cal 337 (341, 342) = ILR (1940) 1 Cal 372 (DB) ** AIR 1936 Mad 656 (659) = ILR (1937) Mad 471 ** AIR 1927 Lah 231 (232).

(26) In cases of agreement to stifle prosecutions, the fact that there was a debt really due from the accused to the complainant, is irrelevant if the agreement to abandon a prosecution is part of the consideration for payment of the debt. AIR 1941 PC 95 (96) = 68 Ind App 144 = ILR (1941) Kar (PC) 141 = ILR (1942) 1 Cal 1 ** AIR 1951 All 613 (614).

(27) A creditor must not, by stifling prosecution, obtain a guarantee for his debt. AIR 1933 Bom 413 (416) = 57 Bom 678 (DB) ** AIR 1926 Cal 59 (64) = 53 Cal 51 (DB).

(28) If the agreement as to the civil liability changes the nature or the extent of the original civil liability; for example, if the guarantee of a surety is introduced or if the liability is changed from a personal one to a mortgage security, this will be an indication that the agreement is not merely in settlement of the original civil liability, but that it is one made under pressure and in return for an agreement not to prosecute. AIR 1940 Cal 337 (342, 343) = ILR (1940) 1 Cal 372 (DB).

(29) A reference is invalid and the award which followed would be inoperative when the reference is the result of an understanding between the parties to abandon the prosecution of a non-compoundable case. AIR 1944 Sind 80 (81) = ILR (1943) Kar 390 (DB) ** AIR 1939 Lah 187 (187) ** AIR 1939 Pat 291 (292) ** AIR 1933 Cal 817 (818) ** AIR 1963 SC 107 (112) = (1963) 3 SCR 687.

(30) If it is an implied term of the reference to arbitration of a civil dispute that the criminal complaint would not be further proceeded with, then the consideration of the reference is invalid, whether any prosecution had been started or not. AIR 1930 PC 100 (102) = 57

Ind App 117 = 57 Cal 1302. (AIR 1926 Cal 519, Reversed.)

(31) Where the partners agree to refer their whole dispute concerning the partnership to arbitration, the agreement does not become void under Section 23 simply because a criminal prosecution under Section 406, Penal Code, is pending against one of the partners at the instance of the other partners, and in pursuance of such an agreement the prosecution is dropped. AIR 1927 Lah 465 (466).

(32) In case of offence compoundable with or without Court's leave, agreement between complainant or prosecutor and accused, or person interested in his welfare, to withdraw prosecution, is not against public policy and is therefore valid. AIR 1941 Rang 231 (233) = 1941 Rang LR 316 ** AIR 1946 Mad 80 (80) ** AIR 1945 Bom 82 (84) = ILR (1945) Bom 208 ** AIR 1942 Mad 173 (176) = 43 Cri LJ 734 ** 1935 Oudh WN 553 (554) ** 1960 MPLJ 1374 = 1960 Jab LJ 737.

(33) Compounding, on behalf of wife, a compoundable offence, for consideration, by husband, is legal and the consideration is not illegal merely because of the absence of signature of wife. AIR 1928 Bom 305 (306) = 52 Bom 693.

(34) A promise to pay sum of money as compensation for the abduction of woman is not enforceable, abduction being a non-compoundable offence. 1904 Pun Re No. 82, p. 302 (304) (DB).

(35) Though criminal breach of trust is not compoundable in British India, pro-note executed in consideration of dropping prosecution of such offence committed in French territory, where it is a compoundable offence, for consideration, payable in British territory, is valid. AIR 1923 Mad 708 (709, 711).

(36) Offence compoundable with Court's permission — Compromise during pendency to refer dispute to arbitration and withdraw prosecution — Compromise is lawful. AIR 1939 Lah 98 (99, 100) (DB).

(37) Where the complaint is about a non-compoundable offence but the sworn statement disclosing an offence which is only compoundable, the parties are at liberty to compound and an agreement in respect of such compoundable offence is not invalid. AIR 1946 Mad 80 (80) ** AIR 1916 Cal 917 (917, 918) (DB).

(38) The withdrawal of a false complaint intentionally lodged to coerce the opposite party to enter into an agreement is not good consideration for such agreement even though the offence alleged is a compoundable one. AIR 1932 Lah 446 (447) (DB).

(39) A promissory note executed for the amount to the person who reported an offence under S. 406, Penal Code, immediately after his complaint was recorded by police, is not void under Section 23. 1950 All LJ 379 (382).

Section 23 — Note 14 (contd.)

(40) The test to determine whether the condition amounted to stifling the prosecution is really to find out from the language of reference along with the attending circumstances as to what was the consideration for the agreement. AIR 1961 All 173 (174).

(41) There cannot be an agreement to the effect that even if there is an embezzlement, the person who has embezzled will not be prosecuted and the matter will be referred to an arbitration. 1965 All LJ 538 = ILR (1965) 2 All 82.

(42) A principal has right to revoke vakalat given by agent in favour of Advocate, for if he is to be constrained to continue his litigation through a counsel not of his choice, it would tantamount to stifling the prosecution of a lawful suit and certainly, therefore it will be against public policy. AIR 1968 Mad 333 (334) = 1968 2 Mad LJ 74.

(43) Where the offence is compoundable only with the permission of the Court before which the prosecution is pending, till such permission is granted, the offence remains non-compoundable. AIR 1963 Madh Pra 139 (139, 140) = 1962 MPLJ 411.

15. Marriage contracts.— (1) Marriage contract is not per se opposed to public policy and therefore void. AIR 1949 Pat 250 (252) = 27 Pat 287 (DB) ** AIR 1963 Mys 245 (247) = (1963) 1 Mys LJ 437.

(2) Contract of betrothal entered into by a Hindu parent is not void as being against public policy or Hindu Law. 1937 Mad WN 1274 (1277).

(3) A breach of betrothal agreement gives rise to a claim for damages. AIR 1915 Lah 480 (481).

(4) It is a matter of public importance that parents and guardians, as a class, should duly perform their duty as sponsors in the marriages of infant children and agreements which intend to cause misfeasance in the performance of this duty may be properly held void as being opposed to public policy. 1889 Pun Re No. 128, p. 446 (450, 451) (FB).

(5) To constitute marriage brokerage contract, some third party must stipulate for a personal benefit to himself for bringing about marriage. 1937 Mad WN 1274 (1277).

(6) Where the object of an agreement is to procure by corrupt means, the guardian's consent to a desired marriage and is therefore, a bargain and sale of the minor in marriage, as it were, such agreement is void, as opposed to public policy. 1892 Punj Re No. 112, p. 385 (387) (DB).

(7) A contract to pay money to the father of a girl in consideration of his giving her in marriage is immoral and opposed to public policy. (1909) 32 Mad

185 (188) (FB) ** 1889 Pun Re No. 128, p. 446 (448) (FB) ** AIR 1957 Orissa 124 (129) = ILR (1957) Cut 334 ** AIR 1928 Nag 89 (90) = 24 Nag LR 66 ** (1912) 10 All LJ 159 (161, 162).

[But see AIR 1926 Pat 582 (600) = 5 Pat 646 (DB).]

(8) An agreement for the purchase of a bride for the son of a person who had given his daughter in exchange for finding a wife for that person is void being against public policy. AIR 1930 Lah 561 (566) = 11 Lah 598 (DB).

(9) Contract by A to give his daughter in marriage to D's son and to pay damages in case of breach, is void since it creates pecuniary interest in marriage taking place. AIR 1914 Mad 551 (552) = 37 Mad 393 (DB) ** AIR 1935 Pesh 121 (122).

(10) An agreement providing money payment for the negotiation of a marriage by a third party is void being immoral and contrary to public policy. (1889) 13 Bom 131 (136).

(11) Agreement to pay money to a person for persuading woman to marry a person, paying money, is opposed to public policy. AIR 1919 Upp Bur 2 (2) = 3 Upp Bur Rul 119.

(12) Receiving consideration, by those who arrange marriages, when the money received, is intended to benefit those persons and not for the expenses of the ceremony or for the benefit of bridegroom or bride, is against public policy and hence no suit would lie to enforce any agreement to that effect. AIR 1944 Nag 159 (160) = ILR (1944) Nag 535 (DB).

(13) Contract for payment of money by parent of, either boy or girl, after performance of marriage is not void ab initio, as being opposed to public policy. AIR 1919 All 248 (248) (DB).

(14) A promise to pay a particular sum of money or to settle some property on a bride or bridegroom in consideration of her or his marrying the son or daughter of the promisor is not illegal. AIR 1945 Mad 165 (166) ** (1959) 2 Mad LJ 502.

(15) Betrothal with unborn person is against public policy. AIR 1930 Lah 561 (564) = 11 Lah 598 (DB).

(16) Consideration paid in consideration of betrothal agreement is not recoverable. AIR 1915 Lah 480 (481).

(17) Although a marriage when performed in the Asura form is valid, an agreement to pay money to the father, in consideration of such marriage, is not valid, and the money cannot be recovered by suit. (1909) 32 Mad 185 (190) (FB) ** AIR 1926 Pat 582 (588) = 5 Pat 646 (DB).

(18) A suit can lie to recover money already paid to the girl's father, in case the marriage falls through, there having been a breach of the marriage contract.

Section 23 — Note 15 (contd.)

AIR 1928 Nag 89 (90) = 24 Nag LR 66
 ** AIR 1954 Orissa 17 (23) = ILR (1953)
 Cut 558 (DB) ** AIR 1951 Pat 519
 (520) = 27 Pat 687 (DB) ** AIR 1949
 Pat 250 (252) = 27 Pat 287 (DB) **
 AIR 1947 Pat 132 (134) ** AIR 1968
 Andh Pra 375 = (1967) 2 Andh WR 465.
 [But see (1912) 10 All LJ 159 (161,
 162).]

(19) Money paid for arranging for marriage can be recovered if contract is not one of brokerage. AIR 1923 Nag 298 (296, 297).

(20) Where certain amount was borrowed under a promissory note for celebrating the marriage of the borrower's daughter but the lender had no knowledge that the marriage was in contravention of the Child Marriage Restraint Act the transaction was not unlawful within the meaning of Section 23, Contract Act. (1958) Andh LT 14 ** AIR 1967 Andh Pra 83 (85) = (1966) 1 Andh LT 21 ** AIR 1958 Andhra Pra 145 (146) = (1957) 2 Andh WR 16 (DB).

(21) Where the plaintiffs' case in the plaint was that a promissory note executed by their father came into existence while the criminal proceedings were pending against their father and therefore its execution was opposed to public policy, it is the duty of the plaintiffs to prove that the promissory note was executed under the circumstances stated in the plaint. Where there is no evidence to connect the criminal prosecution with the execution of the promissory note its execution cannot be held to be opposed to public policy. AIR 1964 Mad 327 (329) = (1964) 2 Mad LJ 232.

(22) Taking of 'Tilak' forbidden by and made offence under Bihar Dowry Restraint Act — Money paid under contract — Marriage not taking place — Money cannot be recovered, contract under which it was paid being one forbidden by law. AIR 1962 Pat 343 (345, 346, 348) (DB).

16. Adoption contracts. — (1) Agreement by widow, whereby she undertakes not to exercise her power to make adoption, is void as being opposed to public policy. AIR 1919 Mad 447 (452) (DB) ** AIR 1962 Bom 175 (181) = 62 Bom LR 726 (DB).

(2) A contract to give a son in adoption in consideration of the natural parents receiving an annual allowance during their lives is void under Section 23. (1874) 13 Beng LR (App) 42 (43, 44) ** AIR 1922 Bom 382 (382) = 46 Bom 908 (DB).

(3) Agreement by adoptee as condition precedent to give some property to widow's brother is binding on adopted son. AIR 1926 All 7 (10, 14) (DB).

(4) Agreement to pay bribe to procure adoption of a boy is one against public policy and therefore void. AIR 1915 Mad 130 (131) (DB).

(5) Contract offering inducement to one party to adopt a certain person on pain of losing a part of his property is not opposed to public policy, if the parties intend thereby to end family trouble. AIR 1925 Mad 321 (322, 323) ** AIR 1926 Mad 1093 (1093, 1094) (DB).

(6) Although under law a person validly adopted cannot renounce his status arising under the adoption a person whose alleged adoption is disputed can by an agreement admit that there had been no adoption of him at all. As his admission does not amount to the renouncement of any status the agreement is not invalid. 1947 Marwar LR (Civ) 100 (104) (DB).

(7) Recognition by Thikanedar of adoption made by Sikmi Jagirdar under him upon execution of bond for payment of nazarana — Bond cannot be enforced after Constitution — Power to give sanction of payment of nazarana lapsed after Constitution — Bond is therefore without consideration and cannot be sustained on any ground of public policy. 1961 Raj LW 632. (AIR 1961 Raj 146, Rel. on.)

17. Religious contracts. — (1) An agreement to pay money to another for offering prayers to God for the success of the promisor in a suit is not opposed to public policy. AIR 1929 Mad 812 (812) = 53 Mad 29 (DB).

[But see AIR 1927 All 406 (407) = 49 All 705 (DB).]

(2) Agreement to perform religious rites to secure, by propitiation of deity, confirmation in post — Agreement is not opposed to public policy. AIR 1935 Nag 119 (120) = 31 Nag LR 229.

(3) Agreement for consideration by a Gayawal to pay part of his earnings from certain ceremonies to an Acharya is neither opposed to public policy nor uncertain and so is not void. AIR 1916 Pat 218 (219) = 1 Pat LJ 539 (DB).

(4) Agreement by Pandas of temple to share offerings to deities is not necessarily against public policy. AIR 1923 All 56 (57) = 45 All 79.

(5) Agreement among Maha Brahmans regulating method in which offerings shall be collected or divided which does not control or restrict discretion of those, by whom offering or gifts are made, is valid. AIR 1918 Oudh 462 (463) = 20 Oudh Cas 265.

(6) Sale of a share of the right to receive the offerings of a share is not opposed to public policy, if it is made in favour of one, who is a participant in the offerings, and not to a stranger. AIR 1933 Lah 223 (224).

18. Agreement to indemnify surety. — (1) An agreement by the accused with the surety who gives bail to him, that he will indemnify the surety if the bail is forfeited on account of the accused's non-appearance is void, being opposed to

Section 23 — Note 18 (contd.)

public policy. AIR 1925 Nag 59 (60) = 20 Nag LR 166 ** AIR 1930 Cal 596 (597) = 57 Cal 1093 ** AIR 1920 Cal 498 (498) ** 1899 Pun Re No. p. 1 (4) (DB).

(2) Bail bond forfeited due to accused's failure to appear — Third person agreeing to indemnify surety in case of forfeiture — Agreement to indemnify is illegal. AIR 1915 Cal 695 (695) (DB).

(3) Person standing surety for another on receipt of cash consideration — Latter cannot recover consideration. (1922) 65 Ind Cas 137 (138) (DB) (Lah).

(4) Where A deposited a certain sum of money with B who undertook to stand surety for a person who was an accused in a case but not for his good behaviour and B agreed to refund the money to A on the termination of the case it was held that the agreement was not void as being opposed to public policy. AIR 1952 Ajmer 28 (28).

(5) No agreement between surety and accused that latter would reimburse former for amount of security on forfeiture — Amount forfeited — Accused, three years later, voluntarily executing mortgage in favour of surety, consideration being amount forfeited — Section 23, held, did not apply. AIR 1938 Lah 732 (734) (DB).

19. Office brokerage contracts. — (1) A promise to pay money in order to procure resignation of public servant with a view to promisor's securing that appointment is void as being an office-brokerage agreement. (1907) 30 Mad 530 (531).

(2) It is contrary to public policy to induce public officers for money or other valuable consideration, to use their position and influence to procure a benefit. AIR 1921 Cal 185 (187) = 48 Cal 427 (DB) ** AIR 1916 Cal 266 (267) = 43 Cal 115 (DB).

(3) Agreement to withdraw candidature for a public office in consideration for certain sum to be annually paid amounts to bargain or traffic relating to public office and is opposed to public policy. AIR 1931 All 428 (429) = 53 All 609 ** AIR 1957 Pat 659 (660) = 35 Pat 870.

(4) A Kaikagada under which certain amount is paid as consideration with the object that a shanbhogue should not revert to his post and the person making the payment should continue in his place as a shanbhogue, is void under S. 23, Contract Act as its object is opposed to public policy. AIR 1953 Mad 506 (506, 507).

(5) Where plaintiff and defendant agreed that both should eventually bear costs of lambardari suit, brought by both of them and that successful party should pay to other half the pachotra of the office, held, agreement was void ab initio. 1893 Pun Re No. 86 pp. 346 (347).

(6) Transfer of a right to conduct charity by one trustee to another co-

trustee for consideration, is against public policy, and confers no right on transferee. AIR 1938 Mad 982 (987) (DB).

(7) Agreement to pay money in consideration of recommendation to appointing authority is against public policy, and, therefore, void. AIR 1933 Mad 768 (768) ** AIR 1951 Madh B 113 (1) (113).

(8) The object or consideration of an agreement under which one person promised to pay another in consideration of his securing him an appointment outside the territorial limits of the Travancore State was held to be not unlawful within the meaning of Section 24 of Travancore Contract Act, 10 of 1115. 1949 Trav-Co LR 244 (245).

(9) Sale of palanquin bearing service Inam is not opposed to public policy. 1911-2 Mad WN 588 (588) (DB).

(10) Agreement to give share of commission, allowed by Government as salary for services, is not opposed to public policy. 1912 Pun LR No. 201, pp. 642 (646).

20. Interference with course of justice. — (1) Agreement between parties to assist the other in litigation with object of delaying execution of decree is opposed to public policy within the meaning of Section 23. AIR 1933 All 303 (305) (DB).

(2) An agreement to make a disposition of property in the hands of the Court Receiver is against public policy, as an interference with the Receiver's work, and is unlawful. (1912) 16 Cal WN 114 (116) (DB).

(3) Contract to transfer property to a person, in consideration of his giving false evidence, is void as being against public policy. AIR 1940 Rang 73 (75).

(4) A promissory note executed in consideration of giving evidence is unenforceable whether the statement which a person may have promised to give be either true or false. AIR 1938 Mad 911 (913, 914).

(5) Agreement to bring suit in one only out of two Courts, having jurisdiction, is not opposed to public policy. AIR 1946 Lah 57 (61) = ILR (1945) Lah 281 (FB) ** AIR 1954 Mad 845 (846) = ILR (1954) Mad 855 (DB) ** AIR 1937 Nag 334 (335) = ILR (1939) Nag 641.

[But see AIR 1935 Nag 48 (49).]

(6) The mere fact that a part of the consideration for a sale of property is dependent on the result of a suit relating to that property, does not make the transaction bad as opposed to public policy. AIR 1932 Pat 80 (83) = 10 Pat 670 (DB).

(7) Agreement by judgment-debtor, not to appeal against the decree, in consideration of certain arrangements with the decree-holder, is binding upon the parties under Section 23. AIR 1931 Nag 126 (127).

Section 23 — Note 20 (contd.)

(8) A contract involving a reference to arbitration in a pending suit without order of Court has the effect of ousting the jurisdiction of the Courts though only temporarily to proceed with the trial and therefore is opposed to public policy. AIR 1950 Orissa 169 (176) = ILR (1950) Cut 1 (DB).

(9) Where the illegality of an agreement on the ground of its interfering with the course of justice is established before the Court, it will be declared to be void even in the absence of a plea from any party about its illegality. 1954 Raj LW 423 (426).

21. Agreements creating interest against duty. — (1) If a person enters into a contract with a public servant, which he knows casts upon the public servant duties, conflicting with his duties as a public servant, the contract is void. (1909) 13 Cal WN 59 (62).

(2) It is sufficient to show that the personal interest created by the contract has a tendency to prevent the plaintiff from discharging his duties. AIR 1959 Madh Pra 151 (166 to 169) = 1960 MPLJ 334 (FB).

(3) Commissioner appointed by Court, though at instance of party taking bond from latter — Bond is not enforceable. AIR 1923 Cal 436 (437) (DB).

(4) Person entrusted with sale of land, and occupying fiduciary position, using that position for interest of prospective purchaser for which purchaser agrees to pay him commission — Contract is unenforceable. AIR 1936 Mad 541 (543).

(5) Loan by a regimental bania to a sowar is not opposed to public policy. 1902 Pun Re No. 96 p. 432 (437) (DB).

(6) Payment of money to procure exercise of private influence with Government is not immoral or contrary to public policy. AIR 1917 Pat 92 (98) (DB).

(7) Suit to enforce agreement to sell two and half annas share in managing agency by way of bride offered to plaintiff, a member of committee appointed to report on management of Company by defendant — Held agreement was not enforceable. AIR 1966 SC 1734 (1738) = (1966) 3 SCR 623.

22. Agreement between client and his pleader. — (1) Agreements between legal practitioners and their clients whereby the payment of the former is contingent on the success of the litigation, are improper and opposed to public policy. 1907 Pun Re No. 61 p. 280 (288) (FB) ** AIR 1954 Bom 478 (484, 485) = ILR (1955) Bom 11 = 1954 Cri LJ 1531 ** 1874 Pun Re No. 26 p. 130 (132) (DB).

[But see 1878 Pun Re No. 5 p. 33 (42) (DB).]

(2) A champertous agreement between an advocate and his client for the former being remunerated proportionately

to the results of the litigation out of the property recovered cannot be enforced. AIR 1954 SC 557 (559, 560) = 1955 SCR 490 = 1954 Cri LJ 1410.

(3) Agreement to pay vakil's clerk for special attention to his case is void, as against public policy. AIR 1918 Mad 504 (504) = 41 Mad 471 (FB).

(4) Loan transaction between a pleader and person, who is not his client, is not opposed to public policy and is enforceable. AIR 1917 Oudh 34 (36) = 20 Oudh Cas 67 (DB) ** AIR 1953 All 276 (281) = ILR (1951) 1 All 690 (DB).

23. Benami transactions. — (1) Benami transactions are entered into for a variety of reasons and the benamidar holds the property in trust for his principal. AIR 1960 SC 213 (219) = (1960) 1 SCR 861.

(2) Where a public servant buys property in the name of another without the permission of the Government, his conduct is reprehensible but cannot be deemed to be against public policy. AIR 1923 Cal 154 (156) (DB) ** AIR 1931 Bom 269 (270, 271) (DB).

[But see AIR 1918 Oudh 457 (459) ** (1911) 11 Ind Cas 2 (2, 3) (All).]

(3) Benami purchase by police-officer, while in service, is not void as being opposed to public policy. AIR 1919 Nag 50 (52) = 16 Nag LR 25.

[See however AIR 1933 Bom 262 (265) (DB).]

(4) Assignment of mortgage in the name of a patwari's mother is not against public policy. AIR 1917 All 462 (463) = 39 All 51 (FB).

[See also AIR 1944 Nag 325 (326) = ILR (1944) Nag 645.]

(5) Transfer of property to kanungo's wife, but really in favour of kanungo, is not against public policy. AIR 1917 All 447 (447) = 39 All 58 (DB).

(6) Plaintiff entering into agreement with defendant 1, Inspector of Land Records, to buy land in his circle — All transactions to be carried out in name of defendant 2 — Defendant 1 buying land in name of defendant 2 — Contract held, was not opposed to public policy. (1911) 6 Low Bur Rul 1 (3) (DB).

(7) Money lending by pleader in the name of his wife. Question in such cases is really one of professional etiquette rather than of public policy, and contract is not invalid. AIR 1923 Oudh 3 (4) = 26 Oudh Cas 201.

(8) Since the Service Rules of Court of Wards were not shown to be statutory rules, disregard thereof did not taint a benami arrangement whereby an employee of Court of Wards was conducting business in name of another person, with illegality. AIR 1965 SC 1364 (1367, 1369) = (1965) 1 SCR 861.

24. Agreement against bidding. — (1) There is nothing unlawful in two or more persons agreeing not to bid against

Section 23 — Note 24 (contd.)

one another at an auction sale. (1894) 18 Bom 342 (346) (DB) ** AIR 1951 Mad 390 (391) ** AIR 1949 Nag 113 (113) = ILR (1948) Nag 431 ** AIR 1940 Bom 369 (373) = ILR (1941) Bom 71 (DB). (Public sale held for farming out public revenues.) ** AIR 1933 Oudh 124 (127) = 8 Luck 233 (DB) ** AIR 1918 Low Bur 77 (81) ** AIR 1917 Nag 62 (63). (Excise auction.) ** (1911) 10 Mad LT 338 (340) (DB) ** (1907) 6 Cal LJ 111 (116) (DB) ** ('05) 1 Cal LJ 85 (91) (DB) ** (1889) 16 Cal 194 (199) (DB).

(2) An agreement not to bid against each other, with the object of defrauding a third person, is void. AIR 1933 Oudh 124 (127) = 8 Luck 233 (DB).

(3) An agreement by intending bidders at an auction forming a ring to share the profits resulting from the 'knock out' is against public policy. AIR 1943 Lah 100 (100, 101) = ILR (1943) Lah 837 ** AIR 1954 Mys 29 (31) = ILR (1953) Mys 340 ** (1907) 6 Cal LJ 111 (116) (DB).

(4) Agreement among intending bidders at public auction, by the Government, for purpose of keeping down bids and dividing profits, as among themselves is opposed to public policy and unenforceable. AIR 1914 Sind 165 (169, 170) = 8 Sind LR 247 (DB).

(5) An agreement between several persons to purchase land jointly at an auction-sale, held under the Punjab Colonization of Government Lands Act, without bidding against each other, is not opposed to public policy. AIR 1932 Lah 32 (33).

(6) An agreement by which one party agreed to withdraw his tender to postal authorities to carry mails on bus, in consideration of the other paying certain amount, is not invalid under Section 23 as being opposed to public policy. AIR 1946 Mad 289 (291).

25. Monopoly.— (1) An agreement, the object of which is to create a monopoly is void, as being opposed to public policy. (1905) 28 Mad 520 (523) (DB).

(2) Agreement attempting to monopolise right to ply on hire motor boats, tends to fix hire at artificial figure and as such is against public policy. AIR 1936 All 112 (115).

(3) A contract by a District Board giving a person a monopoly to ply lorries along a road undertaking to permit no other lorry proprietor to use the road is void being opposed to public policy. AIR 1934 Lah 474 (475).

(4) Agreement of plaintiff not to set up business in consideration of which defendant promised to pay off certain sum for life is unlawful under S. 23 in spite of the fact that it was partly carried out. AIR 1916 Low Bur 51 (54) = 8 Low Bur Rul 389 (FB).

(5) Grant of a monopoly in favour of a person by a panchayat to sell vege-

tables in the village is opposed to public policy under Section 23. AIR 1928 Lah 33 (34).

(6) A contract purporting to be a license, granting exclusive right to collect hides of animals from a certain area amounts to granting a monopoly and is unenforceable by reason of S. 23. AIR 1938 Pat 473 (475, 476) = 17 Pat 255 (DB).

(7) Defendant executing kabuliyat in plaintiff's favour agreeing to pay him specified rent for privilege of carrying on trade within certain area — Contract held was not in nature of monopoly. AIR 1916 Pat 304 (305) = 1 Pat LJ 37 (DB).

(8) A claim to an absolute right of sending scavengers in Madras to various houses and thereby to extort from the scavengers a certain portion of the wages earned by them is opposed to public policy as being an oppressive monopoly. AIR 1940 Mad 558 (559) (DB).

(9) Where in its essence a contract executed on 4-10-1947 is a monopoly contract granted to the plaintiff to manufacture radios, etc., in an area for a stipulated period of years for certain concessions, the contract will be hit by Article 19 (1) (g), Constitution of India ever since the commencement thereof. AIR 1964 Raj 205 (212) = 1964 Raj LW 313 (DB).

26. Trade combines.— (1) Agreement to form combination to fix rates and to divide profits in certain manner is not in restraint of trade or opposed to public policy. (1912) 34 All 587 (588) (DB) ** (1905) 29 Bom 107 (119) (DB).

(2) An agreement whereby it is provided that the manufacture and sale of certain produce shall be distributed according to certain proportions, that the manufacturing capacities of the parties to it shall remain in status quo, and the produce, if and when manufactured, shall be sold at a particular rate does not fall within Section 23. (1905) 29 Bom 107 (119, 120, 121) (DB).

(3) Where the Government allows a market to be held on its land and restricts the admission of brokers, there is nothing illegal or contrary to public policy in it. AIR 1914 Cal 202 (203) (DB).

(4) Traders agreeing to carry on business among members of their private association only and to penalise the breach of condition — Agreement does not offend against the provisions of Section 23. AIR 1931 All 83 (85) = 53 All 316 (DB).

(5) The principle of public policy cannot be made to apply in its result to a combination of persons who agree not to quote against one another at a public sale. ILR (1962) Cut 266.

27. Service contracts.— (1) A contract under which a labourer engages to work without any payment under conditions which make it practically impossible for

Section 23 — Note 27 (contd.)

him to discharge the debt is wholly void. AIR 1918 Pat 249 (250) = 3 Pat LJ 412 (DB).

(2) Even if the contract consists of two covenants, viz., a positive covenant undertaking to serve a particular person during a particular period and also a negative covenant agreeing not to serve any other person during that particular period, such an agreement would be void neither under Section 23 nor under Section 27. AIR 1964 Guj 215 (217) = (1963) 2 Lab LJ 522. (ILR 18 Bom 702, Rel. on.)

(3) In order to succeed in an action for procuring breach of a service contract there ought to be some evidence, to predicate active association of the defendant with the breach of contract by the servant. AIR 1958 Madh Pra 367 (367, 368) = 1958 MPLJ 657.

(4) Harwahi bond executed by an agricultural labourer which binds the executant to daily attendance and manual labour until a certain sum is repaid in a certain month and penalises default with overwhelming interest is unenforceable being opposed to public policy. AIR 1916 Cal 718 (719) = 42 Cal 742 (DB).

(5) Where a bond provided for payment of interest in the shape of work to be done by the executant and his wife and the wages to be paid were low, and there was no provision for repayment, it was held that it was a slavery bond and unenforceable. AIR 1929 Mad 267 (268) (DB) ** AIR 1918 Cal 409 (410).

[See also AIR 1927 Mad 818 (819) ** AIR 1918 Mad 917 (917).]

[But see AIR 1927 Mad 531 (532) (DB).]

(6) A contract to do gratuitous service, in lieu of rent for the land occupied, is not illegal as being against public policy under Section 23. AIR 1929 Cal 224 (224) = 56 Cal 862.

(7) Contract to engage dancing boy on payment of certain sum is not contrary to public policy. AIR 1919 Cal 1002 (1003) (DB).

(8) Agreement to do what constitutes breaches of the service agreement defeats the provision of law relating to contract and is void. 1961 Ker LT 885 = (1961) 2 Ker LR 539.

(9) Agreements tending to injure the public service are always considered to be opposed to public policy. AIR 1964 Andh Pra 465 (467) = (1964) 1 Andh WR 248.

(10) Contract to serve on Rs. 2 P.M. for 112 months is illegal. AIR 1958 Madh Pra 367 (368) = 1958 MPLJ 657.

(11) Section 23 has no application to rules such as Rule 143 of the Railway Establishment Code, containing provision for service agreement. AIR 1959 All 643 (649).

23. Contract of agency. — (1) Contract of agency is not by itself unlawful.

When principal makes agent do something which is unlawful the act of the agent becomes unlawful. AIR 1930 Sind 9 (10) (DB).

(2) One of several judgment-debtors got an assignment of decree in name of his agent who was to be paid commission for executing the same against the remaining judgment-debtors. Held that suit by principal against agent for money realised was maintainable as agency was not in itself unlawful. AIR 1921 Mad 334 (335) = 44 Mad 334 (DB).

(3) A principal having paid money to his agent for an unlawful purpose is entitled to a locus paenitentiae till the execution of the unlawful object and the unlawfulness of the commission, he was entrusted with, could not be set up by the agent in defence. 1898 Pun Re No. 63, page 218 (221) (DB).

(4) Where an agent puts through transactions contravening control legislation, he abets the commission of an offence under the law and the contract of agency is vitiated by Section 23. AIR 1951 Kutch 50 (52).

(5) Where an agent makes collections as a result of transactions forbidden by law no claim to recover such amount from the agent can be given effect. 1957-2 Andh WR 226 (232) ** AIR 1954 Nag 306 (319) = ILR (1954) Nag 514 (DB).

(6) An agent can recover from his principal the amounts paid by him for the principal's gambling debt. 1912 Pun Re No. 79, p. 249 (251, 252) (DB).

(6-A) Agreement of agency — Trader appointed selling agent of medicines — Trader though not holding wholesaler's licence at time of agreement obtaining licence subsequently — Agreement is not void. AIR 1970 Bom 128 (131) (DB). (AIR 1964 SC 978 and AIR 1965 SC 484, Followed.)

(7) As to non-liability of employer of agent to do a criminal act, see Section 224.

29. Partnership. — (1) A partnership is prima facie legal, unless it is proved that the object of the same was illegal or that the object of the partnership necessarily involved something illegal or contrary to public policy. AIR 1930 Mad 361 (363) ** AIR 1956 Nag 225 (227) = ILR (1956) Nag 774 (DB).

(2) When some objects of a firm are lawful while others are unlawful and it is possible to separate the lawful objects from the unlawful objects, the deed of partnership is not void but is partly valid to the extent it relates to the lawful objects. 69 ITR 819 = (1968) 2 ITJ 377 (DB) (All).

(3) An agreement of partnership which contravenes the provisions of Section 4 of the Companies Act in that it is between persons exceeding seven in number is illegal and void. AIR 1952 Vindh Pra 1 (3).

Section 23 — Note 29 (contd.)

(4) A partnership formed for the purpose of carrying on business in violation of the Food Grains Control Order is illegal. AIR 1957 Andh Pra 837 (840) ** (1967) 2 Andh LT 405 = (1968) 1 Andh WR 101.

(5) Where the terms of a licence for running a talkie prohibited assignment or transfer or sub-letting by the licensee, a partnership agreement entered into by the licensee about subject matter of the license is void. AIR 1955 Mad 536 (539) = ILR (1954) Mad 1013 (DB).

(6) A suit to recover money lent to a partnership which is an illegal one or forbidden by law, with the knowledge that it is going to be used for purposes forbidden by law, is not maintainable. AIR 1936 Mad 603 (604).

(7) A suit filed by a firm consisting of partners all of whom obtained licenses to carry on business in fireworks but did not obtain a license in the name of the firm as such is not in any way affected by the provisions of Section 23 of the Indian Contract Act. 1958-1 Andh WR 474 (476).

(8) Money lent for illegal partnership but not known to lender to be so can be recovered. AIR 1926 Mad 772 (774) (DB).

(9) Illegal association suit by member for dissolution and realization of his share — Per Sulaiman J.: Simple partition of assets can be granted — Per Mukerji and Walsh JJ.: Relief of partition amounts to dissolution of partnership and so cannot be granted. AIR 1926 All 591 (594, 597, 601) = 48 All 735 (DB).

(10) The party who in the suit for the dissolution of a partnership pleads that the partnership being one prohibited by the provisions of law must prove the illegality by such evidence as he can place before the Court. AIR 1954 Mad 1074 (1075).

(11) Partnership entered into in contravention of Cochin Tobacco Act (1922) is illegal. AIR 1960 Ker 276 (278) = 1960 Ker LT 122 (DB). (AIR 1950 Mad 444 (FB), held not overruled by (1959) 37 ITR 271 (276) (SC). 27 Cochin 222 and AIR 1927 Lah 333, Dissented from.)

(12) Section 23 does not hit a partnership made in contravention of Section 6, Central Excises and Salt Act and Rr. 175 (2), 178 (4) and 210 framed thereunder. AIR 1960 Andh Pra 39 (42) = (1959) 2 Andh WR 550 (DB).

(13) A new partner, merely by joining a business which is being carried on by the old partner in a shop, does not become a tenant of the shop. An agreement making him a co-tenant without the permission as required by law is void. 1967 All LJ 410 = 1967 All WR (HC) 370.

(14) Where the contractor who undertook Government works was himself permitted to appoint agent for the purposes of completion of the works, and was not prohibited from taking a financing partner to finance the business, the agreement of partnership between the contractor and the financing partner was not illegal. (1961) 3 Orissa JD 190.

(15) Motor transport business carried on by partnership on strength of permit obtained by partner and with vehicle belonging to such partner is legal. AIR 1966 Madh Pra 13 (17) = 1965 MPLJ 644 (DB) ** AIR 1969 SC 493 (495, 496). (AIR 1967 Mad 100, Reversed; AIR 1963 Mad 413 and AIR 1962 Andh Pra 14, Overruled.)

(16) A partnership agreement which contravenes the positive provision of Section 28 (1) of the Electricity Act (1910) is void. AIR 1967 Pat 191 (199) (DB).

(17) Partnership formed to carry on Government contract which expressly prohibited assignment or sub-letting of contract is not illegal. AIR 1967 Mad 449 (450) = (1967) 1 Mad LJ 168 (DB).

(18) Partnership agreement by dealer in cloth with licence under Madras Cloth (Dealers) Control Order (1947) is illegal. AIR 1964 Andh Pra 145 (151) = (1963) 2 Andh WR 455 (DB).

(19) Partnership being an agreement within the meaning of Section 23, it is not unlawful, though its object is to carry on wagering transactions. AIR 1959 SC 781 (792) = (1959) Supp (2) SCR 406.

(20) Where four partners, one of whom was a licensee of selling English wine and others were licensees for selling country liquor formed a partnership authorising the other partners also to sell English Wine, the partnership is illegal. 1968 Cur LJ 775 = 71 Punj LR 122 (Punj).

(21) A partnership for carrying on business in forward contracts is not illegal. AIR 1958 Cal 703 (708) = ILR (1956) 1 Cal 297 (DB).

30. Void Contracts — Enforcement of. — (1) In cases which fall under Section 23, the agreement is void ab initio. AIR 1936 Nag 268 (269) = ILR (1937) Nag 94.

(2) Where a contract is illegal being contrary to positive law or against public policy, an action cannot be maintained to enforce it directly or to recover the value of services rendered under it or money paid on it. AIR 1916 Cal 266 (268) = 43 Cal 115 (DB) ** AIR 1919 Low Bur 71 (73, 74) ** AIR 1914 Lah 353 (353) ** AIR 1967 Cal 294 (306, 307) ** AIR 1967 Pat 72 (75, 76) = 1966 BLJR 46 ** (1962) 28 Cut LT 485.

[But see AIR 1928 Mad 476 (476).]

(3) When a transaction is entered into for an unlawful or immoral purpose and that purpose has been achieved, the Court would not interfere at the instance of the

Section 23 — Note 30 (contd.)

'particeps criminis' to relieve him from the legal effects of the transaction. AIR 1921 Mad 326 (327) = 44 Mad 329 (DB) ** AIR 1941 Oudh 529 (555) ** AIR 1930 Oudh 196 (199) = 4 Luck 669 ** AIR 1924 Pat 321 (322) ** AIR 1923 Mad 626 (628) (DB) ** AIR 1919 Nag 43 (43) = 16 Nag LR 129 ** (1888) 12 Bom 422 (424) (DB) ** AIR 1966 Andh Pra 209 (209, 210) = (1965) 1 Andh WR 156 (DB) ** AIR 1958 Cal 713 (724, 729, 730) = 63 Cal WN 258 (DB).

(4) Where a contract is void for illegality as opposed to being merely nugatory, money paid in pursuance of it cannot be recovered unless it is still executory because of the maxim "*ex turpi causa non oritur actio*". AIR 1938 Nag 335 (344) = ILR (1939) Nag 1 (FB) ** AIR 1918 Low Bur 77 (81).

(5) A party cannot recover money paid in respect of a contract which is tainted with criminality or immorality, even though the contract has not been performed. AIR 1916 Cal 266 (268) = 43 Cal 115 (DB) ** AIR 1919 Pat 316 (316) = 4 Pat LJ 542 (DB).

[But see AIR 1930 Lah 1018 (1020) ** AIR 1968 Andh Pra 375 (378) = (1967) 2 Andh WR 465. (Presents and monies given in connection with contract of marriage of minors — Contract being admittedly illegal — Repudiation of contract — Amount paid is recoverable.) ** AIR 1967 Cal 294 (310).]

(6) The law allows locus paenitentiae. So before fraud or an illegal purpose is carried out the money may be recovered from the person to whom it was advanced. AIR 1959 Andh Pra 647 (649) (DB).

(7) Where an illegal purpose of a void contract has been carried out even in part, a Court of equity will not only refuse to enforce the obligation created or to restore property given away, but will also refuse to grant relief by way of declaration on the principle that no relief could be given to a wrongdoer. AIR 1916 Pat 284 (288, 290) = 1 Pat LJ 48 (DB).

(8) Transferee of property for illegal purpose cannot get transfer annulled if intended purpose has been carried out. AIR 1924 Mad 849 (849).

[See AIR 1938 Lah 732 (734) (DB).]

(9) The money due under an illegal or immoral agreement cannot be recovered by a change in the form of action based on another agreement, which has for its support the original illegal agreement. AIR 1935 Cal 748 (750).

(10) Where a deposit has been made in connection with an illegal contract, such a deposit can be recovered by a suit if the plaintiff does not rely for his claim on the illegal contract. AIR 1932 Nag 32 (33) = 27 Nag LR 376.

(11) Where a promissory note is void being made payable to bearer on demand

the creditor can sue on the basis of any obligation independently of the execution of the promissory note. AIR 1928 All 371 (376) = 50 All 839 (SB).

(12) A party to an illegal and void contract, willing to perform his part, cannot enforce performance. AIR 1916 Low Bur 51 (54) = 8 Low Bur Rul 389 (FB).

(13) Defendant borrowing money from plaintiff intending to utilise same for gambling — Plaintiff not privy to this intention — Plaintiff can recover money by suit. AIR 1931 All 458 (458).

(14) The right of a person who pays money to another, in pursuance of an illegal agreement, to claim its refund is not lost by the fact that it was really due to the payee. AIR 1917 Mad 607 (608) = 40 Mad 285 (DB).

(15) Purchasers are not entitled to refund by reason of fact that they are deprived of the benefit of portion of what they purchased under a deed of conveyance which turned out to be unenforceable. AIR 1927 Sind 62 (65) (DB).

(16) A Court cannot decline to enforce a contract which is legal as between the parties on a mere assumption that in reality it is intended for the benefit of a third person, against whom a statutory prohibition to enter into such contract exists. AIR 1925 Lah 65 (66).

(17) When a contract is void because prohibited by statute, the Court has power to work out the equities and place the parties upon terms. AIR 1938 Nag 335 (344) = ILR (1939) Nag 1 (FB) ** AIR 1954 Kutch 7 (8).

(18) While it is the duty of the Court not to render its aid to the enforcement of transactions which are illegal, it is at the same time incumbent that the illegality should be sufficiently proved and the facts constituting illegality established. AIR 1930 Mad 361 (363) ** AIR 1940 Rang 73 (74) ** AIR 1925 Rang 275 (277) = 3 Rang 275 ** AIR 1920 Cal 704 (705) (DB) ** AIR 1968 SC 1165 (1176) = 1968-3 SCR 163 ** AIR 1965 SC 1364 (1368) = (1965) 1 SCR 861 ** AIR 1959 Andh Pra 647 (649) (DB) ** 1963 Ker LJ 19 ** AIR 1959 Andh Pra 370 (376) (DB).

(19) Where a contract or transaction is illegal there need be no pleading of the parties raising the issue of illegality and the Court is bound to take judicial notice of it. AIR 1965 SC 1364 (1370) = (1965) 1 SCR 861 ** AIR 1959 Madh Pra 151 (168) = 1960 MPLJ 334 (FB) ** 1963 Ker LJ 19 ** AIR 1960 Andh Pra 190 (191) ** AIR 1960 Pat 145 (146) = 1959 BLJR 549 (DB) ** AIR 1959 Andh Pra 370 (376) (DB).

(20) Objection that contract is illegal must be considered even though taken late. AIR 1944 Mad 387 (387).

(21) Although a contract is not enforceable at law, as being for an illegal purpose, it can form the basis of a pro-

Void agreements.

24. Agreements void, if considerations and objects unlawful in part.—If any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object, is unlawful,* the agreement is void.

Illustration

A promises to superintend, on behalf of B, a legal manufacture of indigo, and an illegal traffic in other articles. B promises to pay to A a salary of 10,000 rupees a year. The agreement is void, the object of A's promise, and the consideration for B's promise, being in part unlawful.

[*] See Ss. 57 and 58, *infra*.

Section 23 — Note 30 (contd.)

secution. AIR 1933 Rang 199 (200) = 34 Cri LJ 1255 ** AIR 1963 Madh Pra 326 (329) = 1963 MPLJ 325 (DB).

(22) Maxim "in pari delicto potior est conditio defendantis" does not apply (a) where the illegal purpose has not yet been substantially carried into effect before it is sought to recover money paid or goods delivered in furtherance of it; (b) where the plaintiff is not in pari delicto with the defendant; (c) where the plaintiff does not have to rely on the illegality to make out his claim. AIR 1968 SC 534 (537) = (1968) 1 SCR 805 ** AIR 1960 SC 213 (216) = (1960) 1 SCR 861.

(23) A wagering contract cannot be enforced as being hit by Section 23. AIR 1964 Andh Pra 537 (538, 539) = (1965) 1 Andh LT 234 ** AIR 1967 Cal 25 (28) (DB).

(24) Where the cause of action is not founded either on the illegal contract or on its breach, the party's right to possess his own chattels will be enforced against those who without any right detain the same or convert it to their own use even if it appears either from the pleadings or evidence led at the trial that they have come in possession of the defendants as a result of an illegal transaction. AIR 1960 Bom 548 (551) = 62 Bom LR 304 = ILR (1960) Bom 671 (DB).

(25) When the agent for purchase knows at the time he makes the purchase that the goods he instructed to buy are to be dealt with in a manner prohibited by law, he cannot enforce any right arising out of the contract of agency. AIR 1960 Andh Pra 190 (192).

(26) A promissory note or a mortgage in favour of the society does not become unenforceable when it is not shown to be illegal by the fact that the society under the memorandum of association had no power to lend money. AIR 1959 Madh Pra 172 (175) = 1959 MPLJ 301 (DB).

(27) Where the forward contracts in respect of cotton were not void ab initio but became void and unenforceable due to prohibition of law, there is no bar to their enforcement when the inhibition is lifted by the repeal of that law. AIR

1961 Raj 52 (59) = ILR (1960) 10 Raj 1304 (DB).

(28) A contract entered into in defiance of a legal provision continues to be illegal even after the legal provision ceases to be effective and a plea that the contract, when it was to be enforced, was not hit by any subsisting law is not open to the party seeking to enforce it. AIR 1963 All 206 (209) = 1962 All LJ 767 (DB).

(29) If the illegality be trivial or venial and the plaintiff is not required to rest his case upon that illegality, the public policy demands that the defendants should not be allowed to take advantage of the position. AIR 1960 SC 213 (218, 219) = (1960) 1 SCR 861.

SECTION 24 — SYNOPSIS

1. Scope and applicability.
2. Indivisible contracts.
3. Divisible contracts.
4. Mortgage transactions.

1. Scope and applicability.— (1) Section 24 lays down no principle at variance with the English common law. It is declaratory in its nature. AIR 1940 Rang 45 (47) = 1939 Rang LR 711.

(2) Section 24 does not apply to a transfer of immovable property. AIR 1934 All 246 (249) (DB) ** AIR 1930 All 1 (3) = 52 All 338 (FB) ** AIR 1935 Oudh 501 (505) (DB).

(3) Section 24 does not apply to cases of an out and out transfer. AIR 1925 All 474 (476).

(4) There is nothing in Sections 23 and 24 to support the view that a sale, made with the view to defeat a probable execution, would be a sale with a fraudulent and unlawful object, and, therefore, void. (1879-80) 4 Bom 70 (73) (DB).

(5) Section 24 has no application to promises which are offered in the alternative. AIR 1931 All 589 (592) (DB).

(6) Section 24 has no applicability to a case where the plaintiff is seeking to enforce an equity in respect of a perfectly valid security. AIR 1917 All 290 (292) = 39 All 539 (DB) ** AIR 1935 All 862 (863) = 58 All 230 (DB).

(7) Where, after the marriage, the Muhammadan husband agreed by a Kabinnama in favour of his wife that

Section 24 — Note 1 (contd.)

he would do nothing without the permission of his wife, that if he so did, she would be at liberty to divorce him, that he would pay over to her the whole of the money which he might earn during the time the marriage continued, and so on: **Held**, in a suit by the wife to enforce such a contract, that Section 24 did not apply. (1875) 15 Beng LR (App) 5 (7).

(8) Where the agreement is hit by Section 24, Section 65 may not apply. But where neither the consideration nor the object is illegal Section 24 has no application. AIR 1955 Assam 33 (43) (DB) ** AIR 1938 Bom 54 (59, 60) (DB).

2. Indivisible contracts.— (1) When a contract consists of a number of terms and conditions each condition does not form a separate contract but is an item in the one contract of which it is a part. The consideration for each condition in a case like this is the consideration for the contract taken as a whole. AIR 1954 SC 236 (242) = 1954 SCR 817.

(2) Where a part of the consideration is unlawful, then general rule is that when you cannot sever the illegal from the legal part of a contract, the contract is altogether void. AIR 1933 Bom 132 (134) = 57 Bom 278 (DB) ** ILR (1963) 1 Ker 522.

(3) Where each part of contract is an inducement to every other part of it, there is an entire contract for a single consideration and there is no warrant to divide the contract into distinct parts. AIR 1938 Mad 982 (985, 992) (DB).

(4) Where the various promises of the two parties are quite interdependent, one large part of contract, if void, vitiates the whole. AIR 1922 Upp Bur 9 (11) = 4 Upp Bur Rul 110.

(5) One entire consideration for two several contracts, one of them for doing illegal act — The whole is void. AIR 1940 Rang 45 (47) = 1939 Rang LR 711 (DB).

(6) Part of transaction without necessary sanction of Magistrate — Whole is invalid. AIR 1928 Nag 283 (283) (DB).

(7) Proceedings in Supreme Court — Agent's remuneration fixed by agreement in any event and taxed costs in event of success — Case succeeding — In taxing costs between party and party, latter part of agreement cannot be ignored and only earlier part given effect. If agreement is considered, void, whole of it should be treated as non-existent. AIR 1954 SC 26 (28).

(8) Debtors executing bond with interest at high rate — One of them to render service without pay till bond becoming payable — Consideration as to rendering service is unlawful — Contract being indivisible is void. AIR 1918 Pat 249 (250) = 3 Pat L Jour 412 (DB).

(9) A licensee of electric supply created a partnership. The partnership agreement vested the building, license and book etc., in the partners and the partners agreed to pay one-tenth of the profits to the licensee and after his death to his heirs as long as the company was in existence. It was held that the transfer of the undertaking was void under the Electricity Act and the contract not being divisible was void as a whole under Section 24. AIR 1937 Rang 47 (49).

(10) Defendant agreed, by a kabuliati, to pay the plaintiff an enhanced rent by more than two annas in the rupee, thus contravening provisions of Section 29 (b), Bengal Tenancy Act. The plaintiff contended that the decree be given for so much of the enhanced rent as does not exceed the two annas in the rupee. **Held**, the contract was to pay the enhanced rent; the contract, qua the payment of the enhanced rent, did not consist of two parts. The contract was not severable and, therefore, was void. (1897) 24 Cal 895 (896) (DB) ** 1947 All WR (HC) 11 (12).

(11) Pending a criminal prosecution against the defendant, his pleader stood bail for his appearance in the Criminal Court; and to indemnify the pleader against any loss which he as bailee might suffer, a nominal sale-deed and a nominal rent-note were passed to the pleader's relative, the plaintiff. In a rent suit by a plaintiff: **Held**, that agreement was indivisible agreement; part of a single consideration for one object was unlawful and therefore, whole agreement was void under Section 24. (1908) 32 Bom 449 (453, 454) (DB).

(12) Where the finding of the Court was to the effect that the consideration for the promissory notes was, at least in part, losses to the plaintiffs in respect of gambling debts and the Court could not ascertain the exact proportion of such consideration: **Held**, the whole of the suit was properly dismissed. (1913) 35 All 558 (559) (DB).

(13) If adultery, past or future, is consideration or indivisible part of the consideration for an agreement, such agreement is illegal and the contract would be void. (1905) 27 All 266 (269).

(14) Consideration for an agreement by a person to pay a certain sum of money to a prostitute, if she allowed him to cohabit with her, is immoral and unlawful and the contract is, therefore, void under Section 24. AIR 1935 Oudh 71 (71, 72) ** (1905) 27 All 266 (270).

(15) Client agreeing to pay pleader money and part of the suit property as Inam for "religious purposes":

Section 24 — Note 2 (contd.)

Held, that in spite of the words "religious purposes" the consideration for the services of the pleader was the money agreed to be paid and the gift of part of the property in suit. Agreement being inseparable the whole of it was void. AIR 1925 Bom 470 (470, 471) = 49 Bom 619 (DB).

(16) Transfer of occupancy holding is forbidden by law and contract, a part of consideration for which is such a transfer, is void. (1913) 18 Ind Cas 9 (10) (All).

(17) Suit for recovery of loss suffered in forward contract which is prohibited by law, is not maintainable. AIR 1963 Madh Pra 323 (329) = 1963 MPLJ 325 (DB).

(18) Where the terms of a settlement are not separable and two of them which are the basic terms are found to be illegal, the settlement must be set aside as a whole. AIR 1952 Cal 763 (767) = ILR (1954) 2 Cal 41.

3. Divisible contracts. — (1) In an agreement, if different clauses are separable, the fact that one clause is void does not necessarily cause the other clauses to fail. AIR 1931 Bom 264 (265) (DB) ** AIR 1930 All 1 (3) = 52 All 338 (FB) ** AIR 1933 All 468 (470) ** AIR 1917 All 290 (291, 292) = 39 All 539 (DB) ** (1910) 7 All L Jour 778 (781) ** (1968) 69 ITR 819 = (1968) 2 ITJ 377 (All) (DB).

(2) Where in the same instrument there are distinct engagements by which a party binds himself to do certain acts some of which are legal and some illegal the performance of those legal can be enforced. AIR 1922 Pat 171 (177, 178) (DB).

(3) In cases of contract only partly beyond the competence of the promisor, there is no good ground why the promisee who has paid good consideration should not be allowed to enforce that part of the promise which the promisor was competent to make. AIR 1930 All 1 (3) = 52 All 338 (FB) ** AIR 1933 All 468 (470, 472) (DB).

(4) The bad part may be rejected and the good retained, A bond may be good though consideration is partly good and partly illegal. AIR 1933 Pat 306 (409) = 12 Pat 359 (DB) ** AIR 1926 Oudh 270 (271) (DB) ** (1911) 10 Ind Cas 465 (466) (All).

(5) Provision in a will or contract partly for illegal purposes can stand though not separated from valid purposes. AIR 1928 PC 119 (121).

(6) Where contract is legal and as evidence of contract something illegal is done, the whole contract cannot be said to be illegal. AIR 1925 Mad 929 (931).

(7) Where the sale of lands and surrender of occupancy rights therein were

both contended to be void as being one transaction and intended to defeat the Tenancy law: Held that the surrender was separable from the sale and the former alone was void. AIR 1925 Nag 302 (304) = 22 Nag LR 136 (DB) ** AIR 1931 Nag 6 (7) = 27 Nag LR 113.

(8) Where a suit was based upon a bond for a certain sum of money, part of which was interest upon the amount covered by the first bond, and it was agreed in the second bond that the whole amount of the consideration as mentioned in the bond should bear interest. Held, that the obligee can recover such sums of money as in law he is entitled to recover, notwithstanding that part of the consideration is compound interest which could not, under the law in Sonthal Parganas, be decreed by Courts. (1899) 26 Cal 238 (240) (DB).

(9) The void part of an agreement would not invalidate the rest of the agreement if it could be properly separated from it. But where the parties thereto have treated the two debts as a lump sum the contract must be regarded as an integral one and void. (1885) 9 Bom 176 (179) (DB).

(10) Where a claim consisting of two items — one for Rs. 1000 and the other for Rs. 600 was preferred but the foundation of the claim for Rs. 1000 was that that amount be paid to a vendor to influence the co-vendors to enter into a sale transaction, it was held that this part of the claim was immoral and cannot be enforced and the plaintiffs were entitled to recover only Rs. 600, the other part being void. 1955 Raj LW 230 (231).

(11) Wrestling match — Agreement that party failing to appear should pay certain sum and the winner should get the gate money — Former being legal and separate from the other illegal one, is enforceable. AIR 1931 Bom 264 (265) (DB).

(12) Bond agreeing to repay money on a certain date — Further condition that if money was not repaid on that date the creditor to enter into possession of plaintiff's cultivatory holding as a usufructuary mortgagee — Whole contract is not illegal though the latter covenant was contrary to the provisions of the Tenancy Act, and the plaintiff could get money decree. AIR 1924 All 80 (80) = 45 All 621 (DB).

4. Mortgage transactions. — (1) While an application for execution was pending the defendants executed a mortgage for satisfaction of judgment-debt providing for payment in excess of the decretal amount. The mortgage was for a certain amount and bore an interest at 9 p. c. p. m. on the whole amount. In a suit to recover the amount of mortgage, with future interest: Held, the

25*. Agreement without consideration, void, unless it is in writing and registered, or is a promise to compensate for something done, or is a promise to pay a debt barred by limitation law.—An agreement made without consideration† is void, unless—

- (1) it is expressed in writing and registered under the law for the time being in force for the registration of ‡[documents], and is made on account of natural love and affection between parties standing in a near relation to each other; or unless
- (2) it is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor, or something which the promisor was legally compellable to do; or unless
- (3) it is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorized in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits.

Section 24 — Note 4 (contd.)

money that was agreed to be paid in consideration of the mortgage, was the entire sum of money mentioned as principal in the deed along with interest on it and it was not permissible to split up the consideration. The mortgage therefore was void. AIR 1932 Bom 237 (239) (DB).

(2) Mortgage executed for a certain sum misappropriated by son of mortgagor and as compromise of police prosecution pending against the son — Prosecution for uncompoundable offence — Mortgage held void under Section 24. AIR 1960 Ker 194 (195) = 1959 Ker LT 1268.

(3) Mortgage of occupancy holdings with other properties legally transferable, for single consideration — Mortgagee given possession of occupancy lands not transferable — Suit to recover possession of the remaining lands — Held, that mortgagee-plaintiff was not entitled to seek any relief in Court at all as part of mortgage contract was illegal. AIR 1925 All 543 (544) = 47 All 780 (DB).

[But see AIR 1917 All 290 (2) (291, 292) = 39 All 539 (DB).]

(4) Mortgage of occupancy holding with covenant for indemnity if mortgagee is not paid — As the two portions of the deed were inseparable and the mortgage of the occupancy holding being illegal, the covenant also could not be enforced. AIR 1921 All 392 (392) = 43 All 81 (DB) ** AIR 1926 Rang 186 (187).

(5) If a usufructuary mortgage of an occupancy holding is void a personal covenant to that effect embodied in the deed is also void and unenforceable. AIR 1922 All 134 (135) = 44 All 486 (DB) ** (1929) 27 All L Jour 479 (480).

(6) In a contract where one of several considerations moving from the defendant was the mortgage of reversionary interest which was illegal under Sec. 6 (d), T. P. Act: Held, the whole agreement was void. AIR 1917 Oudh 230 (232) = 20 Oudh Cas 155.

(7) Where the mortgagor actually received Rs. 1036 only as consideration but the mortgage-deed showed a sum of Rs. 1451 as the consideration for the mortgage and the balance of Rs. 415 was fictitiously entered, the part of the consideration for the balance fails and is inoperative. The mortgagor is entitled to redeem the mortgage at Rs. 1036. 1956 Raj LW 84 (86).

SECTION 25 — SYNOPSIS

1. Agreement without consideration is void.
 2. Compromise and forbearance to sue.
 3. Existing obligations as consideration.
 4. Clause (1) — Promises made out of love and affection.
 5. Clause (2) — Compensation for past services.
 6. Clause (3) — Contract to pay time-barred debts.
 7. Agreement by acceptance of offer necessary.
 8. Promise to pay is an essential ingredient.
 9. Writing and signature of party to be charged with, necessary.
 10. "Person to be charged therewith."
 11. Persons authorised to renew time-barred debts.
 12. "Debt," meaning of.
 13. Explanation 1.
 14. Explanation 2.
- 1. Agreement without consideration is void.—** (1) An agreement without consideration is void under this section and therefore, it cannot be enforced. AIR 1927 Mad 1102 (1102) ** AIR 1939 PC 219 (221) ** AIR 1957 Raj 29 (31) = ILR (1957) 7 Raj 222 (DB) ** AIR 1952 Trav-Co 255 (256) ** AIR 1929 Lah 169 (170) (DB).
- (2) Mortgage without consideration is a nullity and so inoperative. AIR 1917 Mad 492 (495) (DB) ** (1913) 24 Mad L

In any of these cases, such an agreement is a contract.

Explanation 1.—Nothing in this section shall affect the validity, as between the donor and donee, of any gift actually made.

Explanation 2.—An agreement to which the consent of the promisor is freely given is not void merely because the consideration is inadequate; but the inadequacy of the consideration may be taken into account by the Court in determining the question whether the consent of the promisor was freely given.

Illustrations

(a) A promises, for no consideration, to give to B Rs. 1,000. This is a void agreement.

(b) A, for natural love and affection, promises to give his son, B, Rs. 1,000. A puts his promise to B into writing and registers it. This is a contract.

(c) A finds B's purse and gives it to him. B promises to give A Rs. 50. This is a contract.

Section 25 — Note 1 (contd.)

Jour 355 (357) (PC) ** (1875-77) 1 All 309 (311) ** 1969 Raj LW 207.

[See also AIR 1956 Trav-Co 80 (81, 82) = ILR (1956) Trav-Co 220 (DB).]

(3) Every one of the several undertakings given by one party is supported by consideration where all of them constitute together a single consideration for the promise of the other party. Therefore it is not permissible to single out any one of those undertakings and repudiate it on the ground that it is not supported by consideration. AIR 1954 Sau 8 (10).

(4) Where there is a recital of receipt of consideration in a document the onus of proving absence of consideration lies on the party denying it. (1933) 32 Pun LR 577 (578) (DB).

(5) In the case of a negotiable instrument a presumption that there was consideration for its execution arises under Section 118, Negotiable Instruments Act. AIR 1938 Oudh 14 (15).

(6) A disposition of property brought about by transfer is not a contract and therefore is not governed by Section 25 of the Contract Act. AIR 1955 Bom 122 (126) = ILR (1955) Bom 309 (DB).

(7) A receipt is merely evidence of a fact. It is not an agreement requiring consideration to make it a valid contract. AIR 1924 Nag 156 (156).

(8) A condition precedent attached to an agreement by consent of parties does not become unenforceable on the ground that there is no fresh consideration for the same. AIR 1921 PC 71 (75).

(9) The section saves certain agreements from the general rule declaring all agreements without consideration void and gives effect to those excepted agreements. AIR 1921 Lah 205 (207) = 2 Lah 263 (DB).

(10) Certain agreements, like agreements to pay time-barred debts, are made valid under Indian law; while they are illegal contracts under English law. (1906) 16 Mad L Jour 422 (425) ** AIR 1949 Bom 215 (217).

(10-A) Mere moral duty to perform a promise given to a party cannot be a consideration to support a contract. AIR 1963 Madh Pra 37 (40) = 1962 All LJ 781.

Instances of agreements supported by consideration.

(11) Where a newly admitted partner, along with the existing partners acknowledges a debt due from the partnership to their creditor there is consideration for the new partner's undertaking to pay the debt. The new partner obtains the promise of a partnership as the condition of his liability. AIR 1943 PC 147 (152) = ILR (1944) Kar (PC) 85. (Reversing AIR 1939 Pat 323.)

(12) A bond executed by one to another upon the dissolution of an admitted partnership between them for dues on account of such partnership is fully supported by consideration and the fact that all the accounts had not been gone into and cleared before its execution would not in the least detract from that consideration. AIR 1950 Kutch 67 (67).

(13) Where the manager of a firm writes an account demanded by the servant for the purpose of knowing his remuneration and the manager states it for the purpose of enabling the servant to know it, it was held, that this was a case of a promise made to pay the balance for a good consideration. AIR 1934 PC 144 (147).

(14) Whenever a third person undertakes the liability of another, in whom he is interested, the third person's promise cannot, in law, be considered as being made without consideration or vitiated by illegality. AIR 1937 Mad 223 (225) (DB).

(15) Tenants executing pro-notes in favour of Manager of indigo factory in order to obtain release from their supposed obligation to grow indigo on their lands — Bona fide belief of both parties in existence of such obligation — Agreement held was supported by consideration. AIR 1920 Pat 552 (553) (DB).

(d) A supports B's infant son. B promises to pay A's expenses in so doing. This is a contract.

(e) A owes B Rs. 1,000 but the debt is barred by the Limitation Act. A signs a written promise to pay B Rs. 500 on account of the debt. This is a contract.

(f) A agrees to sell a horse worth Rs. 1,000 for Rs. 10. A's consent to the agreement was freely given. The agreement is a contract notwithstanding the inadequacy of the consideration.

(g) A agrees to sell a horse worth Rs. 1,000 for Rs. 10. A denies that his consent to the agreement was freely given.

The inadequacy of the consideration is a fact which the Court should take into account in considering whether or not A's consent was freely given.

[*] This section is not affected by the provisions of Limitation Act, 1963—see Limitation Act (1963), S. 29 (1).

[†] For definition of, see S. 2 (d) supra.

[‡] Substituted for "assurances", by the Amending Act, 1891 (12 of 1891).

Section 25 — Note 1 (contd.)

(16) A promise to pay bonus which is a part of the contract of service between the parties is not a promise without consideration. AIR 1953 Mad 433 (434).

(17) Contract of sale — Vendee agreeing to defend contemplated suit by a collateral of the vendor by expending money left with him — Such promise is legal consideration for sale. AIR 1920 Lah 468 (469) (DB).

(18) A, a ward of Court of Wards, executing a promissory note in favour of B — After release of estate from Court of Wards and after A's death A's son executing a bond, a substantial portion of the consideration being the debt under the promissory note — Agreement held was not without consideration and could not be brought within Sec. 25. AIR 1923 All 590 (590) (DB).

(19) Where at the request of a person another performed the loi lena ceremony at the tonsure of the former's daughter and the former promised to pay a guzara in return it was held that the promise was supported by consideration and hence enforceable. 1950 All L Jour 168 (171, 172) (DB).

(20) Where an arrangement has been arrived at between certain members of the family that is designed to promote peace and good will among certain of its members, this, by itself, is a good consideration to support the transaction. AIR 1932 All 174 (176) (DB).

(21) A bond remains valid though the consideration was not paid in full; the bond is operative to the extent of the sum actually advanced. AIR 1921 Cal 435 (440) (DB).

(22) If the sale and the promise to resell were parts of a single transaction, no question of mutuality arises. The purchaser's promise to reconvey the land is based on consideration. This consideration may be a promise for a promise or an act already performed in return for a promise. AIR 1965 All 83

(86) = 1963 All WR (HC) 811 (DB) ** 1963 All WR (HC) 811 ** AIR 1965 All 83 (86) ** AIR 1961 Assam 173 (175) = ILR (1961) 13 Assam 351 ** AIR 1963 Cal 325 (327) = 67 Cal WN 110 (DB).

(23) Mortgage bonds executed during Collector's regime without Collector's permission — Later mortgage bond executed in lieu of earlier bonds after Collector's regime had ended are not without consideration and hence valid. AIR 1959 All 788 (789) = 1959 All LJ 498 (DB).

(24) A contracting to purchase goods from B at contract price — A refusing to take delivery of some goods on ground of fall in price — C, agent of B guaranteeing performance of contract by A promising A to pay money and inducing him to take delivery of goods — A promising to take delivery — Contract between A and C is for consideration. AIR 1963 Madh Pra 37 (40) = 1962 MPLJ 781.

(25) Fees on sale of cattle is tax — Levy of fees by following procedure for imposition of fees — Transfer of right to collect fees — Right to recover such fees not being legal, no consideration passed due to transfer — Agreement is void. AIR 1963 Madh Pra 240 (241) = 1963 MPLJ 261 (DB).

(26) Agreement of sale of business — Trifling consideration — Second document stipulating for payment of maintenance to vendor and to his wife on his demise — Sale of business at under value can be a consideration for second document. (1962) 66 Cal WN 8.

Agreements not supported by consideration.

(27) An agreement by a tenant under a subsisting tenancy to pay a different rent when measurement would be made cannot be enforced as it is not supported by consideration. AIR 1933 Cal 725 (726).

(28) A bond given by a person arrested in execution of a decree for money, passed by Court having no jurisdiction,

Section 25 — Note 1 (contd.)

to the holder of such decree, for the decree amount plus the cost of stamp paid for him, in order that he might be released from such arrest, is one given, under decree and executed without consideration. (1882) 4 All 352 (354, 355) (DB).

(29) Woman living in adultery with a Hindu till his death is not entitled to maintenance from estate. Promise by the widow to pay maintenance to such woman is not valid as it is not supported by consideration. AIR 1922 Oudh 27 (28) = 25 Oudh Cas 145.

(30) An agreement executed by the father after his son's marriage that he would pay maintenance to the son's wife on the happening of certain event was held to be one without consideration. 1911 Pun LR No. 245 p. 910 (911, 912).

(31) A mere promise to subscribe to a charitable institution is without consideration and cannot be sued upon. AIR 1953 Nag 195 (198) = ILR (1953) Nag 130 ** AIR 1953 Pat 231 (234) = 32 Pat 152.

(32) Subscriptions were raised from persons of the caste of plaintiff and defendant for festival but it was not in consequence of any prior agreement by defendants that plaintiff incurred obligations. There was not any promise by defendants to compensate plaintiff for something done by him for defendants. **Held**, the promise by defendants to pay was purely voluntary for no legal consideration and payment could not be enforced as payment of money due under contract. AIR 1923 Mad 330 (330).

(33) Defendant had agreed to pay out of his pocket certain sums proportionate to the value of goods imported by him, to a charitable society. As such sums were in arrears, he executed a hatchita in favour of society promising to pay the sum with interest. In a suit on hatchita, it was held that the promise to contribute out of his pocket was unenforceable as being without consideration and that it was merely a voluntary promise. AIR 1937 Pat 358 (359, 360) (DB).

(34) An agreement by the patnidar under the lease to pay cess on the property which is not liable to pay any cess is an agreement which is void as being one without any consideration. AIR 1947 Cal 70 (73) = ILR (1946) 2 Cal 420 (DB).

(35) An agreement to take less than what is due and to give time for payment being without any consideration is a mere nudum pactum, and cannot be binding in law. Section 63 cannot validate such an agreement. AIR 1928 Rang 144 (144) = 6 Rang 191 (DB).

[See however AIR 1925 Mad 660 (666). (Agreement to give up a portion of claim needs no consideration.)]

(36) Where there is no dispute also as to the legitimacy of any one of the brothers an agreement by one of them to take a smaller share merely because the others promise not to disturb his possession or family peace must be struck down as an agreement without consideration. AIR 1954 Orissa 80 (85) = ILR (1953) Cut 591.

(37) The promise of a Government servant, in return for the sanction of the leave to which a person is legally entitled, not to return to duty after the expiry of the leave is without consideration and hence unenforceable. AIR 1956 All 439 (444) = ILR (1956) 1 All 24 (DB).

2. Compromise and forbearance to sue.— (1) A compromise of a doubtful claim or right is a sufficient foundation for an agreement. AIR 1925 Pat 68 (94) (FB) ** AIR 1928 Bom 539 (543) ** AIR 1924 Pat 736 (744) (DB).

(2) An agreement by a husband to pay maintenance to his wife in settlement of a doubtful claim of maintenance is not void for want of consideration. AIR 1931 Nag 197 (198) = 27 Nag LR 281.

(3) In a case of mutual compromise, consideration passes from either side and it is impossible to hold that such a compromise is without consideration. AIR 1926 All 715 (717) = 48 All 637 (DB).

(4) Relinquishment by a party of his counterclaim is a good consideration for the withdrawal by the plaintiff of his claim. AIR 1924 Sind 41 (45).

(5) Withdrawal of proceedings by plaintiff under Section 523 of Act XIV of 1882 is a sufficient consideration for a compromise by the parties to the suit. AIR 1914 Lah 131 (132) = 1914 Pun Re No. 20 (DB).

(6) The question whether an agreement of compromise is supported by valid consideration depends on whether the plaintiff in the suit had a bona fide claim to the property which was the subject of the agreement of compromise. **AIR 1948 PC 7 (7).**

(7) The forbearance to enforce a claim bona fide believed to exist and enforceable is a good consideration for the contract. AIR 1922 All 260 (262) = 44 All 424 (DB) ** (1947) 48 Cri L Jour 522 (527) (Lah) ** AIR 1929 Lah 485 (486) (DB) ** AIR 1915 Lah 285 (286) (DB) ** AIR 1960 Raj 237 (241) = 1960 Raj LW 352.

(8) A promise to pay the amount found due and acknowledged in writing is supported by consideration where, by reason of such promise, the creditor abstained from suing the debtor. AIR 1930 Nag 298 (299) = 26 Nag LR 320.

(9) Threat of bringing a false suit cannot be regarded as good considera-

Section 25 — Note 2 (contd.)

tion for contract. AIR 1936 Lah 6 (6, 7) ** AIR 1919 Oudh 120 (120) = 22 Oudh Cas 163.

(10) See also Notes under Section 2 (d).

3. Existing obligations as consideration.— (1) Promise to pay what the promisor is already under an obligation to pay is without consideration. Any separate promise to pay the amount at a particular place must be supported by consideration before it can be legally enforced. AIR 1918 Low Bur 101 (102) = 9 Low Bur Rul 75.

(2) No right of suit arises, where a person promises a pleader any extra money for winning the case, after his remuneration is fixed and he has been engaged on his behalf. The promise has no consideration. (1871) 3 NWP HCR 25 (26) (DB) ** ('77-78) 2 Bom 362 (364) (DB).

4. Clause (1)—Promises made out of love and affection.— (1) An agreement to pay a certain sum of money to a near relative out of love and affection is a contract under this section. AIR 1952 All 564 (576) = ILR (1952) 2 All 421 (DB).

(2) In a case which falls under cl. (1) of S. 25, the contract cannot be declared to be void on the ground of the absence of any monetary consideration. AIR 1950 Trav-Co 73 (76) = 1950 Trav-Co LR 532 (DB).

(3) Where a person undertakes by means of a registered document, out of natural love and affection, to discharge the debt due by another and, on the former failing to do so, the debtor himself discharges the debt, the debtor is entitled to recover from such person the amount paid by him to discharge the debt as the breach of the obligation becomes actionable under Section 25. (1903) 13 Mad L Jour 428 (428) (DB).

(4) Father executing mashahara patra in favour of widowed daughter providing for monthly allowance and charging certain property with its payment — Allowance not to be allowed to fall into arrears for more than one year — Grantee restricted from bringing suit for more than one year — Mashahara patra held to be agreement within Section 25 (1) and the restrictive condition was void under Section 23. AIR 1932 Cal 720 (721) (DB).

(5) A sued B, his brother who was on bad terms with him, for a half share in certain ancestral property — Suit dismissed on oath of B that property was not ancestral — Subsequently, B executing a registered document by which he agreed to give half share to A — Suit by A to recover share — Held, that the agreement was valid

under Section 25 (1) as B had such natural love and affection for his brother that he was willing to give him the property in order to be reconciled to him — Held also that the document was a valid gift or family settlement. (1899) 1 Bom LR 495 (497) (DB).

(6) An agreement by a person entitled to a certain share in the income of a trust, to pay out of that share a certain amount to his mother over and above her own share of that income is supported by adequate consideration within the meaning of Section 25 (1). AIR 1949 Bom 17 (18) (DB).

(7) A suit is not maintainable by a wife for an allowance for maintenance on an agreement, for which the sole consideration is a stipulation that the wife is not to communicate with or molest her husband. AIR 1926 Nag 501 (503).

(8) Husband promising to pay wife for maintenance, and separate residence by a registered deed, which stated certain quarrels and disagreements as the cause, which were not enough to entitle the wife to claim the amount under Hindu law: Held, that the agreement was without consideration and Section 25, Clause (1), did not apply as the agreement was not made on account of natural love and affection, the document showing quite a contrary state of affairs. (1900) 4 Cal WN 488 (490) (SB).

(9) Where a person settles an annuity upon his alleged wife who was not validly married to him, the settlement cannot be construed to be a contract for consideration of love and affection but is a gift pure and simple and no consideration is necessary. AIR 1932 PC 34 (35).

(10) 'Parties standing in a near relation' do not mean 'near relatives' only. The parents of a Mahomedan lady stand in a near relation to her husband and an agreement to pay them certain maintenance is a valid disposition within Section 25 (1). AIR 1927 Oudh 146 (146, 147) (DB).

(11) An advocate is entitled to his legal remuneration from his near relation when there is no agreement in writing to work without remuneration. AIR 1965 Andh Pra 409 (409, 410) = (1965) 2 Andh WR 78.

5. Clause (2) — Compensation for past services.— (1) This clause appears to cover cases where a person without the knowledge of the promisor, or otherwise than at his request, does the latter some service and the promisor undertakes to recompense him for it. In such cases the promise does not need a consideration to support it. (1896) 20 Bom 755 (758) (DB).

Section 25 — Note 5 (contd.)

(2) The expression 'voluntarily done' used in the section when applied to actions denotes something performed or done of one's own will, impulse and choice and not under constraint, prompting or suggestion of another. AIR 1958 Andh Pra 605 (607).

(3) A promise to compensate another for the assistance he had rendered in a suit in which the promisor was interested is valid within the meaning of Section 25 (2). ILR (1954) Madh B 337 (343).

(4) Where a man promises to pay a woman an allowance in consideration of past co-habitation, he merely undertakes to compensate for past services voluntarily rendered to him. (1881) 3 All 787 (788) (DB) ** AIR 1935 Oudh 71 (72) ** ('75-77) 1 All 478 (480) (DB).

[But see AIR 1924 Bom 135 (137) (DB).]

(5) Two joint Hindu brothers applied to have their property taken up under Court of Wards and while it was being so managed an agreement was made between them whereby one of them H. D., became manager of the property with an allowance of Rs. 12000 per annum and ceded to the other, S. D., absolutely and unconditionally, his interest in the family property. **Held**, that the agreement between the brothers was not bad for want of consideration, as S. D., had foregone the profits of his share of property during the management of Court of Wards and that he refrained from suing his brother for an account after the cessation of management by Court of Wards; and even if it were not so, the agreement would be good either under Section 25, Clause (2) or under Section 70 of the Act. (1895) 17 All 264 (269, 271) (DB).

(6) Agreement to pay a certain annuity to a person in consideration of past services rendered by him voluntarily and also for future services that might be rendered by him — No promise to render future services by such person — **Held**, that the agreement so far as regards future services was without consideration and that with regard to past services was valid under Sec. 25 (2) — The agreement being one and indivisible was wholly void. AIR 1919 Cal 765 (766) (DB).

(7) Where plaintiff had voluntarily expended money or establishing a market to please District authorities, and not at the request of defendants (shopkeepers) or for their benefit, agreement by defendants to pay plaintiff in consideration of such expenditure certain commission on articles sold through their agency in such market, is one that does not come within Section 2 (d) of Contract Act, and is void for want

of consideration. (1881) 3 All 221 (227) (DB).

(8) A promise to pay bonus or compensation to employees for services rendered by them as a part of their duty under the contract of service will not fall under Section 25 (2) because it is not a promise in consideration of services voluntarily rendered. AIR 1952 Trav-Co 99 (100) = ILR (1951) Trav-Co 635.

(9) Where a person had paid money to another not at his request and also not voluntarily but because he was bound under an agreement to do so, it was held that a promote executed by the person to whom the money was paid was without consideration. In the circumstances the promote did not fall under Section 25 (2) and, therefore, could not be enforced at all. AIR 1948 PC 150 (155) = ILR (1949) Mad 300.

(10) Where a son without expecting any compensation for the same sent several amounts of money to his father and the latter also had never treated them as loans it was held that a sale executed by the father for these amounts in order to defraud his creditors was not a transaction which could be rendered valid by Section 25 (2). AIR 1948 Bom 265 (267) = ILR (1947) Bom 807 (DB).

(11) A cheque drawn by a customer on his bank was presented for payment through another bank. The first bank which dishonoured the cheque on the ground of absence of sufficient credit for the customer failed to communicate the fact within the prescribed time to the presenting bank. Consequently it found itself compelled to pay the presenting bank which had already paid the value of the cheque. Subsequently it took an undertaking from the customer to pay the amount back. It was held that as there was no question of the bank having paid upon the cheque to preserve the credit of the customer there had been no services voluntarily rendered to the customer to bring the case within Section 25 (2). AIR 1958 Andh Pra 605 (607) (DB).

(12) Proviso to Section 32-FF of Pepsu Tenancy and Agricultural Lands Act and Rule 23-A of Pepsu Tenancy and Agricultural Land Rules, 1958, imply that gift for love and affection is not included in dispositions of land for consideration contemplated under Section 32-FF of the Act. (1966) 68 Pun LR 888.

(13) A Muhammadan son based his claim upon a Rukka written by his father by which he was appointed manager of his father's shop and the Rukka was not gratuitous but was by way of remuneration for work done. The Rukka was written by the father under the apprehension of immediate

Section 25 — Note 5 (contd.)

death and was against the rule of Muhammadan law: **Held**, that the agreement was without consideration and it did not fall under Clause (2) of Section 25 as it was not a promise to compensate one who had voluntarily done something for the promisor. 1893 Pun Re (Cri) No. 61 page 272 (272) (DB).

(14) X agreed to pay Y Rs. 5 per mensem for life in consideration of Y having trained X in the art of singing and dancing at his own cost. It was found that Y's sister and not Y himself had rendered those services for X. In a suit by Y it was held that, as Y himself had done nothing for defendant, there was no consideration for the agreement and, therefore, it was unenforceable. AIR 1916 Pat 80 (81).

(15) A contract entered into by a minor is null and void and any consideration received by the minor cannot be a good consideration for a fresh promise by him after attaining majority. AIR 1928 All 440 (441) = 51 All 164 (FB) ** (1941) Nag L Jour 363 (364) ** AIR 1938 Oudh 14 (15) ** AIR 1935 Lah 561 (565) = 16 Lah 546 (FB). (**Overruling** AIR 1920 Lah 37; AIR 1921 Lah 205 = 2 Lah 263 = 1911 Pun Re No. 31 and 1888 Pun Re No. 86.) ** AIR 1934 Pesh 123 (125) ** AIR 1927 Lah 24 (25, 26) (DB) ** (1906) 16 Mad L Jour 422 (423) (DB).

(16) Where a person executed a mortgage after attaining majority in consideration of the mortgagee paying off certain debts due to a third person which the mortgagor had incurred during his minority: **Held**, payment by mortgagee to creditor was valid consideration. AIR 1933 All 659 (660) (DB).

6. Clause (3) — Contract to pay time-barred debts. — (1) Under Section 25 (3) a debtor can enter into an agreement in writing to pay the whole or part of a debt of which the creditor might have enforced payment but for the law of limitation. AIR 1954 Pepsu 44 (45).

(2) A suit on a written promise to pay a barred debt under Section 25 (3) lies as it is valid contract. AIR 1923 Lah 481 (483) ** ('54) 20 Cut LT 100 (102) ** AIR 1935 Lah 984 (984) ** AIR 1932 Lah 212 (213) = 13 Lah 448 (DB) ** (1909) 31 All 495 (496, 497) (DB) ** 1959 Ker LT 294 = 1959 Ker LJ 168.

(3) A time barred debt can form a good consideration because the debt is not extinguished although the remedy is lost. AIR 1929 All 657 (657) (DB) ** AIR 1958 All 313 (316) ** AIR 1958 Raj 10 (11, 12) = ILR (1957) 7 Raj 129 ** AIR 1954 Pepsu 44 (45) ** AIR 1926 Lah 633 (634) (DB) ** (1912) 16 Cal WN 636 (638).

(4) A mortgage deed obtained in lieu of the amount due under a preliminary

decree passed in a suit on a prior mortgage which had abated on the failure of the deceased plaintiff's heirs to obtain their substitution within the prescribed time is not void for want of consideration inasmuch as it is covered by S. 25 (3). AIR 1931 All 154 (155) = 53 All 374 (DB).

(5) A barred debt is a valid consideration for a promise to pay under S. 25 even if the promisor did not know it to be barred on the date of the promise. AIR 1915 Mad 242 (242) (DB) ** AIR 1951 Mad 903 (904) (DB) ** (1913) 18 Cal L Jour 329 (331) (DB) ** (1913) 18 Cal L Jour 269 (271) (DB) ** AIR 1958 Raj 10 (11) = 1958 Raj LW 169 ** AIR 1969 Orissa 301 (303).

[But see (1910) 20 Mad L Jour 656 (656).]

(6) Where the document contains an express promise to pay it is valid under S. 25 (3) even though the time-barred debt itself is not referred to in it. (1936) 63 Cal 759 (762) ** AIR 1951 Mad 903 (904) (DB) ** AIR 1943 Bom 447 (450) ** AIR 1938 Rang 134 (135) = 1938 Rang LR 6 (DB). (Following AIR 1929 Rang 240 = 7 Rang 292.) ** AIR 1936 Lah 1016 (1018) ** (1910) 33 Mad 159 (161, 162) (DB).

[But see 1941 Nag L Jour 363 (364).]

(7) Where actual consideration was something different from that recited in document, effect must be given to real consideration and this rule is equally applicable to contracts falling under Section 25 (3). AIR 1936 Lah 1016 (1018) ** AIR 1943 Bom 447 (450) ** (1910) 33 Mad 159 (160, 161) (DB).

(8) A promise to pay a part of a barred debt would render the promisor liable to pay only that part not the whole debt. AIR 1940 Mad 678 (679).

(9) Where a debt is not binding on the defendant, and consequently not enforceable against him, there is no question of applicability of Section 25, Clause (3), because the barred debt is not one which would be enforceable against the defendant, but for the law of limitation. AIR 1934 Mad 549 (551) (DB) ** AIR 1937 Oudh 300 (301) (DB) ** AIR 1933 All 175 (176) ** AIR 1928 Bom 539 (542) ** AIR 1967 Mad 189 (190).

[See (1906) 8 Bom LR 644 (645, 647) (DB).]

[See however AIR 1937 Lah 484 (484).]

(10) A contract entered into by a guardian is voidable by the minor on attaining majority but not void. Subsection (3) of Section 25 applies to the case of a minor who executes a promise in writing to pay a debt incurred by his guardian. AIR 1922 Nag 250 (252) = 19 Nag LR 135.

Section 25 — Note 6 (contd.)

(11) A promise to pay time-barred debt referred to in this clause constitutes novation of the contract which can form the basis of a suit independently of the original debt. AIR 1930 Oudh 287 (289) = 6 Luck 7 (DB) ** AIR 1938 Rang 134 (136) = 1938 Rang LR 6 (DB) ** AIR 1967 Orissa 158 (158) = 33 Cut LT 193 (DB).

(12) What Section 25 (3) does is not to revive a dead right but to resuscitate the remedy to enforce payment by suit. The right of lender to receive payment and the obligation of borrower to repay never dies by lapse of time. AIR 1947 Cal 267 (268) = ILR (1946) 2 Cal 209 (DB).

(13) Where a promise to pay a time-barred debt is made for some consideration though inadequate the agreement falls outside the ambit of Section 25 (3) which applies only when there is a wholly gratuitous promise. Such an agreement constitutes an entirely new valid contract executed for a fresh consideration. AIR 1943 All 63 (65, 66) = ILR (1943) All 171 (DB) ** AIR 1936 All 160 (161, 162) = 58 All 382 (DB) ** (1910) 5 Ind Cas 418 (419) (DB) (All).

[See also AIR 1921 Pat 29 (30) = 6 Pat L Jour 121 (DB).]

(14) The debts or items of claim may be barred by limitation and yet they can be taken into account while arriving at account stated and be treated as paid off or discharged by the debts on the other side. The account stated thus results in an agreement by one party to pay to the other the balance found due on account stated and it furnishes a new cause of action to the party in whose favour the balance found is due. (1962) 3 Guj LR 574. (**Overruled** on another point in AIR 1967 SC 1078.) ** AIR 1968 Cal 292 (295) = 72 Cal WN 416.

[But see AIR 1958 Ker 31 (33) = 1959 Ker LT 870 (FB).]

(15) Where a promissory note contained a promise made in writing and signed by a person as karta, manager and representative of joint family in lieu of father's antecedent debt to be charged therewith to pay any part of the debt of which the creditor might have enforced payment but for the law of limitation of the suit, the agreement though without consideration was not void. ILR 42 Pat 704 (730, 731) (DB).

7. Agreement by acceptance of offer necessary. — (1) Applicability of Section 25 (3) depends upon there being an agreement by the acceptance of offer. Hence where the offer is rejected by the creditor and there is no agreement the creditor gets no right of suit merely on basis of the offer. AIR 1946 Mad 72 (73) ** AIR 1964 Orissa 111 (113) = ILR (1963)

Cut 741 (DB) ** AIR 1961 Raj 211 (216) = 1961 Raj LW 148 (DB).

[See AIR 1940 Rang 159 (160) = 1940 Rang LR 377.]

(2) Section 25 (3) requires that there must be an agreement by the acceptance of a proposal before or at the time when the writing is made and signed in accordance with its provisions. AIR 1952 Cal 443 (446).

(3) In order to bring a deposition within the meaning of a fresh contract, the necessary ingredients of proposal and acceptance with the consciousness of the purpose for which the contract is being entered have to be clearly brought out. AIR 1963 Andh Pra 337 (339) = (1963) 1 Andh WR 416.

8. Promise to pay is an essential ingredient. — (1) A promise to pay the time barred debt is a condition precedent to the applicability of the section. AIR 1958 All 313 (316) ** AIR 1952 Sau 79 (79) ** AIR 1938 Lah 155 (156) ** AIR 1936 Lah 164 (165) ** AIR 1930 Nag 236 (237) ** AIR 1929 Oudh 529 (529) (DB) ** AIR 1929 Pat 258 (260) = 8 Pat 706 (DB).

(2) The promise to pay may be conditional or absolute. (1912) 14 Ind Cas 133 (134) (Cal).

(3) The promise necessary to attract the operation of Section 25 (3) is a promise to pay at sometime in the future. AIR 1949 Oudh 48 (51) = 23 Luck 47 (DB) ** (1954) ILR (1954) Patiala 306 (308).

(4) The promise necessary to bring a case within Section 25 (3) must be such as what is contemplated under Section 9 of this Act. AIR 1953 Punj 28 (30).

(5) Under Section 25 (3) a promise to pay a debt barred by limitation must be express promise to pay and not merely an unconditional acknowledgment involving an implied promise to pay. AIR 1938 Bom 460 (461) (DB) ** AIR 1958 Ker 31 (33) = ILR (1957) Ker 983 (FB) ** AIR 1949 Oudh 48 (51) = 23 Luck 47 (DB) ** AIR 1942 Nag 92 (94) = ILR (1942) Nag 369 ** AIR 1941 Nag 100 (101, 102) = ILR (1941) Nag 144 (DB).

[See however AIR 1958 Madh Pra 21 (22) = 1957 MPLJ 859 (DB).]

[But see AIR 1938 Lah 757 (757) ** AIR 1968 Pat 203 (207) = 1968 BLJR 619 (DB). (AIR 1935 All 129 held overruled by AIR 1953 SC 225; AIR 1956 Raj 12, Dissented from.)]

(6) An acknowledgment in which there is no express promise implying new contract to pay the debt must be made before the debt is barred by time and in this respect an acknowledgment under Section 19, Limitation Act, differs from a promise to pay a barred debt under Sec. 25 (3) of the Contract Act. AIR 1955 Pat 320 (329) = 34 Pat 487

Section 25 — Note 8 (contd.)

(DB) ** AIR 1954 Pat 575 (579) ** 1962 Raj LW 483 = ILR (1962) 12 Raj 839.

(7) An acknowledgment of the liability which contains an express promise to pay the debt even though made after the debt has become time barred would constitute fresh promise to pay within the meaning of Section 25 (3) of this Act. AIR 1958 Madh Pra 21 (22) ** AIR 1938 Lah 234 (237) = ILR (1938) Lah 199 (FB). (Reversing AIR 1937 Lah 642.) ** AIR 1949 Nag 229 (284) = ILR (1948) Nag 639 (DB) ** AIR 1943 All 63 (64) = ILR (1943) All 171 (DB) ** AIR 1929 Lah 695 (696, 697) ** AIR 1929 Lah 511 (512) ** 1969 Jab LJ 426 = 1969 MPLJ 501 (502, 503) ** 1961 MPLJ 169 ** 1962 Raj LW 215 ** 1962 Raj LW 483.

(8) Whether there is an express promise to pay or not in a given document will depend upon its language. ILR (1954) Patiala 306 (308).

(9) The distinct or express promise which is necessary for Section 25 (3) must be so in the sense that the language indicates that payment would be made in the future. AIR 1949 Oudh 48 (51) = 23 Luck 47 (DB) ** AIR 1954 Madh B 11 (12) ** AIR 1939 Lah 466 (467) ** AIR 1935 Nag 221 (222) ** AIR 1932 All 461 (464) = 54 All 506 (DB) ** AIR 1929 Cal 444 (444, 445) = 57 Cal 394 (DB) ** AIR 1925 Cal 338 (338) (DB) ** ('84) 8 Bom 405 (407) (DB).

(10) The words in each case should be weighed on their merits and with reference to the circumstances of the case to arrive at a decision on the question whether they do import or do not import a promise to pay. AIR 1942 Lah 50 (54, 55) = ILR (1942) Lah 282 (FB). (AIR 1932 Lah 470; AIR 1934 Lah 835; AIR 1938 Lah 503; AIR 1938 Lah 511 and AIR 1939 Lah 486, Overruled.)

(11) There is no difference between an endorsement written in the hand of the creditor that a certain amount is receivable by him and an entry made by the debtor himself stating that a certain amount is payable by him. In either case the entry signed by the debtor implies a promise to pay on the part of the debtor within the meaning of Section 25 (3). AIR 1955 Ajmer 59 (60).

(12) The defendant's Munim, duly authorised by the defendant, acknowledged in writing a certain time-barred sum due to plaintiff and there was also a written promise to pay within the month. Held, it was not a mere acknowledgment but an express promise, which was enforceable. AIR 1932 All 38 (40).

(13) Where there are both barred debts and others that are not barred a promise to pay the latter debts cannot be interpreted as a promise to pay the former also. AIR 1941 Cal 449 (451).

9. Writing and signature of party to be charged with, necessary. — (1) Unless a promise to pay is in writing it cannot fall within the purview of S. 25 (3). AIR 1941 Nag 100 (101) = ILR (1941) Nag 144 (DB) ** AIR 1938 Nag 180 (181) = ILR (1940) Nag 441 ** AIR 1937 Lah 382 (383) = ILR (1937) Lah 562 (DB) ** AIR 1925 Mad 1147 (1148) ** (1900) 23 Mad 94 (97, 98) (DB).

(2) A statement which is not signed by the person to be charged with or by his agent, generally or specially authorised, cannot constitute a valid contract under S. 25 (3). AIR 1924 All 12 (15) (DB) ** AIR 1953 Mad 433 (434, 435) ** 1908 Pun Re No 102 p 473 (479) (DB) ** 1907 Pun Re No 132 p. 626 (634) (DB) ** (1900) 23 Mad 94 (97, 98) (DB).

(3) As a promise to pay which falls within S. 25 (3) is a contract, it must be expressed, if the Governor-General is the person to be charged under it to have been made on his behalf and executed on his behalf by such persons and in such manner as directed or authorised by him. AIR 1952 Cal 443 (446).

(4) An acknowledgment of the liability to pay an amount found due on a particular day although it is a contract is not with reference to a time-barred debt. Therefore S. 25 (3) would not be attracted to the case and writing is unnecessary. AIR 1930 Nag 298 (299) = 26 Nag LR 320.

10. "Person to be charged therewith."—

(1) The words "by the person to be charged therewith" in S. 25 are wide enough to cover the case of a person who agrees to become liable for the payment of a debt due by another, and need not be limited to the person who was indebted from the beginning. AIR 1940 Mad 678 (678, 679) ** AIR 1957 Mad 14 (16).

(2) The liability to be proceeded against in an action for the debt by reason of the possession of the property of the debtor is sufficient to put a person, even though he himself is a third party to the transaction between the creditor and the debtor under an obligation to pay the debt under Section 25 (3). AIR 1957 Mad 14 (16).

(3) As the son under the Hindu Law cannot be made personally liable for the debts of his father he does not become by the operation of Section 25 (3) personally liable by his execution of a promissory note for a time barred debt of his father. AIR 1934 Cal 178 (179) ** AIR 1938 Lah 159 (160) ** AIR 1929 All 586 (586) = 51 All 983 (DB).

11. Persons authorised to renew time barred debts. — (1) Section 25 (3) specifically requires that the person renewing a time-barred debt must be either the person himself or his agent generally or specially authorised in that behalf.

26. Agreement in restraint of marriage void.—Every agreement in restraint of the marriage of any person, other than a minor is void.

Section 25 — Note 11 (contd.)

AIR 1939 Bom 464 (465) ** (1882) 11 Cal LR 581 (583) (DB).

(2) Executor can promise to pay the deceased's time barred debts. AIR 1928 Bom 539 (544).

(3) A Hindu father or grandfather can pass a promissory note for a time-barred debt and such a note constitutes a binding contract under Section 25 (3) even on the sons and grandsons. AIR 1932 Bom 522 (523) ** AIR 1922 All 402 (402) = 44 All 628 (DB).

(4) A promise to pay a barred debt by a manager of a Hindu family who is not the father of the junior member is not binding on such junior member. Section 25 (3) Contract Act, does not apply to such a case. AIR 1937 Nag 327 (329) ** AIR 1950 PC 15 (16) = 77 Ind App 22 = 29 Pat 272.

(5) A guardian of an infant cannot make a promise to pay a time-barred debt. AIR 1928 Cal 850 (852) (DB) ** AIR 1939 Bom 464 (465).

(6) Agent to Court of Wards has no authority to bind a minor by promise under Section 25 (3) to pay debt barred by limitation. (1896) 19 Mad 255 (257) (DB).

(7) The Deputy Commissioner, acting on behalf of the Court of Wards, is not an agent authorised to pay a time-barred debt of the ward. AIR 1940 Oudh 107 (110) = 15 Luck 308 (DB).

(8) Pleader's statement in Court, promising payment of time-barred debts on certain conditions, does not bind his client in absence of special authority. AIR 1924 All 12 (15) (DB).

(9) A power of "mookhtarnama" to pay debts, or to secure debts, or otherwise to deal with debts, is prima facie a power to deal with existing debts, and it does not authorize the agent to revive time-barred debts. (1882) 11 Cal LR 581 (584) (DB).

(10) Where it is found that the 'account stated' is signed by a managing partner, who had actual power to act and sign on behalf of the firm, the firm is liable on it. AIR 1958 All 313 (315) (DB).

12. 'Debt', meaning of. — (1) The word 'debt' in Section 25 must be taken to have been used in its ordinary meaning of a sum payable in respect of money demand recoverable by action. AIR 1918 Mad 1145 (1146) = 40 Mad 31 (FB) ** AIR 1932 Lah 212 (213) = 13 Lah 148 (DB).

(2) The word 'debt' in Section 25 (3) includes a judgment debt. (1881) 3 All 781 (785) (DB) ** AIR 1924 Cal 388 (389) = 50 Cal 974 (DB) ** (1890) 14 Bom 390 (391, 392) (DB) ** (1879) 4 Cal 500 (506, 508) (DB).

(3) The liability of a member of a joint family to have his property sold for a debt contracted by the manager for the joint family purpose and binding on the joint family property is a debt within the meaning of Section 25. AIR 1922 Mad 23 (24, 26, 27) = 45 Mad 345 (DB).

(4) A promise to pay an unascertained sum is not a promise to pay a 'debt' within the meaning of S. 25 (3). AIR 1952 Pat 73 (77) = 30 Pat 1161.

(5) A promise to pay amount which might be found due by arbitrator on taking accounts of the partnership between parties does not amount to a promise to pay debt under this section. AIR 1918 Mad 1145 (1146) = 40 Mad 31 (FB).

(6) In order to attract the provisions of S. 25 (3) there must be an existing debt before the promise to pay. AIR 1952 Cal 443 (446, 447).

13. Explanation 1. — (1) The rule laid down in Expl. 1 applies as between a donee and persons claiming through the donor. AIR 1915 Low Bur 86 (87) = 8 Low Bur Rul 185.

(2) Where a husband gifted away his property to his wife and land was changed to her name and then he mortgaged the property, held that question as to validity of gift should be determined by reference to S. 5, Punjab Laws Act, and not to S. 25 to the Contract Act. 1899 Pun Re No 38 p 186 (186, 187, 188) (DB).

14. Explanation 2. — (1) Under this explanation inadequacy of consideration is not relevant unless it affects the question of free consent to contract. AIR 1943 All 63 (65) = ILR (1943) All 171 (DB) ** AIR 1923 All 590 (591) (DB) ** (1964) 30 Cut LT 377 ** 1966 BLJR 739.

(2) A party seeking to set aside a transaction on the ground of inadequacy of consideration must show such inadequacy as will involve the conclusion that he either did not understand what he was about, or was the victim of some imposition. (1878) 3 Cal 192 (196) (DB) ** AIR 1954 Pat 280 (284) (DB).

(3) Where the consideration for a promise is unreal as where the promisor gets nothing in return for his promise except that to which he is already legally entitled to, the promise cannot be enforced. AIR 1956 All 439 (444) = ILR (1956) 1 All 24 (DB).

Section 26 — Note 1

(1) Sections 23, 26 and 27 do not exhaust all instances of agreements contrary to public policy. AIR 1924 Oudh 404 (405) = 27 Oudh Cas 100.

(2) Though Section 26 is in general terms, it is doubtful whether partial or indirect restraint on marriage is within scope of the section. AIR 1942 All 351 (353) = ILR (1942) All 810 (DB).

27. Agreement in restraint of trade void.—Every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void.

Saving of agreement not to carry on business of which good-will is sold.

Exception 1.—One who sells the good-will of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer, or any person deriving title to the good-will from him, carries on a like business therein, provided that such limits appear to the Court reasonable, regard being had to the nature of the business.

° [° ° ° ° °]

[*] Exceptions 2 and 3 relating to agreements between partners upon, or in anticipation of, dissolution of partnership and during continuance of partnership, respectively were repealed by the Indian Partnership Act, 1932 (9 of 1932), S. 73 and Sch. II—see now Ss. 11(2) and 36(2) of that Act.

Section 26 — Note 1 (contd.)

(3) Section 26 is not restricted to the case of first marriage only but also applies to a person already married. Hence, an agreement for repayment of money spent on the boy's education if he married another during the lifetime of his wife is void. AIR 1914 Low Bur 156 (1) (156) = 7 Low Bur Rul 304 (DB).

[But see (1908) 4 Nag LR 86 (89).]

(4) Though a stipulation not to take another wife is illegal as being in contravention of Section 26, yet promises to live in wife's house and to work and support her, are good and lawful and therefore enforceable. (1913) 15 Ind Cas 915 (916, 917) = (1912) 1 Upp Bur Rul 108.

(5) Agreement to pay woman certain annual allowance only "until death or remarriage" or "during widowhood" is not illegal. (1912) 10 All L Jour 185 (186, 187).

(6) Compromise between co-widows in mutation proceedings — Both to be entered in equal shares — Either on remarriage to forfeit her share: **Held**, compromise was not in restraint of marriage as no direct prohibition to remarry was imposed by it. AIR 1942 All 351 (353) = ILR (1942) All 810 (DB).

(7) A Kabinmah by a Muhammadan husband authorising his wife to divorce him in the event of his marrying a second wife, is not void under Section 26. AIR 1916 Cal 761 (762) (DB).

(8) Wakf deed giving share of profits to widows contained condition forfeiting such share on widow's remarrying — **Held** condition was neither illegal nor improper and did not offend Section 26. AIR 1932 Oudh 108 (112) (DB).

(9) Promise to pay a bride price, while marrying a major girl, cannot be enforced as being immoral and in restraint of marriage. AIR 1920 Lah 357 (359) = 1 Lah 574 (DB).

(10) Contract restricting major girl's right of marrying according to her own choice is void. AIR 1934 Pesh 22 (22).

(11) The application of Section 26 must be governed by considerations connected with the country and the personal law of the parties concerned in each case as it comes up for decision of the question whether or not a particular agreement or condition is in "general" restraint of marriage, and therefore void under the section. (1908) 4 Nag LR 86 (89).

(12) Where a direction in the will was that if any person entitled to benefit under will married a non-Zoroastrian, interest going to him would lapse and go over to others, it was held that it could not be said that not marrying a non-Zoroastrian was contrary to law or public policy. AIR 1948 Bom 319 (320, 321) = ILR (1948) Bom 509 (DB).

SECTION 27 — SYNOPSIS

1. Agreement in restraint of trade.
2. Agreement for mutual benefit.
3. Service contracts.
4. Sale of goodwill — Exception.

1. Agreement in restraint of trade. —
(1) Section 27 aims at contracts by which a person precludes himself altogether for a limited time or over a limited area from exercising his profession, trade or business and not at contracts by which in exercise of his profession, he enters into ordinary agreements with persons dealing with him which are necessary for carrying on his business. (1890) 13 Mad 472 (475).

(2) Restraint on trade, whether general or partial may be good if shown to be reasonably necessary for freedom of trade. A restraint reasonably necessary for the protection of the covenantee must prevail unless some specific ground of public policy can be clearly established against it. AIR 1967 SC 1098 (1102) = (1967) 2 SCJ 317 ** (1967) 1 Mad LJ 117 = 79 Mad LW 676.

(3) The test as to reasonableness of restraint is whether the primary object of the parties was in restraint of trade or was one to have a restrictive covenant in a sale. The reasonableness of the restriction must be judged by the

Section 27 — Note 1 (contd.)

character and the nature of the business or its customers. (1967) 1 MLJ 117 = 79 Mad LW 676.

(4) A covenant of restraint is designed to protect the legitimate proprietary interests of the covenantee. In no case will the law allow a covenant merely to avoid competition. Nor will law allow a restraint wider than the protection of the proprietary interests requires. AIR 1962 Cal 61 (65).

(5) Where a claim is founded on tort, S. 23 and S. 27 do not apply. AIR 1931 All 83 (85) = 53 All 316 (DB).

(6) Every person has a right to a free course of trade and to conduct his business upon his own lines even though it results in an interference with the business of another person to his detriment. AIR 1931 All 83 (89) = 53 All 316 (DB).

(7) Whether an agreement is in restraint of trade within the meaning of S. 27 is a question of law. AIR 1934 Lah 110 (111).

(8) Whether contract is in restraint of trade within the meaning of S. 27, Contract Act, is question to be determined on construction of contract in each case (1890) 13 Mad 472 (474).

(9) Where the restrictive clauses appear in the formal document of dissolution of partnership and no local limits are at all specified, it is not permissible to enter upon a consideration of what the parties were likely to have contemplated. As the place of restriction is not nominated in the bond limitation should not be imported which the parties have not seen fit to express in order to aid so unprecedented a contract. AIR 1943 Sind 197 (210) = ILR (1943) Kar 49 (DB).

Burden of proof.

(10) To succeed under S. 27 one must establish that suit is one to enforce agreement whereby some one is restrained from exercising a lawful profession, trade or business of any kind. (1905) 29 Bom 107 (118) (DB).

(11) Burden of justifying covenant in restraint of trade lies on the party upholding it. AIR 1934 PC 101 (104) ** AIR 1967 SC 1098 (1102) = (1967) 2 SCJ 317. (Once, this onus is discharged, onus of showing that restraint is nevertheless injurious to the public is upon party attacking contract.

Law applicable.

(12) Agreement in restraint of trade is governed not by *lex loci contractus* but by the law of the place of performance. ('76-78) 1 Mad 134 (143).

Restraint of trade.

(13) Bare agreement in restraint of competition cannot be upheld — Restrictive clause must be ancillary to main transaction and necessary in interest of both parties — Restriction on outgoing partner not to do business, in which he had specialised in the whole

world held not valid. AIR 1943 Sind 197 (210, 211) = ILR (1943) Kar 49 (DB).

(14) Defendants agreeing to remain subject to the orders of the head of their caste and not to carry on their profession of working in lead with assistance of any other persons than the caste people — Agreement cannot be enforced for want of consideration and being against public policy. (1878-1880) 2 Mad 44 (44, 45) (DB).

(15) Agreement not to set up a business in consideration of promise to pay a sum for life is void as in restraint of trade though partly executed. AIR 1916 Low Bur 51 (54) = 8 Low Bur Rul 389 (FB).

(16) Defendant carrying on business as a carrier of passengers by boat agreed to pay large sum to the plaintiff in consideration that the latter should abstain from carrying on similar business. Held, that the contract was void and did not fall within the Exception 1 to Sec. 27 as the plaintiff had no goodwill in his rival business. AIR 1918 Cal 546 (551) (DB).

(17) Covenant giving person exclusive right to convey passengers to and from on road between Ootacamund and Metupalaya is not contract in general restraint of trade and can be enforced. (1868, 69) 4 Mad HCR 77 (DB).

[But see AIR 1938 Pat 473 (475, 476) = 17 Pat 255 (DB). (Contract purporting to be license granting defendant exclusive right to collect hides of animals in particular area in plaintiff's Zamin-dari amounts to granting monopoly to defendant and is therefore unenforceable.)]

(18) Contract between licensee for manufacture of salt with buyer whereby former agrees to sell all salt manufactured by him to buyer and not to any other and at fixed price is void in so far as it restrains the former from selling to any other. (1890) 13 Mad 475 (476, 477).

(19) In a contract between a manufacturer and a purchaser of salt a stipulation that the former should not sell to other people than the latter is not in restraint of trade. But the stipulation that the former should not manufacture more than the quantity specified amounts to restraint of trade but if it is separable from the rest it does not affect the validity of the other condition. (1892) 15 Mad 79 (80, 81) (DB).

(20) Agreement not to supply coolies to one of the rival cooly suppliers is void. AIR 1914 Mad 673 (674).

(21) Broker agreeing to give up admitted claim to brokerage in consideration of plaintiff selling like quantity of

Section 27 — Note 1 (contd.)

goods for future only through him — On failure, brokerage on whole to be paid by defendant — Agreement is not void as being in restraint of trade or for uncertainty. (1875) 23 Suth WR 146 (146) (DB).

(22) Agreement to supply silica sand for one year, with stipulation not to supply sand, during that period to four specified factories, is void only to the extent to which it restrained trade or business. AIR 1931 All 539 (540).

(23) If an agreement confers or amounts to a recognition of a party's exclusive right to perform religious services for the whole village it is in restraint of a trade, profession or calling. It can be enforced only if the restriction is reasonable. AIR 1951 Kutch 56 (58).

(24) It is impossible to treat the obtaining of a license from Government as in the nature of a trade or calling. AIR 1946 Mad 289 (290).

(25) A and B who were bus owners submitted tenders to the Government for securing license to carry mails. A withdrew the tender in pursuance of an agreement with B that B would, in consideration of the withdrawal, make a monthly payment of a certain amount. It was held that A was entitled to enforce the agreement which was not void under Section 27. AIR 1946 Mad 289 (290, 291).

(26) An agreement between two bidders whereby one agrees not to bid at an auction sale of the right to recover market dues, in consideration of Rs. 500 can be enforced, when such an agreement does not result in restraint of trade and it is not suggested that these two were the only bidders. AIR 1949 Nag 113 (113, 114) = ILR (1948) Nag 431.

(27) Where a partnership contained a clause "that on termination of selling agency business, neither of the parties to the agreement shall take up the selling agency from the mills", it was held that the clause was one in restraint of business and the restriction was not enforceable under Section 27 of the Contract Act and Section 54 of the Partnership Act. AIR 1956 Punj 49 (54).

(28) Condition at auction among members of Senayar community to sell their betel leaves only to highest bidder at auction and to none else held valid. (1967) 1 Mad LJ 117 = 79 Mad LW 676.

Partial restraint.

(29) Section applies even when the restraint is for a limited period only or is confined to a particular area. Such matters of partial restriction have effect only when the facts fall within the exception to Section 27. AIR 1942 Sind 114 (115) = ILR (1942) Kar 25 (DB) ** (1951) ILR (1951) 2 Cal

386 (383, 389). (Agreement between two sugar factories allocating zones for each for procuring sugar-cane — Undertaking not to appropriate canes from zones allotted to the other is in restraint of trade.) ** AIR 1937 Oudh 445 (445) = 13 Luck 405 (DB). (Contract to sell hides only to plaintiff is partial restraint and is void.) ** AIR 1922 Upp Bur 9 (10) = 4 Upp Bur Rul 110. (Clause preventing each party from carrying on business for long periods at a time makes an agreement in partial restraint of trade and is void.) ** (1909) 9 Cal L Jour 216 (225) (DB). (Agreement by plaintiff with 29 out of 30 manufacturers of combs in a city whereby latter agreed to supply to plaintiff alone the goods manufactured by them and no others held was void, being in restraint of trade and being an attempt to suppress competition.) ** (1892) 19 Cal 765 (770) (DB) ** (1890) 13 Mad 472 (474) ** (1874) 22 Suth WR 370 (375) (DB). (Contract between Hindus whereby one of them agreed to cease to carry on his business in certain locality in Calcutta in consideration of receiving certain sum of money from other is void.)

[But see (1904) 6 Bom LR 23 (27) ** (1890) 17 Cal 320 (323) (DB). (Goods purchased at certain rate for particular market — Stipulation for higher rate should goods go to any other market is not one in restraint of trade.) ** (1890) 13 Mad 475n (476, 477). (When restraint is only partial in respect to time or place, and there is good consideration given to party restrained the restraint is not unlawful.) ** (1882) 8 Cal 809 (818, 819) (DB). (Stipulation in contract against sale of goods of certain description to any others till fixed date is not one in restraint of trade.)]

2. Agreement for mutual benefit. —

(1) Agreement for a fixed period between two millers not to charge less than certain price for milling other people's rice and to work their respective mills during alternate weeks, and providing for fixed sum as penalty in case of breach, is not contract in restraint of trade. (1913) 18 Ind Cas 183: (184) (Low Bur).

(2) Rules framed for regulating use of market amounts to restraint of trade, if they are unreasonable and stifle trade. Restraint is reasonable if it affords fair-protection to the parties and does not interfere with public interests. AIR 1944 Nag 73 (77) = ILR (1943) Nag 740- (DB).

(3) Agreement between neighbouring landowners that market for sale of cattle shall not be held on same day on lands of both is not void. AIR 1915 All 94 (95) = 37 All 212 (DB).

(4) Agreement between traders to carry on business among members of

Section 27 — Note 2 (contd.)

their private association is valid. AIR 1931 All 83 (85) = 53 All 316 (DB).

(5) The fact that the scheme of the agreement would limit competition and keep up prices, does not necessarily bring it within the terms of Section 27. (1905) 29 Bom 107 (118) (DB).

(6) Where two branches of the legal profession (Barrister and Solicitor) are amalgamated in a particular place, a person who carries on both branches and is a legal practitioner in that place, may enter into an agreement not to practise for a reasonable time and such an agreement is valid. (1913) 17 Cal WN 215 (218) (PC).

(7) Agreement between ice factory owners to work one factory alone and to divide profits — Agreement is not "in restraint of trade." AIR 1934 Lah 110 (111).

(8) The abandonment of a bona fide claim is good consideration for a compromise even though the agreement on which the claim was based was void as being in restraint of trade. AIR 1914 Mad 673 (674).

3. Service contracts.— (1) Section 57 of the Specific Relief Act extends to agreements of negative character such as are necessarily implied from the contracts for whole time service and the operation of such contracts as contracts for service appear to prevent the application of Section 27 of the Contract Act to such negative agreements so far as they purport to impose restriction only during the period of affirmative agreement for service. (1903) 5 Bom LR 878 (882) ** AIR 1946 Bom 423 (425) = ILR (1946) Bom 89 (DB). (Question whether particular covenant is unreasonably wide has to be decided on the nature of the agreement, the qualifications of employee, and service he has to render considered along with places where employer can get alternative service of the same nature.) ** AIR 1966 Guj 189 (192) = (1966) 7 Guj LR 493 (DB) ** AIR 1964 Guj 115 (119, 121) = (1963) 4 Guj LR 795.

(2) Negative covenant that employee would not, during contract period, engage in trade or business or would not get himself employed by any other master for whom he would perform similar or substantially similar duties is not restraint of trade and hence not hit by Section 27, unless contract is unconscionable or excessively harsh or one sided. AIR 1967 SC 1098 (1104) = (1967) 2 SCJ 317 ** AIR 1964 Guj 215 (217) = (1963) 2 Lab LJ 522 ** AIR 1966 Guj 189 (192) = (1966) 7 Guj LR 493 (DB).

(3) Courts have a wide discretion to enforce by injunction a negative covenant. AIR 1967 SC 1098 (1105) = (1967) 2 SCJ 317.

(4) The master is entitled to be protected in regard to his interests in trade secrets and secret process of manufacture. That protection is secured by restraining the employee from divulging those trade secrets or putting them to the use of the servant. The master is also entitled to be protected against invasion of his customers or clientele but the master is not entitled to be protected against competition. AIR 1962 Cal 61 (66).

(5) There is distinction between restraints applicable during the term of the contract of employment and those that apply after its cessation. AIR 1967 SC 1098 (1102, 1104) = (1967) 2 SCJ 317.

(6) Contracts by which persons are restrained from competing after term of their engagement is over, with their former employers within reasonable limits, fall under the general prohibition contained in Section 27. (1885) 11 Cal 545 (549) (DB) ** AIR 1921 Low Bur 19 (22) = 11 Low Bur Rul 26 (DB). (Contract restricting employee from serving for specified period in other firm in a certain territory is valid.) ** ('76-78) 1 Mad 134 (142). (Stipulation that after the expiration of the term of service the employee was not to carry on the same business within 800 miles of Madras, held, amounted to an agreement in restraint of trade the limit as to space being unreasonable.)

(7) Onus lies on the employer to prove that negative covenant restraining employee on termination of service from competing for certain period is necessary for protection of his goodwill. 1968 Lab IC 819 (823) (Ch D)

(8) Physician agreeing to serve as assistant stipulating not to practice as physician and surgeon for three years — Agreement is not void. (1899) 23 Bom 103 (117, 118) (DB).

(9) Where it is proved that the employer is justified in apprehending that the employee may, on joining the service of his competitor, divulge the special knowledge and secrets in business gained by him while in employer's service, after receiving special training, injunction to enforce negative contract which is restricted as to time, nature of employment and area, can be issued in order to protect employer's interests. AIR 1967 SC 1098 (1105) = (1967) 2 SCJ 317.

(10) Where W having contracted with C to play for C and not to play in any other theatre on his own or on somebody else's behalf, until after the expiration of the period contracted for and until after his return to England, performed in another theatre after the expiration of the period for which he was under contract with C but before his return to England, it was held

Section 27 — Note 3 (contd.)

that the agreement being in restraint of a lawful profession, trade or business, was void. (1912) 16 Cal WN 534 (535, 536).

(11) Agreement not to sell products in specified area after termination of service of employee working with plaintiff as sales representative — Agreement held went beyond the scope of protecting plaintiff's goodwill inasmuch as employee was precluded from selling to those who were not potential customers of plaintiff — If agreement included potential customers it was bad for uncertainty. 1968 Lab IC 819 (823) (Ch. D).

(12) Section 26 (2) of Bihar Shops and Establishments Act (8 of 1954) is not repugnant to existing law relating to contract of service. AIR 1958 Pat 442 (444) = 1958 BLJR 223 (DB).

4. Sale of goodwill — Exception.—

(1) Contract selling real goodwill in the trade of plying ferry-boats between certain landing places — Contract does not amount to agreement contravening Section 27. AIR 1922 PC 167 (168) = 48 Ind App 508 = 48 Cal 1030.

(2) Restraint in a contract selling a goodwill can be said to be injurious to public if it is calculated to produce pernicious monopoly, prohibiting other persons to trade in the line, so as to enhance prices to unreasonable extent. AIR 1941 PC 75 (84).

(3) A bare covenant not to compete cannot be upheld, unless it is ancillary to main covenant and necessary to make it effective. It can be upheld only if it is reasonable and is consistent with interests of public. AIR 1934 PC 101 (104).

(4) When the Court is satisfied that restraint was reasonable as between the parties it must always be very difficult to prove in a case connected with the goodwill that public interest was affected. AIR 1941 PC 75 (84).

(5) Vendor company carrying on business in Canada transferring same to another company — Covenant restraining vendor from doing any similar business whatsoever in Dominion of Canada — Restriction as to space, held, not unreasonable — Holding of small shares by vendor company in another company, carrying similar business was not a breach of agreement. AIR 1941 PC 75 (80, 84).

(6) Where the vendor of a goodwill contracts not to "directly or indirectly engage" in similar business, the phrase is not void for uncertainty. AIR 1941 PC 75 (80).

(7) Where a person merely buys the whole or any part of the tangible assets of any person who has been using the same in his business the purchaser cannot be said to acquire any interest of any sort in the old business of the

vendor nor can he be regarded as a successor of the old business nor is he entitled to any of the intangible privileges. But by purchase of the goodwill, he acquires the right to use the same or a similar name for his business or to canvass the old customers as against the vendor and becomes the successor in interest of the old business. AIR 1957 Bom 111 (113) = ILR (1958) Bom 8.

(8) The goodwill of a business is inclusive of positive advantages such as carrying on the commercial undertaking at a particular place and in a particular name and also its business connections, its business prestige, and several other intangible advantages which a business may acquire. AIR 1957 Bom 111 (115) = ILR (1958) Bom 8 ** AIR 1970 Raj 34 (41) (DB).

(9) Goodwill must always be understood in relation to facts. It represents business reputation which is a complex of personal reputation, local reputation and objective reputation of the products of the business. Except where the reputation of a business and where the product of the business more than its proprietor have won widespread popularity and universal approval and except in the case of well-known patents and manufacturing processes in which event the personal and objective reputation predominate, it is the local reputation or the attribute of locality which forms the largest content of goodwill in almost every other business. Specially is the attribute of locality the most important consideration in the business of an ordinary trader or a dealer. AIR 1957 Cal 280 (282).

(10) Contract for payment of goodwill money need not always be express but there may be oral contract or a contract may be implied by law, which may be inferred from acceptance of payment and other circumstances. AIR 1968 Raj 278 (280) = 1968 Raj LW 163.

(11) Goodwill of a business depends upon a variety of circumstances or a combination of them. The location, service, the standing of business, the honesty of those who run it, and the lack of competition and many other factors go individually or together to make up the goodwill. AIR 1968 Raj 278 (281) = 1968 Raj LW 163.

(12) Plea of D that P had transferred to him only tenancy and not goodwill of business — When business run by P and D is same and premises are located in business locality, conclusion is that goodwill must have necessarily passed. AIR 1968 Raj 278 (281) = 1968 Raj LW 163.

28. **Agreements in restraint of legal proceedings void.**—Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent.

Saving of contract to refer to arbitration dispute that may arise.

Exception 1.—This section shall not render illegal a contract, by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.

*[* * * *]

Saving of contract to refer questions that have already arisen.

Exception 2.—Nor shall this section render illegal any contract in writing, by which two or more persons agree to refer to arbitration any question between them which has already arisen, or affect any provision of any law in force for the time being as to references to arbitration.†

[*] The second clause of Exception 1 was repealed by the Specific Relief Act, 1877 (1 of 1877). Act 1 of 1877 has now been repealed by the Specific Relief Act, 1963 (47 of 1963) (1-3-1964). This new Act extends to the whole of India except the State of Jammu and Kashmir.

[†] Cf. the Arbitration Act, 1940 (10 of 1940), and Companies Act, 1956 (1 of 1956), Section 389.

SECTION 28 — SYNOPSIS

1. Scope and applicability.

2. Agreements affecting jurisdiction of Courts.

3. Agreements affecting limitation for enforcing rights under contract.

4. Agreements restraining enforcement of rights.

5. Exception 1.

1. Scope and applicability.— (1) No man can exclude himself from the protection of Courts by contract. AIR 1917 PC 116 (118) = 42 Bom 380 = 45 Ind App 61.

[See also AIR 1925 Pat 487 (488). (Agreement by servant not to sue for wrongful dismissal is invalid.)]

(2) Agreement by which one party thereto is restricted absolutely from taking usual legal proceedings is void to that extent. AIR 1934 Sind 1 (3) = 27 Sind LR 280 ** AIR 1951 Sau 83 (85) ** AIR 1950 Lah 174 (176) = Pak LR (1950) Lah 323 ** (1876) 1 Cal 466 (468, 469) (DB) ** (1967) 10 Law Rep 342 = (1967) 1 Mys LJ 521.

(3) Section 28 cannot be construed so as to exclude agreements to refer to arbitration without order of Court in a pending suit. AIR 1927 Bom 565 (576) = 51 Bom 908 (FB) ** AIR 1953 Cal 690 (692) = ILR (1955) 1 Cal 12.

(4) Section cannot be applied to rights under a decree. (1885) 7 All 124 (125, 131) (DB).

(5) Compromise of doubtful rights arising out of a previous contract is not void. It is outside the scope of Sec. 28. AIR 1926 Sind 202 (206).

2. Agreements affecting jurisdiction of Courts.— (1) It is a well settled proposition of law that litigants cannot, by private agreement, confer jurisdiction upon a Court which it does not possess nor can they divest a Court of jurisdiction which it possesses under the ordinary law. AIR 1955 Cal 161 (162, 163, 164) (DB) ** AIR 1954 Bom 176 (177) = ILR (1954) Bom 334 (DB) ** AIR 1954 Mad 845 (847) = ILR (1954) Mad 855 (DB) ** (1947) ILR (1947) 1 Cal 412 (418) (DB) ** AIR 1935 Nag 48 (49) ** AIR 1930 Bom 185 (186, 187) = 54 Bom 278 (DB). (Words "to that extent" means that only the stipulation which ousts the Court's jurisdiction is void and not the whole agreement.) ** AIR 1960 Cal 155 (156) = 1960 Cal LJ 18 (DB).

(2) The principle that parties cannot by consent confer jurisdiction on Court or deprive Court of jurisdiction only applies to cases of inherent jurisdiction of a Court over the subject-matter of a suit, but the question of territorial jurisdiction is not a question of inherent jurisdiction. AIR 1946 Lah 57 (60) = ILR (1945) Lah 281 (FB) ** AIR 1955 Madh B 145 (145) ** AIR 1947 Pesh 48 (50).

(3) Section 28 makes void only those agreements which "absolutely" restrict a party to a contract from enforcing

Section 28 — Note 2 (contd.)

the rights under that contract in ordinary tribunals. It has no application when a party agrees not to restrict his right of enforcing his rights in the ordinary tribunals but only agrees to a selection of one of those ordinary tribunals in which ordinarily a suit would be tried. Accordingly, an agreement between the parties to a contract, where a suit can be tried within the territorial limits of several Courts, to the effect that it will only be tried in one of the Courts having territorial jurisdiction and that the parties will be limited to have recourse to one of the several competent Courts is not within the mischief of the section and is valid and enforceable. AIR 1946 Lah 57 (59) = ILR (1945) Lah 281 (FB). (AIR 1923 Lah 425, AIR 1929 Lah 605 and AIR 1943 Lah 295, **Overruled.**) ** AIR 1957 Cal 240 (241) ** AIR 1956 Trav-Co 200 (203) = ILR (1956) Trav-Co 206 (DB) ** AIR 1955 Cal 161 (162, 164) (DB) ** AIR 1955 J and K 26 (27) (DB) ** AIR 1955 Madh B 145 (145) ** AIR 1954 Bom 176 (177) = ILR (1954) Bom 334 (DB) ** AIR 1954 Mad 845 (846) = ILR (1954) Mad 855 (DB) ** AIR 1950 Kutch 32 (33) ** AIR 1949 Ajmer 44 (45) ** AIR 1949 Ajmer 19 (22) ** (1949) 54 Mys HCR 186 (192) (DB) ** AIR 1947 Pesh 48 (50) ** (1947) ILR (1947) 1 Cal 412 (420) (DB) ** AIR 1944 Mad 47 (48) ** AIR 1944 Oudh 275 (276) = 20 Luck 105 ** AIR 1937 Nag 334 (335) = ILR (1939) Nag 641 ** AIR 1935 Bom 198 (199) ** AIR 1931 Cal 279 (279) = 57 Cal 1280 ** AIR 1925 Mad 1145 (1146) ** AIR 1968 Pat 44 (45) = 1967 BLJR 164 (DB) ** AIR 1968 Raj 89 (94) = 1967 Raj LW 129. (AIR 1956 Madh Bha 120, **Dissented from.**) ** AIR 1966 Andh Pra 256 (258) ** AIR 1964 Mys 147 (151) = (1963) 2 Mys LJ 513 (DB) ** (1968) 1 An WR 424 = (1968) 2 Andh LT 173 ** (1968) 1 Andh WR 429 ** (1967) 80 Mad LW 270 = (1967) 2 Mad LJ 57 ** AIR 1962 Andh Pra 452 (454) = (1962) 1 Andh LT 282 (DB) ** 1961 Ker LT 314 (DB) ** AIR 1960 Cal 545 (546) ** 1960 Jab LJ 1129 = 1960 MPLJ 1359 (DB). (AIR 1956 MB 120, **Dissented from.**) ** AIR 1959 Cal 669 (671, 672).

[But see AIR 1946 Cal 112 (112, 113) = ILR (1946) 1 Cal 257 ** AIR 1956 Madh B 120 (121).]

(4) A clause in a bill of lading that "Bombay" Courts alone shall have jurisdiction in respect of any claims filed against the Company", is not void under Section 28. AIR 1954 Trav-Co 461 (462) = ILR (1954) Trav-Co 351 (DB) ** AIR 1962 AP 452 (454) = (1962) 1 Andh LT 282 (DB).

[See also (1963) 1 Mys LJ 194. (Where the words "subject to Bangalore jurisdiction" are printed in a sale

note, which bears the signature of both the parties to the sale transaction jurisdiction of other Courts is excluded.)]

[See however AIR 1959 Mad 227 (228, 229) = (1959) 1 Mad LJ 106. (Words "subject to Bombay Jurisdiction" printed at top of the Bill — Jurisdiction of other Courts is not excluded.)]

(5) The validity of an agreement by which the parties prefer one of the two Courts depends upon the fact that both the Courts must have jurisdiction in deciding the matter. AIR 1957 J and K 7 (7).

(6) Parties cannot make agreement that suits relating to disputes will be brought only in a particular Court even if cause of action arose outside its jurisdiction. (1909) 3 Sind LR 45 (47) (DB).

(7) Where a receipt executed by A for the price of articles entrusted to him at X and to be returned at Y contained a printed note that all disputes were subject to the jurisdiction of the Courts at Z but the acceptance of that term by B was not proved or even alleged by A, held that the agreement as to jurisdiction was not binding on B and that the cause of action arose either at X or at Y and Courts at Z had no territorial jurisdiction over the dispute. AIR 1957 J and K 7 (7).

(8) Agreement that another Court to the exclusion of Court having jurisdiction shall have jurisdiction to adjudicate upon the disputes arising under the agreement of the parties, is illegal. But if such an agreement specifies the place, where according to the facts stated in the agreement, the cause of action is deemed to arise, the agreement is legal. AIR 1930 Lah 611 (612) ** AIR 1956 Trav-Co 200 (203) = ILR (1956) Trav-Co 206 (DB) ** 1967 All LJ 343 = 1967 All WR (HC) 380.

(9) Agreement restricting right to institute suit in particular Court — Strict proof that restriction applies to proceedings under consideration is necessary — In deciding whether such restriction prevents either of the parties from filing a suit in another Court regard must be had to the actual wording used in the agreement — Condition in agreement that proceedings arising out of "contract" be instituted in Court M — Offer not ripening into completed contract — Condition did not apply — Jurisdiction of other Courts otherwise competent to entertain suit not ousted. AIR 1947 Mad 99 (100).

(10) Agreement providing that in settling the rates for work done Chief Engineer's decision would be accepted as final by the contractors — Restriction held amounted to ousting jurisdiction of Court and as such agreement would be void under Section 28. (1951) 4 Sau LR 34 (43) (DB).

Section 28 — Note 2 (contd.)

(11) Where the Courts at M and B have ordinary jurisdiction to try a suit but the parties contract to sue only at B the Court at M cannot entertain the suit filed by one of the parties to the contract. AIR 1950 Kutch 32 (33).

(12) If the suit is filed in a Court not agreed upon by the parties the proper course for it is to return the plaint for the presentation to the Court agreed upon by them. AIR 1949 Ajmer 44 (45) ** AIR 1955 Cal 161 (164) (DB) ** (1968) 1 An WR 424 = (1968) 2 Andh LT 173 ** AIR 1964 Mys 147 (157) = (1963) 2 Mys LJ 513 (DB).

(13) When parties enter into an agreement restricting their rights to institute suits except in particular Courts, it must be strictly proved that the restriction applies to the proceedings under consideration. In deciding whether such restriction prevents either of the parties from filing a suit in another Court regard must be had to the actual wording used in the agreement. AIR 1947 Mad 99 (100) ** AIR 1959 Mad 227 (228) = (1959) 1 Mad LJ 106. (Ouster of jurisdiction of Court cannot be a matter of presumption — Words "Subject to Bombay Jurisdiction" printed at top of the Bill — Jurisdiction of other Courts is not excluded.)

3. Agreements affecting limitation for enforcing rights under contract.— (1) Section 28 contemplates the suspension permanently of the usual remedies for the enforcement of legal rights. It aims at the prohibition of agreements which could only operate so long as rights were in existence. Section 28 is aimed only at covenants not to sue at any time and covenants not to sue for a limited time. AIR 1914 Bom 225 (2) (228) = 38 Bom 344 (DB).

(2) It is only when a period of limitation is curtailed that Section 28 of the Contract Act comes into operation. It does not apply when the term spells out an extinction of the right of the plaintiff to sue or spells out the discharge of the defendant from all liability in respect of the claim. AIR 1951 Bom 347 (352) ** AIR 1966 Pat 69 (73) = 1965 BLJR 328 ** AIR 1962 J and K 15 (16).

(3) Condition in life insurance policy that no suit shall be brought on the policy after one year from death of assured is void. (1911) 11 Ind Cas 756 (756) (Low Bur) ** AIR 1926 Rang 3 (3) = 3 Rang 383 (DB).

[See however (1912) 14 Bom LR 741 (743) (DB).]

(4) A claim cannot be time-barred under an indent providing that no claim can be recognised if not made in writing within 60 days from due date of

payment, as such clause cannot take away plaintiff's statutory right to bring claim within prescribed time. AIR 1932 Lah 169 (172) = 12 Lah 692 (DB).

(5) Condition in contract that on happening of certain event one party shall lose his rights is not a condition limiting period within which he may seek relief in ordinary Courts — Condition is not void. AIR 1926 Rang 3 (4) = 3 Rang 383 (DB) ** AIR 1962 J & K 15 (16).

(6) Condition in fire insurance policy that company would not be liable for loss or damage after expiration of twelve months from happening of the loss or damage, unless claim was the subject of pending action or arbitration, does not contravene Section 28. AIR 1934 Rang 15 (16, 17) = 11 Rang 475 ** AIR 1960 Punj 236 (240, 244) = 62 Pun LR 273 (FB). (AIR 1932 Lah 169, Overruled.)

(7) A condition in Insurance policy providing for forfeiture of all benefits unless an action is brought within three months from the rejection of the claim does not infringe Section 28. AIR 1924 Cal 186 (187) (DB) ** AIR 1950 East Punj 352 (355) ** AIR 1924 Rang 351 (351, 352) (DB) ** AIR 1914 Bom 225 (229) = 38 Bom 344 (DB). (Phrase "thus enforce his rights" refers to enforcement by usual legal proceedings in ordinary tribunals—Per Batchelor J.) ** AIR 1968 J & K 39 (43) = 1967 Kash LJ 144 ** (1959) 61 Punj LR 114.

(8) Stipulation in policy that risk is to last only for three days after arrival of train at destination and no liability for loss would attach unless notice is given within 10 days of said risk to company does not infringe Section 28. AIR 1966 Pat 69 (73, 74) = 1965 BLJR 328 (DB).

(9) Article III, Cl. (IV) of the schedule to Carriage of Goods by Sea Act does not limit time within which holder of bill of lading may enforce his rights against carrier. It extinguishes the right itself and is irretrievably lost — Insertion of clause in a bill of lading incorporating the article is not void. AIR 1931 Sind 124 (126) = 25 Sind LR 222.

(10) It is not open to the Railway Administration to repudiate its liability if the claim is not made immediately to the clerk in charge and is not forwarded to the Traffic Manager forthwith in spite of the rule printed at the back of the Railway receipt to that effect. The observance of this rule would be contrary to Section 28. AIR 1953 Nag 169 (172) = ILR (1953) Nag 314 (DB) ** AIR 1951 All 702 (702, 703) ** 1888 All WN 59 (60, 61) (DB).

(11) Father executing 'mashahara patra' in favour of his widowed daughter providing for monthly allow-

Section 28 — Note 3 (contd.)

ance of Rs. 10 — Grantee restricted from bringing a suit for arrears of more than one year — Restriction held to be void under Section 28. AIR 1932 Cal 720 (721) (DB).

(12) Condition in bill of lading that carrier and ship would be discharged from liability for loss or damage unless plaintiff brought suit within one year from date of delivery — No suit brought within one year — **Held**, that rights of plaintiff were extinguished — Section 28 did not help him. AIR 1932 Bom 330 (332).

(13) R. 102 of the Indian Post Office Rules framed under S. 35 of the Indian Post Office Act, in so far as it fixes a limit of one year for making the claim, is ultra vires. 1966 All LJ 675 = 1966 All WR (HC) 502 (DB).

(14) Suit filed within prescribed limitation cannot be dismissed on ground that it is filed beyond the time fixed by Revenue officer. Revenue officer has no jurisdiction to curtail period of limitation allowed by law for filing suit. AIR 1968 Punj 341 (343) = 1968 Punj LJ 102.

4. Agreements restraining enforcement of rights. — (1) Section 28 contemplates the suspension, permanently or temporarily, of the usual remedies for the enforcement of legal rights. It aims at the prohibition of agreements which could only operate so long as rights were in existence. AIR 1914 Bom 225 (2) (228) = 38 Bom 344 (DB).

(2) Section 28 does not apply to cases where there is no absolute restraint against enforcing the rights. AIR 1951 Sau 83 (85).

(3) Agreement restraining transferee from enforcing in any way his rights under the transfer is void. AIR 1921 Mad 599 (606) = 44 Mad 919 (FB).

(4) Agreement restraining party to arbitration from raising objections to the award in any way is opposed to the spirit of S. 28 and is void. AIR 1916 Lah 89 (91) = 1916 Pun Re No. 117, p. 361 (DB) ** AIR 1928 Sind 81 (81) = 21 Sind LR 253 (DB) ** AIR 1917 Sind 38 (39) = 11 Sind LR 43 ** ('83) 6 Mad 368 (369, 370) (DB) ** AIR 1965 Pat 239 (240).

[But see AIR 1918 Sind 13 (21) = 13 Sind LR 75].

(5) Where a clause in agreement was that all kinds of disputes shall be decided according to certain rules and the exclusive authority rested with a committee, so as to make its decision final, it was held that the parties can come to Court and question the finality of its decision, in spite of the agreement. (1910) 34 Bom 13 (27).

(6) Byelaw providing that a member wishing to proceed with litigation against Society in a Court of law shall

first resign his membership, failing which his name shall be removed from roll of members is void. (1967) 10 Law Rep 342 = (1967) 1 Mys LJ 521.

(7) Agreement in writing between parties to refer disputes between them to arbitration filed in Court — Order of reference made — No award filed by arbitrators — Reference superseded by order of Court — **Held**, agreement to refer did not bar under Section 28 one of the contracting parties from filing suit after supersession of reference. 1876 Pun Re No. 37, p. 67 (71) (DB).

(8) Even if a barrister Advocate makes a special contract with his client that the latter would not be sued for fees, such a contract would be void under Section 28. AIR 1933 All 417 (420) = 55 All 570 (FB). (25 All 509. **Overruled**.)

(9) Plaintiff agreeing to forbear to sue debtor at the request of defendant who agreed to indemnify plaintiff — Agreement so far as it restricted plaintiff's right to sue, held, void. 1879 Pun Re No. 120, p. 358 (360) (DB).

(10) Claimant under O. 21, Rule 58, Civil P. C., withdrawing claim and agreeing not to file suit under O. 21, Rule 63, Civil P. C. — Decree-holder agreeing not to press petition for enquiry as to genuineness of hatchitta alleged by him to be forged: **Held**, (Per Wort J.) Section 28 was no bar to the enforcement of the above contract. AIR 1940 Pat 683 (689) = 19 Pat 715 (DB). (But such contract is invalid under Section 23.)

(11) Agreement not to appeal against decree is not a void agreement and is not prohibited by Section 28. AIR 1934 Pat 644 (645) (DB) ** AIR 1929 Oudh 451 (452) = 5 Luck 391 (DB). (Agreement by which parties agree as to procedure to be adopted by Court in deciding case on merits and also consenting that the decision will be binding on them is tantamount to saying that no right of appeal will be exercised by the parties.) AIR 1926 Sind 202 (207) ** (1882) 8 Cal 455 (458) (DB) ** ('75-77) 1 All 267 (270) (FB) ** AIR 1969 Bom 221 (224) = 70 Bom LR 788.

(12) Where a condition in a bill of lading only exempts the company from liability in case a notice of the claim is not given within fourteen days from the due date, the condition is not void as it does not restrain a party from making a claim in a Court of law in respect of the loss or damage. AIR 1951 Sau 83 (85).

(13) Agreement that security deposit will be returned on furnishing no demand certificate is not hit by Section 28. AIR 1962 J & K 66 (67) = 1962 Kash LJ 144 (DB).

5. Exception 1. — (1) Exception 1 only applies to class of contracts where

Section 28 — Note 5 (contd.)

parties have agreed that no action shall be brought until some question of amount has first been decided by arbitrators. (1875-76) 1 Cal 466 (469) (DB) ** AIR 1955 Punj 113 (114) = ILR (1956) Punj 177 (DB) ** 70 Cal WN 199 (DB).

(2) To make agreement conform to Exception 1, jurisdiction of Courts must be excluded in all respects except matter which is the result of arbitrator's award. Section does not forbid action for damages for breach of such agreement to refer to arbitration. (1875-76) 1 Cal 42 (50, 51) (FB).

(3) A person may not contract himself out of his right to have recourse to Courts of law; but lawful agreement to refer matter to arbitration can be made a condition precedent before going to a Court of law. (1910) 34 Bom 13 (23) ** AIR 1960 All 72 (78).

(4) An agreement restraining a party to arbitration from raising objections to the award in any way is opposed to the spirit of Section 28 and is void. AIR 1917 Sind 38 (39) = 11 Sind LR 43 ** AIR 1950 Lah 174 (176) = Pak LR (1950) Lah 323 ** (1883) 6 Mad 368 (370) (DB). (Exceptions 1 and 2 do not legalize agreement not to object at all to validity of award.) ** AIR 1965 Pat 239 (249) (DB) ** AIR 1960 All 72 (78).

(5) No question of limitation arises where agreement to refer to arbitration falls within four corners of Exception 1. AIR 1929 Sind 55 (57, 58) (DB) ** AIR 1955 J & K 36 (38) (DB).

(6) Exception 1 covers an arbitration clause in a contract. (1906) 33 Cal 1169 (1173).

(7) Suit will not lie to enforce agreement to refer to arbitration, even in the case referred to in the first exception to Section 28. (1875-76) 1 Cal 466 (468) (DB).

(8) A contract appointing arbitrators is a contract "uberrima fides" and unless there is a complete confidence between the tribunal and the parties it would be wrong to bind a party to his contract, when there is a probability that injustice would result from doing so. AIR 1933 Sind 347 (350).

(9) Agreement to refer disputes arising between parties out of various contracts, to arbitration and to abide by the award — No prohibition to taking proceedings thereafter in Court of law — Agreement is valid. AIR 1937 All 650 (652) ** AIR 1966 Andh Pra 256 (258). (Suit is not maintainable before steps are taken to refer matter to arbitration.)

(10) Deputy Commissioner engaging plaintiff as workman — Agreement providing that in case of breach workman was to accept amount given by Deputy Commissioner and to be bound by his decision in other matters — Suit by plaintiff for balance of wages after

grant of amount by Deputy Commissioner — Held, suit fell within Exception 1 and was barred under Section 21, Specific Relief Act. AIR 1932 Oudh 265 (266) = 8 Luck 98 (DB).

(11) Agreement by servant of company, that Manager of Company shall be sole judge as to company's right to retain whole or part of wages for breach of rules and his certificate in writing in respect of the amount so retained, and the cause of such retention, shall be conclusive evidence between the parties in all Courts of justice was held to be an arbitration clause covered by Exception 1. (1885) 11 Cal 232 (234, 235) (DB).

(12) A clause in the grant under Crown Grants Act (1895) that in the event of any boundary disputes between lessees, they shall be bound to submit such dispute to the Commissioner, and that the decision of the Board of Revenue on appeal shall be final and binding on the lessees, such a clause is not affected by Section 28 by reason of Section 3, Crown Grants Act. AIR 1938 Cal 211 (215) = ILR (1938) 1 Cal 626.

(13) Contract between person and company — Party agreeing that decision of engineers of company will be final in respect of the contract whose execution is put under their supervision. Held, that though the engineers are not arbitrators, they are persons exercising judicial functions and the party can come to Court to question the decision if there is remissness in the proceedings. AIR 1935 Mad 356 (359) (DB).

(14) Submission to arbitration clause in bill of lading — Arbitrators and umpires to meet in England — Submission to be made rule of High Court in England — Submission clause held not rendered illegal by Section 28. AIR 1932 Sind 111 (112) = 26 Sind LR 497 (DB).

[See also AIR 1962 Cal 601 (604) = 66 Cal WN 538 (DB) ** AIR 1960 Cal 155 (156, 157) = 1960 Cal LJ 18 (DB).]

(15) Held, on interpretation of the clause conferring jurisdiction on foreign Court, that the clause did not oust the jurisdiction of Indian Court. The clause could, however, be invoked for stay of suit and the Court has to find out whether taking into consideration the entire facts placed before it, the Court mentioned in the clause is the Court of convenience. AIR 1960 Cal 45 (46) = 64 Cal WN 269.

(16) Where a party to a contract agrees that in case of any dispute arising out of the contract or in any matter concerning the contract, he will abide by the decision of the other party, he cannot afterwards be allowed to say that such decision is not binding upon him, being a decision by a person in his own cause, unless it can be shown to be

29. Agreements void for uncertainty.—Agreements, the meaning of which is not certain, or capable of being made certain, are void*.

Illustrations

(a) A agrees to sell to B "a hundred tons of oil". There is nothing whatever to show what kind of oil was intended. The agreement is void for uncertainty.

(b) A agrees to sell to B one hundred tons of oil of a specified description, known as an article of commerce. There is no uncertainty here to make the agreement void.

(c) A, who is a dealer in coconut-oil only, agrees to sell to B "one hundred tons of oil". The nature of A's trade affords an indication of the meaning of the words, and A has entered into a contract for the sale of one hundred tons of coconut-oil.

(d) A agrees to sell to B "all the grain in my granary at Ramnagar". There is no uncertainty here to make the agreement void.

(e) A agrees to sell to B "one thousand maunds of rice at a price to be fixed by C". As the price is capable of being made certain, there is no uncertainty here to make the agreement void.

(f) A agrees to sell to B "my white horse for rupees five hundred or rupees one thousand". There is nothing to show which of the two prices was to be given. The agreement is void.

[*] Cf. Evidence Act (1872), S. 93, which prohibits evidence to make certain or complete instruments which are ambiguous or defective.

Section 28 — Note 5 (contd.)

arbitrary or otherwise unjust. AIR 1933 Sind 93 (99) = 26 Sind LR 469 (DB).

(17) An agreement to appoint one of the contracting parties as an arbitrator about matters arising out of the same contract may not be ruled out completely in theory but in practice, that seldom happens, and if one of the contracting parties wants to set up a case of that nature, he has to prove it beyond any doubt. AIR 1964 Pat 326 (330) (DB) ** AIR 1964 Pat 326.

(18) If the parties choose to agree to abide by the certificate of the architects whom they have named in the agreement, then they must accept the decision of the architects, however wrong and erroneous it may be. Final certificate can be challenged only on ground of fraud, collusion or misconduct on the part of architect. AIR 1942 Bom 334 (335).

(19) Telephone hiring contract between plaintiff and the Governor-General provided for reference to arbitration of Director-General of Posts and Telegraphs in case of any dispute. Dispute arose and the plaintiff brought a suit. The defendant applied for stay of the suit under Section 34 of the Arbitration Act. It was held that the agreement was not an agreement by which any party thereto was restrained absolutely from enforcing his right under or in respect of any contract by the usual legal proceedings before the ordinary tribunals and even if it were, Exception 1 to Section 28 would save such an agreement. AIR 1949 Bom 359 (361, 362) = ILR (1949) Bom 449 (DB).

(20) A contract which is ab initio void cannot form the basis of a reference to

arbitration. AIR 1954 Mad 528 (531) (DB) ** (1962) 64 Bom LR 113 = 1962 Nag LJ 709.

(21) Where the existence or validity of the entire agreement itself is denied, and if the denial is found to be correct, the arbitration clause goes along with the agreement. AIR 1958 All 26 (27) = 1958 All WR (HC) 23 (DB).

(22) A mere covenant making arbitration a condition precedent to an action at law does not create a special contract and even in cases where it is provided that no action shall be brought until an award is made, a party has still the right to bring an action. ILR (1953) Hyd 727 (728) (DB).

(23) In view of Sections 23 and 28, there cannot be any agreement between the parties not to launch criminal prosecution even if one of the parties is guilty of embezzlement. 1965 All LJ 538 = ILR (1965) 2 All 82 (DB). (AIR 1937 Oudh 331, Overruled.)

(24) A policy of marine insurance, which provided that all disputes must be referred to for settlement in England and all legal proceedings must be taken in England, was held to be covered by exception 1 of S. 28. AIR 1949 Ajmer 44 (45).

SECTION 29 — SYNOPSIS

1. Scope.
2. Contracts void for uncertainty or vagueness.
3. Contracts not void for uncertainty or vagueness.
4. "Capable of being made certain".

1. Scope.— (1) Section 29 contemplates that the meaning of an agreement shall be clear on the face of it. AIR 1945

Section 29 — Note 1 (contd.)

Mad 10 (10) = ILR (1945) Mad 521 (DB).
(An agreement to pay certain amount "after deductions as would be agreed upon" between the parties, held void for uncertainty.)

(2) It is impossible for a Court of justice to give effect to a contract, the meaning of which it is unable to find out with reasonable clearness. AIR 1915 Lah 328 (329) (DB).

(3) Where a reasonable meaning can be construed into the contract, the contract is not void for uncertainty. 1913 Pun LR No. 305 p. 1027 (1031) (DB).

(4) The construction of an ambiguous stipulation in a deed may be governed or qualified by a recital, but on the other hand, if the intention of the parties is clearly to be collected from the operative part of the instrument, that intention is not to be defeated or controlled because it may go beyond what is expressed in the recital. (1880) 2 Mad 239 (257) = 7 Ind App 83 (PC).

(5) Considerable latitude is allowed to parties in the construction of commercial documents; and phrases, which would be sufficiently vague and uncertain in other forms of contract to render them unenforceable, are frequently given effect to in commercial contracts. AIR 1951 Cal 10 (18) = ILR (1950) 2 Cal 656 (FB).

2. Contracts void for uncertainty or vagueness.— (1) Where a contract is uncertain, performance of which would never be enforced, then it must be held that the contract is void for uncertainty. AIR 1951 Cal 10 (17) = ILR (1950) 2 Cal 656 (FB) ** AIR 1967 Cal 168 (172) (DB).

(2) Where the term in an agreement is vague in the extreme and might be interpreted in as many ways as there are interpretations thereof, the agreement is certainly one which must be considered as void because of uncertainty under Section 29. (1921) 4 Nag L Jour 67 (69) ** AIR 1959 AP 551 (557) (DB). (Condition of defeasance must be clear and unequivocal so as to be operative.)

(3) Where a compromise petition stated:— "the following five gentlemen shall decide (all matters) relating to our movable and immovable property and the said 20 bighas of land." **Held**, that the terms of the clause were so vague that it could not amount to an enforceable agreement or a contract. AIR 1950 Pat 445 (447) (DB).

(4) A contract for pre-emption entered into by the co-sharers for an unlimited period is unenforceable against the heirs and representatives of the co-sharers as being too vague and uncertain. But

a contract for pre-emption between the co-sharers entered into at the time of the settlement, held must be presumed, in the absence of anything to the contrary, to have been intended to hold good for the whole period of the settlement and not longer and therefore not uncertain. AIR 1924 All 400 (403) = 46 All 333 (DB).

(5) Certain persons describing themselves as residents of X, giving a bond for payment of money in which as collateral security they pledged "Kul haq haquk" (their properties) **Held**, that the general hypothecation was too indefinite to be acted upon and no charge on their property situated in X was created. (1875-77) 1 All 275 (276) (DB).

(6) Iqrarnamah covenanting to grant land to society whenever required for building Mandir or Dharmshala and empowering to take it if refused — **Held**, covenant was personal but inoperative owing to vagueness. AIR 1916 Pat 226 (228, 230) = 1 Pat L Jour 238 (DB).

(7) An agreement to sell at a favourable or concession rate is indefinite and void for uncertainty. AIR 1929 Mad 243 (246) = 52 Mad 300 (DB).

(8) A covenant of partnership giving one party the right of specifying the share of the profits to be assigned to the other and affording no indication as to the proportion of losses which one party is to bear in the partnership is void for uncertainty. AIR 1915 Lah 328 (329) (DB).

(9) An agreement to pay rent in cash without the rate being definitely fixed is void for uncertainty. AIR 1920 Mad 115 (116) (DB).

[See also 1966 All WR (HC) 69 = 1966 All LJ 688. (Where tenant has taken possession of accommodation, agreement of tenancy is not void for non-fixation of rent and Court has jurisdiction to compel tenant to pay reasonable rent.)]

(10) Although an agreement may otherwise be definite if an essential element is reserved for future agreement of both parties, the promise can raise no legal obligation until such future agreement. Thus if a party agrees to pay a sum of money "after deductions as may be agreed upon" the essential element of the agreement viz., the determination of the amount to be deducted is left to future agreement. An agreement of this nature has been described as an agreement to enter into an agreement and declared to be too vague to create a legal obligation. AIR 1953 Sau 122 (124, 125) (DB).

(11) Where the conditions mentioned in the proposal asking for extension of time are so vague and uncertain that it is not possible to ascertain definitely the

Section 29 — Note 2 (contd.)

period for which the time for the performance of the contract was really intended to be extended, the agreement for extension must be held to be vague and uncertain and as such void under Section 29. AIR 1958 SC 512 (517) = 1959 SCR 213.

(12) An agreement requiring landlord to 'make all necessary repairs as and when desired' is vague and not enforceable. 1963 All WR (HC) 580.

(13) Covenant for renewal in lease — Lessee entitled to renewal on such terms and conditions as may be agreed — Contract is invalid for uncertainty. AIR 1961 Madh Pra 324 (328) = 1961 MPLJ 541 (DB).

(14) Where the contract does not specify a way of ascertaining the price, the contract is imperfect and incapable of being enforced. AIR 1966 Ker 311 (314) = 1966 Ker LT 644 ** 1968 Raj LW 68 = ILR (1967) 17 Raj 781.

(15) Agreeing to serve B — Fixing of remuneration left entirely at the discretion of B—Contract is unenforceable. AIR 1966 Mad 235 (239) = (1966) 2 Mad LJ 251 (DB).

3. Contracts not void for uncertainty or vagueness. — (1) Where an arbitration clause in a contract provided that "all disputes between the parties arising out of contract shall be referred to the sole arbitration of A/B," it was held that in the absence of any provision with regard to the choice to be made between A and B, the clause was invalid as being vague and uncertain. AIR 1956 Punj 205 (205) = ILR (1956) Punj 488.

(2) Where a contract provides for arbitration by the Superintendent Engineer for the time being the meaning of the said clause is that it must be the arbitration of the Superintending Engineer holding that office at the time when the dispute arose and had to be referred. That being so, it cannot be said that such an arbitration clause is void for uncertainty. ILR (1952) 1 Cal 324 (326) ** AIR 1958 Punj 19 (23) = ILR (1957) Punj 1760.

[But see AIR 1947 Lah 215 (219) (DB).]

(3) No contract is void merely because no time for performance is specified. AIR 1924 All 657 (658) = 46 All 514 (DB) ** AIR 1951 Mad 767 (768).

(4) A covenant for renewal without specifying period and rent must be presumed to be for the same period and rent as in the original and therefore not void for uncertainty on that ground. AIR 1917 Cal 509 (510) (DB) ** AIR 1961 Madh Pra 324 (328) = 1961 MPLJ 541 (DB).

(5) A term in the agreement for reconveyance that the vendor was to take a resale for his family use and not

for speculative purposes is neither vague nor uncertain. ILR (1950) All 32 (44, 45) (DB).

(6) Though the actual figure of the rent has not been determined, if there is no uncertainty regarding the way in which it should be fixed throughout the lease, the lease cannot be said to be unenforceable for uncertainty and would be a binding lease. AIR 1944 Mad 518 (523) = ILR (1945) Mad 355 (DB).

(7) A contract to sell land at a fair valuation, when there is no difficulty in ascertaining what a fair valuation would be, is valid and enforceable and not void for uncertainty. (1880) 5 Cal 175 (183) (DB) ** AIR 1966 Ker 311 (313) = 1966 Ker LT 644. (Contract to let out for reasonable or fair or proper rent is enforceable.)

(8) A contract is not void for uncertainty simply because the permission of the Khasmahal authorities sanctioning transfer has not been obtained. AIR 1951 Orissa 291 (294) = ILR (1949) 1 Cut 593 (DB).

(9) Where the parties to the reference merely say that there was some dispute in regard to certain brick kiln and that the arbitrators were to decide the dispute in any manner they thought proper the arbitration agreement cannot be said to be so vague or uncertain as to be unenforceable. AIR 1957 All 406 (408).

(10) Where by a deed of assignment the goodwill as well as the assets of a business are transferred, there is no vagueness in the description of the property transferred. AIR 1954 Pat 280 (284) (DB).

(11) Where the terms of contract of guarantee, though oral, have been mentioned with sufficient precision in plaint, the contract cannot be held to be uncertain or void within the meaning of S. 29. AIR 1957 Pat 256 (258).

(12) A term in the contract of sale of goods which gives a party power to alter or postpone deliveries or to cancel any balance which might remain undelivered at the end of the contract period, does not render the contract uncertain and void under S. 29. ILR (1951) 1 Cal 420 (429).

(13) Where a Nattukotai Chetty impliedly agreed to give something extra to his agent as remuneration for the collection of outstandings left uncollected by the agent's predecessor, but did not fix a rate of percentage: Held, that in view of the nature of the business of Nattukotai Chetties, the contract was enforceable and the agent was entitled to a reasonable amount as remuneration. AIR 1915 Mad 931 (934) (DB).

(14) Where the contract for supply of goods did not mention the maximum limit of purchase, it was held that the contract was not uncertain. AIR 1916 Bom 315 (317) (DB).

Section 29 — Note 3 (contd.)

(15) Plea that the agreement was void for uncertainty held could not be availed of where the parties themselves did not regard it as vague and had acted on it. AIR 1929 Nag 194 (197) = 25 Nag LR 131 (DB).

(16) Contract subject to 'usual force majeure clause' — Contract is not void for vagueness or uncertainty. AIR 1961 SC 1285 (1292) = (1961) 3 SCR 1020.

(17) An agreement that rent should be paid on a certain date in advance would import that the term of lease started to run from the date of payment of rent and the agreement is not uncertain for non-mention of date of commencement of lease. AIR 1960 All 420 (423) = 1960 All LJ 193 (DB).

(18) Agreement to refer disputes to arbitration in accordance with Rules of Mill-Owners' Association Bombay — There being provision for reference of dispute in the rules, objection that agreement was void for uncertainty was held not maintainable. AIR 1959 Cal 687 (688) = ILR (1960) 1 Cal 634 (DB).

(19) A term in agreement to reconvey property on deposit of costs of execution of deed and 'other necessary and indispensable expenses', besides purchase price — **Held**, that the words 'other necessary and indispensable expenses' did not make the contract void for uncertainty — Such necessary and indispensable expenses having regard to expression 'other' should be construed 'ejusdem generis' and related to execution of deed. AIR 1963 Cal 325 (329) = 67 Cal WN 110 (DB).

(20) An agreement in compromise decree to the effect that "each party has to sell to the other, respective portions of the properties which have come to their share as above at a price fixed by two members of the panchas when either party wants to sell its share" is arbitration agreement and is not void for uncertainty as to the identity of Panchas. Having regard to provisions of Ss. 8 and 9 of Arbitration Act there is no distinction between such case and illustration (e) of S. 29. AIR 1967 Guj 81 (83, 84) = (1965) 6 Guj LR 915.

(21) Contract to reconvey in favour of four persons — Person to exercise first option not determinable — Contract not void for uncertainty. AIR 1964 Mad 219 (220) = (1964) 1 Mad LJ 135 (DB).

(22) Condition in a lease that lessee shall start construction of a house on leased plot within three years — It is specific enough to be enforceable. 1966 All WR (HC) 1 = 1966 All LJ 531.

4. "Capable of being made certain" —

(1) Under Section 29 an instrument is not void if it is capable of being made certain. (1913) 20 Ind Cas 812 (813) **

AIR 1969 Pat 114 (117) (DB) ** AIR 1967 Guj 81 (83) = (1965) 6 Guj LR 915.

(2) A contract which is otherwise good but omits to mention some term explicitly does not become void or uncertain for that reason if the uncertainty can otherwise be made certain id certum est quod certum reddi potest. AIR 1951 Orissa 291 (294) = ILR (1949) 1 Cut 593 (DB).

(3) The non-fixation of the price and the time for the execution of a sale deed in a contract of sale of land, does not make the contract void for uncertainty under Section 29 if the parties have consensus ad idem with reference to any essential term of the contract. AIR 1951 Orissa 291 (294, 295) = ILR (1949) 1 Cut 593 (DB).

(4) In arbitration agreements the actual points of dispute are seldom stated. Generally, references are made to arbitration where disputes arise and the parties thereafter formulate, when necessary, their disputes before the arbitrators and seek their decision on those points of differences. The meaning of such agreements is not in any sense uncertain, and even if there is any slight uncertainty, that is capable of being made certain at the time of hearing. AIR 1957 All 406 (408).

(5) A contract to execute a kabala "containing necessary stipulations" is not void for uncertainty as the "necessary stipulations" evidently mean the stipulations for sale implied under the law and contained in the Transfer of Property Act. AIR 1927 Cal 889 (893, 894) = 55 Cal 285 (DB).

(6) Where a written contract for sale of land is silent about the price and the time for performance, the contract is not void for uncertainty if it is one that can be made certain within the meaning of Section 29. AIR 1951 Orissa 291 (294) = ILR (1949) 1 Cut 593 (DB).

(7) Where the mortgagors described the mortgaged property in the mortgage deed as "their property" and at the date of the mortgage the mortgagors had specific interest in the mortgaged property, it was held that the words were sufficiently certain, or at any rate were capable of being made certain. (1890) 12 All 175 (178, 179) (DB).

(8) A contract to grant a renewal of a lease on such conditions as shall be reasonable and proper at the time of such renewal is not void for uncertainty. AIR 1927 Mad 513 (515) = 50 Mad 595 (DB).

(9) Where the indigo cakes mortgaged were described as those to be manufactured from the crops to be grown on lands of the Pupri Factory from the date of the execution of the mortgage upto the date of its being paid off, held that there was no vagueness as to the

30. Agreements by way of wager void.—Agreements by way of wager are void; and no suit shall be brought for recovering anything alleged to be won on any wager, or entrusted to any person to abide the result of any game or other uncertain event on which any wager is made.

Exception in favour of certain prizes for horse-racing.—This section shall not be deemed to render unlawful a subscription or contribution, or agreement to subscribe or contribute, made or entered into for or toward any plate, prize or sum of money, of the value or amount of five hundred rupees or upwards, to be awarded to the winner or winners of any horse-race.

Section 294A of the Indian Penal Code not affected.—Nothing in this section shall be deemed to legalize any transaction connected with horse-racing, to which the provisions of Section 294A of the Indian Penal Code apply^o.

[^o] See Act for Avoiding Wagers (Amendment) Act, 1865 (Bom. Act III of 1865), which has been extended to the whole of the then Bombay State by Bombay Act for Avoiding Wagers (Extension and Amendment) Act, 1959 (Bom. Act XXI of 1959).

Section 29 — Note 4 (contd.)
indigo cakes. (1904) 31 Cal 667 (678) (DB).

(10) Agreement between landlord and tenant to adjust cost of new construction to be made by tenant against rent — Amount to be spent not fixed — Agreement not void for uncertainty. AIR 1963 All 248 (249) = 1963 All WR (HC) 460.

(11) If there is no statement in contract regarding the price to be paid the law allows a standard of reasonableness. Accordingly a fair or reasonable price is recoverable on the basis of a term to be implied in the contract and contract is enforceable. AIR 1966 Ker 311 (313) = 1966 Ker LT 644.

(12) A agreeing to serve B — Service not to be gratuitous—Remuneration to be fixed by B — Contract is enforceable and the rate of remuneration to be fixed must be fair and reasonable. AIR 1966 Mad 235 (239) = (1966) 2 Mad LJ 251 (DB).

SECTION 30 — SYNOPSIS

1. Scope.
2. Wagering contracts.
3. Burden of proof and evidence.
4. Speculative contracts.
5. Satta transactions.
6. Teji Mandi transactions.
7. Badni transactions.
8. Lotteries.
9. Chit funds.
10. Patta patti contracts.
11. Sale and purchase of shares.
12. Insurance contracts.
13. Nazarana transactions.
14. Other illustrative cases.
15. Wagering agreements are not illegal.

16. Promissory note given in consideration of wagering transaction.

17. Suits relating to recovery of deposit, winnings or losses.

18. Collateral agreements.

19. Wagering contracts by agents.

20. Pakka adatiya transactions.

1. Scope.— (1) There is no distinction between the expression “gaming and wagering” in the English Gaming Act 1845, and the earlier Indian Act XXI of 1848, and the expression “by way of wager” used in Section 30 of the Indian Contract Act (9 of 1872). (1902) 29 Cal 461 (467) = 28 Ind App 239 (PC) ** AIR 1917 Low Bur 18 (20).

(2) Section 30 makes a wagering contract void ab initio and to such a class of contracts Section 65 has no application. AIR 1918 Mad 163 (163) (DB) ** 1966 Jab LJ 399 = 1966 MPLJ 379 ** ILR (1961) 11 Raj 390 (DB) ** AIR 1959 SC 781 (792) = (1959) Supp (2) SCR 406. (Though wagering contracts are void they are not forbidden by law.)

(3) Section 30 requires that there must be at least two parties, the agreement between them must be by way of wager and further both sides must be parties to that wager. (1904) 28 Bom 616 (621) (DB) ** AIR 1925 Bom 79 (83) (DB).

(4) Section 30 is open to the reproach that it has in fact encouraged the precise evil it would strike at, for as long as the dishonest gambler knows that he can evade payment when he loses, he is certain to go on gambling with utmost recklessness. (1910) 7 Ind Cas 665 (668) (Bom).

2. Wagering contracts.— (1) A wager is a promise to give money or money's worth upon the determination or ascertainment of an uncertain event. There must be mutual chances of gain and loss and the parties must contemplate the determination of an uncertain

Section 30 — Note 2 (contd.)

event, as the sole condition of their contract. AIR 1935 Mad 135 (136, 137). (Quoted from Ansari's Contract.) ** AIR 1926 Oudh 202 (207, 208) ** (1913) 15 Bom LR 85 (93) ** (1910) 8 Ind Cas 500 (500) (Oudh).

(2) The essence of gaming and wagering is that one party is to win and the other to lose upon a future event, which at the time of contract is of an uncertain nature. AIR 1923 Nag 291 (292) = 19 Nag LR 21 ** ('51) 1951-2 Mad L Jour 393 (394) ** (1904) 28 Bom 616 (621) (DB).

(3) The essence of wagering contract is that neither of the parties should have any interest in the contract other than the sum which he will win or lose. AIR 1935 Mad 135 (136) ** 1966 Jab LJ 399 = 1966 MPLJ 379 ** AIR 1960 Punj 471 (473) = (1960) 62 Pun LR 442 (DB).

(4) To constitute a wager, the transaction between the parties must "wholly depend on the risk in contemplation" and neither must look to anything but the payment of money on the determination of an uncertainty. (1885) 9 Bom 358 (363) (DB).

(5) The test as to true character of a transaction is comparison between magnitude of transaction and capacity of person who seeks to have it declared a wager. (1910) 12 Bom LR 1062 (1066).

(6) To bring a contract under Sec. 30, it is necessary that the common intention of both parties was that no delivery or acceptance shall take place and that the mere difference in price shall be paid; but if only one of the parties intends that no delivery shall take place, the contract is not vitiated. AIR 1922 Pat 220 (221, 222) ** AIR 1917 PC 101 (102) = 45 Ind App 29 = 42 Bom 373 ** AIR 1958 Andh Pra 438 (440) (DB) ** AIR 1958 Cal 703 (706, 707) = ILR (1956) 1 Cal 297 (DB) ** AIR 1957 Madh Pra 194 (198) (DB) ** AIR 1953 Sau 141 (142) ** (1953) ILR (1953) 3 Raj 815 (823) ** 1951-2 Mad L Jour 393 (394) ** AIR 1942 All 170 (174) = ILR (1942) All 289 (DB). (Option to demand delivery or acceptance does not take the transaction out of wagering contract.) ** AIR 1938 Lah 781 (783) (DB). (The mere fact that as to the greater part of the goods there was no delivery but an adjustment of claims, does not vitiate the transaction.) ** AIR 1937 Nag 345 (351) = ILR (1938) Nag 308 (DB) ** AIR 1934 Nag 129 (130) ** AIR 1932 Lah 273 (274) (DB) ** AIR 1930 Nag 273 (276) = 26 Nag LR 277 (DB). (Whether a contract is a wagering one depends upon the intention of the parties at the time of the contract.) ** AIR 1930 Nag 111 (113) = 26 Nag LR 125 ** AIR 1929 Bom 157 (170) = 53 Bom 367 = 30 Cri L Jour 595 (DB) ** AIR 1926 Lah 318 (319) =

7 Lah 442 (DB) ** AIR 1926 Mad 326 (331, 332) (DB) ** AIR 1925 Bom 511 (512) = 49 Bom 689 (DB) ** AIR 1925 Bom 79 (84) (DB). (Understanding between principal and agent alone to deal in differences only is not enough. The third parties on the one side and the agent and principal on the other must together agree to deal only in differences.) ** AIR 1924 Mad 378 (378). (Mere contemplation that delivery would not in fact be likely to be demanded is not sufficient to make a contract a wagering one.) ** AIR 1924 Nag 290 (292) ** AIR 1923 Nag 324 (325) ** AIR 1922 All 360 (361) = 43 All 585 (DB) ** AIR 1922 Bom 408 (408, 409) = 47 Bom 263 (DB) ** AIR 1922 Bom 66 (68) ** AIR 1921 Sind 114 (116) = 15 Sind LR 5 ** AIR 1914 Cal 868 (869). (Contracts in which only differences are payable and delivery is either excluded or optional, are wagering contracts.) ** (1910) 34 Bom 519 (523, 524) (DB) ** (1909) 11 Bom LR 997 (1004) ** (1908) 1908 Pun Re No. 74, p. 341 (342, 343) (DB) ** (1907) 9 Bom LR 125 (138) ** (1903) 5 Bom LR 503 (505) ** (1902) 29 Cal 461 (467) = 28 Ind App 239 (PC) ** (1899) 1 Bom LR 263 (266). (Both sides must clearly understand not only that no delivery is ordinarily to be given or taken but that none could even be asked for under any circumstances — Mere guess is not enough.) ** (1894) 17 Mad 480 (491) (DB) ** (1885) 9 Bom 358 (362) (DB) ** (1961) 2 Andh WR 304 = 1961 Andh LT 901. (Mere mention of time and place of delivery in the contract does not take the contract out of wagering contract.) ** AIR 1960 Cal 261 (262) = 63 Cal WN 745 ** AIR 1959 SC 781 (784) = (1959) Supp (2) SCR 406 ** AIR 1959 Raj 27 (31) = ILR (1958) 8 Raj 1162 (DB)..

(7) The common intention of the parties may be express or may be implied from the course of dealings and other circumstances on record. AIR 1957 Madh Pra 194 (198) (DB).

(8) The intention of the parties is to be gathered from the position of the parties and the history of dealings. AIR 1925 Lah 564 (564) ** 1961 Andh LT 901 = (1961) 2 Andh WR 304.

(9) The question whether the transactions between parties were wagering transactions, is one of fact. AIR 1942 PC 19 (20) ** AIR 1938 Bom 44 (46) (DB) ** AIR 1923 Bom 458 (459) (DB) ** (1906) 30 Bom 83 (89) ** (1894) 17 Mad 480 (491) (DB).

(10) What has to be proved in order to establish that a transaction was a wagering one is the fact that it was agreed between the parties that no delivery was ever to be demanded or given. AIR 1954 All 789 (795) (DB) ** AIR 1956 Madh B 38 (39) ** Madh BLJ 1955 HCR 788 (789, 790) ** AIR 1954 Raj

Section 30 — Note 2 (contd.)

24 (25) (DB) ** AIR 1953 Sau 141 (142)
 ** AIR 1950 All 352 (354) ** AIR 1926
 Lah 318 (319) = 7 Lah 442 (DB) ** AIR
 1924 Nag 290 (292).

(11) If a contract is wagering in its inception the mere fact that in certain contingencies delivery could be asked for would still not render the contract enforceable. AIR 1926 Mad 326 (331) (DB).

(12) The fact that in respect of some of the contracts goods were actually delivered is no ground for assuming that the other contracts were real transactions and not mere agreements to adjust differences. AIR 1926 Mad 326 (329) (DB).

(13) The mere fact that, on settlement of some contracts the differences were entered in the books does not establish that it was the intention of the parties not to call for and give delivery. AIR 1958 Andh Pra 427 (434) (DB).

(14) Where it appeared that the sale price was far beyond the means of the parties, and that no attempt was made to complete the transaction by delivery of goods; **Held**, that parties intended, not an actual transfer of goods, but a mere adjustment of prices according to fluctuation of market rate, and that the agreement was a wagering contract. AIR 1916 Lah 329 (330).

(15) That there has been no delivery but only payment of differences in numerous other transactions between the parties is not enough to rebut the evidence against the contract being a wagering one. AIR 1924 Nag 290 (291).

(16) The mere fact that during the course of dealings between the parties no delivery was actually made is not alone sufficient for holding that contracts were wagering. AIR 1953 Sau 141 (142, 143) ** AIR 1957 Madh Pra 138 (142) (DB).

(17) Where the terms of the contract between the parties have not been proved the mere fact that in the past delivery was never demanded is not a circumstance from which a necessary inference can be drawn that the differences only should become payable. AIR 1960 Punj 471 (472, 473) = (1960) 62 Pun LR 442 (DB).

(18) The mere fact that delivery was in fact not given in numerous other transactions, or in a particular case does not prove that it was not given because of an agreement to that effect or that there was a term in the original contract to that effect. In every case the terms of the contract or of the agreement have to be proved. AIR 1956 Madh B 38 (39).

(19) Where there is no evidence in the case that the parties did not intend to give or take delivery of specific goods

sold, and where during a number of transactions the parties had actually given delivery and taken delivery and if towards some part of the goods there was no actual delivery but adjustment of claims — these circumstances would not vitiate the transactions as being by way of wager. AIR 1952 Hyd 95 (97) = ILR (1952) Hyd 188.

(20) The parties will not be allowed to 'camouflage' their transaction by getting it up as 'delivery' transaction when, in fact, it was never their intention that it should be such. AIR 1954 All 789 (795) (DB) ** AIR 1960 Punj 471 (473) = (1960) 62 Pun LR 442 (DB).

(21) The mere fact that the parties unnecessarily proceeded to provide for the consequence of the breach namely, payment of loss by one party to the other in the case of fluctuations in the market price would be no indication that there was a wagering transaction. 1951-2 Mad L Jour 393 (394).

(22) Where the terms of a contract establish that delivery of goods was contemplated and in fact the buyer was called upon to take delivery of the goods and it was only when he failed to comply with that demand that the goods were sold at his risk and compensation claimed by way of difference between the prices, the contract cannot be held to be a wagering contract. AIR 1958 Andh Pra 216 (217) (DB).

(23) A subsequent agreement to the effect that buyer has no right to demand delivery and the seller is no longer obliged to give delivery does not make the contract a wagering one. AIR 1930 Nag 111 (113) = 26 Nag LR 125 ** AIR 1958 Andh Pra 438 (440) (DB).

(24) There is no authority for the proposition that because under the terms of a contract an obligation to pay or receive differences may arise on the happening of a particular event, the contract is void as a wager if that event does not happen. Such a result would be inconsistent with the principle underlying Section 57 of the Contract Act. (1910) 34 Bom 519 (533) (DB).

(25) Persons in a position to carry out contract at the time of making contract or at the time of performance — Contract is not necessarily wagering contract even if contract provides for alternative of receiving or paying on differences instead of actual delivery. AIR 1922 All 360 (361) = 43 All 585 (DB) ** AIR 1925 Bom 115 (117) (DB).

(26) A contract containing a condition that one of the parties becoming unable from pecuniary circumstances to perform the contract shall not put an end to it but if contract be beneficial to that party, damages shall be ascertained and paid then and there to the party,

Section 30 — Note 2 (contd.)

is not of the nature of gambling transaction. (1905) 7 Bom LR 154 (156).

(27) Although a contract may have the appearance of a wagering contract, if there was an intention on the part of one party to make delivery of the goods and an intention on the part of the other party to accept that delivery, they clearly bring themselves out of the mischief of Section 30. AIR 1944 All 196 (197) = ILR (1944) All 397.

(28) Seller may, technically speaking, be said to deliver goods to his buyer by giving him a delivery order on a certain person but just as mercantile contracts for payment of differences so also delivery orders may be used and passed from hand to hand amongst persons who have no other intention than that of adjusting differences amongst themselves. (1913) 15 Bom LR 750 (760, 761).

(29) There must be actual delivery or transfer of the commodity itself in order to take the transaction out of the definition of speculative transactions in Explanation 2 of Section 24 (1) of the Income-Tax Act (1922). AIR 1968 Cal 253 (256) = (1968) 1 ITJ 684 (DB).

3. Burden of proof and evidence.—

(1) The burden of proving that a particular contract was a wagering contract lies on the party which alleges the contract to be a wagering contract. AIR 1954 Raj 24 (25) (DB) ** AIR 1957 Madh Pra 138 (141) (DB) ** AIR 1956 Madh B 38 (39) ** ILR (1954) 4 Raj 346 (351). (Absence of defendant is not enough for dismissal of case put forward by him, if Court is satisfied that transaction was of wagering nature.) ** 1951-2 Mad L Jour 393 (394) ** AIR 1937 Nag 345 (352) = ILR (1938) Nag 308 (DB) ** AIR 1934 Nag 129 (130) ** AIR 1924 Nag 290 (291) ** AIR 1923 Bom 458 (459) (DB) ** AIR 1922 Bom 81 (81) (DB) ** AIR 1920 Sind 29 (30) = 14 Sind LR 227 (DB) ** (1910) 7 Ind Cas 665 (666) (Bom) ** (1906) 30 Bom 83 (89) ** (1894) 17 Mad 480 (491) (DB) ** 1961 Andh LT 901 = (1961) 2 Andh WR 304 ** AIR 1961 Raj 52 (57) = ILR (1960) 10 Raj 1304 (DB) ** AIR 1960 Punj 471 (472) = (1960) 62 Pun LR 442 (DB).

(2) Person alleging a transaction to be a wagering contract must show that under terms of arrangements no goods were to be taken or delivered under the forward contracts but that the contracts were to result merely in the payment of differences. (1939) 182 Ind Cas 416 (417) (PC) ** AIR 1921 Sind 99 (99) = 15 Sind LR 193 (DB).

(3) To determine whether a contract is a wagering contract or not the substance of the matter is to be regarded and if there is no other purpose in the contract than that of wagering or gam-

ing it is void. AIR 1935 Mad 135 (137)

** AIR 1925 Mad 330 (330, 331) (DB).

(4) In order to deduce the existence of wagering contract the proved or admitted facts must be of such a nature as to show that they are incompatible with a lawful contract. AIR 1934 Nag 129 (130).

(5) The whole transaction and its nature have to be looked at for the purpose of determining the question whether the contract is one by way of wager. 1951-2 Mad L Jour 393 (394) ** ILR (1961) 11 Raj 390 (DB).

(6) Court should lean towards a construction favouring the validity of the contract rather than its illegality. AIR 1925 Bom 115 (118) (DB).

(7) The Courts must look to surrounding circumstances besides the terms of original contracts indicating the original agreement between the parties. Common intention to wager must be established, as also the common intention that there was to be no actual delivery but only payment of differences. AIR 1934 Nag 129 (130) ** AIR 1954 Raj 24 (25) (DB) ** AIR 1942 All 170 (174) = ILR (1942) All 289 (DB) ** AIR 1938 Bom 44 (46) (DB) ** AIR 1936 Lah 215 (215). (Intention may be gathered from oral evidence.) ** AIR 1933 Cal 759 (766) = 60 Cal 856 ** AIR 1921 Cal 362 (362) (DB). (Court is bound to scrutinize with suspicion the defence of wagering contract set up by defendant, who has accepted payments in successful dealing but has recourse to plea of wagering contract when transactions end in loss.) ** AIR 1914 Bom 319 (320) = 38 Bom 204 (DB) ** (1906) 30 Bom 83 (89). (The Court must examine all surrounding circumstances including parties' conduct.) ** (1903) 5 Bom LR 503 (505, 506) (DB). (Court must look into the contract itself, also at dealing of parties immediately before and after transaction and into the circumstances of persons dealing in commodities under dispute.) ** (1898) 22 Bom 899 (903). (Court can even go behind written agreement.) ** AIR 1965 AP 136 (141) = (1965) 1 Andh WR 60 (DB) ** 1961 Andh LT 901 = (1961) 2 Andh WR 304 ** AIR 1960 Punj 471 (473) = (1960) 62 Pun LR 442 (DB) ** AIR 1960 Raj 296 (301) = ILR (1960) 10 Raj 412.

(8) The party who sets up that an agreement is void by way of wager, should be allowed to let in oral evidence to prove that it is so. (1905) 32 Cal 437 (442) (FB) ** AIR 1938 Bom 44 (46) (DB) ** (1894) 17 Mad 480 (491) (DB).

(9) Court will not allow party, setting up defence of wagering, to interrogate his opponent generally as to his business transaction apart from the one in question. (1913) 37 Bom 347 (351).

(10) The Court must for itself find out what were primary intentions of the

Section 30 — Note 3 (contd.)

parties when they entered into transaction in question before it and must not be misled by the mere protestation of one of the parties as to his real intentions. (1907) 9 Bom LR 125 (137) ** (1913) 37 Bqm 264 (277).

(11) If the terms of the contract have been proved and they show on their face that delivery was to be given or taken and it is alleged by the defendant that it was agreed that the term about delivery was not to take effect but that differences alone were to be paid, then the fact of non-delivery, coupled with certain other facts, may induce the Court to believe the defendant instead of the plaintiff. AIR 1950 All 352 (354) ** AIR 1954 All 789 (795) (DB).

(12) Where Court on consideration of entire evidence records clear finding that transaction was by way of wager question of burden of proof remains no longer material. AIR 1967 Cal 25 (29) (DB).

4. Speculative contracts.— (1) There is no law against speculation as there is against gambling. AIR 1922 Bom 66 (68) ** AIR 1958 Andh Pra 438 (440) (DB) ** 1947 Jaipur LR 283 (284, 285) ** AIR 1938 Bom 44 (46) (DB).

(2) Mere speculation, where it does not amount to wager, is not apart from special legislation, illegal. AIR 1954 Mad 699 (702) = ILR (1954) Mad 966 (DB).

(3) A speculative contract is not necessarily a wagering contract. AIR 1923 All 273 (276) (DB) ** AIR 1917 PC 101 (102) = 45 Ind App 29 = 42 Bom 373 ** AIR 1938 Lah 781 (783) (DB) ** AIR 1922 Pat 220 (222).

(4) The mere fact that contracts are highly speculative is not sufficient in itself to render them void as wagering contracts; to produce that result there must be proof that the contracts were entered into upon the terms that performance of the contracts should not be demanded but that differences only should become payable. AIR 1928 PC 30 (32) = 55 Ind App 32 = 51 Mad 96 ** AIR 1956 Madh-B 38 (39) ** (1953) 1953 Raj LW 110 (112) ** AIR 1952 Trav-Co 435 (436, 437) (DB) ** AIR 1934 Nag 129 (131) ** AIR 1929 All 890 (893) = 51 All 1027 (DB) ** AIR 1929 All 134 (138) (DB) ** AIR 1961 Raj 52 (57) = ILR (1960) 10 Raj 1304 (DB) ** ILR (1961) 11 Raj 390 (DB).

(5) Speculation forms sometimes an element in many transactions relating to the sale and delivery of goods at a certain rate owing to market fluctuations. But existence of such an element does not make the contract void; as it may be accompanied by a real desire by vendor to sell and buyer to purchase. Where such an intention exists the con-

tract is not a wagering contract. AIR 1924 Oudh 186 (186).

(6) Even if one party to a contract were a speculator who never intended to give delivery and that fact was known to the other party, yet in the absence of any bargain or understanding express or implied that the goods were not to be delivered, that would not convert a contract otherwise innocent into a wager. AIR 1956 Madh B 38 (39) ** AIR 1938 Lah 781 (783) (DB).

(7) As far as the distinction between speculation and gaming is concerned, it makes but little difference whether the commodities are actually paid for and held with a view to selling again at a profit or whether the matter is arranged by a resale before the time of delivery. Such dealings are perfectly legitimate. Gaming and wagering contracts, on the other hand, are not really dealings at all. They may take the form of purchases and sales but they are in fact mere bets on the market prices on commodities at a future date. 1951-2 Mad L Jour 393 (394) ** AIR 1937 Nag 345 (351) = ILR (1938) Nag 308 (DB).

(8) The distinction between contracts which are legitimate and genuine trading transactions of a speculative character and contracts which are simply gaming and wagering transactions, is frequently a narrow one and difficult of determination even after the examination of the parties concerned, the course of the business and the nature of the contracts. AIR 1931 PC 136 (140) = 53 All 190 = 58 Ind App 173 ** AIR 1921 Sind 99 (99, 100) = 15 Sind LR 193 (DB).

(9) If there existed an agreement between the parties at the time when the contract was brought about between them by the broker, the broker is the best person to give the best evidence as to what exactly were the terms of the contract, whether it was speculative or merely a wagering. 1951-2 Mad L Jour 393 (395).

(10) Every forward contract is to some extent speculative, but merely on that account it is not necessarily a gambling one. AIR 1956 Madh B 38 (39) ** (1955) 7 Sau LR 172 (175) ** AIR 1961 SC 268 (270) = (1961) 1 SCR 668 ** ILR (1961) 11 Raj 390 (DB).

(11) Forward contracts for purchase and sale of goods are legitimate commercial transactions though speculative. They may be wagering or gambling transactions. When there is bargain for differences they are wagering contracts, even if one party has option to demand delivery. In spite of the terms of the contract, extrinsic evidence may establish the common intention of both parties that there was to be no delivery but only to take differences according to rise or fall in prices on date of delivery.

Section 30 — Note 4 (contd.)

But when it is established that substantial parts of goods were actually taken delivery of, the transaction may be taken to be genuine commercial transaction. AIR 1941 Cal 341 (344, 345) (DB) ** AIR 1956 Madh B 38 (39) ** AIR 1956 Mad 110 (111) ** AIR 1925 Rang 234 (285) (DB) ** AIR 1965 AP 136 (139) = (1965) 1 Andh WR 60 (DB) ** AIR 1962 Andh Pra 350 (354) = (1962) 2 Andh LT 41 (DB) ** AIR 1961 Madh Pra 57 (60) = 1960 MPLJ 1217. (If it is intended and is possible that the goods can be delivered, then the mere fact that in certain circumstances either party would be liable to make good to the other the difference in price, will not make the contract a wagering contract.) ** AIR 1960 Punj 471 (473) = (1960) 62 Pun LR 442 (DB) ** AIR 1960 Ker 122 (123) = 1959 Ker LT 927 (DB). (Transaction in nature of forward contract — Delivery of goods to pass under each sale and purchase — **Held**, transactions were not merely in nature of speculation on difference in prices.)

(12) An agreement of a forward sale containing a provision for delivery and resale to the first party of the same quantity as that of the previous transaction before the date of that transaction and at the rate prevailing on the date of the resale though highly speculative does not amount to a wagering contract. AIR 1936 Rang 319 (323) = 14 Rang 347 (DB). (Contract held highly speculative.) ** (1966) ITR 154 (169) (Cal).

(13) Vendor agreeing to sell what he has not and may never have — Price fixed upon calculation of risk taken by purchaser for sum for below real value. Contract is eminently speculative, not to say gambling one. (1967-69) 12 Moo Ind App 292 (308) (PC). (Purchaser retaining part of price until risk is determined — Risk contracted is pro tanto diminished and contract becomes incapable of being performed.)

(14) Pakka Adatia entering into forward contract which is banned by law — Amounts to breach of Section 15 of Forward Contracts (Regulation) Act (1952). AIR 1967 SC 986 (990) = 1967 Cri LJ 946 = (1967) 1 SCR 138.

5. Satta transactions.— (1) The transactions of the nature where parties speculate on the varying rate of the goods are not satta. AIR 1956 Hyd 131 (133) = ILR (1956) Hyd 477 (DB).

(2) A satta transaction need not be a gambling transaction if either of the parties intends to make delivery of the goods in case of breach of contract. It can be a gambling transaction only if it is the common intention of both the parties that in no event would deli-

very take place and that only differences would be settled between them. AIR 1956 Hyd 131 (133) = ILR (1956) Hyd 477 (DB).

6. Teji Mandi transactions.— (1) Teji Mandi contracts are not presumed to be wagering contracts in the absence of evidence to the contrary. AIR 1926 PC 119 (120) = 53 Ind App 241 = 51 Bom 1 ** AIR 1938 Lah 825 (826). (Defendant at Delhi placing with plaintiff, pakka ahritia of Bombay order for forward transaction of certain amount of cotton bales and undertaking to pay mandi as soon as a telegram was received — Contract held complete between parties — Defendant failing to pay amount of mandi on demand — Plaintiff selling bales at loss — Defendant held liable for mandi and loss suffered by plaintiff.) ** AIR 1937 Nag 345 (352) = ILR (1938) Nag 308 (DB) ** AIR 1925 Bom 79 (82) (DB) ** AIR 1922 Bom 408 (409) = 47 Bom 263 (DB) ** AIR 1922 Bom 66 (70).

[But see (1913) 37 Bom 264 (272). (Teji Mandi transactions must be regarded as wagering ones. The onus of proving the contrary lies heavily on party alleging so.) ** (1910) 7 Ind Cas 665 (666) (Bom). (Teji Mandi transactions are in nature of gambling transactions).]

(2) The transaction may be a bet on the rise of the market and if the intention of both parties was not to deliver but merely to pay the difference between the teji and the market rate on be void under Section 30. AIR 1914 Low the day of settlement the contract would Bur 183 (184, 185).

7. Badni transactions.— (1) In absence of common intention to wager there can be no badni or wagering transactions. Liabilities incurred on badni transactions are unenforceable. AIR 1928 Lah 420 (422) (DB).

(2) Where transactions included sales and purchases by the same dealers for a fixed date coupled with failure to deliver in practically all cases: **Held** that the transactions were badni. AIR 1928 Lah 420 (421, 422) (DB).

(3) Where the contract for sale of goods specifically provides that the goods would be delivered after weighing them and the purchaser asks for delivery and is not replied that delivery was not contemplated, the mere fact that the contract involved very large quantities of the goods does not make the contract a badni transaction though they are highly speculative forward contracts. AIR 1929 Lah 689 (690) (DB).

(4) Where the transactions which parties entered into are beyond their means and there is no intention on the part of either contracting party from the very beginning to give or to take delivery,

Section 30 — Note 7 (contd.)

the transactions are badni and so void. AIR 1929 Lah 375 (376).

8. Lotteries.— (1) Transaction between definite number of persons — Each to contribute rupee 1 for first week—On week end prizes drawn — A prize winner getting gramophone out of transaction — Remaining subscribing 4 annas more for next week and drawing made next week end — Prize winner getting gramophone and dropping out — Similar drawings continuing for 20 weeks — Remaining subscribers each then getting one gramophone — Held that no offence under Section 294-A, Penal Code was committed and since each one got his money's worth, though some got less and some more by lot and since there was no invitation to public to join, the transaction did not amount to wager. AIR 1934 Mad 136 (137).

(2) An agreement to decide a suit by lottery is void ab initio as being one by way of wager and opposed to public policy. (1909) 5 Nag LR 107 (110).

(3) Effect of Government sanctioning lottery is that no prosecution would lie in respect thereof. But the sanction does not affect civil law relating to lotteries — Agreement to purchase ticket of such lottery is void. AIR 1917 Bom 138 (140) = 42 Bom 676.

(4) Lottery and wagering contracts are two distinct things. A scheme may amount to a lottery though none of the competitors is a loser. If the subscribers have purchased a chance of winning a prize the scheme would be a lottery, whether the prizes are paid circuitously from the interest earned on the subscribers' contributions or are paid directly from those contributions. A lottery is not in British India unlawful in the sense that it is prohibited by law. It is only in relation to Section 294-A, Penal Code, that it becomes illegal. AIR 1936 Mad 225 (227, 228, 229, 244) = 59 Mad 562 (FB). (The chit fund held amounted to lottery and the promoters of the kuri by keeping place for conducting it and by its publication committed offence under Section 294-A, Penal Code.)

(5) Sale of a share in sweepstake ticket after that ticket has drawn a horse, for a definite amount, is not a wager and is not opposed to public policy and the vendee can enforce the payment of his share in the prize money. AIR 1914 Lah 72 (73) (DB).

9. Chit funds.— (1) Where an agreement provides that winners are to get prizes and subscribers to get refund of contribution without interest in the end and the promoter to retain only interest, it was held the chit fund is not a wager-

ing agreement. AIR 1927 Mad 583 (585) = 50 Mad 696 (FB).

(2) Though kuri, as ordinarily conducted in Malabar is not lottery, yet if some subscribers obtain as prizes amounts which are in excess of the amounts subscribed by them, it comes within definition of lottery and suit to recover money paid for such lottery is not enforceable. AIR 1919 Mad 139 (139).

(3) Chit fund with arrangement for payment of prize every month by casting lots, was held illegal as lottery. AIR 1925 Mad 281 (282) (DB).

(4) Kuri transaction — Successful bidder executing mortgage under terms of kuriwari, for due payments of remaining instalments — Liability on mortgage, incurred on date of its execution — The mortgage bond cannot be regarded as only affirming the pre-existing liability of the successful bidders as subscribers to the kuri chit to pay their subscriptions according to the instalments fixed in the Kuriwari. AIR 1941 Mad 231 (233) = ILR (1941) Mad 486 (DB).

10. Patta patti contracts.— (1) The patta and patti contracts are highly speculative but not opposed to public policy as wagering contracts. AIR 1934 Nag 129 (130) ** AIR 1928 PC 30 (32) = 55 Ind App 32 = 51 Mad 96. (In absence of proof that contracts were entered into upon the terms that their performance should not be demanded but the differences only should be payable if the seller was unable to give delivery and buyer was not agreeable to take delivery through third parties so as to exonerate seller, making of patta patti resulting in agreement to pay differences only would not make the transaction a wagering one.)

11. Sale and purchase of shares.— (1) Quick purchase and sale of shares and commodities on the exchange market and earning or losing the difference is not itself illegal. There should be proof that there were actual particular commodities and shares to be purchased and sold. As long as there are particular shares to be transacted in, there was nothing illegal in that business. AIR 1950 Kutch 24 (27).

(2) A pronote for amount advanced by the share brokers on behalf of the defendants in the transactions of purchases and sales of shares which they made for the defendants is not for an illegal consideration although the purpose for which the advances might have been utilised may be unlawful. AIR 1950 Kutch 24 (27).

12. Insurance contracts.— (1) In India an insurance for a term of years on the life of a person in which the insurer has no interest is void as wager-

Section 30 — Note 12 (contd.)

ing contract under Section 30. ('99) 23 Bom 191 (210) ** AIR 1941 Lah 33 (35, 36) (DB). (Person effecting insurance on his younger brother's life, held had no insurable interest, and hence the insurance contract was void under Section 30 and Section 23.) ** AIR 1966 All 474 (477).

(2) Section 30 is applicable to insurance policies. AIR 1966 All 474 (477).

13. Nazarana transactions.— (1) The Nazarana or Gali transactions are by themselves not necessarily wagering transactions. They are similar to the Teji-mandi contracts. AIR 1957 Madh Pra 138 (140, 141) (DB).

(2) What are known as nazarana contracts in the Punjab are not necessarily wagering contracts. AIR 1932 Lah 356 (358) = 13 Lah 766 (DB).

(3) The party who pleads that Gali and Nazarana transactions are wagering in nature has to prove this fact. AIR 1957 Madh Pra 194 (198) (DB).

14. Other illustrative cases.— (1) Where under a contract for purchase of rubber coupons the buyer was entitled to delivery of coupons purchased and formal tender of coupons purchased was in fact made to him: **Held** that the contract was not a wagering contract. AIR 1946 PC 63 (64).

(2) K owed money to N in respect of betting transaction. N demanded the money and on K's refusal threatened to post him under Rangoon Turf Act. K then gave N a cheque post-dated and requested him not to present it and promised to make the payment on a certain date. N did not post K as he could have done. **Held** that there had been good consideration for the passing of the cheque in the fact that N refrained from posting K and that there was nothing in Section 30 which made a promise based on such consideration illegal. AIR 1929 Rang 241 (242) = 7 Rang 263 ** AIR 1923 Cal 445 (448, 449). (Where consideration for hundis was that plaintiff would not report the defendant as defaulter to the Turf Club, the consideration was held to be legal.)

(3) The sale of a growing crop for cash is not gaming or wagering. AIR 1923 Nag 291 (292) = 19 Nag LR 21.

(4) The tenant of a field agreed to allow another to pick the cotton crop of that field in exchange for a promise to deliver $2\frac{3}{4}$ khandis of cotton at the time of picking. **Held**, that this was not wagering contract. AIR 1923 Nag 291 (291) = 19 Nag LR 21.

(5) Contract to deliver certain documents to a party to a suit for a certain amount if the suit were compromised, but if the party won the suit, four-times the amount was agreed to be paid. **Held**, the transaction was not a wager

but only a contingent contract and was enforceable. AIR 1935 Mad 135 (137).

(6) Where under a contract for purchase of rubber coupons the buyer was entitled to delivery of coupons purchased and formal tender of coupons purchased was in fact offered to him. **Held** that the contract was not a wagering contract. AIR 1946 PC 63 (64). (Case from Ceylon.)

(7) Merchant buying goods in Japan and desirous of paying for them in Rupees and not in Yen, entered into contract with Bank — Contract taking form of purchase of Yen to be delivered during specified period at fixed rate — Bank covering itself by Yens purchased against Yens sold. It was held that transactions were genuine and not wagering contracts. AIR 1936 Rang 269 (271) (DB).

(8) Where two wrestlers agreed to play match on condition that party not appearing was to forfeit a certain sum and that winner was to receive certain amount out of gate money, the contract held was not wagering one. AIR 1931 Bom 264 (265) (DB).

(9) The purchase of option or right to call for shares is not necessarily wagering contract; test is whether in such contract, differences only are intended to be paid: so also double option is not more necessarily gamble than single option. Contract is not wagering contract unless neither of parties intends to give or take delivery. AIR 1914 Low Bur 183 (186, 189).

(10) Where a contract for purchase of salt successively transferred from one to another, every transferee paying the amount of profits, and delivery was likely to be much delayed and the actual date of delivery was doubtful: **Held** that contract was one by way of wager. AIR 1925 Lah 564 (564).

(11) Transactions of sale and purchase — No delivery — Only one khata for all transactions — Panchayat fixing artificial rates for a certain day — Khata not showing loss or profit — The transactions held wagering ones. AIR 1934 Lah 85 (86) (DB).

(12) Where the parties to arbitration contract that neither they nor their witnesses shall give evidence and the arbitrators cannot fairly use judicial discretion in the absence of evidence, the submission merely amounts to wager and is invalid. (1913) 7 Sind LR 113 (115).

(13) A lent a sum of money to B on the risk or security of a ship belonging to B under sail to Nicobar from Nega-pattam. B stipulated that as soon as the ship returned back after its voyage he would repay the amount with interest. The ship having been lost in the voyage A sued B for recovery of the amount. **Held** that the agreement was one by

Section 30 — Note 14 (contd.)

way of wager and therefore the suit was liable to be dismissed. (1902) 25 Mad 561 (566).

(14) The transactions of kacha khandi are gaming or wagering. AIR 1929 Bom 157 (165) = 53 Bom 367 = 30 Cri L Jour 595 (DB).

15. Wagering agreements are not illegal.— (1) Wagers are not favoured by law and agreements by way of wager are void by Section 30. (1900) 24 Bom 227 (229) (DB) ** 1966 MPLJ 379 = 1966 Jab LJ 399. (Wagering contract is not, however, illegal.)

(2) Betting is not illegal but law is unwilling to assist in enforcing obligations arising out of it or wagers. Section 30 expressly says that agreements by way of wager are void. AIR 1925 Cal 1007 (1008) = 52 Cal 677 ** AIR 1929 Rang 241 (242) = 7 Rang 263 ** (1904) 17 CPLR 63 (73) ** ('85) 9 Bom 358 (364) (DB).

(3) An agreement to enter into agreement by way of wager will be void only if the object or consideration is unlawful within the meaning of Section 23 of the Contract Act. AIR 1958 Cal 703 (707) = ILR (1956) 1 Cal 297 (DB).

16. Promissory note given in consideration of wagering transaction.— (1) As between the original parties, a promissory note having for its consideration debt due on wagering contract is void and so not binding in the hands of the original payee. (1898) 22 Bom 899 (902) ** AIR 1967 Cal 25 (29) (DB) ** AIR 1964 Andh Pra 537 (539) = (1965) 1 Andh LT 234.

(2) Where A gives to B a promissory note partly for his gambling losses and partly on other accounts and it is found that the part of the consideration represented by gambling debts cannot be separated from the rest a suit to recover money due on the promissory note is liable to be dismissed. (1913) 35 All 558 (559) (DB).

(3) Promissory notes in respect of transactions which were really intended only for payment of money by either party to other according to chances in market, though purporting to be agreements for actual purchase of goods, held to have been given in consideration of gambling transaction. (1900-02) 1 Low Bur Rul 107 (108) (DB).

17. Suits relating to recovery of deposit, winnings or losses.— (1) A deposit made by one gambler with the other as security for the observance of the terms of wagering contract can be recovered unless the amount has in fact been appropriated for the purpose for which it was deposited. AIR 1944 Mad 321 (321) = ILR (1944) Mad 713 (DB) ** AIR 1918 Mad 163 (164) (DB).

[But see AIR 1920 All 167 (167, 168) = 42 All 449. (Money deposited as security in respect of satta transaction (wagering contracts) cannot be recovered by suit. Section 65 does not apply.)]

(2) Claim for recovery of loss sustained in consequence of contract in nature of wager is not enforceable. Person entering into wagering contract with partner of firm as between principal and principal cannot recover losses from other partners. AIR 1930 All 525 (526) (DB).

(3) The words "entrusted to any person to abide the result of a game, etc." in Section 30 refer only to monies deposited with stake-holders. AIR 1918 Mad 163 (164) (DB).

(4) Plaintiff pledging diamond ring with manager of gambling house to obtain money for gambling — Plaintiff can recover ring by paying money advanced, agreement not being wagering agreement. 1872-92 Low Bur Rul 128.

(5) Where a person bets on a horse for himself and on behalf of another and the horse having won receives the winnings, so far as regards the share of the other man in it he receives it for the benefit of that other, and suit for recovery of this share is maintainable as a suit for the recovery of money had and received to his benefit. S. 30 is not a bar to such a suit. AIR 1936 Mad 486 (487).

(6) Paying over, which bars suit of person who has deposited money as wager and seeks to get it back means paying over upon event of wager, and does not cover application of money to other purposes. Where plaintiff in suit to recover money deposited with stake-holder does not repudiate wager but demands whole winnings he can get nothing, not even stake he had himself deposited. 1904 Upp Bur Rul 3.

(7) Deposit on a wagering contract can be recovered before it is paid over by the stake-holder. 1872-92 Low Bur Rul 30 ** AIR 1926 Rang 48 (48) = 3 Rang 543 ** AIR 1913 Low Bur 77 (81). (Money paid can be recovered before contract is carried out.)

(8) Suit for amount deposited by plaintiff's with stake-holder on wager is maintainable; but suit for amount deposited by both parties to wager is barred by Section 30 as it is based on wagering contract. (1903-04) 2 Low Bur Rul 271 (271).

(9) Section 30 is applicable to prevent a case only when the party suing is claiming the amount under the terms of the contract. AIR 1928 Mad 434 (435, 436) ** (1929) 30 Pun LR 596 (597) (DB). (A suit based on a wagering contract should be dismissed, though defendant confesses judgment.)

(10) Prohibition applies only to case of winners. Person, who has won wager

Section 30 — Note 17 (contd.)

or bet, cannot sue to recover amount deposited by loser with stake-holder. (1910) 12 Bom LR 590 (594) = 7 Ind Cas 665 (667).

(11) No suit lies for damages for breach of a wagering contract. AIR 1925 Mad 971 (972) (DB).

(12) A party who is not a party to fraud is entitled to get back the money which he left with another, for performance of a wagering contract. AIR 1918 Mad 163 (164) (DB).

(13) Money paid on wagering or Badni contracts is not recoverable. 1908 Pun Re No. 74, p. 341 (344, 345) (DB).

(14) Where person lends money for the purpose of paying of gambling debt with knowledge of its being applied for payment of such debt, there is nothing to disentitle him to recover back money. (1900) 22 All 452 (453) (DB).

(15) A provision in a kuri entitling the stake-holder to recover from the benefited subscriber the amount of all the instalments immediately on default in the payment of any one of them is not penal and is enforceable. AIR 1941 Mad 231 (234) = ILR (1944) Mad 486 (DB).

(16) If two parties bet, on the premium at which Government securities may sell in the market on a future date, and the one promises to pay certain sum of money to the other according as the actual market price on that date is, one way or other, such transaction is a gambling or the premium at which Government securities sell in the market from time to time and is forbidden by Section 30. No suit lies to recover anything won on the wager. (1894) 17 Mad 480 (483, 484) (DB).

18. Collateral agreements. — (1) A contract collateral to a wagering contract is not necessarily unenforceable. AIR 1944 All 196 (197) = ILR (1944) All 397 ** AIR 1919 Low Bur 71 (74, 75). (Difference between void and illegal transactions lies in their effect on collateral transactions. It is holding of lottery that is prohibited and not receiving prize money and agent receiving such money for winners is bound to account for the same.) ** (1904) 17 CPLR 67 (73) ** (1901) 23 All 165 (166) (DB) ** (1900-07) 1 Low Bur Rul 128 (130) (FB) ** AIR 1959 Raj 27 (31) = ILR (1958) 8 Raj 1162 (DB).

(2) Where two partners enter into a contract of wager with a third person and one partner has satisfied his own and his co-partner's liability under the contract, he can legally claim partner's share of the loss. Section 30 does not affect agreements or transaction collateral to wagers. AIR 1923 Nag 48 (49).

(3) Suit brought by agent or broker to recover his commission or brokerage

is maintainable even though transaction in relation to which claim is made is by way of wager. AIR 1961 Raj 52 (58) = ILR (1960) 10 Raj 1304 (DB).

(4) The forbearance of a plaintiff to sue coupled with his forbearance to declare the defendant a defaulter constitutes a good consideration for the fresh agreement, though the original contract was wagering transaction, and the plaintiff is entitled to recover on fresh agreement. AIR 1938 Lah 781 (784) (DB).

(5) A party to a wagering contract can sue to set aside an award made in pursuance of arbitration clause contained in the wagering contract. AIR 1933 Cal 759 (761) = 60 Cal 856.

(6) Although wagering contract cannot be basis of cause of action, if the wagering contract be a collateral one or if the rights and liabilities of the parties stand altered by a novation, the contract although of a wagering nature in its origin can be enforced in view of the altered rights and liabilities. AIR 1963 Madh Pra 323 (329) = 1963 MPLJ 325 (DB).

(7) If there is a second contract collateral to the wagering contract, such a transaction is itself void, if it merely re-states the earlier void agreement and is supported by no other consideration. 1966 Jab LJ 399 = 1966 MPLJ 379.

19. Wagering contracts by agents. —

(1) When the transactions are made through brokers who are mostly interested in earning their commission and are not concerned with the ultimate result the element of wager is absent. AIR 1957 Madh Pra 194 (199) (DB).

(2) In transactions entered through brokers according to usage of particular market, there is a strong presumption against intention to wager which can be rebutted by evidence of common intention to wager. AIR 1938 Bom 44 (46, 48, 49) (DB) ** 1940-2 Mad LJ 997 (1000) ** (1903) 5 Bom LR 768 (772, 776) ** ILR (1961) 11 Raj 390 (DB) ** AIR 1961 Raj 52 (58) = ILR (1960) 10 Raj 1304 (DB).

(3) Section 30 requires a common intention between contracting party and broker to wager and the burden lies on the former to show that the transaction is by way of wager. AIR 1920 Sind 29 (30) = 14 Sind LR 227 (DB) ** AIR 1950 East Punj 92 (95, 96) = ILR (1949) East Punj 547 (FB) ** AIR 1961 Raj 52 (58) = ILR (1960) 10 Raj 1304 (DB).

(4) Where the plaintiff, a commission agent, bets in his own name for the defendants and pays the losses, the plaintiff can recover from defendants the sums so paid. (1904) 17 CPLR 67 (73) ** AIR 1940 All 95 (96, 97) ** AIR 1935 Lah 761 (762) = 16 Lah 1077 (DB). (Badni transaction.) ** AIR 1932 Lah

Section 30 — Note 19 (contd.)

356 (358) = 13 Lah 766 (DB). (A set-off or adjustment in the accounts of third parties should be treated on the same footing as cash payment by the agent.) ** AIR 1928 Lah 420 (421) (DB) ** AIR 1927 All 323 (824) = 49 All 926 (DB) ** AIR 1925 All 102 (102) ** AIR 1925 Rang 234 (285) (DB) ** AIR 1923 All 585 (585) = 45 All 503 (DB) ** (1911) 33 All 219 (222) (DB) ** (1908) 1908 Pun Re No. 74, p. 341 (342, 343) (DB). (Agent must prove either actual payment on his principal's behalf, or that liability has been incurred which is enforceable by law, and that surrender of claim to profits made under badni contracts does not constitute actual payment.) ** (1904) 14 Mad L Jour 326 (328) ** 1895 Pun Re No. 80, p. 380 (386) (DB). (Agent failing to prove either an actual payment upon the principal's behalf, or that a liability has been incurred which is enforceable at law — He cannot claim set-off on that account in a suit by the principal but in such a suit it is open to the agent to repudiate his liability by advancing the plea that they were wagering transactions.)

[But see AIR 1922 Lah 408 (409). (A suit by agent against principal for loss caused to him for having entered into wagering contracts on his behalf with third parties cannot lie and the plaintiff cannot be allowed to alter the claim to one for refund of losses paid upon wagering contract.)]

(5) An agent, who has received money on an illegal contract between him and the third party, cannot put forth the plea of illegality of the contract as a defence in an action by his principal to recover money from him. (1903) 25 All 639 (641) (DB) ** AIR 1929 Rang 244 (244) = 7 Rang 300 ** AIR 1927 All 795 (796) (DB) ** AIR 1927 All 238 (238, 239) = 49 All 438 (DB) ** (1910) 7 Ind Cas 665 (668) (Bom) ** 1901 Pun Re No. 46, p. 152 (154, 155).

(6) Section 30 does not bar suit by principal against agent in receipt of prize money on a lottery on behalf of his principal. AIR 1937 Cal 297 (301) = 63 Cal 1234.

(7) Munim of firm of defendant entering into forward contract with plaintiff — Goods not delivered — Adjustment of accounts — Balance found due to defendant — Suit for balance — Defendant held bound by transaction entered into by munim but transaction being only for differences was wagering one and hence could not be enforced. AIR 1914 Bom 142 (144) = 39 Bom 1 (DB).

(8) Commission agent is not debarred from recovering his commission fees on the ground that they were earned in respect of services relating to wagering transactions. 1895 Pun Re No. 80, p. 380

(383) (DB) ** AIR 1951 Nag 392 (394) = ILR (1951) Nag 487 ** AIR 1960 Raj 296 (299, 300, 301) = ILR (1960) 10 Raj 412 ** AIR 1959 Raj 27 (31) = ILR (1958) 8 Raj 1162 (DB).

[But see (1900) 24 Bom 227 (230) (DB).]

(9) Where there is no proof of the contract being a wagering contract, the fact that the plaintiff has not proved that he had made payments to third parties on behalf of the defendant or entered into enforceable liability on his account does not disentitle the plaintiff from recovering from the defendant the amount of the loss sustained in such a transaction. AIR 1932 Lah 273 (274) (DB).

(10) If commission and losses are agreed to be paid to broker, presumably the transaction is not a wagering one. AIR 1920 Sind 29 (30) = 14 Sind LR 227 (DB).

(11) Where broker acts on behalf of his customer and the customer gambles, the customer cannot set up a plea of gaming and wagering against the broker's claim. AIR 1941 Cal 125 (127) = ILR (1940) 2 Cal 385 ** (1963) 65 Pun LR 1054.

(12) Wagering contract between agent and third party — Agent cannot claim immunity on the ground that he is only an agent for another. AIR 1933 Cal 759 (765) = 60 Cal 856.

(13) Where an agent has paid losses arising from wagering transactions to third parties on behalf of the principal in pursuance of the authority conferred upon him, his right to indemnity can be enforced by a suit. AIR 1954 SC 500 (502) = 1955 SCR 439 ** AIR 1960 Ker 122 (122) = 1959 Ker LT 927.

(14) An agent authorised to enter into wagering contracts can claim indemnity from the principal only upon proof of actual payment. He cannot say that he has become liable to third parties because there is no legal liability upon him in respect of wagering transactions. AIR 1951 Nag 392 (393) = ILR (1951) Nag 487.

(15) If money won in a lottery is paid to third person as agent for the winner the taint would be purged by its passing into the hands of a person who is bound to account and winner can sue for recovery from the agent. AIR 1917 Low Bur 18 (21).

(16) Where grain pit was purchased by plaintiffs as commission agents on behalf of defendants and latter not being able to pay purchase-money former sold it at loss and sued defendants for loss: **Held**, that case did not come under Section 30, even though the probabilities to the knowledge of the plaintiffs were that the defendants would resell the contents of the grain pit

Section 30 — Note 19 (contd.)

through plaintiffs as commission agents getting the benefits of any rise in prices or suffering any fall. AIR 1914 All 321 (322) = 36 All 426 (DB).

(17) Where the documents show an ordinary commercial transaction, and in conformity with them one of the parties incurs personal obligations on a genuine transaction with third parties so that he himself is not a winner or loser by the alteration of price, but can only benefit by his commission, the inference of betting is irresistibly destroyed. In such cases, the fact that no delivery is required or tendered is of practically no value. Ordinary speculation conducted on the stock exchange through a broker who makes himself by the rules personally liable to the other members of the stock exchange for the performance of the contract cannot be a bet. AIR 1942 PC 19 (21).

20. Pakka adatiya transactions. — (1) Pakki Adat dealings are legitimate modes of conducting commercial business in Bombay market. AIR 1917 PC 101 (102) = 42 Bom 373 = 45 Ind App 29 ** AIR 1935 Sind 38 (41) (DB). (Pakki Adat contracts are almost necessarily of a speculative nature and bordering upon wager.) ** AIR 1927 Bom 125 (127) (DB) ** AIR 1960 Raj 296 (301) = ILR (1960) 10 Raj 412.

(2) Adatia does not make contracts with third parties as agent but as principal, the constituents having no right to be brought into contract with third parties. Thus in a suit against his constituents for recovery of losses incurred by pakka adatia — on contracts entered by him with third parties for his constituents — in order to win, the defendants must prove that there was an understanding between them and the plaintiff, (i) that they were not only speculating but gambling, (ii) that there was no intention of effecting any delivery of goods, (iii) that if the plaintiff incurred losses he would be indemnified, (iv) that differences would be received and paid. AIR 1921 Bom 238 (243) = 45 Bom 386 (DB).

(3) Pakka adatia contracts as principal, his constituent having no right to be brought into contract with third parties, while broker contracts agent for client who himself is personally responsible to person with whom broker contracts. AIR 1921 Bom 238 (242) = 45 Bom 386 (DB).

(4) In the case of 'Pakka arhat' transaction the real question is to ascertain what, as between the parties, was the real intention when they entered into the contract. AIR 1954 All 789 (795) (DB).

(5) The contract of Pakka Adatia may, like any other contract, be shown to be

a wagering contract. The burden of proof is on the constituent who contests his liability on that ground. AIR 1954 Sau 99 (102) (DB) ** ('13) 37 Bom 347 (350) ** AIR 1960 Raj 296 (300) = ILR (1960) 10 Raj 412.

(6) Contract between pacca arhtiya and his constituent providing that there should be no delivery but that only difference should be paid, held wagering contract and so void. AIR 1940 All 182 (184) = ILR (1940) All 136 ** AIR 1962 AP 350 (354) = (1962) 2 Andh LT 41 (DB).

(7) Wagering contracts between pakka adatia and his constituents are not valid if pakka adatia has entered into other contracts to shield first contract. AIR 1920 Bom 88 (89) (DB).

(8) Where the correspondence between the parties showed that the plaintiff who was pakka adatia knew that defendant was gambling and not merely speculating and where he assisted the defendant in carrying on the wagers and delivery was never intended to be given or called for and where even the constituents of plaintiff knew that the transactions were to be closed either before or at the 'vaida' by payment of differences only, the transactions were held to come within the purview of S. 30. AIR 1921 Bom 238 (243) = 45 Bom 386 (DB).

(9) Pakka adatia incurring personal obligations on the transactions with third parties — He himself not a winner or loser by the alteration in price but getting only the benefit of commission — Though delivery has not been actually taken or given and the transaction had been squared up by adjustment of claims that fact will not vitiate the transactions. AIR 1954 Sau 99 (102, 103) (DB).

(10) If the contract between pakka adatias and their constituents is a contract of employment it is not wagering contract and the pakka adatia must win unless constituent brings contract within the provisions of Bombay Act, III of 1865. AIR 1921 Bom 238 (239) = 45 Bom 386 (DB).

(11) A entering into wagering contract with Pucca Arhatia — A from time to time depositing with Pucca Arhatia cover or margin money — Transaction resulting in a loss — A cannot recover amount of cover money from Pucca Arhatia. AIR 1947 All 14 (15).

(12) Contract of cutcha adatia agency is not a wagering contract. AIR 1926 PC 119 (120) = 53 Ind App 241 = 51 Bom 1.

[See also AIR 1961 Raj 52 (57) = ILR (1960) 10 Raj 1304 (DB).]

(13) Where owing to default of his client on one side or the other, the pukka adatia has been compelled either

CHAPTER III

OF CONTINGENT CONTRACTS

31. "Contingent contract" defined.—A "contingent contract" is a contract to do or not do something, if some event, collateral to such contract, does or does not happen.

Illustration

A contracts to pay Rs. 10,000 if B's house is burnt. This is a contingent contract.

Section 30 — Note 20 (contd.)

to find goods or money, and he seeks to recover from the defaulting client the amount he has been obliged to pay, it is impossible to say that as between him and his client any defence of wagering can succeed. (1913) 15 Bom LR 85 (97, 98).

(14) Mere use of words "pakka Adat" is not enough to attract incidents of Pakka Adat business so as to found plea of wager. AIR 1960 Raj 296 (300) = ILR (1960) 10 Raj 412.

Section 31 — Note 1

(1) Person contracting to buy shares if appointed sole agent of company — Contract is contingent. AIR 1925 All 658 (661, 662).

(2) Agreement between plaintiff and one of defendants that if plaintiff succeeded in suit with regard to certain land in defendant's possession, plaintiff should purchase same for Rs. 300. Agreement held to be contingent contract. (1900) 2 Bom LR 118 (119) (DB).

(3) Guardian of minor entering into agreement to sell land for fixed price contingent upon leave of Court — Court sanctioning sale but at higher price — **Held**, contract was never completed contract at any time as it was contingent upon Court's permission which did not extend to whole contract as agreed. (1886) 12 Cal 152 (155) (DB).

(4) A contract of insurance is a contingent contract within the meaning of Section 31 of the Contract Act. AIR 1957 SC 669 (673, 676) = 1957 SCR 1002.

(5) Life insurance in a broader sense comprises any contract in which one party agrees to pay a given sum upon the happening of a particular event contingent upon the duration of human life in consideration of the immediate payment of a smaller sum or certain equivalent periodical payments by another party. AIR 1967 SC 816 (818) = (1967) 1 SCR 921.

(6) Where under a compromise decree the plaintiff agreed to recover by suit a certain property transferred by him pendente lite and relinquish it to the defendant it was held that the defendant under these terms got only contingent and not a vested right in the property and therefore, no claim at all to the property when the plaintiff's suit for recovery failed. AIR 1954 Hyd 185 (189, 190) = ILR (1954) Hyd 250.

(7) Where an agreement provided that the agent appearing in the case in the Supreme Court would be paid the taxed costs if the case was successful it was held that the obligation which was contingent would ripen into an absolute obligation in the event of the success of the case. AIR 1954 SC 26 (28). (Such an agreement is not a champertous one where the client is bound in the alternative to pay the out-of-pocket expenses of the agent and a fixed remuneration in any case.)

(8) An agreement to sell a property within a specified time coupled with a separate oral agreement to the effect that the former agreement is subject to the condition that the vendor is able to persuade the lessee to surrender possession within the specified time constitutes a contingent contract and hence if the vendor fails to secure the agreement of the lessee the contract fails to create any obligation. AIR 1954 Trav-Co 10 (19, 24) (Such oral agreement is capable of being proved under Section 92, third proviso.)

(9) A wrote a letter to B as security for the repayment of a loan of Rs. 1½ lakhs advanced to him. The letter ran as follows "in consideration of your having at my request acceded to the proposal to advance Rs. 1½ lakhs, I hereby bind myself to procure a loan, within two weeks, of Rs. 11 lakhs on the first mortgage of the Mill property and to pay to you thereout the said sum of Rs. 1½ lakhs agreed to be advanced by you". B sued A for breach of contract contained in the letter. **Held**, that the contract was not a contingent contract but it amounted to a substantial undertaking by A that a loan of Rs. 11 lakhs should be procured and that out of the loan Rs. 1½ lakhs would be repaid to B. (1912) 36 Bom 387 (395) = 39 Ind App 152 (PC).

(10) Where a contract provides that the goods are to be delivered when they arrive, the word "when" cannot be read as "if" and the contract was not a contingent contract but an absolute one, the obligation undertaken by the seller not being conditioned by or contingent upon the arrival of the goods in India. AIR 1949 Bom 356 (357, 359) = ILR (1950) Bom 144 (DB).

(11) Where a contract between seller and buyer contains the provision "The

32. Enforcement of contracts contingent on an event happening.—Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened.

If the event becomes impossible, such contracts become void.

Illustrations

(a) A makes a contract with B to buy B's horse, if A survives C. This contract cannot be enforced by law unless and until C dies in A's lifetime.

(b) A makes a contract with B to sell a horse to B at a specified price, if C to whom the horse has been offered, refuses to buy him. The contract cannot be enforced by law unless and until C refuses to buy the horse.

(c) A contracts to pay B a sum of money when B marries C. C dies without being married to B. The contract becomes void.

Section 31 — Note 1 (contd.)

goods have been purchased by me as for January delivery and will be shipped to your friends 'as soon as delivered to us.' it was held that the obligation was not conditional but also absolute, and the mode of performance consisted of the fact that delivery could be given as soon as the goods were delivered to the seller, and that partial shipments could be made. AIR 1956 Bom 151 (153, 155).

(12) Where a stipulation in a sale-deed in respect of certain property in the Punjab provided that the amount of Rs. 25,000 which remained payable out of consideration money would be paid by the vendee to the vendor 'as soon as possible but at a time when the former is in a position to make the payment' the true import of the stipulation was that the balance consideration would be payable within a reasonable time by virtue of S. 46. The agreement to pay Rs. 25,000 could not be regarded as contingent contract within the meaning of S. 31. AIR 1964 Punj 123 (125, 127) = ILR (1964) 1 Punj 143 (DB).

(13) A term in the lease that the lessee could not transfer his interest without the previous consent of the landlord would cease to operate against the lessee when there is a further condition that the landlord cannot withhold his consent unreasonably and that condition has not been complied with by the landlord. (1949) 53 Cal WN 329 (334) (DB).

(13-A) Where by a statute property is not transferable without the permission of the authority, an agreement to transfer the property must be deemed subject to the implied condition that the transferor will obtain the sanction of the authority concerned. AIR 1970 SC 546 (547) = (1970) 1 SC WR 175. (AIR 1930 PC 287 and AIR 1964 SC 978, Rel. on.)

(14) Where a contract for sale of leasehold in khas mahal contained a provision that application for sanction for transfer should be presented to authorities in due course it was held that such a contract was as between the lessor and lessee not a contingent contract but a concluded one and the alienation was

valid until terminated by the Collector who alone had the option to terminate the lease and eject the lessee. AIR 1951 Orissa 291 (294) = ILR (1949) 1 Cut 593 (DB).

(15) The conditional transfer of a business with the police permit necessary for carrying on the same becomes an unconditional and irrevocable transfer when the police permission stipulated for is given. Even if the police subsequently refuse to alter or reissue the permit in the name of the transferee unless and until another distinct condition relating to the issue of permits is complied with, the completed contract of transfer would in no way be affected. AIR 1949 PC 118 (120).

(16) A clause in a contract, which, instead of providing for contingencies subject to which alone it could be enforced, confers an absolute and arbitrary power on one of the parties to say that it is unenforceable is void. AIR 1957 Mad 82 (85) = ILR (1957) Mad 315 (DB).

(17) A licensee may take the risk of putting a huge sum as a license fee with the Government on the assumption that certain quantity of liquor will be regularly supplied to him and on that basis he is likely to make huge profit; but the license fee even if calculated on the basis of certain estimated supply and even though payable monthly, cannot be said to be the price of the liquor supplied to him. It cannot be said that the contract is a contingent one inasmuch as the payment of fee depended on the continuance of supply. AIR 1959 Assam 75 (91).

(18) Agreement for sale of evacuee property on condition that execution of sale deed to take place after obtaining certificate from Custodian under Section 40 of Administration of Evacuee Property Act (1950) is a contingent contract. AIR 1970 Guj 12 (23) = 1970 Cri LJ 32 (DB).

Section 32 — Note 1

(1) There is a clear difference between a contract under which a present obligation is created but the performance is postponed to a future date and a con-

Section 32 — Note 1 (contd.)

tract under which there is no present obligation at all and the obligation arises by reason of some condition being complied with or some contingency occurring. A promise by a person to buy certain shares himself in the event of his not being able to sell those shares on behalf of its owner within a stipulated time creates no present obligation to buy the shares but only an obligation contingent upon the failure to sell the shares within the stipulated time and therefore falls under the second category of contracts. AIR 1956 Bom 74 (75) = ILR (1955) Bom 1083.

[See also AIR 1952 Kutch 27 (29). (Agreement creating absolute and unconditional obligation to pay debt — Clause stating that payment was to be made from specified source which would become available on accounts being made merely indicated mode of performance — Non-making of accounts and hence non-availability of source cannot render suit for enforcing the absolute liability untenable.)]

(2) The law allows the enforcement of a contingent contract after the event upon which it was contingent has happened. (1932) 33 Pun LR 207 (208) (DB).

(3) A conditional obligation is a quasi-obligation consisting in the chance or possibility that a real obligation may already exist or may come into existence in the future. The fulfilment of the condition is the transformation of that potentiality into actuality. Conversely the failure of the condition is the failure of that chance to become a fact. AIR 1956 Bom 74 (76) = ILR (1955) Bom 1083.

(4) Where the execution of a further contract is a condition or a term of the bargain, there cannot be an enforceable contract unless the condition or the term is fulfilled. AIR 1942 Pesh 33 (34, 35) (DB).

(5) Co-sharer in undivided land contracting with person to sell certain land adjoining person's land — Co-sharer promising in sale-deed to get specified land measured out and to hand it over to purchaser — Purchaser's suit for specific performance on failure of promise — Contract held depended on contingency not yet happening, hence suit premature — Contract held within Section 32 — Hence purchaser not entitled to compensation. AIR 1936 Sind 26 (28) (DB).

(6) Clause in agreement that in event of vendor not being in possession of goods, contract to be deemed to have been cancelled does not render the contract void. AIR 1964 Punj 230 (231).

(7) Ante-nuptial agreement to give land in consideration of marriage is contingent contract and becomes enforce-

able on marriage. AIR 1928 Rang 286 (287).

(8) Where the buyer agreeing to buy goods as might be ready for delivery or as might arrive and be deliverable, the use of the words "as might arrive" rendered the performance of the contract conditional upon the arrival of the goods. Hence if the goods do not arrive the seller would be absolved from delivering the goods. AIR 1949 Cal 407 (413) = ILR (1945) 1 Cal 391.

(9) Sale of property in Punjab — Stipulation in sale deed that balance of consideration would be paid "as soon as possible but when vendee would be in position to make payment" cannot be regarded as contingent contract. AIR 1964 Punj 123 (126) = ILR (1964) 1 Punj 143 (DB).

(10) Merely because a contract is "for forward delivering" of goods ordered from a foreign country it cannot be said that the performance of it will depend upon the arrival of the goods at the port in India. Hence even if the goods have not been shipped from the foreign country the seller cannot avoid the consequences of his failure to supply according to the terms of his contract by raising a plea of impossibility of performance. AIR 1948 PC 217 (220).

[See also AIR 1968 SC 522 (528, 529) = (1968) 1 SCR 821.]

(11) The question whether the obligation of the seller to perform under an F. O. R. contract for sale of goods is absolute or contingent upon the availability of wagons must be decided upon the facts of each case. Where at the time of entering into the contract itself the happening of the contingency of the non-availability of wagons must have been present to the minds of the parties and yet they have not expressly provided for such contingency the Court should not imply any such condition into the contract. AIR 1949 Cal 472 (473, 474).

(12) Where a contract to supply certain bales of cloth within a stipulated time contained a statement that the supply of goods under the contract would go on as soon as the bales were delivered by the mill to the seller it was held that the statement was intended only to indicate a mode of delivery and not a condition on which the delivery to the buyer was made contingent. Hence the seller cannot escape the consequences of his failure to supply the goods according to his contract by pleading that the mill had failed to deliver the bales in sufficient time. AIR 1952 SC 9 (11) = 1952 SCR 36.

(13) Although the law would not permit implying into a written contract or grant a condition which would alter or modify the written terms of the contract or grant there is nothing in it to pro-

Section 32 — Note 1 (contd.)

hibit implying a condition that the contract or the grant would cease to operate if a pending litigation goes a particular way. In such a case the contract or the grant is not left to operate subject to any modification or alteration introduced by the condition but the whole contract or grant is struck down as a result of the happening of the event contemplated. **AIR 1957 SC 489 (493) = 1957 SCR 663.**

(14) Law of frustration has been incorporated in Sections 32 and 56 of Contract Act and Courts cannot go beyond them on analogy of principles of English Common Law or otherwise. **AIR 1963 Punj 49 (63) = 1962 Cur LJ 196 (FB).** (Overruled on another point in **AIR 1968 SC 1024.**)

(15) Where the contract itself, as a matter of construction, contains impliedly or expressly a term according to which it would stand discharged on the happening of certain circumstances the question of dissolution of the contract according to its terms falls to be determined under Sec. 32 or other similar provisions and not under Section 56. **AIR 1954 SC 44 (48) = 1954 SCR 310 ** AIR 1968 SC 522 (527) = (1968) 1 SCR 821 ** AIR 1959 Assam 75 (95) (DB).** (Held on facts that contract was not contingent.)

(16) If the performance of contract is rendered unlawful either for determinate or indeterminate period of time, the contract would not stand discharged unless the ban on its performance existed on the day or during the time in which it has to be performed. **AIR 1965 SC 1523 (1526) = (1965) 2 SCR 630 ** AIR 1959 Cal 576 (579) = 63 Cal WN 549 (DB).**

(17) The doctrine of discharge by frustration cannot be available where the contract makes full and complete provision, so intended, for a given contingency. The reason is that where there is an express term the Court cannot find, on construction of the contract, an implied term inconsistent with such express term. **AIR 1968 SC 522 (528) = (1968) 1 SCR 821.**

(18) A party suing to enforce an obligation which is conditioned upon the occurrence of an event has to establish that the event had occurred in the manner contemplated by the contract for the obligation to arise. **AIR 1958 Madh Pra 297 (299) = 1958 Jab LJ 235.** (Insurance against loss during transit — Goods not put in transit at all — No obligation to pay value of goods can attach to the Insurance Company.)

(19) A plea that contract is a contingent contract has to be alleged and proved by the party who sets it up and it is futile to argue that it is bounden

duty of the trial Court to go into a matter like this suo motu. **AIR 1965 Raj 132 (138) = 1964 Raj LW 428.**

Contract void if future event becomes impossible:

(20) Contingent contract depending upon future event is void if the event becomes impossible. **AIR 1915 Nag 15 (16) = 12 Nag LR 69.**

(21) So far as India is concerned the law relating to avoidance of contract on the ground of impossibility is embodied in Sections 32 and 56 and the doctrine of frustration will be of no avail to a party in default when neither of the sections is applicable to his case. **AIR 1952 SC 9 (11) = 1952 SCR 36 ** AIR 1957 All 143 (146, 151) (DB).**

(22) Where by an agreement or compromise a party undertook to pay a certain sum of money to another and created a charge for the debt on an estate in his possession as a mode of discharging the liability and there was nothing in the transaction to show that the obligation was conditioned on the continued existence of the estate it was held that the acquisition of the estate by the Government under the Zamindari Abolition Act did not in any way render the agreement impossible of performance. **1955-2 Mad L Jour 339 (355) (DB).**

(23) Pleader retained by plaintiff to appear in certain suit — Plaintiff paying fees in advance — One S agreeing to pay further fees if plaintiff obtained decree — Suit compromised without pleader's advice and in his absence — Held that case was of contingent contract within Section 32 and event having become impossible contract was void. **(1879) 1879 Pun Re No. 155, p. 440 (441) (DB).**

(24) Where the forward contracts in respect of cotton were not void ab initio but become void and unenforceable due to prohibition of law (Cotton Control Order, 1945), there is no bar to its enforcement when the inhibition is lifted by the repeal of that law. **AIR 1961 Raj 52 (59) = ILR (1960) 10 Raj 1304 (DB).**

(25) An agreement to sell land held on restricted tenure the performance of which is contingent on sanction of revenue authorities being obtained under Section 73-A of the Bombay Land Revenue Code, cannot, on refusal of such sanction, be enforced specifically or an action for damages maintained for breach thereof. **AIR 1928 Sind 63 (65, 66) = 22 Sind LR 396.**

(26) Where the possibility of completing a contract is dependent on the will of a third person, a defendant who has entered into the contract to the performance of which such consent is necessary will not, if such consent cannot be procured, be decreed to obtain it and thus

33. Enforcement of contracts contingent on an event not happening.—Contingent contracts to do or not to do anything if an uncertain future event does not happen can be enforced when the happening of that event becomes impossible, and not before.

Illustration

A agrees to pay B a sum of money if a certain ship does not return. The ship is sunk. The contract can be enforced when the ship sinks.

34. When event on which contract is contingent to be deemed impossible, if it is the future conduct of a living person.—If the future event on which a contract is contingent is the way in which a person will act at an unspecified time, the event shall be considered to become impossible when such person does anything which renders it impossible that he should so act within any definite time, or otherwise than under further contingencies.

Illustration

A agrees to pay B a sum of money if B marries C. C marries D. The marriage of B to C must now be considered impossible, although it is possible that D may die and that C may afterwards marry B.

35. When contracts become void which are contingent on happening of specified event within fixed time.—Contingent contracts to do or not to do any-

Section 32 — Note 1 (contd.)

perform an impossibility. AIR 1915 Nag 15 (17) = 12 Nag LR 69.

(27) An agreement entered into by the parties on the clear understanding that some other party should also become a party to the contract cannot become a perfect agreement until and unless the third party joins the agreement. AIR 1949 FC 211 (217) = 1949 FCR 379. (It is necessary in such cases that there should be a clear understanding between the parties as to the condition. It is not sufficient to say that the parties acted in the 'faith' that the third party would join the agreement.)

(28) Where the parties to a contract for the sale of a property within a specified time stipulated by an oral agreement that the performance of the contract by the vendor will abide by the result of his efforts to persuade the lessee in possession to surrender the property within the specified time it was held that the vendor's failure to obtain possession from his lessee within the time made the contingent contract for sale fall through. AIR 1954 Trav-Co 10 (19, 24) (DB). (The oral agreement itself could be proved under the 3rd proviso to Section 92, Evidence Act as it was only a condition precedent on the happening of which alone the contract could be enforced and not one in defeasance of the contract.)

(29) Contract to purchase shares on being made sole agent of Company — Company going into liquidation before appointing purchaser as sole agent — Latter is not liable as a contributory. AIR 1925 All 658 (661, 662).

(30) Where a contract stated that certain conditions therein would be void if there should be any fluctuation in the

rates issued by a certain syndicate: **Held**, that the non-issue of the rates by the syndicate due to its ceasing to exist did not bring into operation the condition rendering the contract void. AIR 1921 PC 46 (47).

(31) Agreement for sale of evacuee property on condition that execution of sale deed to take place after obtaining certificate from Custodian under Section 40 of Administration of Evacuee Property Act (1950) — **Held**, since condition of obtaining certificate became unnecessary in view of property being restored free from any such restrictions under Section 16 (1) of Act of 1950, contract did not depend upon condition which could not be enforced by law or which had become impossible of performance so as to render it void. AIR 1970 Guj 12 (23) = 1970 Cri LJ 32 (DB).

Section 33 — Note 1

(1) Acceptance by telegram with condition that it would be confirmed by post if mistake found in telegram — Condition is, what is known as condition subsequent — Contract is complete subject to the "uncertain future event" which is possible discovery of telegraphic mistake. AIR 1922 All 219 (221, 222) = 44 All 472 (DB).

Section 35 — Note 1

(1) In contracts under Section 35 the specified event as a rule is independent of will of either party. There is no question of breach of any agreement. AIR 1923 Rang 26 (26) = 4 Upp Bur Rul 99.

(2) Where in surety bond surety undertook to get judgment-debtor to deposit decree amount before certain date or to pay amount himself in case of default, and judgment-debtor died before

thing if a specified uncertain event happens within a fixed time become void if, at the expiration of the time fixed, such event has not happened, or if, before the time fixed, such event becomes impossible.

When contracts may be enforced which are contingent on specified event not happening within fixed time.—Contingent contracts to do or not to do anything if a specified uncertain event does not happen within a fixed time may be enforced by law when the time fixed has expired and such event has not happened or, before the time fixed has expired, if it becomes certain that such event will not happen.

Illustrations

(a) A promises to pay B a sum of money if a certain ship returns within a year. The contract may be enforced if the ship returns within the year, and becomes void if the ship is burnt within the year.

(b) A promises to pay B a sum of money if a certain ship does not return within a year. The contract may be enforced if the ship does not return within the year, or is burnt within the year.

36. Agreement contingent on impossible events void.—Contingent agreements to do or not to do anything, if an impossible event happens, are void, whether the impossibility of the event is known or not to the parties to the agreement at the time when it is made.

Illustrations

(a) A agrees to pay B 1,000 rupees if two straight lines should enclose a space. The agreement is void.

(b) A agrees to pay B 1,000 rupees if B will marry A's daughter C. C was dead at the time of the agreement. The agreement is void.

CHAPTER IV

OF THE PERFORMANCE OF CONTRACTS

Contracts which must be performed

37. Obligation of parties to contracts.—The parties to a contract must either perform, or offer to perform, their respective promises, unless such performance

Section 35 — Note 1 (contd.)

specified date: **Held**, that Section 35 (2) applied to case and not para. (1). Specified uncertain event was the payment of the decretal debt by the judgment-debtor and as that event did not happen before the specified event, the contingent contract became enforceable. (1910) 8 Ind Cas 985 (986) (Low Bur).

(3) Sale contingent on not repaying amount within certain time is contingent contract and becomes void if payment is made within that time. AIR 1926 Bom 107 (107, 110) (DB).

(4) Where in a contract for purchase of plot of land containing a term 'subject to purchaser's lawyer's approval of title there is no reference to the time within which the lawyer's approval had to be obtained, it is fair to both sides to assume that the intention was that the approval should be obtained within a reasonable time. It has been held that even where a particular time is fixed for the completion of a contract of sale of land, the Courts of equity may ignore the time and give relief where justice requires it. AIR 1959 Andh Pra 256 (262).

Section 37 — Note 1

(1) Section 37 of the Indian Contract Act, covers also cases of partial performance. AIR 1946 Nag 336 (339) = ILR (1946) Nag 334.

(2) A concluded and completed contract, though it is deficient in some requirement as to form, will bind the parties in equity when they have acted upon it and some material terms of it have been performed. AIR 1934 Cal 235 (238) = 60 Cal 1372 (DB) ** ILR (1969) 2 Ker 95 (111, 112) = 1969 Ker LT 587. (Party cannot avoid contract retaining benefit under it — Contract must be avoided as a whole.)

(3) It is not obligatory under Sec. 37 to make a decree according to the terms of the contract and on no other terms. AIR 1939 Pat 55 (60) = 18 Pat 13 (FB).

(4) The tenant of a house, who, under the rent deed executed by him, deposited a certain sum as rent in advance for the last month of the tenancy and also agreed to pay the rent of the other months by a specified date in each month, cannot without paying the rent of any such previous month in the agreed manner and by merely unilateral-

is dispensed with or excused under the provisions of this Act, or of any other law.

Promises bind the representatives of the promisors in case of the death of such promisors before performance, unless a contrary intention appears from the contract.

Illustrations

(a) A promises to deliver goods to B on certain day on payment of Rs. 1,000. A dies before that day. A's representatives are bound to deliver the goods to B, and B is bound to pay the Rs. 1,000 to A's representatives.

(b) A promises to paint a picture for B by a certain day, at a certain price. A dies before the day. The contract cannot be enforced either by A's representatives or by B.

Section 37 — Note 1 (contd.)

ly adjusting the advance which had already been appropriated towards the last month's rent claim to be not in default in the payment of rent for that month. AIR 1953 Trav-Co 70 (71) = ILR (1952) Trav-Co 361.

(5) A party to an agreement who has failed to perform his part of the agreement is not entitled to the performance under the agreement by the other party. AIR 1924 Oudh 425 (426) = 27 Oudh Cas 60. (Usufructuary mortgagee not paying off creditors of mortgagor as agreed cannot require mortgagor to give him possession.)

[See also AIR 1933 Pat 579 (581). (Suit for rejection — Defendant in default of agreement — He cannot rely on the agreement which was for granting him permanent lease against ejectment).]

(6) Contract to institute a suit to prevent waste of properties due to a reversioner — Suit filed — Contract not unconscionable or champertous — Premature termination of suit does not disentitle the party who has filed the suit from claiming benefits under the contract. ILR (1960) 2 Cal 538 (DB).

(6-A) Agreement permitting defendant reimbursement of 130 paraahs of paddy for payment of Rs. 50 as revenue — Price of paddy increasing seven-fold — Agreement becomes unconscionable and extortionate — Plaintiff can be relieved from it. 1967 Ker LT 607 = 1967 Ker LJ 882.

(7) The parties are bound by the terms of the agreement and when there is nothing in the contract which provides for a contingency in the party cannot claim extra consideration on the ground that because of the contingency he had to expend more money. AIR 1963 Andh Pra 216 (221) = (1963) 1 Andh WR 31 (DB).

(8) Where two parties to a contract settle accounts and release each other from mutual obligations, the point of

time at which such settlement and release take place would be the time at which the contract terminates. AIR 1960 Mys 150 (153) = 37 Mys LJ 135 (DB).

Waiver.

(9) Where before goods were delivered under a contract to sell which can be said to contain only an assurance that the goods supplied would be of marketable quality the buyer wrote to the seller intimating his determination to refuse acceptance of the delivery if a guarantee that the goods contained in the package were according to sample shown was not forthcoming, it was held that he had thereby excused performance of the promise made to him by the seller. AIR 1950 Orissa 42 (46) = ILR (1949) 1 Cut 453 (DB).

(10) Where a vendee, who had leased back the property for a specified number of years, stipulated by a separate agreement to reconvey the property if the vendor paid the annual rent on the stipulated dates each year regularly but subsequently accepted the belated payments on the clear understanding that the agreement to reconvey had however become inoperative owing to the default of the vendor it was held that there was no waiver on his part of the default by his acceptance of belated rent. AIR 1946 Mad 47 (48) = ILR (1946) Mad 470 (DB). (Vendor held not entitled in the circumstances to specific performance of the agreement to reconvey.)

(11) A new promise made by the obligor and accepted by the obligee in lieu of the promise contained in the original contract between them discharges the obligor from his liability to perform the promise under the original contract. AIR 1951 Pat 621 (623) = 30 Pat 703 (DB).

"Other law" excusing performance.

(12) As S. 37 of the Contract Act itself sanctions and recognises the existence of laws which might dispense with or excuse the performance of an act which is binding or valid under the Con-

Section 37 — Note 1 (contd.)

tract Act it cannot be postulated that the U. P. Agricultural Tenants (Acquisition of Privileges) Act, 10 of 1949, which is one such law, could fail on the ground of it being in conflict with or repugnant to the Contract Act which is an earlier Central law. AIR 1957 All 644 (646).

(13) Any law which dispenses with or excuses performance under an agreement relating to tenancy of premises will also be treated as supplementary to the T. P. Act and the parties to the agreement can take advantage of that law. Such a law cannot, in view of the provisions of Section 37 of the Contract Act which envisages interference with agreements by validly made law, be struck down on the ground of repugnancy with the provisions of T. P. Act. AIR 1954 Raj 252 (256) = ILR (1954) 4 Raj 958. (Sections 6 and 8 of the Rajasthan Premises (Control of Rent and Eviction) Act, 17 of 1950 which empower Courts to scale down agreed rent are not invalid as the Act must be treated as supplementary to the T. P. Act.)

(14) Section 13 of the Rajasthan Premises (Control of Rent and Eviction) Act 17 of 1950 must be deemed to be "any other law" excusing the performance of the terms of the contract of tenancy relating to ejection. (1955) ILR (1955) 5 Raj 575 (580). (Hence Rajasthan Act cannot be struck down as being inconsistent with the provisions of the Contract Act.)

(15) The Hindu law rule of "damdupat" is "other law" within the meaning of Section 37 and that section therefore does not affect the operation of the rule of damdupat. AIR 1946 Nag 210 (212) = ILR (1946) Nag 407 (DB).

Legal representatives.

(16) Legal representatives have right to require specific performance or are bound by promise to perform contract in absence of contrary intention. AIR 1926 Bom 97 (100) = 49 Bom 862 (DB) ** AIR 1967 SC 744 (746, 747) = (1967) 1 SCR 293.

(17) Under Section 37 promises bind representatives of promisors before performance. Hence registered contract of lease by Hindu father would bind his son, especially if he has possession of property, subject of lease, during the period for which rent is claimed. 1902 Pun Re (Rev) No. 4, p. 7 (8).

(18) A contract for pre-emption can be enforced against the representatives of the parties to the contract and also against a person who has taken the property affected by the contract with notice of the contract. AIR 1924 All 657 (658) = 46 All 514 (DB) ** AIR 1967 SC 744 (746) = (1967) 1 SCR 293 ** AIR 1961 Cal 152 (154) = (1961) 64 Cal WN 416 (DB).

(19) Partition between two brothers — Agreement that if share of one is sold, the other would be entitled to buy for certain price is enforceable against sons of parties. Section 14, Transfer of Property Act, does not invalidate agreement. AIR 1944 Nag 187 (187, 188) = ILR (1945) Nag 174.

(19-A) A universal legatee is the legal representative of the deceased testator and is liable for the debts of the testator to the extent of property of the testator in his hands. AIR 1936 Oudh 7 (9) = 12 Luck 1 (DB).

(20) Covenant for good title cannot be enforced against persons who are in possession of part of property of deceased vendor as legatees from universal legatee of vendor. AIR 1961 Andh Pra 29 (31) = (1960) 1 Andh WR 282.

(21) Where certain co-sharers agree to divide profits in particular manner, the agreement is binding on their heirs until it is terminated. AIR 1934 All 139 (141) (DB).

(22) Vendee undertaking to pay off mortgage — On default sale of mortgaged property effected — Mortgagee becoming owner after final foreclosure decree — There is breach of contract and after vendee's death sons are liable. AIR 1928 Oudh 148 (151) (DB).

(23) Section 37 applies to an agreement to pay a certain sum of money to a near relation out of natural love and affection as it is a contract under Section 25. Hence, it would in the absence of any contrary intention appearing from it bind the legal representatives of the promisor also. AIR 1952 All 564 (576) = ILR (1952) 2 All 421 (DB).

(24) Where the contract is one which has relation to the personal conduct of both the contracting parties, the death of either of them puts an end to the contract. AIR 1954 Orissa 241 (243) (DB). (Contract of personal service.)

(25) Personal contract by manager of joint Hindu family — Other members are not his representatives and cannot enforce it after his death. AIR 1923 Pat 589 (589, 590) (DB).

(26) Lease for building and residential purposes does not fall within the class of personal contracts contemplated by Section 37. Upon death of lessee tenancy is not determined, but vests in his legal personal representatives who are entitled to give or receive the usual notice to quit. (1910) 37 Cal 377 (381) (DB).

Assignees.

(27) In contracts, except where they depend on personal factors of the contracting parties or the like, assignability is the rule and the contrary is exception. AIR 1961 Cal 152 (153) = (1961) 64 Cal WN 416.

38. Effect of refusal to accept offer of performance.—Where a promisor has made an offer of performance to the promisee, and the offer has not been accepted, the promisor is not responsible for non-performance, nor does he thereby lose his rights under the contract.

Every such offer must fulfil the following conditions:—

- (1) it must be unconditional;
- (2) it must be made at a proper time and place, and under such circumstances that the person to whom it is made may have a reasonable opportunity of ascertaining that the person by whom it is made is able and willing there and then to do the whole of what he is bound by his promise to do;
- (3) if the offer is an offer to deliver anything to the promisee, the promisee must have a reasonable opportunity of seeing that the thing offered is the thing which the promisor is bound by his promise to deliver.

An offer to one of several joint promisees has the same legal consequences as an offer to all of them.

Illustrations

A contracts to deliver to B at his warehouse, on the 1st March 1873, 100 bales of cotton of a particular quality. In order to make an offer of a performance with the effect stated in this section, A must bring the cotton to B's warehouse, on the appointed day, under such circumstances that B may have a reasonable opportunity of satisfying himself that the thing offered is cotton of the quality contracted for, and that there are 100 bales.

Section 37 — Note 1 (contd.)

(28) As a rule obligations under a contract cannot be assigned except with the consent of the promisee, and when such consent is given, it is really a novation resulting in substitution of liabilities. On the other hand, rights, under a contract are assignable unless the contract is personal in its nature or the rights are incapable of assignment either under the law or under an agreement between the parties. **AIR 1962 SC 1810 (1817) = (1963) 3 SCR 183. (AIR 1960 Cal 86, Reversed.)**

(29) Assignment contract — Parties may agree that one of them should drop out and third person assume benefit and liabilities of contract — Third party's consent need not be express. **AIR 1940 Cal 466 (469) = ILR (1940) 2 Cal 53.**

(30) Only privy to a contract has a right to sue for breach of the contract. The benefits of a contract are assignable but the assignee of the benefits does not get a right to sue the other contracting party for breach of the contract itself except in the case of a person who is claiming through a party to the contract by operation of law. **AIR 1966 Guj 6 (13) = (1964) 5 Guj LR 879 (DB).** (The proposition that the transferee of a benefit under the railway receipt will have a right to sue the railway administration cannot be accepted absolutely. **(AIR 1957 Nag 31, Dissented from.)**)

(31) Where there is an assignment of the rights of a mortgagee under the

mortgage and the assignment deed contains a stipulation to indemnify the assignee in case of dispute, the stipulation for indemnity can be enforced by the transferee from assignee under Sec. 37 of the Indian Contract Act. **AIR 1950 Kutch 84 (86).**

(32) A person who wishes to obtain decree on the basis of assignment must allege and prove a valid assignment in order to show that he has a cause of action. **AIR 1958 Punj 52 (53) = ILR (1957) Punj 1555.** (There is valid assignment where it is supported by consideration, and is not contrary to law or public policy or tainted by fraud or illegality and is also not a champertous agreement.)

(33) An arbitration clause does not take away the right of a party to a contract to assign it if it is otherwise assignable. **AIR 1962 SC 1810 (1818) = (1963) 3 SCR 183. (AIR 1960 Cal 86, Reversed.) ** AIR 1962 Cal 441 (442) = ILR (1962) 2 Cal 371.**

SECTION 38 — SYNOPSIS

1. Scope.
2. Tender.
3. Tender by cash.
4. Tender in part.
5. Tender must be unconditional.
6. "Able and willing."
7. Reasonable opportunity of inspection.
8. Tender to one of joint promisees.
9. Refusal or acceptance of offer.
10. Waiver of tender.

Section 38 (contd.)

1. Scope.— (1) Section 38 requires, in case of payment, a genuine and unconditional offer to pay unconditionally at a proper place, made by person in a position to pay. (1880) 5 Cal LR 105 (107).

(2) Section does not apply to a case of principal and agent. AIR 1923 Pat 464 (465) = 2 Pat 585 (DB).

(3) In construing Section 38, rule of English law as to tender should not be relied on. AIR 1939 Cal 131 (133) = ILR (1938) 2 Cal 337.

(4) Section 38, deals with consequences which flow from an offer of performance which has been refused, but does not deal with the legal consequences of the offer which has been accepted. The section is therefore not helpful in deciding the question whether payment to one of joint creditors is binding on the other creditors. AIR 1948 Nag 279 (282) = ILR (1947) Nag 553 (DB). (Opinion of White, C. J. in 36 Mad 544. Followed.)

2. Tender.— (1) If the amount due is validly tendered to the creditor by the debtor or by his agent, on the debt becoming payable, the creditor is bound to accept the money. AIR 1955 All 350 (351) (DB).

(2) According to the law of contract, the performance is said to be complete when there is a legal tender on the part of the promisee. It may sometimes happen that a person who is to perform a promise has been ready and willing to perform and has also offered to perform his promise at the proper time and proper place. In such a case, the contract is discharged. It is so discharged even in the case of a wrongful refusal to accept the performance. A valid tender satisfies all the requirements of performance. AIR 1958 Orissa 125 (130) (DB).

(3) A tender to be valid under Sec. 38, Contract Act, should be open, unconditional and should be made under circumstances giving the promisee opportunity to know that the tender is real and bona fide. A plea of tender need not be followed by deposit in Court. A tender as such is valid and complete as soon as the party who has entered into a contract to pay money to another tenders the same to the party to whom it is to be paid. AIR 1947 Pat 208 (212) = 25 Pat 451 (DB).

(4) There must be either an actual offer of the money by one party or a dispensation of such offer by the other. But the mode of payment is also determined by the previous conduct of the parties. AIR 1958 Orissa 125 (130) (DB).

(5) Where the course of conduct between the parties has evolved a different mode of payment than that contemplated by a statute, the obligor cannot be

held to be defaulter if for no fault of his the obligee refuses to accept payment when payment is offered according to that mode. 1950 Trav-Co LR 434 (436) (DB).

(6) It cannot be laid down as a general rule that in order that it may be legal tender actual money must be produced under all circumstances. If the creditor by his conduct dispenses with the production of the money, he cannot afterwards object that there was no valid tender. AIR 1952 Raj 72 (73).

(7) A tender may be of a greater sum of money than the amount due. It is open to the creditor, in such case, to accept so much of it as is due and reject the rest. AIR 1949 Mad 535 (538) = ILR (1949) Mad 657 (DB).

(8) A valid tender on a contract of debt is as much a performance and discharge of a debtor's duty as an actual payment. AIR 1928 Cal 68 (79) = 55 Cal 624 (DB).

(9) A bona fide tender amounts to payment unless there is a suggestion that the applicant was not in a position to make the payment at the time when he filed the tender in Court. 1966 All LJ 1108.

(10) Offer of performance is not discharge of obligation. (1910) 20 Mad L Jour 709 (713) (DB).

(11) Where payee does not agree to accept payment to third party as equivalent to payment to himself there is no proper tender. AIR 1925 Lah 180 (181).

(12) A formal tender is unnecessary when its refusal is quite evident. AIR 1923 PC 26 (28) = 50 Ind App 41 = 46 Mad 108 ** 1949 Bur LR (HC) 58 (61) ** AIR 1962 SC 77 (78) = (1961) 3 SCR 579. (Sale with an agreement to repurchase — Offer of repurchase by vendor — Purchaser repudiating agreement to reconvey — Formal tender of price by vendor not necessary. — AIR 1955 Cal 101, Affirmed.)

(13) Where condition in contract that notice should be given of arrival of goods is not essential part of it, failure to give such notice or mistake in notice given, is not breach of contract entitling one party to avoid it — Nor can that notice by itself be deemed to be offer of performance within meaning of Sec. 38. Where on receipt of notice of arrival of goods, one party has to apply for delivery of goods but fails to do so, he commits breach and is liable in damages. AIR 1916 Mad 1066 (1067) (DB).

(14) Promisor, after he makes a tender is not responsible for non-performance and will not be required to pay interest from date of tender. (1910) 20 Mad L Jour 709 (713) (DB).

(15) It would make no difference in principle whether the contract itself fixed a particular date as the date for per-

Section 38 — Note 2 (contd.)

formance or whether it gave the option to one of the parties to fix the date for the performance. When once the option is exercised and a date is fixed it is as if the contract itself has fixed that date as the date for performance. AIR 1953 Mad 380 (387) = ILR (1953) Mad 488 (DB).

(16) Where, according to the Rent Controller's Order the arrears of rent have to be paid to the landlord on or before a particular date, a mere remittance of money order within the time limit would not be a proper tender. The tenant must prove that the amount was actually taken to the landlord and offered to him for payment within the time limit. 1954 Ker L Tim 599 (601).

(17) Where the vendor agrees to execute a conveyance, without specifically agreeing also to have the conveyance registered, even in such a case the agreement would not be fully performed until the vendor has done all that he is required to do to have the document duly registered. This is because an agreement to execute a conveyance necessarily implies an agreement to execute a valid conveyance. AIR 1960 Mad 33 (36) = (1959) 2 Mad LJ 324 (DB).

3. Tender by cash.— (1) The currency in any particular country must be determined by the law of that country and that law is naturally in terms limited to defining what is legal tender in that country. But when that is fixed by the local law, it determines what is the legal tender of that country for purposes of transactions in any other country, so that a foreign Court will, when such questions come before it, give effect to the proper law of legal tender so determined. AIR 1938 PC 26 (32).

(2) Agreement entered into in London — One party employed by the other in New Zealand on certain remuneration of £ 700 sterling. The word, "sterling" held, referred to English Currency and not to New Zealand one. AIR 1938 PC 136 (138).

(3) Where there is an obligation to pay a foreign unit of account, the form must be regulated by the municipal law of the country whose unit of account is in question and what would be a legal tender must depend upon the law in force at the time when the tender should have been made. AIR 1939 PC 74 (77).

(4) Mortgage in one country covenanting repayment of given number of notes of different country — Tender of equivalent of such notes in currency of former country according to market rate in such country held proper. AIR 1943 PC 69 (71).

(5) In the case of money claims, in order to stop the running of interest a tender before suit must be followed by

payment into Court. AIR 1932 Mad 109 (111) = 55 Mad 458 (DB).

(6) The tender of a cheque for the amount due is not a valid tender, especially when the cheque tendered could not be accepted by reason of the defects therein. (1950) 28 Mys LJ 36 (61) (DB).

(7) Tender by cheque will be valid tender if the person to whom it is tendered is willing to receive payment by a cheque. AIR 1929 Mad 230 (232) = 52 Mad 322 (DB) ** AIR 1950 Bom 166 (170) = ILR (1950) Bom 750 (DB).

(8) A payment by cheque to the Rent Controller to the credit of the landlord is not payment in current coins of the realm, till the cheque is actually cashed into current coins and the cash is put into the landlord's account. AIR 1951 Cal 459 (459).

(9) Debtor sending hawala to creditor to be presented to debtor's debtor and get payment — Creditor not presenting it due to his own laches — Debtor's debtor becoming insolvent — Debt can be deemed satisfied. AIR 1936 Rang 164 (165) (DB).

(10) Payment by voucher — Creditor accepting voucher and presenting it at treasury — Voucher not cashed due to mistake of creditor in endorsing it — Tender held valid. AIR 1938 All 15 (16) (DB).

(11) Valid tender of a debt can only be in the currency of the country which is recognised as legal tender. An insured cover cannot be treated as legal tender. The creditor is not bound to accept the insured cover merely because it is insured for a sum larger than the debt due. AIR 1955 All 350 (351) (DB).

4. Tender in part.— (1) Creditor is not bound to reduce costs of proceedings by accepting tender of part payment and thereby bringing suit within pecuniary jurisdiction of less costly tribunal. AIR 1939 Cal 131 (134) = ILR (1938) 2 Cal 337.

(2) Rule treating tender of part of debt as nullity applies only when tenderor admits that more is due than is tendered. (1892) 16 Bom 141 (150).

(3) Part payment is no valid tender — Its acceptance will not preclude a creditor from claiming the residue unless under a condition of tender, he accepted it in full discharge — If there are several distinct debts, the tenderer should make appropriation specific or it will not be good for any debt. AIR 1923 Cal 527 (530) (DB).

(4) Refusal of cheque on the ground that it was for less amount and not that it was not in cash is wrong — The tender is valid. AIR 1931 Bom 118 (120) = 55 Bom 525 (DB).

(5) Where tender made by the lessee is not for the full amount which was due

Section 38 — Note 4 (contd.)

and the name of the sender is not disclosed, the tender is invalid. AIR 1940 Nag 140 (141).

(6) Tender to be proper must be of whole amount due — This applies to mortgages also. AIR 1923 Oudh 241 (242) = 26 Oudh Cas 59 (DB).

(7) Tender of principal only where interest is expressly stipulated is not a proper tender. AIR 1916 Mad 1040 (1040).

(8) Mortgage deed providing for payment by yearly instalments and also delivery of possession — Mortgagee held could not refuse tender of the yearly instalment on the ground of the breach of the condition for delivery of possession. AIR 1923 PC 26 (28) = 50 Ind App 41 = 46 Mad 108.

(9) Where only for one consideration, a party to contract undertakes to do number of things which constitute only one contract, contract cannot be enforced piecemeal. AIR 1943 Nag 266 (269) = ILR (1943) Nag 643.

(10) Plaintiff, employee of defendant, claiming arrears of his remuneration Defendant stating that amount due was much less than claimed and sending cross-cheque for amount found due in full satisfaction of his claim — Plaintiff accepting cheque in part satisfaction and suing for balance — **Held** that if plaintiff was not willing to accept on terms proposed by defendant he should have returned cheque. 1948 Oudh WN 357 (358) (DB).

5. Tender must be unconditional.— (1) A tender to be effective must be unconditional and of the full amount due. AIR 1954 Mys 168 (169) = ILR (1954) Mys 423 (DB) ** 1968 MPLJ 451 = 1968 Jab LJ 556 (DB).

(2) Incomplete or conditional tender is not equivalent to payment. AIR 1922 PC 347 (349).

(3) Deposit in Court not good if made with condition — But if accepted by Court and upon objection by decree-holder, petitioner withdrew condition, it cannot be held as invalid. AIR 1923 Pat 418 (419, 420) = 2 Pat 534 (DB).

(4) If the offer is accompanied by a condition which prevents it from being perfect or complete in itself, it is not equivalent to payment, and the promisee is under no obligation to accept it. Where the plaintiff sends a single cheque for two items, only one of which was due at the time while the other was payable after some time the cheque being one and indivisible can be accepted as a whole or not at all, and hence the tender of one of the items by that cheque is not good and the promisee is therefore within his rights in rejecting it. AIR 1936 Lah 168 (175, 176) (DB).

(5) Conditional tender of rent demanding receipt that tenant paying rent was

kaimi raiyat is not good tender. AIR 1919 Cal 332 (333).

(6) Debtor tendering portion of debt and asking creditor to take that in full satisfaction — This is tender with condition — Creditor is entitled to reject it. AIR 1924 Bom 264 (272) ** AIR 1954 Mys 168 (169) = ILR (1954) Mys 423 (DB).

(7) Sending of a cheque for a smaller amount than the amount claimed by creditor along with a letter to the effect that it was in full settlement does not amount to a discharge of the entire debt, nor does it amount to payment or tender of the amount on any condition that acceptance of that amount is in full and complete discharge of the entire debt. Further, the fact of keeping the cheque is not conclusive in law. AIR 1965 Cal 541 (545).

(8) Where tenant tendered reduced amount of rent and interest on arrears, on plea that not having been in possession of entire area he was entitled to abatement of rent, but no ground was made out for such abatement, tender is not good tender. (1914) 41 Cal 493 (513) = 40 Ind App 223 (PC).

(9) Tender is not valid pro tanto if larger sum is in fact due and if tender is accompanied by demand for cancellation and delivery of mortgage deed. AIR 1915 Mad 402 (404).

(10) Tender of goods priced higher than at the contract price cannot be a performance of the contract. AIR 1922 Mad 28 (30) (DB).

(11) There cannot be tender or agreement to waive tender of unascertained sum. Offer to pay amount found due on settlement of accounts if payee undertook to execute indemnity bond, is not valid tender. (1911) 34 Mad 320 (322) (DB).

(12) A tender made "under protest" is not bad in law. Similarly the tender of more than what is due is also good. AIR 1936 Lah 168 (175) (DB).

[See however AIR 1953 Punj 70 (71) (DB).]

(13) However ready and willing to pay a party may have been, there will not be a tender in law unless there is, following the offer outside Court an unconditional deposit into the Court of money due. AIR 1957 Trav-Co 216 (217).

(14) Where a party insists that before performance of his part of contract the other party complies with the condition which does not form part of the terms of contract, there is no free and voluntary tender. AIR 1960 Andh Pra 178 (181) (DB).

(15) It is always a question of intention of parties whether a bill or note taken on account of a debt, operates as an absolute discharge of the debt or only as a conditional payment of it.

Section 38 — Note 5 (contd.)

Generally speaking, bill or note can never go in discharge of a debt, unless it is part of the contract that it shall be so; for, a mere promise to pay cannot be regarded as an effective payment. (1962) 1 Ker LR 616 (618, 619) = 1962 Ker LT 316.

6. "Able and willing."— (1) One of the requisites of a valid tender is that the party making the tender must always be ready and willing to fulfil the obligation whenever called upon, or, as it is otherwise expressed, a tender in order to be valid must be kept good in accordance with the requirements of the law. AIR 1928 Cal 874 (875) (DB). (Plea of tender is good only if it accompanied by deposit in Court. It must not only allege that person raising plea is still ready.)

(2) A person cannot be said to be able and willing to do what he has promised when he is not in position to do the same. 1968 MPLJ 451 = (1968) Jab LJ 556 (DB).

(3) Offer made by promisor through solicitor to pay debt with interest due thereon on date of offer does not of itself afford reasonable opportunity to promisee of ascertaining whether promisor is able and willing to perform his promise — Offer to representatives of creditors stands on same footing. AIR 1939 Cal 131 (133) = ILR (1938) 2 Cal 337.

(4) Mere offer by postal letter to tender expenses of sale and registration by vendee is not legal tender. AIR 1915 Mad 546 (547) (DB).

(5) Offer to perform — Must fulfil all requirements regarding delivery. AIR 1918 Low Bur 97 (100).

(6) In order to be considered to be ready and willing to deliver, a seller need not be in physical possession of the goods. AIR 1925 Mad 971 (972) (DB).

(7) Vendor to notify on arrival of goods from Mills and vendee to take delivery at vendor's godowns — Vendor need not prove presence of goods at godowns. AIR 1925 Mad 1290 (1291) (DB).

(8) Contracts of purchase — Defendants offering to deliver goods to plaintiff though they themselves had not taken delivery from their own vendors — Plaintiff refusing though repeatedly asked — Tender held valid and plaintiff held committed breach. AIR 1925 Mad 888 (889).

(9) Mere expression by letter of willingness or readiness to deliver is not proper offer nor willingness to execute release deed without having document ready for delivery. AIR 1915 Mad 210 (216) = 38 Mad 959 (DB).

(10) If a party is in a position to perform his part of the contract and express his willingness to perform it,

either personally or through his agent, or representative, that is sufficient evidence of readiness and willingness, though the offer of performance may not amount to tender. AIR 1954 Cal 179 (186).

(11) Before decreeing claim for specific performance of contract for sale, it must be established that buyer was ready and willing to carry out his part of contract. 1954 All WR (HC) 446 (448).

(12) Where an employee is ever ready and willing to perform his part of the contract, his services cannot be terminated before the expiry of the contract period unless the employee is at fault. AIR 1957 Madh Pra 144 (145) = ILR (1957) Madh Pra 40 (DB).

7. Reasonable opportunity of inspection.— (1) Section 38 only requires reasonable opportunity to be given to buyer to examine goods sold. AIR 1918 Low Bur 144 (144) ** AIR 1927 Mad 62 (65) (DB) ** AIR 1925 Mad 1168 (1171) (DB). (Promisor is under no obligation to prove identity of goods.)

(2) Natural place of inspection is place of delivery unless such place of inspection is postponed to another destination to vendor's knowledge and inspection at that place is unsuitable or unreasonable. AIR 1932 Cal 879 (883) = 59 Cal 928.

(3) Though joint survey would be, by itself, reasonable opportunity, yet it is not essential element to constitute reasonable opportunity. Also it cannot be taken that purchaser is entitled to continue inspecting and examining goods until expiration of period for delivery. Reasonable opportunity afforded for examination is reasonable limit alike for vendor and purchaser. (1881-82) 6 Bom 692 (698, 699). (Period of twenty-four hours held to be reasonable opportunity.)

(4) Vendor not bound to see that purchaser takes delivery in time when he has accepted tender of delivery and drawn samples. AIR 1916 Sind 35 (36) = 9 Sind LR 160 (DB).

(5) Tender of money locked up in box or of goods enclosed in case, which other party is not allowed to open is not sufficient tender and plea of tender as an answer to action is incomplete unless accompanied by tender in Court. AIR 1915 Mad 210 (216) = 38 Mad 959 (DB).

8. Tender to one of joint promisees.— (1) Co-heirs of a single promisee are not joint promisees within the meaning of Section 38. (1909) 1 Ind Cas 219 (219) (DB) (Mad).

(2) Assignees of mortgagee are not joint promisees within Sec. 38 — Receipt by co-assignee of his share of mortgage debt, is not on behalf of others — His liability to account for amount realised cannot be enforced. AIR 1939 Mad 818 (822) (DB).

39. Effect of refusal of party to perform promise wholly.—When a party to a contract has refused to perform, or disabled himself from performing, his pro-

Section 38 — Note 8 (contd.)

(3) Mortgagees must be regarded, unless contrary is shown, as to be in position of tenants-in-common. Payment to one of two mortgagees is not discharge of mortgagor's liability to the other. AIR 1921 Pat 27 (28) = 5 Pat L Jour 376 (DB) ** AIR 1918 Low Bur 19 (21) = 3 Upp Bur Rul 42.

(4) Section 38 deals with the consequences which flow from an offer of performance which has been refused but does not deal with the legal consequences of the offer which has been accepted. The section is, therefore, not helpful in deciding the question whether payment to one of joint creditors is binding on the other creditors. AIR 1948 Nag 279 (282) = ILR (1947) Nag 553 (DB) ** ILR (1953) 3 Raj 318 (327) ** AIR 1945 All 311 (315, 316) = ILR (1945) All 165 (DB). (Particularly so if it is not bona fide and is either collusive or fraudulent.) ** AIR 1917 Lah 443 (445, 446) = 1917 Pun Re No. 68 (FB). (Payment of mortgage money to one of several co-mortgagees, without consent of other mortgagees is not discharge that will bind all mortgagees. Section does not deal with case of offer accepted by one of several joint promisees but refers only to case of offer which has been rejected.) ** AIR 1914 All 518 (518) (DB).

[See also AIR 1928 Bom 420 (421) (DB). (Collusive and fraudulent payment of rent to one does not mean payment to whole body of landlords.) ** (1912) 35 Mad 685 (687) (DB). (Do.)]

[But see ('13) 36 Mad 544 (545) (FB) ** AIR 1957 Madh Pra 5 (6) ** AIR 1954 Mad 473 (475) (DB) ** AIR 1937 All 527 (527). (Payment of rent to one co-sharer gives valid discharge.) ** AIR 1925 Mad 261 (263) = 48 Mad 693 (DB) ** ('23) 73 Ind Cas 682 (687) (Pesh). (In absence of fraud or intention to defeat rights of other mortgagees payment to one of the several joint mortgagees discharges the mortgagor.) ** (1909) 1 Ind Cas 219 (219) (DB) (Mad). (Payment to one of joint mortgagees discharges mortgagor.) ** 1893 Pun Re No. 60, p. 267 (271) (DB). (Adult co-owner of house is competent to demand rent payable jointly to himself and to minor co-owners, and grant valid discharge, so as to bind minors.)]

(5) Obiter — Acceptance by one of joint promisees absolves debtor from liability to the other where postal money order is addressed to both. AIR 1923 All 465 (466).

9. Refusal or acceptance of offer. — (1) Mortgagee's reply to equity of redemption that no tender need be made as mortgagor's right has vested in him

but also mentioning the amount due on the mortgage, is not a refusal of a tender, so as to stop running of interest. AIR 1923 PC 26 (28) = 46 Mad 108 = 50 Ind App 41.

(2) Interest ceases to run when valid tender is improperly refused. AIR 1926 Cal 310 (311) (DB) ** AIR 1955 All 350 (351) (DB) ** AIR 1929 Mad 230 (232) = 52 Mad 322 (DB). (Creditor is estopped from disputing validity of tender on ground that it was by cheque.) ** (1911) 34 Mad 320 (322) (DB) ** ('09) 10 Cal L Jour 538 (541) (DB). (It does not, however, extinguish indebtedness.) ** (1907) 34 Cal 305 (323) (DB).

(3) Debtor ready to pay dues under contract—Creditor dead — No legal representative — Interest ceases to run till there is a proper representative capable of giving valid discharge. (1908) 4 Mad L Tim 335 (339).

(4) Where in execution proceedings a decree was tried to be executed on the ground of default in paying the instalment due, and it was found that the judgment-debtor had tendered the amount due which was refused by the decree-holder, it was held that the tender was valid and operated to invalidate immediate execution of decree. AIR 1947 Pat 208 (212) = 25 Pat 451 (DB).

(5) Where A makes an offer of performance to B, the promisee, but the offer is not accepted by B, A is not responsible for the non-performance within the meaning of Section 38, nor does he thereby lose his primary rights under the contract. AIR 1958 Andh Pra 504 (507) = ILR (1958) Andh Pra 120 (DB).

10. Waiver of tender. — (1) An objection to the form of a tender may be waived by the creditor either expressly or impliedly. If the creditor rejects the tender on other grounds he is deemed to have waived the objection as to the form of tender. AIR 1949 Mad 535 (538) = ILR (1949) Mad 657 (DB).

(2) Contract of repurchase — Production of cash only is strict compliance but vendee's conduct may amount to dispensation with literal compliance. AIR 1925 Oudh 533 (534) (DB).

SECTION 39 — SYNOPSIS

1. Scope and applicability.
2. "Disabled himself from performing."
3. "In its entirety."
4. "Promisee may put an end to the contract."
5. Waiver.
6. Promisor's insolvency — Effect.
7. Contract of service.
8. Compensation for breach.
9. Rescission — Plaintiff's default — Effect.
10. Restitution.

mise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.

Illustrations

(a) A, a singer, enters into a contract with B, the manager of a theatre, to sing at his theatre two nights in every week during the next two months, and B engages to pay her 100 rupees for each night's performance. On the sixth night A wilfully absents herself from the theatre. B is at liberty to put an end to the contract.

(b) A, a singer, enters into a contract with B, the manager of a theatre, to sing at his theatre two nights in every week during the next two months, and B engages to pay her at the rate of 100 rupees for each night. On the sixth night A wilfully absents herself. With the assent of B, A sings on the seventh night. B has signified his acquiescence in the continuance of the contract, and cannot now put an end to it, but is entitled to compensation for the damage sustained by him through A's failure to sing on the sixth night.

Section 39 (contd.)

1. **Scope and applicability.** — (1) Section 39, Contract Act, applies to cases of what are called "executory" contracts and not to "executed" contracts. AIR 1944 Pat 3 (5) = 22 Pat 306 (DB) ** AIR 1957 Pat 408 (412) ** AIR 1953 Mad 380 (386) = ILR (1953) Mad 488 (DB).

(2) Section 39 does not apply to transaction which is an actual conveyance of immovable property. (1877-78) 2 Bom 547 (548) (DB) ** AIR 1917 Pat 514 (515) = 2 Pat L Jour 168 (DB) ** (1912) 34 All 273 (277) (DB).

[See also AIR 1930 All 506 (508) (DB).]

(3) The word "anticipatory" nowhere occurs in the section. This section applies to all breaches which occur before the expiry of the last date on which the contract can be performed in the whole or in part though it also covers all earlier breaches. AIR 1927 Lah 693 (695, 696) = 8 Lah 501 (DB).

(4) Section 39 only enacts what was the law in England and the law in India before the Act was passed. The illustration (a) is not quite happy and is likely to lead to misapprehension. (1879) 4 Cal 252 (256) (DB).

(5) Remedy in Section 39 is not only remedy to party who has done his part of contract; he can also sue other party to recover debt, arising from part of contract done by him. (1910) 34 Bom 192 (198) (DB).

(6) A party to a contract is entitled to have it performed in its entirety; a breach of a part is a breach of the contract and, unless the parties waive the breach, the contract is at an end. AIR 1919 Mad 379 (382) (DB).

2. **"Disabled himself from performing."** — (1) Where a party has by his own conduct made it impossible for himself to perform his contract in its entirety within the stipulated time, the other party is legally entitled to put an end to the contract without incurring any liability for damages. (1931) 32 Pun LR 503 (507) (DB).

(2) East Africa Order, 1897, Part IV, Art. 11 (b) — Party bound to convey timber by wagons, selling off wagons and oxen and disabling himself from performing his promise in its entirety — Promisee may put an end to the contract. AIR 1919 PC 190 (192).

(3) Where a widow enters into a compromise with the sole person entitled to the estate, whereby she obtains a life estate in the property on condition that she would not exercise the right of adoption conferred by her husband, she cannot take any advantage under the compromise if subsequently she adopts in pursuance of the authority of her husband. AIR 1927 Oudh 265 (275) (DB).

(4) Contract of affreightment — Demand by shipper for space as per terms of contract — Fact that shipper had no goods to ship and was attempting to obtain advantage due to rise in freight does not entitle the shipowner to repudiate the contract — On the date of demand it cannot be said that shipper had disabled himself from performing his part of the contract under Section 39. AIR 1941 Sind 146 (150).

(5) Party not to cut trees more than he had paid for — Cutting in breach — Promisee entitled to rescind. AIR 1922 Oudh 259 (263) = 25 Oudh Cas 169 (DB).

(6) The defendant agreed to sell to plaintiff property, for a certain sum which he had received from plaintiff, after buying the property at an auction sale. The defendant bought it, but by collusion with a third person put it out of his power to perform his part of the contract. The plaintiff sued for the refund of his money — Held, that a suit lay for cancellation of the contract under Section 39, and was triable by Small Cause Court for the refund of the amount. AIR 1929 All 62 (62).

(7) Agreement between landlord and tenant — Tenant to use specified area for grove — Tenant breaking condition by using small portion for other pur-

Section 39 — Note 2 (contd.)

poses — Zamindar is entitled to eject the tenant if he had not acquiesced in the breach. AIR 1928 All 117 (118).

(8) When the vendor is not in a position to give possession of the property agreed to be sold by him to the purchaser, the purchaser will be entitled by virtue of Section 55 (1), T. P. Act and under Section 39 to rescind the contract and claim the advance that has been paid. AIR 1951 Mad 470 (471).

(9) In absence of service rules, employer is entitled to put an end to the contract of employment for long continued absence without leave as in that case, employee would be deemed to have refused to perform his part of the contract or disabled himself from performing his part. AIR 1962 Pat 452 (456) = 1962 BLJR 519 (DB).

3. "In its entirety". — (1) Right of rescission arises only when other party fails to perform contract in its entirety. (1912) 6 Sind LR 103 (106) (DB).

(2) Where the question is whether the one party is set free by the action of the other, the real matter for consideration is whether the acts or conduct of the one do or do not amount to an intimation of an intention to abandon and altogether refuse performance of the contract. (1906) 33 Cal 477 (482) (SB). (Freeth v. Burr, (1874) 9 CP 203 Applied.) ** AIR 1966 Mys 154 (156) = (1965) 1 Mys LJ 442 (DB). (Suit for specific performance of agreement — Plea of abandonment of agreement by plaintiff — Burden of proving abandonment is on defendant.)

(3) Repudiation must be total, absolute and clear. AIR 1924 Bom 247 (251) = 47 Bom 924 ** AIR 1931 Rang 126 (126).

(4) Where there was contract to deliver goods in two instalments and plaintiff failed to tender for, or take delivery of, first instalment although market was in his favour, but, as regards second instalment, made tender which defendants refused to recognise because of such failure, held, under circumstances, conduct of plaintiff had not amounted to renunciation, to absolute refusal to perform contract, such as would amount to rescission and therefore defendant could not accept it as reason for not performing his part. (1906) 33 Cal 477 (482, 484) (SB).

(5) Where a party to a contract complains about delay in carrying out the contract and protest against the other party's right to put an end to it, it cannot amount to a refusal to perform. AIR 1924 Cal 427 (431) (DB).

(6) Mortgagee failing to pay part of the consideration — Section 39 does not apply. AIR 1930 All 506 (508) (DB) ** AIR 1927 Oudh 527 (527) (DB) ** (1907)

10 Oudh Cas 69 (75, 76) (DB). (Mortgagor can sue mortgagee for damages for non-performance of contract where mortgagee undertook to pay off prior mortgagee with part of consideration left with him.) ** (1906) 10 Cal WN 932 (933) (DB).

[But see 1906 Pun Re No. 103, p. 363 (366) (DB). (Mortgage — Part of consideration left with mortgagee who undertook to pay off prior encumbrance with it — Default by mortgagee — Mortgage contract never came into existence owing to non-payment of consideration as agreed — Even if there was a completed contract it came to an end owing to mortgagee's default to carry out its terms. This was a case of rescission under Section 39 — Mortgagee cannot claim repayment.) ** (1895) 18 Mad 126 (127). (Mortgage — Part of consideration left with mortgagee to pay prior mortgagee — Default—Held, that mortgagor was entitled to cancel the mortgage under Section 39, but mortgagor was bound to give up the benefit he had received — Mortgagee was not entitled to treat the mortgage as one in force for the sum already received.)]

(7) Property mortgaged for 15 years in consideration of mortgagee paying mortgagor's decree-holder — Mortgagee making default, mortgagor pays off decree-holder — Mortgagor entitled to redeem before expiry of 15 years as mortgagee breaks condition. AIR 1927 Oudh 12 (14) = 2 Luck 279 (DB).

(8) Contract for supply of goods contained condition regarding cash payment on delivery of railway receipts but credit had for long been allowed to purchaser — Rescission of contract on ground of purchaser's refusal to pay cash on one occasion cannot be sustained under S. 39. AIR 1914 Lah 298 (301) = 1914 Pun Re No. 63, p. 214 (DB).

(9) Defendant in Madras agreed to take goods to be supplied by plaintiffs by monthly shipments from England. There was also proviso in agreement by which plaintiffs were excused from monthly shipments if space in ships sailing for Madras was not available. Second shipment was not made within one month from first, though ship was available few days earlier for such shipment. Defendant having rescinded contract, plaintiffs sued him for damages for non-acceptance: Held, reasonable construction was that interval contemplated by parties to agreement was not precisely one month or 30 days, but one month more or less, regard being had to time which it may be reasonable to allow to plaintiff to find steamer available for required shipment and that, plaintiffs having failed to make second shipment by steamer which was available, defendant was entitled

Section 39 — Note 3 (contd.)

to rescind contract. (1895) 18 Mad 63 (70, 72) (DB).

(10) The defendants who contracted to purchase 25 bales of yarn from the plaintiff and take delivery of the bales one day after notice of arrival, took delivery of three bales and did not take delivery of seven bales, though notice was given about their arrival as well. The plaintiffs treated this as a repudiation of the entire contract and did not give notice of arrival as regards the remaining 15 bales. In a suit by plaintiffs for damages for breach of contract in respect of 22 bales, held, the plaintiffs were not entitled to treat the conduct of the defendant as a repudiation of the entire contract and were bound to give the notice. AIR 1925 Mad 1290 (1291) (DB).

(11) Talking of refusing to perform but asking for further information and speaking of sending definite reply when it arrives is no repudiation. AIR 1922 Mad 28 (29) (DB).

(12) Unreasonable postponement will entitle vendor to terminate contract for sale of land. AIR 1921 Mad 141 (142) (DB).

(13) Where, in contract, under which defendants agreed to deliver certain goods to plaintiffs, to be paid for, on delivery, defendants made part delivery for which, however, plaintiffs declined to pay until certain cross claims of theirs had been adjusted, and defendants, thereupon, refused to deliver remainder and cancelled contract, it was held that there was not such refusal on part of plaintiffs to perform their part of contract as to entitle defendants to rescind under Section 39. (1879) 4 Cal 252 (256) (DB).

(14) Contract for sale — Vendor unable to make out good title — Vendee can repudiate contract under Section 39 or treat the case as one of want of mutuality. AIR 1927 Bom 195 (202, 203) = 51 Bom 247 (DB).

(15) Sale of house — Possession not delivered forthwith — Vendee can rescind contract. 1932 Mad WN 122 (125) (DB).

(16) Agreement by B to supply goods to A — Ready delivery within one week — Delivery of all the goods within one week not asked for by A — A held had impliedly refused to perform the contract in its entirety, and Section 39 applied. (1911) 10 Ind Cas 18 (20) (Oudh).

(17) Promise of indemnity is an implied term of the contract of agency, hence the refusal of the principal to indemnify the agent for any act done by him in the course of agency, justifies him to rescind the contract of agency under Section 39. AIR 1915 Sind 30 (32) = 9 Sind LR 77 (DB).

(18) Parties to a contract agreeing to substitute old contract by a new one, by payment cash down of Rs. 500 and by execution and registration of a mortgage bond for balance — Cash not paid — Assuming that registration receipt was offered to promisee and he refused to accept it, held that promisor refused to perform his part of the contract in its entirety as cash payment was part of agreement of passing liability for balance on mortgage bond — Section 39 applied and parties were relegated to their own position under the old contract — There was no novation under Section 62. AIR 1940 Pat 121 (124) (DB).

(19) Promisee is not bound to accept part performance. (1921) 3 Lah L Jour 141 (144) (DB).

(20) The party repudiating the contract is entitled before the date fixed for completion of the contract to withdraw his repudiation, unless and until the other party has accepted the repudiation and elected to treat the contract as terminated, and to insist upon the contract being performed in its entirety. AIR 1925 Lah 217 (220) = 5 Lah 497 (DB) ** AIR 1927 Lah 693 (695, 696) = 8 Lah 501 (DB) ** AIR 1963 Pat 254 (260).

(21) Under a contract for sale, yarn to be delivered on steamer at Madras in July, August and September, in three shipments — No yarn shipped in July and August, but ten bales shipped together in September — Defendant not complaining of even delays in deliveries but just before tender of the goods gave notice to plaintiffs of his intention to put an end to entire contract — Defendant was not entitled to rescind entire contract but plaintiffs should be awarded damages in respect of the bales allocated for the September shipment. AIR 1921 Mad 675 (676) (DB).

(22) Tripartite agreement under which C agreed to take over A's liabilities to B on several accounts — Agreement to be given effect by entering into four different transactions — All transactions separate — Repudiation by B of three transactions does not affect validity of one which is duly completed. AIR 1950 FC 21 (38) = 1949 FCR 441. (AIR 1947 Bom 217, Reversed.)

(23) An agreement can be repudiated either by words expressive of an intention not to perform the contract or the conduct from which the said intention can be gathered. Mere failure to perform a contract without more cannot be said to be a repudiation of it. AIR 1953 Mad 300 (306) = ILR (1953) Mad 831.

(24) Where by the collapse of the chitty, the stakeholder disables himself from performing his promise in its entirety the subscriber to the chitty who

Section 39 — Note 3 (contd.)

has made a successful bid at an auction is entitled to go back to his right to claim the paid up subscriptions. ILR (1951) Trav-Co 685 (688, 689) (DB).

(25) Where there has been a renunciation or disclaimer of a contract, the renunciation or disclaimer takes place when and where it is communicated to the other party to the contract. AIR 1956 Nag 118 (120) = ILR (1955) Nag 722 ** AIR 1949 Pat 270 (276) = 27 Pat 723 (DB).

(26) Contract for sale of property — No vacant possession of property in possession of tenants possible — Vendee can rescind contract. AIR 1960 Punj 51 (53). (Auction purchaser informed of occupation of portion of property by tenants, in the course of bidding, cannot rescind the sale on ground that no vacant possession is given.) ** AIR 1964 Raj 240 (240, 241) = 1964 Raj LW 225.

(27) Insistence of buyer on performance of condition not forming part of contract — It amounts to refusal to perform promise — Seller can put an end to the contract. AIR 1960 Andh Pra 178 (181) (DB).

(28) Where the contract was for the supply of 19 bales of yarn in the manner indicated in the contract but what was delivered was only 14 bales and even then the said 14 bales were not sent in the manner indicated in the contract, it was held that the seller had not performed the contract. AIR 1958 Mys 10 (13) = 35 Mys LJ 221 (DB) ** AIR 1968 Ker 310 (312, 313) = 1968 Ker LJ 635 (DB). (Contract of sale of cotton of 'Hubli Jayadhar' variety — Actual supply made of Indian Cotton — Breach of contract held, was breach of condition — Buyer entitled to repudiate contract.)

(29) Contract of employment—Change in essential terms of contract by employer — Held, change amounted to refusal by employer to perform previous contract in its entirety and employee could put an end to it and sue for breach. 1968 MPLJ 846 = 1969 Jab LJ 37. (AIR 1943 PC 34, Foll.)

(30) If a contract is validly cancelled by the lessor, the motive behind the action even if bad would not convert it into an illegal act and furnish a cause of action to the lessee under the contract to sue for damages or compensation for breach of contract. Motive is absolutely irrelevant. AIR 1959 Andh Pra 551 (554) (DB). (1892 AC 25 and 1942 AC 435, Rel. on.)

(31) It is open to canvass the grounds urged in justification of a cancellation of a contract in a Court of law. It is quite competent for a Court to review bona fides, go into the motive underlying such

an action and if the Court is satisfied that they are inadequate or insufficient it will set them aside. AIR 1959 Andh Pra 551 (559) (DB).

(32) Bailee mixing his own goods — Offer to return goods without sorting out such goods — Bailor is entitled to refuse delivery in toto and claim compensation for conversion. (1961) 27 Cut LT 340.

4. "Promisee may put an end to the contract." — (1) Repudiation by promisor before time of performance — Promisee may at once accept repudiation and bring his action as on a breach of it, or he may treat notice of intention as inoperative and await the time for performance and then hold the other party responsible for all the consequences of non-performance — Contract is not necessarily broken by the mere notice of intention to break the contract. AIR 1926 Mad 778 (781) = 49 Mad 681 (DB) ** ILR (1955) Mad 528 (546) (DB) ** ILR (1948) 2 Cal 11 (47). (Where the repudiation is not accepted, the party rejecting the repudiation, has no cause of action for maintaining a suit for damages before the expiry of the time of performance.) ** AIR 1925 Lah 217 (220) = 5 Lah 497 (DB) ** (1912) 6 Sind LR 187 (189) (DB) ** (1863) 1 Mad HCR 162 (163) ** 1963 All WR (HC) 580 ** AIR 1959 Madh Pra 30 = 1959 MPLJ 85 (DB).

(2) Where the promisee treats the notice of intention of promisor not to perform the contract as inoperative, the promisee keeps the contract alive for the benefit of the other party as well as his own, he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it. AIR 1926 Mad 778 (781) = 49 Mad 781 (DB) ** AIR 1922 Bom 303 (312) = 46 Bom 489 (DB) ** 1911-1 Mad WN 265 (266) (DB).

(3) Where in a contract for delivery of goods by instalments there was default in respect of delivery of certain instalments and the buyer did not rescind the contract the contract remained subsisting both for the benefit of the buyer and also for the benefit of seller. (1965) 4 LR 663 (Mys) ** 1963 All WR (HC) 580.

(4) Repudiation before time of performance — Acceptance determines the contract — Party repudiating cannot turn round and insist on performance or sue for damages for non-performance. AIR 1925 Lah 217 (220) = 5 Lah 497 (DB).

Section 39 — Note 4 (contd.)

(4a) Per A. P. Sen, J. — An employee submitting his resignation from service — Resignation, unless accepted by the employer, does not operate as discharging the contract by bringing it lawfully to an end. 1969 MPWR 807 = 1969 MPLJ 879 = 1969 Jab LJ 868 (902). ((1900) 2 Bom LR 790, Relied on.)

(5) Where one party to contract has not merely offered to cancel the contract but has definitely expressed an unalterable resolve to refuse to perform it, the other party to the contract may accept the termination several months after the offer after making vain efforts to induce the buyer to change his mind. This is to be distinguished from the case where one party to a contract makes a definite offer to put an end to the contract and that offer has been definitely rejected by the other party, in which case it will not be open to the latter party to cancel the contract several months afterwards by merely accepting the offer to terminate the contract. AIR 1925 Lah 217 (220) = 5 Lah 497 (DB).

(6) On renunciation of a contract by one party, the other party will be justified in regarding himself as discharged from all liability. AIR 1916 Cal 136 (147) = 43 Cal 790 (DB).

(7) A, party to contract informing his intention not to perform contract to B, the other party to contract — Contract terminates when B exercises his option of treating the contract as cancelled, and so, breach takes place when A receives letter of cancellation. AIR 1934 All 740 (764) = 56 All 828 (DB). (Reversed on a different point in AIR 1938 PC 165.)

(8) Contract for sale — Defect in vendor's title — Vendee cannot be compelled to rescind contract or accept the title without investigation. AIR 1920 Mad 859 (861) (DB).

(9) Contract for lease of toll — Default by contractor in payment of kist — Re-sale of toll — Sale postponed for want of bidders — Subsequent sale and suit for loss incurred — Held, that notice of re-sale put an end to contract — Section 39 applied and not Sections 107 and 63 — Limitation for suit for loss ran from date of re-sale and not date of actual sale. AIR 1933 Mad 704 (706).

(10) Per Scott C. J. — The fact that party to contract under Section 39, when other side has refused to perform it, may put an end to it and sue for compensation for breach, does not oblige him to take that course at his peril; he may, if he prefers it, sue to recover any debt due to him which has arisen from his execution of his part of contract. (1910) 34 Bom 192 (198) (DB).

(11) Repudiation of the contract by one of several joint promisors entitles the promisee to rescind the contract as against others. (1909) 19 Mad L Jour 28 (31) (DB).

(12) The renunciation of a contract by one of the parties before the time of performance does not of itself put an end to the contract; there must be two parties to a rescission. AIR 1952 Bilaspur 6 (8) ** AIR 1965 Ker 187 = 1964 Ker LT 546 ** AIR 1963 Andh Pra 370 (373) = (1962) 2 Andh WR 442 ** AIR 1963 Pat 254 (260) (DB).

(13) Failure to fulfil an obligation under Clause (1) of Section 55, Transfer of Property Act amounts to a refusal to perform the contract for sale within the meaning of Section 39 and will entitle the other party to repudiate or to put an end to the contract. AIR 1957 Madh B 23 (26).

(14) Where a seller agrees to sell a certain property at price agreed to by the buyer and the buyer is put in possession of the property and the buyer fails to execute a sale deed, a notice given by the seller to the effect that if the buyer fails to pay the price within eight days the seller will put an end to the contract entitles the seller to rescind the contract and resell the property. ILR (1952) Madh B 410 (415, 416). ** AIR 1960 Andh Pra 178 (182, 184) (DB).

(15) Breach of the substituted agreement does not revive what has been discharged. Further complaint must be founded on the substituted agreement and not on the original contract. If the substituted agreement is put an end to under Section 39 of the Act on account of such breaches, the original contract is not thereby revived. AIR 1953 Cal 642 (645).

(16) New agreement substituting old one — Agreement not relating merely to mode of payment — First part of agreement acted upon by promisors — Second part not fulfilled — Promisee cannot repudiate whole agreement. AIR 1969 Raj 278 (279) = 1969 Raj LW 343.

(17) The Film distributors agreed to release a picture for exhibition to one theatre on a particular date. But later on the distributors wanted to postpone the exhibition of that picture at the said theatre. They informed the theatre by a letter that it was not possible to exhibit the picture at the theatre on the date agreed. It was held that the letter amounted to repudiation of the contract and the other party had a right to cancel the contract. AIR 1953 Trav-Co 90 (97, 98) = ILR (1952) Trav-Co 823 (DB).

(18) Where a contract is repudiated, it survives for the purpose of measuring the claims arising out of the breach and the arbitration clause contained in it

Section 39 — Note 4 (contd.)

survives for determining the mode of settlement of the claims. The repudiating party is not prevented from invoking the arbitration clause in the contract for the purpose of settling all questions to which his repudiation has given rise. It is not correct to say that the arbitration clause will not be given effect to when the contract is ended by something de hors the agreement. AIR 1947 Sind 57 (58).

(19) In a C. I. F. Contract the buyer must accept the documents which represent the goods. Refusal to accept documents amounts to a breach of the contract. The seller, on refusal can treat the contract as at an end and sue for damages. AIR 1954 Mad 268 (270) = ILR (1953) Mad 1159 (DB).

(20) Where no part of the contract remains unfulfilled, it cannot be suggested that the contract is continued in terms of Section 39. 1953 AMLJ 136 (137).

(21) Judgment-debtor executing decree obtained by him against decree-holder — Claim under decree wiped off by adjustment — No right accrues to decree-holder to enforce his decree on account of action of the decree-holder. AIR 1966 All 556 (558) = 1966 All LJ 1133.

5. Waiver. — (1) Promisor refusing to perform his part of the contract in its entirety — Promisee not rescinding contract but acquiescing in its performance — Promisee not entitled to demand price under the contract before the date due under the contract. AIR 1925 PC 188 (193).

(1-a) Contract to construct building on land within 2 years — Resumption of land if there was breach of the condition — Breach of contract — Acquiescence in breach for 12 years — Presumption that the right of resumption was waived. AIR 1969 Mys 310 (311) = (1969) 1 Mys LJ 237.

(2) Legatee agreeing to pay guzara to testator from date of execution of will — Will executed — Legatee making default in payment of guzara — Will not be revoked by testator — Legal representatives of testator cannot revoke will and rescind contract. AIR 1946 Oudh 193 (209, 210) = 21 Luck 314 (DB).

(3) Mortgage suit — Preliminary decree — Subsequent agreement — Plaintiff agreeing to take property at valuation less than amount fixed by preliminary decree — Judgment-debtor agreeing to pay additional sum — Security for latter offered — Default — Plaintiff asking for personal decree for amount due on preliminary decree and also praying execution against surety — Plaintiff is not estopped by acquiescence from proceeding with prelimi-

nary decree from the mere fact that the plaintiff mistakenly pursued both the remedies at the same time. AIR 1938 Rang 353 (355) (DB).

(4) Contract for sale of property — Portion of purchase money left with vendee — Vendor being unable to give possession of property sold, vendee obtaining possession of other equivalent property but making default in payment to creditor — Held, that vendee having waived his right to put an end to the contract, was bound to return the balance of the purchase money as agreed. AIR 1934 All 617 (618).

(5) Contract of agency continuing — Principal is liable to pay agents' commission according to agreement till their dismissal in spite of all shortcomings in discharge of their duties as there was acquiescence, in the continuance of managing agency. AIR 1929 All 87 (94) (DB).

(6) Contract to sell timber — Vendor insisting on payment of full price before vendee can be allowed to remove timber — Vendor selling part of contract timber to third party — Vendee keeping contract alive has no cause of action to sue for damages if he claims credit for value of timber sold. AIR 1930 Lah 979 (982) (DB).

(7) Contract of insurance — Payment of premium condition precedent to policy taking effect — Though premia not paid policy issued — On demands being made for payment of premia assured agreeing to pay same and further renewing policies — Condition held had been waived and there was concluded contract of insurance between parties. AIR 1954 Mad 520 (521) = ILR (1954) Mad 747 (DB).

(8) Waiver of past breaches — Lessor is not precluded from enforcing forfeiture in terms of contract in case of subsequent breach of the same condition or other condition. ILR (1959) Cut 56 = 25 Cut LT 376.

6. Promisor's insolvency — Effect. — (1) A bare notice of insolvency does not necessarily and in all cases amount to a declaration of intention not to fulfil obligation under the contract. It is a question of fact in each case. AIR 1914 Sind 53 (55) = 8 Sind LR 95 (DB).

(2) The plaintiff under a contract was to take delivery of the goods on a certain date; he filed an application for insolvency before that date. The interim receiver who was appointed in the insolvency proceedings also did not act immediately or even within a reasonable time to adopt the contract of the plaintiff. It was held that the insolvency was equivalent to a notice by the insolvent that he did not intend to perform his obligation. AIR 1953 Nag 345 (349) = ILR (1953) Nag 201 (DB).

Section 39 — Note 6 (contd.)

(3) Contract by insolvent after initiation of insolvency proceeding but before adjudication is not per se void. AIR 1964 Andh Pra 299 (301 to 304) = (1964) 1 Andh LT 178 (DB).

7. Contract of service. — (1) Sections 39 and 64 and justice, equity and good conscience require that servant who quits his master's service in India before expiry of contract period, should be ordinarily paid for full period he worked under master deducting the damages caused by breach. (1912) 23 Mad L Jour 680 (682).

(2) Where, the resolution of a Municipal Committee under which an employee agreed to serve, did not contain any stipulation in regard to the period of employment, nor were there any terms laid down on which the employee should be reverted if necessary. Held, that there were no contractual or statutory provisions which governed the rights of parties. That being so, the Municipal Committee enjoyed an absolute power to put an end to the personal relations created by the employment at any time without giving the employee any reason for doing so or any opportunity for showing cause against the proposed action. AIR 1956 Punj 220 (222).

8. Compensation for breach. — (1) If the buyer gives notice that he will not take delivery or disables himself entirely from performing his part of the contract the seller is entitled to rescind the contract and may at once sue for damages. The eventual non-performance may be treated as a cause of action and damages may be assessed and recovered in respect of it, though the time for performance may yet be remote. (1912) 6 Sind LR 187 (189) (DB) ** AIR 1968 SC 1361 (1364) = (1968) 3 SCR 556 ** AIR 1965 Ker 187 (188, 189) = 1964 Ker LT 546 ** AIR 1963 Cal 70 (72) (DB). (Reversed on another point in AIR 1967 SC 378.)

(2) If a promisor performs his promise after the time fixed for performance and the promisee accepts the performance, the promisor is not liable to damages unless at the time of accepting performance the promisee gives notice of his intention to claim compensation. (1912) 14 Ind Cas 129 (130) (All).

(3) Contract to pay debts of another — Breach — Starting point of limitation for suit for damages for breach — Time does not begin to run against the promisee from the date of repudiation of agreement by the promisor — Fact that promisee himself paid the debts in itself gives him no cause of action — If the promisee paid them before the expiry of a reasonable time after the agreement, the defendant may plead

want of reasonable time to perform and that consequently there was no breach — If the plaintiff (promisee) waited till the expiry of a reasonable time, defendant's breach of contract would give him cause of action, whether he himself paid the debts or not. (1912) 22 Mad L Jour 207 (210, 211) (DB).

(4) Contract of sale not by sample — Refusal of buyer to accept goods unless they accorded with sample — Performance held dispensed by buyer — Seller treating contract cancelled — Buyer held responsible for breach and not entitled to compensation. AIR 1950 Orissa 42 (46) (DB).

(5) See also under Section 73.

9. Rescission — Plaintiff's default — Effect. — (1) Contract for sale of immovable property — Defect in title — Vendor cannot sue for rescission of contract. AIR 1920 Mad 859 (861).

(2) Party committing breach cannot require other party to perform his part of the contract. AIR 1934 Lah 474 (475).

(3) Where the parties agree between themselves as to who could rescind the contract the rescission could be made by that designated instrumentality. This is the position especially where the contract is either with the State or the Union Government. (1965) 4 LR 663 (Mys).

10. Restitution. — (1) The party putting an end to the contract under Section 39, is liable under Section 64 to restore to the other party any benefit received by him under the contract. AIR 1943 PC 34 (39) = 70 Ind App 35 = ILR (1943) Kar PC 30. (Case of contract coming under Section 39 comes under the phrase 'voidable contract.') ** AIR 1957 Madh B 53 (55) = ILR (1956) Madh B 182 (DB) ** ILR (1955) Mad 528 (546) (DB).

(2) It cannot be said that the earnest money is a benefit under the contract for sale within the meaning of Section 64. The seller is not, therefore, liable to refund the earnest money to the buyer on his rescinding the contract on account of the failure of the buyer to pay the purchase money. AIR 1955 Orissa 20 (23) (DB) ** (1963) 2 Mad LJ 153 = ILR (1964) 1 Mad 634. (Defaulting buyer is entitled to the part payment.)

(3) Neither S. 39 nor S. 64 is applicable to a case where under the original contract one party has advanced some money to the other and the contract is subsequently varied by consent of parties. But that is no reason why the party advancing the money should not get back the money on breach of contract by the other party in the absence of any contract to the contrary. AIR 1950 Cal 236 (238) = ILR (1950) 2 Cal 158 (DB).

By whom contracts must be performed

40. Person by whom promise is to be performed.—If it appears from the nature of the case that it was the intention of the parties to any contract that any promise contained in it should be performed by the promisor himself, such promise must be performed by the promisor. In other cases, the promisor or his representatives may employ a competent person to perform it.

Illustrations

(a) A promises to pay B a sum of money. A may perform this promise, either by personally paying the money to B or by causing it to be paid to B by another; and if A dies before the time appointed for payment, his representatives must perform the promise, or employ some proper person to do so.

(b) A promises to paint a picture for B. A must perform this promise personally.

Section 39 — Note 10 (contd.)

(4) Where in an executory contract the plaintiff has performed his part of the contract and the defendant repudiates the contract itself, the plaintiff is entitled to treat the contract as void within the meaning of Section 65. It becomes void when the plaintiff exercises his right to rescind it under S. 39. The defendant's liability then is to restore to the plaintiff any advantage the defendant has received under that contract or to make compensation for that is independent of the statutory right accrued to the plaintiff under S. 75. The rights are not necessarily alternative, they can be cumulative. ILR (1955) Mad 528 (547) (DB).

(4A) Discharge of temporary servant without due notice — Servant is only entitled to pay for notice period — Discharge is not rendered invalid. AIR 1959 Pat 192 (194) = 1958 BLJR 593.

(4B) Contract to institute a suit to prevent waste of properties due to a reversioner — Premature termination of suit does not disentitle the party who has filed the suit from claiming benefits under the contract. ILR (1960) 2 Cal 538 (DB).

(4-C) Contract of service by P with X company — X was being managed by Y company under managing agency agreement — Termination of service of P by Z, who was director of X company and managing director of Y company — Held, Z could not be made liable either in tort for procuring breach of contract with managed company, his position in relation to managed company being that of an agent or for breach of contract, by terminating service of P. 1968 MPLJ 846 = 1969 Jab LJ 37.

(4D) Once the contract is repudiated it ceases to have any legal effect from the date of repudiation but there is no reason why a party to it cannot bring a suit for a period prior to the termination of contract. (1959) 25 Cut LT 376 = ILR (1959) Cut 56.

(5) For a fuller discussion, see under Sections 64 and 65.

Section 40 — Note 1

(1) When one of the persons liable under a mortgage has acquired the interest of others, the liability for the repayment of the mortgage debt cannot be said to be transferred by contract to one who is not already liable. Hence a suit for accounts on a usufructuary mortgage at his instance is maintainable. AIR 1948 All 55 (56).

(2) A contract in the absence of contrary intention express or implied, will be enforceable against parties and their legal heirs and representatives including assignees and transferees. AIR 1967 SC 744 (746) = (1967) 1 SCR 293.

(3) In contracts of personal service the question of performance of the contract is one of ascertaining the true intention of the parties. AIR 1954 Orissa 241 (243) (DB).

(4) It is an implied condition of an agreement for personal service that the death of either party will dissolve it. AIR 1954 Orissa 241 (242) (DB) ** AIR 1957 Andh Pra 643 (649) (DB).

(5) A contract to sell goods can be assigned by the seller so as to enable assignee to sue for damages for breach of contract on tender of performance by him. AIR 1947 Mad 258 (258) ** AIR 1954 Mad 87 (87).

(6) Assignment of a contract to sell goods is not transfer of mere right to sue for damages but a transfer of the rights under a contract which is still to be performed on both sides. AIR 1947 Mad 258 (259).

(7) Buyer's rights under a contract to get goods on payment of price is capable of being assigned. AIR 1954 Mad 87 (87).

(8) Benefits of a contract are assignable subject to a contrary intention which may be express or arising by necessary implication. AIR 1955 Cal 621 (622).

(9) Where in a contract of re-sale of land there is no contrary intention against the assignability of its benefits the mere absence of the phrase "heirs, assignees, administrators" is not sufficient to raise any such implication. The

41. Effect of accepting performance from third person.—When a promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promisor.

Section 40 — Note 1 (contd.)

benefits of such contract are therefore assignable. AIR 1955 Cal 621 (622). (AIR 1918 Bom 158 and 35 Bom 258, held no longer good law.)

(10) In order that an assignee of seller, to a contract to sell goods, can sue for damages on breach of the contract by the buyer, the contract must have been contemplated by the parties as capable of being performed on both sides by their assigns or representatives. AIR 1947 Mad 258 (258).

(11) Specific performance regarding contract for purchase of immovable property can be claimed against legal representative. AIR 1929 Rang 274 (274) = 7 Rang 423 (DB).

(12) On death of banker liability of his sons to pay sums to customers is not changed. AIR 1940 Pat 129 (131) (DB).

(13) Under Section 40, except in very special circumstances, a person agreeing to purchase a property is not bound to purchase it himself and he may arrange for the purchase of the property by some other person as his nominee in the terms of the agreement entered into by him. AIR 1967 All 253 (257) = 1968 All LJ 725.

Section 41 — Note 1

(1) The section applies only where a contract has been in fact performed by some person other than the person bound thereby. AIR 1916 PC 68 (70) = 39 All 178 = 44 Ind App 60 ** AIR 1942 Cal 87 (90) = ILR (1942) 1 Cal 237 (DB).

(2) Part performance being not enough it should be performed in full. AIR 1966 Mys 84 (85) = (1965) 2 Mys LJ 338.

(3) What is required by Section 41 is actual performance and not a substituted promise. According to the section, performance by a stranger, accepted by the promisee produces the result of discharging the promisor, although the latter has neither authorized nor ratified the act of the third party. AIR 1928 Mad 972 (974).

(4) Where in a suit on subsequent mortgage which was executed in lieu of prior mortgage, the subsequent mortgage is found invalid, the right of suit on the prior mortgage becomes revived and Section 41 has no application to the case since it applies only where a contract has been in fact performed by some person other than the person bound thereby. AIR 1916 PC 68 (70) = 39 All 178 = 44 Ind App 60.

(5) A instituted suit against B and C. The plaintiff averred that the amount in suit was due to A by B and that C was liable for the reason that he had undertaken to make the payment. It

was alleged that C had intimated this fact to A whereupon the debit and credit entries had been made in accounts but subsequently C informed in writing that inasmuch as B had failed to pay him he withdrawal his undertaking to pay to A. Subsequently A withdraw his case against C and proceeded only against B. The lower appellate Court applied S. 41 and dismissed the suit. On appeal held that there was no novation within meaning of Section 62 and that Section 41 did not apply to the case. AIR 1933 Lah 335 (335, 336).

(6) Just like Section 63, Section 41 also enables a promisee not only to release a debt at the instance of a third party, but also to enable the promisor whose debt has been released at the instance of the third party to take advantage of that release. The intention is that release need not be made in favour of the person liable. AIR 1931 Bom 123 (124) (DB).

(7) Where P, as adopted son of Q, renewed pronotes executed by Q, but his adoption was set aside, it was held that the creditor could fall back on the original notes as P could not be regarded as "third person" within Section 41. AIR 1928 Mad 972 (974).

(8) A was the cashier and accountant of a company and B was the auditor of the company. A misappropriated large sums of the company and executed a promissory note for Rs. 50,000 in favour of the company for the amount misappropriated by him. B was liable to the company for his negligence and paid Rs. 60,000 to the company in full discharge of that liability. It was contended that by reason of payment by B, A's liability under the pronote was discharged under Sec. 41 of the Contract Act. Held, that Section 41 had no application as A's liability was a contractual one while B's liability was one in tort. AIR 1945 Cal 218 (226) (DB).

(9) Where pre-emption decree proved abortive, after payment by pre-emptor of the unpaid purchase money to vendor, the vendor cannot enforce his lien for unpaid purchase money, against vendee, till he has reimbursed the pre-emptor, money paid by him. (1913) 16 Oudh Cas 1 (3, 4).

(10) Plaintiff having accepted payment from a third person in full satisfaction of his claim is not entitled to sue the defendant for the balance. AIR 1963 SC 250 (255) = (1963) 2 SCR 168.

(11) Consignee accepting performance of the promise to pay compensation from the insurer cannot enforce the same claim against the carrier. AIR 1964 Cal 362 (365).

42. Devolution of joint liabilities.—When two or more persons have made a joint promise, then, unless a contrary intention appears by the contract, all such persons, during their joint lives, and, after the death of any of them, his representative jointly with the survivor or survivors, and, after the death of the last survivor, the representatives of all jointly, must fulfil the promise.

43. Any one of joint promisors may be compelled to perform.—When two or more persons make a joint promise, the promisee may, in the absence of express agreement to the contrary, compel any *[one or more] of such joint promisors to perform the whole of the promise.

Each promisor may compel contribution.—Each of two or more joint promisors may compel every other joint promisor to contribute equally with himself to the performance of the promise, unless a contrary intention appears from the contract.

Section 41 — Note 1 (contd.)

[But see AIR 1966 Mad 381 (384) = (1966) 2 Mad LJ 16 (DB).]

(12) Suit for damages against (1) Union of India, (2) Railway Administrations and (3) several insurance companies — Insurance companies settling suit claim by paying full amount on condition that plaintiff would prosecute suit against defendants 1 and 2 and pay to them whatever he would recover from defendants — Held, on reading clause in policy of Insurance, that settlement was conditional and Section 41 of Contract Act had no application. (1968) 2 Mys LJ 240 (242).

Section 42 — Note 1

(1) Under Section 42, the obligation to perform the promise of the promisor devolves jointly on all his representatives and on the death of one of them, his heirs are not discharged but take their place with reference to the liability. 1896 Pun Re No. 53, p. 148 (151) (DB).

(2) Under the English common law the rule of survivorship applies to the case of joint creditors as well as to the case of joint debtors, but under Section 42 and S. 45 of the Indian Contract Act the rule of survivorship is not recognised and the devolution of joint liabilities and rights is governed by the provisions of Sections 42 and 45 respectively. AIR 1948 Nag 279 (282) = ILR (1947) Nag 553 (DB).

(3) The rule of survivorship among joint tenants is modified by Sections 42 and 45, Contract Act which puts the representative of the deceased joint tenant in his place so long as there is such a representative. On failure of such a representative the rule of survivorship among joint tenants applies. AIR 1930 All 350 (352) = 52 All 548 (DB) ** AIR 1935 All 975 (976).

(4) It is clear from Sections 42, 43 and 44 of the Contract Act, that where there are joint promisors there is an implied contract amongst them, inter se, to contribute equally towards the performance of the joint promise. That implied contract of contribution is independent of the contract as between the joint pro-

misors and the promisee. The promisee cannot in any way absolve a joint promisor from his liability to contribution so far as his other joint promisors are concerned who may have performed the promise. AIR 1949 Cal 242 (243) = ILR (1949) 2 Cal 325.

SECTION 43 — SYNOPSIS

1. Scope.
2. Enforcement of joint contracts.
3. Contribution.
4. Joint decree for costs — Contribution.
5. Co-heirs of a promisor.
6. Co-tenants.
7. Partners.
8. Joint tort-feasors.
9. Accord and satisfaction by one.

1. Scope.— (1) Sections 43, 69, 70 do no more than state in written form what was law before the Act. (1893) 9 Cal 395 (397) (DB).

(2) Where subsequent to the acceptance of a joint tender for the right to vend liquor the Government permitted one of the persons who made the tender to withdraw it was held that in view of the principle underlying Sec. 43 of the Contract Act there was nothing in law which prevented the Government from allowing the withdrawal and accepting performance from the other. 1958 Andh LT 696 (698).

2. Enforcement of joint contracts.— (1) Joint and several liability may arise from contract or for a tort but for such liability to come into existence there must be a joint contract or a tort committed jointly as the case may be. So far as the conditions of such liability are concerned they are identical against persons whose liability may be joint and several. ILR (1954) 6 Assam 53 (57).

(2) Whether a sale-deed is joint transaction making all vendees jointly liable or is really several transaction making each vendee responsible for his own share only is a question of fact depending on the intention of the parties. AIR 1930 Lah 806 (807) (DB).

Sharing of loss by default in contribution.—If any one of two or more joint promisors makes default in such contribution, the remaining joint promisors must bear the loss arising from such default in equal shares.

Explanation.—Nothing in this section shall prevent a surety from recovering from his principal, payments made by the surety on behalf of the principal, or entitle the principal to recover anything from the surety on account of payments made by the principal.

Illustrations

(a) A, B and C jointly promise to pay D 3,000 rupees. D may compel either A or B or C to pay him 3,000 rupees.

(b) A, B and C jointly promise to pay D the sum of 3,000 rupees. C is compelled to pay the whole. A is insolvent, but his assets are sufficient to pay one-half of his debts. C is entitled to receive 500 rupees from A's estate and 1,250 rupees from B.

(c) A, B and C are under a joint promise to pay D 3,000 rupees. C is unable to pay anything, and A is compelled to pay the whole. A is entitled to receive 1,500 rupees from B.

(d) A, B and C are under a joint promise to pay D 3,000 rupees. A and B being only sureties for C. C fails to pay. A and B are compelled to pay the whole sum. They are entitled to recover it from C.

[*] Substituted for "one" by the Amending Act, 1891 (12 of 1891).

Section 43 — Note 2 (contd.)

(3) Where the debts are jointly incurred the liability of each is for the whole amount. AIR 1928 Lah 962 (963) ** AIR 1933 Pat 24 (25) (DB) ** AIR 1957 Trav-Co 305 (307). (Mother executing mortgage in her own right and also on behalf of minor children as their guardian — Mother is liable for the entire whole debt and not only for that part which was binding on the minors — Hence decree should be passed against her for the full amount secured by mortgage.) ** AIR 1954 Ajmer 7 (2) (8). (Joint indemnity bond executed by two persons — Liability of each under the bond is joint and several — Hence decree on bond need not specify the liability of each.) ** 78 Mad LW 157 = 1965 Mad WN 117.

[See also AIR 1969 SC 69 (72) = (1968) 3 SCR 759.]

(4) Under the provisions of Sec. 43 it is quite within the competency of the lender to sue all or any of the joint promisors as he may choose. AIR 1924 Pat 164 (165) = 2 Pat 466 (DB). (Nothing in Civil P. C. goes against adopting such a course.) ** AIR 1957 Raj 287 (273) = ILR (1957) 7 Raj 616. (Decree-holder who holds a decree under which several persons are liable jointly and severally can enforce it against any one of the judgment-debtors who are in the position of joint-promisors.) ** AIR 1951 Mad 239 (240) (DB). (Fact that the person sued has as between the joint promisors undertaken liability only as a surety does not detract from the right of the creditor to recover from him the entire debt.) ** AIR 1950 Orissa 6 (9) = ILR (1949) 1 Cut 351 (DB). (Liability under mortgage joint and several —

Liability becoming unenforceable against some mortgagors on account of bar in law — Mortgagee can enforce entire mortgage against others and properties in their hands only.) ** AIR 1949 Pat 184 (190) (DB). (Caste organisation or sabha passing resolution — Defendants, members of the sabha compelling plaintiffs to deposit certain money pending arbitration proceedings in accordance with the resolution and also jointly promising to return the money after completion of the proceedings — Held Section 43, Contract Act applied to case and suit against them to recover the amount was maintainable.) ** AIR 1964 Cal 196 (206) (DB). (Vessel of plaintiff requisitioned by Government under Vessel of India Rules — Held, liability of Government for compensation for use of vessel was statutory and not contractual — Cause of action arose partly within Dominion of India and partly within Dominion of Pakistan — Liability was joint liability and could be enforced against any one of the Dominions.)

[See also AIR 1948 Nag 44 (47) = ILR (1947) Nag 381. (Decree charging several properties — Charge holder can proceed to enforce the charge against any item just as he can against any person liable to him for a debt jointly with another.)]

(5) Unlike English law, the Indian law makes all joint liability, joint and several in the absence of any agreement to the contrary. It is therefore open to the promisee to sue any one or some of the joint promisors and it is no defence to such a suit that all the promisors must have been made parties. AIR 1949 FC 211 (218) = 1949 FCR 379.

Section 43 — Note 2 (contd.)

(Suit for specific performance of part of contract, and willing to pay entire consideration — Suit maintainable.) ** AIR 1934 Pesh 94 (95) ** AIR 1956 Nag 111 (112) = ILR (1955) Nag 33 (DB). (Decree against joint promisors — Death of one joint promisor during pendency of appeal — Appeal abates only against him and can be continued against the rest — Decree in appeal can be executed against surviving promisor because his liability is joint and several.) ** AIR 1927 Pat 426 (427) = 7 Pat 353 (DB). (It is for the joint promisor who wants to resist the suit in which his co-sharer is not impleaded to show the existence of a definite contract that each promisor is not separately liable.) ** 1905 Pun Re No. 81 p. 254 (255) (DB).

(6) A joint contract unenforceable against one on the ground of his not signing it can be enforced against the other signing and receiving consideration. AIR 1926 Nag 196 (196) ** (1962) 2 Andh LT 61. (Consideration paid to any of joint promisors is sufficient to support promise of all joint promisors.)

(7) Suit against Company illegally formed — Liability is joint and several — Suit can be maintained against some members. AIR 1930 Bom 5 (11) = 53 Bom 652 (DB).

[See however AIR 1961 Cal* 393 (395). (Suit against unregistered society — Loan incurred by secretary on behalf of society — Suit by creditor to recover the money due on promotes should be brought against all the members of the society.)]

(8) Where one of the directors of a company alone appointed the broker and entered into the contract it was held that he could be made liable on its basis and the fact that the other two co-directors had also been impleaded and the suit had been dismissed against them could not in any way affect the liability of the director who entered into contract. The fact that the earnest money was accepted by the other directors who passed a receipt for it, was immaterial, those directors being the joint promisors. AIR 1959 All 29 (31) (DB).

(9) Insolvency of one of the joint promisors does not bar a suit as against other joint promisors for recovery of a debt. AIR 1934 Pat 43 (43) ** AIR 1935 Mad 1055 (1055) ** AIR 1919 Cal 781 (782) (DB).

(10) One joint promisor cannot plead minority of the other as a bar to the promisee's claim against himself. AIR 1916 PC 2 (3) = 39 Mad 409 = 43 Ind App 99 ** AIR 1934 Pat 663 (664) = 14 Pat 275 (DB) ** AIR 1924 Lah 146 (147) = 4 Lah 334 (DB) ** AIR 1963 Cal 325 (328) = (1963) 67 Cal WN 110 (DB).

(11) An agency created by a joint contract is joint and several according to Section 43, Contract Act and is not put to an end by the death of the joint agent. After his death the surviving agent would continue to be liable to account and can be sued. (1913) 17 Cal L Jour 201 (204, 205) (DB). (Suit for accounts against the surviving agent is governed by Article 116, Limitation Act.)

(12) Where A who consigned coal to B under a contract arranged with the Railway administration that it should collect both the freight and the cess payable under the Coal Production Fund Ordinance, 39 of 1944 from B when the consignment is delivered to him it was held that both A and B were jointly and severally liable for the payment of the cess and hence the suit for the recovery of the cess was maintainable against A as well. AIR 1958 Madh Pra 425 (432) (DB).

(13) The creditor gets a right to proceed against any one of his joint debtors, and such right must be exercised before the creditor brings his suit. ('96) 1896 Pun Re No. 53, p. 148 (153) (DB) ** AIR 1961 Cal 393 (395).

[See however AIR 1921 Lah 357 (358) (DB). (Death of some defendants during pendency of suit — Suit could be proceeded with without bringing their legal representatives on record against the remaining defendants — Option under Section 43 can be exercised at any stage of the suit.)]

(14) Where a promisee chooses to proceed against one co-promisor, and obtains judgment he cannot proceed against the other co-promisors, or co-contractors. AIR 1936 Bom 344 (345) = 60 Bom 954 (DB). (Per Beaumont C. J., Rangnekar J., Dissenting.) ** (1935) 62 Cal 612 (616) (DB) ** AIR 1917 Bom 268 (273). (Agent and principal — Party dealing through the agent can sue both or either of them — Suit against only one pursued to judgment — Suit against other will not lie afterwards.) ** AIR 1917 Bom 262 (264) ** (1877-78) 3 Cal 353 (359, 360, 362) (DB) ** (1862) 5 Mad 37 (46) (DB).

[But see AIR 1934 Pat 52 (53) ** AIR 1933 Bom 407 (409) ** (1910) 33 Mad 317 (320) (DB) ** (1900) 22 All 307 (319) (DB).

(15) When a suit against a number of joint promisors or joint contractors has been dismissed, the plaintiff cannot prosecute an appeal against only some of them renouncing his claim against the rest or their legal representatives. AIR 1961 Punj 555 (557) = 63 Pun LR 695 (DB).

(16) Sale of land by members of joint Hindu Family — Shares of members determined — Contract not indivisible —

Section 43 — Note 2 (contd.)

Decree for specific performance of contract granted against the members to the extent of their share. (1966) 32 Cut LT 181 (183) = ILR (1965) Cut 885.

3. Contribution.— (1) The relief of contribution contemplated under Sec. 43 is distinct from the relief of reimbursement provided for by Section 69 of the Act. Contribution is between persons equally bound while reimbursement is between a person interested in payment and a person bound to pay. AIR 1950 Pat 212 (214) (DB) ** AIR 1957 Raj 267 (274) = ILR (1957) 7 Raj 616. (Claim for "reimbursement" among joint promisors who are all equally bound to perform the promise cannot lie.) ** (1967) 2 Andh WR 349 = (1967) 2 Andh LT 283 ** AIR 1961 Pat 103 (104-105).

(2) "Contribution" signifies payment by each of the parties interested of his share in any common liability. Mutuality is the test of contribution. AIR 1934 Cal 626 (626) (DB) ** AIR 1915 Cal 278 (279) (DB).

(3) Persons who are liable under a joint decree are bound to contribute to the extent of their respective shares towards the discharge of the decree. AIR 1929 All 792 (793) (DB) ** AIR 1957 Raj 267 (273) = ILR (1957) 7 Raj 616. (Persons jointly and severally liable under a decree are in the position of joint promisors.) ** AIR 1931 Pat 234 (235) = 10 Pat 168 (DB). (Co-debtor who is able to show that the person paying had joint money sufficient to discharge decree is not under any liability to contribute.) ** AIR 1922 Lah 148 (149).

(4) A person who pays in excess of his own share towards a joint liability must be considered in so far as the excess is concerned to have paid on behalf of his co-debtors. AIR 1954 Trav-Co 499 (503) = ILR (1954) Trav-Co 720. (Suits for recovery of such excess from co-debtors is a suit for contribution.) ** 1946 Jaipur LR 375 (377).

(5) The right to contribution is an equitable right which can be availed of only by a co-promisor who has paid more than his share in satisfaction of the joint liability and not by co-promisor who has not paid anything in excess of his share. 1946 Jaipur LR 375 (377) ** (1873) 11 Beng LR 76 (81) (DB). (Payment by promisor would not by itself entitle him to claim contribution from his co-promisors unless the payment is in excess of his shares of the joint liability.)

(6) Principal and Surety — Where one of the joint promisors is only a guarantor or surety he is not liable to pay any contribution to the principal debtors themselves. AIR 1951 Mad 239 (241) (DB).

(7) A mere undertaking to pay the amount at some future date is not equi-

valent to payment. AIR 1925 Mad 261 (263) = 48 Mad 693 (DB).

[See also (1873) 11 Beng LR 76 (82) (DB). (Plaintiff and defendants co-principals each bound to pay his own share of debt — Plaintiff not even paying his own share of debt — His suit to ask for contribution from defendants is premature.)]

(8) Payment by one of the co-debtors which does not exonerate other co-debtors from liability does not give a right of contribution to the co-debtor making such payment. AIR 1924 Mad 279 (280) (DB).

(9) The fact that the promisor claiming contribution made the payment without consulting his co-promisor does not in any way affect his right to the contribution. AIR 1933 Mad 382 (383).

(10) In order to entitle a promisor paying a debt to claim contribution from his co-promisor it is sufficient if the debt was alive when he paid it. It is not necessary that the liability of the co-promisor was also alive then. AIR 1954 Trav-Co 499 (502) = ILR (1954) Trav-Co 720. (Joint executants of hypothecation bond — Death of one during pendency of suit on bond — Abatement of suit as against him does not exonerate his heirs who have taken the benefit of his share of the property from their liability to contribute to decretal debt when recovered from the joint executant by execution.) ** AIR 1955 Cal 62 (63). (A and B jointly and severally liable for payment of putni rent — Suit for recovery of rent as against A only — Defaulting putni when brought to sale A paying off the decree — Fact that on the date of payment claim for rent was barred against B would not excuse him from payment of his share to A.) ** AIR 1929 Mad 309 (310) (DB). (Debt kept alive by acknowledgment — Amount recovered from joint promisor under decree — Other promisor is bound to pay his share.) ** AIR 1915 Mad 675 (677, 679) = 39 Mad 288 (DB). (Promissory note jointly executed by two — Liability kept alive beyond three years against one only while it is barred by limitation against other — Former when compelled to pay under decree is entitled to contribution from latter although the decree exonerated him on the ground of limitation.) ** (1897-1901) Upp Bur Rul 331 (332). (One joint promisor compelled to pay debt — Liability of other promisors to contribute is not excused by the reason that as between them and the creditor the debt was barred by limitation.) ** AIR 1969 Cal 390 (393) ** AIR 1965 Andh Pra 98 (101) = ILR (1963) Andh Pra 931 (DB). (Joint-debtor satisfying decree passed against him — Co-promisors are still liable to contribute and cannot escape

Section 43 —Note 3 (contd.)

liability though they are exonerated in prior proceedings.)

(11) The liability of the joint promisors to contribute equally to the performance of the promise is based on a presumed implied contract amongst them and that liability cannot be affected by any act of the promisee absolving one joint promisor of his liability to him for the debt. AIR 1949 Cal 242 (244) = ILR (1949) 2 Cal 325 ** AIR 1957 Raj 267 (273) = ILR (1957) 7 Raj 616. (One of judgment-debtors jointly and severally liable under decree released by decree-holder — Right of judgment-debtor paying off decree to contribution not affected.)

[See however AIR 1960 Mad 117 (119, 120) = (1959) Mad LJ 555 (DB).]

(12) Where a joint debtor sues for contribution against his co-debtor alleging that he has paid up a decree debt due by them jointly, it is open to him to enforce the defendant's liability on the strength of the original liability, even if the decree as such is bound to be not binding on the defendant. AIR 1934 Mad 386 (387, 388) = 57 Mad 973 (DB) ** (1911) 38 Cal 1 (6, 7, 11, 12). (A co-tenant being himself liable to pay the whole rent of the holding to the landlord must pay his share of the decree for rent even though he was not a party, to the suit in which the landlord obtained his decree. Hence the judgment-debtor co-tenant who paid the decree is entitled to recover it from him.) ** AIR 1965 Andh Pra 98 (100, 101) = ILR (1963) Andh Pra 931 (DB). (Right of judgment-debtor discharging entire joint decree — Payment of decretal amount is condition precedent to right to sue — Judgment debtor fully satisfying decree — He can sue co-promisors for contribution.)

(13) Where a joint decree was scaled down under the C. P. and Berar Relief of Indebtedness Act, 14 of 1939, at the instance of two of the judgment-debtors and the third judgment-debtor was compelled to pay the full decretal debt it was held that he was entitled to recover from the other two their contribution towards the debt unaffected by the discharge in the relief Court before which he was no party. AIR 1948 Nag 292 (293) = ILR (1947) Nag 881.

(14) There is no provision in the Administration of Evacuee Property Act empowering Custodian to determine a claim made against an evacuee by a co-debtor who has paid off a joint decree and wants to compel the evacuee to contribute his share of the decretal amount — Jurisdiction of Civil Court to entertain such a claim is not barred. 1967 All LJ 799.

(15) Barring provisions to the contrary in the contract itself the right of

a promisor who pays more than his share of a joint liability to compel contribution from his co-promisors is an absolute right and Courts have no option in the matter of giving effect to the right. AIR 1934 Pat 411 (413) (DB).

(16) In a suit for contribution all persons whose presence would be necessary to ascertain satisfactorily the liabilities of the parties must be impleaded. If any such necessary party is not so impleaded the suit would fail *in limine*. AIR 1940 Pat 119 (121) (DB).

(17) All partners must be joined in suit for contribution by one or more partners if partnership has come to an end and no adjustment has been made. AIR 1916 Lah 9 (9).

(18) For contribution, a *prima facie* case is made by the production of the judgment and the certificate of satisfaction. AIR 1934 Oudh 437 (439).

(19) Where on the facts set out by a plaintiff it is clear that he is entitled to contribution the method of computation is a matter of law and it is for the Judges to apply the law to the facts stated and give such relief as is appropriate to the case. AIR 1952 SC 47 (51) = 1952 SCR 179.

(20) Where one of the joint promisors liable to contribute does not or cannot pay his proportion of debt his amount of debt has to be divided between other contributories only in the proportion of the benefits which each one of them has received at the time of the original contract and not in equal proportion. AIR 1951 Mad 239 (242) (DB).

(21) No doubt the question of contribution is dealt with both by Section 43 of the Contract Act and Sec. 82 of the Transfer of Property Act but when that question arises in connection with a mortgage it will be governed only by Section 82, T. P. Act. AIR 1952 SC 47 (50) = 1952 SCR 179. (Section 43, Contract Act being only the general law will be excluded by Section 82, T. P. Act which is the special law dealing with the matter.)

(22) As to liability of co-sureties to contribute equally as between themselves, see Section 146.

4. Joint decree for costs — Contribution.— (1) Where a decree for costs does not indicate the proportions in which the costs are to be borne by the judgment-debtors, the rule is that such a decree imposes a joint and several liability on all the judgment-debtors. AIR 1933 Pat 24 (25) (DB).

(1-A) *Prima facie* a right of contribution exists between persons against whom a joint decree for costs has been passed, and it is for the defendant seeking to avoid the liability to show some equity which entitles him to exemption.

Section 43 — Note 4 (contd.)

AIR 1961 Pat (103, 106) ** AIR 1963 Pat 227 (228, 229).

(2) Section 43, Contract Act, does not generally apply to recovery of contribution in respect of costs imposed by a Court of law, on the principle that the liability arises out of a joint wrong. AIR 1950 Pat 212 (215) (DB).

(3) A co-defendant paying the full amount of costs cannot claim contribution unless some equity exists in his favour. In this respect a decree for costs stands on a different footing from a decree for payment of money arising out of a joint liability. AIR 1932 Mad 146 (147) ** AIR 1961 Pat 103 (105).

(4) On broad grounds of justice and equity there appears no reason why a decree for costs should be excepted from the doctrine of contribution. The only ground on which such an exception could possibly be based would be the doctrine that no contribution lies between joint tort-feasors. AIR 1921 Oudh 128 (129) = 24 Oudh Cas 148 (DB) ** AIR 1950 Pat 212 (215) (DB). (Section 43 does not exclude contribution in the case of costs imposed by Courts on equitable grounds.)

(5) Where in a suit in which both the defendants were equally delinquent in taking up the defence and a decree for cost is passed against them and one of them pays the same, he is entitled to contribution from the other. AIR 1935 Mad 347 (349) ** AIR 1950 Pat 212 (215) (DB) ** AIR 1938 Lah 579 (580) ** AIR 1936 Mad 167 (168, 169) = 59 Mad 250 (DB).

(6) M borrowing sum on simple mortgage from N and S — Portion of amount paid by N and rest by S — Mortgage decree passed and property put to sale — Suit by R against N and S for declaration of title to half property — Decree with costs — Costs recovered only from S — Suit by S against N for contribution — S and N held liable for costs only in proportion to their interest in property affected by R's suit and not equally. AIR 1938 All 631 (632) = ILR (1938) All 950.

(7) Defendants neither taking interest nor defending suit are equitably entitled to exemption from contribution for costs in joint decree against them. AIR 1929 All 654 (655) ** AIR 1946 Cal 63 (65) ** AIR 1937 All 227 (228) ** AIR 1963 Pat 227 (228, 229).

(8) Mere execution of mortgage to satisfy the joint decree for costs does not entitle a defendant to claim contribution from other — Suit for contribution is premature until he redeems mortgage or mortgaged property is sold in satisfaction of mortgage. AIR 1936 Oudh 253 (255) = 12 Luck 45 (DB).

(9) If the decree awarding costs renders one of the defendants alone responsible for the payment of the costs awarded he cannot claim contribution from his co-defendants. If however the decree had made the costs the joint liability it would be otherwise. AIR 1955 Mad 721 (721).

5. Co-heirs of a promisor.— (1) Section 43 applies only where two or more persons have made a joint promise and not where two or more persons have become jointly interested by inheritance in a contract made by a single person. AIR 1929 Lah 783 (784) (DB) ** AIR 1957 Andh Pra 688 (690) ** AIR 1918 Cal 512 (514) (DB) ** AIR 1917 Cal 829 (829) (DB) ** AIR 1967 Orissa 158 (160) = 33 Cut LT 193 (DB). (AIR 1917 Cal 829 held no longer good law, in view of AIR 1925 Cal 1056 (FB).)

[See however AIR 1957 Trav-Co 186 (189) (DB). (Devolution of mortgaged property on heirs of mortgagor — Mortgagee can enforce the mortgage against the entire property or against the share in the hands of one of the heirs.) ** AIR 1955 Raj 11 (14): ILR (1955) 5 Raj 95. (Principle of section may be applied even to co-heirs, at least those like the sons of a deceased Hindu father.)]

(2) Suit for rent is maintainable against some of the heirs or successors-in-interest of deceased tenant without bringing all on the record. AIR 1925 Cal 1056 (1058) : 53 Cal 197 (FB). (Ghosh and Mukherjee JJ. dissenting.)

(3) Heirs of joint tenants are not each of them liable for whole rent. (1910) 12 Cal L Jour 642 (644).

6. Co-tenants. — (1) In view of Section 43, a landlord can sue some of his tenants for the whole rent of a holding. (1938) 17 Pat 662 (665) (DB) ** AIR 1935 Pat 146 (147) (DB) ** AIR 1927 Pat 426 (429) = 7 Pat 353 (DB) ** AIR 1927 Pat 2 (4) (DB) ** AIR 1914 Lah 500 (501) = 1914 Pun Re No. 107 ** 1968 Pat LJR 118 (120) (SC).

(2) Where one of the two co-tenants dies, a suit by the landlord against all the heirs of the deceased tenant for the entire rent is maintainable without making the other tenant a party thereto. AIR 1923 Cal 615 (618) (DB) ** AIR 1924 Cal 165 (166) = 50 Cal 737 (DB).

(3) It is true that in the case of a joint contract the cause of action for a suit to enforce the promise is exhausted by a judgment obtained against one of the promisors only and hence no second suit against the co-promisor could be brought thereafter. But as arrears of rent when they fall due furnishes a separate cause of action in respect of each year the above rule would not affect the second suit of the landlord

Section 43 — Note 6 (contd.)

against certain co-tenants for the recovery of arrears of rent pertaining to subsequent years merely because in the previous suit against another co-tenant he had obtained a judgment for the arrears of a previous year. AIR 1947 Cal 11 (13, 14) = ILR (1946) 2 Cal 605 (DB).

(4) Where the plaintiff and the defendant are in the position of joint tenants and are therefore joint promisors as regards the rent payable to the landlord, the plaintiff who has paid the entire rent is entitled under Section 43, Contract Act, to contribution from the defendant. AIR 1950 Pat 212 (214) (DB).

(5) A sharer in a patni lease discharging the decree for rent obtained against him by the landlord is under Section 43 entitled to recover by way of contribution from his co-sharer his share of the rent even though the claim of the landlord for rent against such co-sharer was barred by limitation. AIR 1955 Cal 62 (63).

(6) Joint lessees — Decree against for arrears of rent — Two groups having equal rights in the lease — One group making payments not exceeding their half share before Madras Act IV of 1938 came into force — Subsequent scaling down reducing the balance due — Contribution cannot be claimed from joint lessees for the amount paid before the Act came into force by the other lessees. AIR 1945 Mad 266 (266) = ILR (1946) Mad 167.

7. Partners. — (1) Section 43 applies as much to partners as to other co-contractors. AIR 1933 Bom 407 (409) ** AIR 1927 Lah 819 (821) = 9 Lah 217 (DB) ** (1898) 21 Mad 256 (257) (DB) ** (1893) 17 Bom 6 (11) (DB) ** (1881-82) 6 Bom 700 (702) ** AIR 1964 Tripura 13 (15) ** AIR 1969 J & K 96 (97, 98).

(2) Cause of action against firm is a joint cause of action against all partners and each partner is jointly and severally liable for the whole claim. AIR 1926 Sind 75 (76).

(3) Loan taken by firm — Pro-notes signed by principal partner — Principal partner can be made to pay. AIR 1924 Lah 148 (149) = 4 Lah 239 (DB).

(4) Suit instituted against partners in private capacity, if unsuccessful, cannot be continued against them as firm and S. 43 has no application to such a case. AIR 1915 Lah 167 (168) = 1915 Pun Re No. 76 (DB).

(5) The remedy of a partner who has been compelled to pay the whole or more than his share of the partnership debt is to sue for account and his suit for contribution against his co-partners is not maintainable. AIR 1949 Mad 109 (2) (111, 112) (DB) ** AIR 1954 Mad 1101 (1107) = ILR (1954) Mad 1160 (FB). (Subsisting partnership — Suit for con-

tribution for payment of particular items in excess of their shares is not open to partners even though the payment had been made under decrees passed on those items of liability — AIR 1933 Mad 755, **Overruled**; AIR 1939 Mad 508, **Impliedly overruled**.) ** AIR 1946 Oudh 118 (120) = 21 Luck 295. (Claim for contribution in respect of a debt due from partnership which is paid by one partner is based on the plaintiff's right as partner to receive contribution, which is also subject to the prepayment of the debts due by the partnership and to the reciprocal rights possessed by the other partners which can be determined only in a suit for general accounts.)

[But see AIR 1942 Nag 72 (72, 73) = ILR (1942) Nag 340 ** AIR 1921 Nag 45 (46).]

(6) A claim for contribution against the co-partners based on the contract of partnership would be excluded by the general doctrine that as between partners there can be no claim for contribution. AIR 1939 Mad 508 (508) ** AIR 1946 Oudh 118 (120) = 21 Luck 295. (No contribution is allowed by reason of the contract of partnership between parties in respect of individual transaction ignoring other partnership transactions — But a claim based on equity and not on any statutory provision has to be distinguished from such claims.)

(7) Where a partner had to pay under a decree passed for a partnership debt after the dissolution of the firm but by then his right to claim general accounting had become barred it was held that his suit for contribution against the other partners was not maintainable. AIR 1954 Mad 1101 (1110) = ILR (1954) Mad 1160 (FB). **Held** Section 43, Contract Act conferred no right on him and the fact that the liability had become merged in a decree did not make any difference — AIR 1939 Mad 228, **Overruled**; 32 Mad 203, 34 Mad 112 and AIR 1914 Mad 295 **held impliedly overruled** by AIR 1922 PC 115.)

(8) Where a partner who contested in his suit for dissolution the binding nature of a mortgage of the partnership assets agreed under a compromise to recognize the validity of the mortgage and pay a certain amount to have his share of the assets released from the mortgage claim it was held that the other partner who had to pay off the entire mortgage was entitled to recover contribution upto the amount promised under the compromise even though subsequent to the compromise the mortgage had been declared by the Court to be not binding on the partner who disputed it. AIR 1914 PC 10 (11) = 11 Nag LR 53.

(9) A partner to whom a bill is endorsed by his firm is himself a co-pro-

44. Effect of release of one joint promisor.—Where two or more persons have made a joint promise, a release of one of such joint promisors by the promisee does not discharge the other joint promisor or joint promisors; neither does it free the joint promisors so released from responsibility to the other joint promisor or joint promisors.*

[*] See Section 138.

Section 43 — Note 7 (contd.)

misor who could be compelled to contribute towards the discharge of the bill by the other partners and therefore his action against the firm on the bill will not be maintainable. AIR 1951 Cal 466 (468).

8. Joint tort-feasors. — (1) If an act is manifestly unlawful, or the doer of it knows it to be unlawful as constituting either civil wrong or a criminal offence, he cannot maintain an action for contribution or indemnity against the liability which results therefrom. An express promise of indemnity to him for the commission of such act is void. AIR 1932 Mad 1 (5) (FB) ** AIR 1936 Pat 49 (51) = 15 Pat 219 (DB) ** (1902) 25 Mad 599 (601, 602) (DB) ** AIR 1961 Pat 103 (106).

[But see AIR 1953 Cal 513 (514) = ILR (1953) 1 Cal 249 (DB). (Defence that plaintiff is a joint tort-feasor is no ground for refusing relief where facts brought before Court show defendant as more blameworthy out of the two.) ** AIR 1951 All 774 (790) = ILR (1952) 1 All 759 (FB). (Contribution should be allowed where equitable considerations warrant — AIR 1932 All 334 (DB), Overruled.)]

(2) Person in wrongful possession cannot bring suit for contribution if payment was made in support of his own title. (1911) 13 Cal L Jour 646 (647) (DB).

(3) Where joint debtors (who were joint tort-feasors in the suit) have under compromise in Court contracted to pay a sum to plaintiff and some of them pay the sum and sue the rest for contribution, their claim cannot be resisted on the ground that all of them were joint tort-feasors before the compromise. AIR 1916 All 160 (161) = 38 All 237 (DB) ** AIR 1963 Orissa 140 (142) = ILR (1963) Cut 313. (Joint tort-feasors may be sued for damages either jointly or severally.)

9. Accord and satisfaction by one. —

(1) Under the English Law, accord and satisfaction made by one of several parties jointly liable or jointly and severally liable to the same creditor for the same debt, discharges the claim of the creditor against all. There is no reason why this principle would not apply to cases of joint and several liability under Section 43, Contract Act. AIR 1942 Cal 87 (91) = ILR (1941) 2 Cal 237 (DB).

SECTION 44 — SYNOPSIS

1. Scope and applicability.
2. Co-mortgagors.
3. Co-heirs.

4. Co-judgment-debtors.

5. Decree against one co-promisor — Effect.

6. Contribution, right of.

1. Scope and applicability. — (1) English law doctrine that release of one of several joint debtors releases all from liability has no application to India. (1911) 14 Cal L Jour 354 (357, 358) (DB).

(2) Section 44 applies as much to partial discharge as to complete discharge. (1942) 46 Cal WN 234 (237, 238) (DB) ** AIR 1948 Nag 279 (282) = ILR (1947) Nag 553 (DB).

(3) Section means generally, that release to one of several contractors does not discharge co-contractors, and applies as well to a discharge after breach as to a release before breach. (1879) 4 Cal 336 (338).

(4) The provisions of Section 44 are applicable to the co-parceners of a joint Hindu family in spite of the dissolution of the joint family unless the creditor has agreed to the arrangement between the co-parceners that one of them alone would pay the debt. 1949 Bur LR (SC) 46 (50).

2. Co-mortgagors. — (1) Release by the creditor of one of the mortgagors jointly and severally liable, has not the effect of releasing others. AIR 1917 Cal 502 (505) = 44 Cal 162 (DB).

(2) The qualified release of a part of the mortgage security in favour of some of several joint mortgagors, resulting from the mortgagee not seeking to enforce his right as against any surplus sale proceeds of such part when sold in satisfaction of a prior mortgage, ought not to affect the mortgagee's right. (1903) 30 Cal 953 (958) (DB).

(3) Where five brothers had made themselves jointly liable for a sum of money under a bond and mortgaged certain village as security for the debt and the mortgagee having subsequently taken a separate bond from each of the two brothers for one-fifth of the whole amount, sought to recover the remaining three-fifths of the said amount from remaining three brothers: **Held** that any one of the five might be sued for the whole amount and the promisee was entitled to recover the three-fifths from the remaining three brothers. (1876) 25 Suth WR 419 (419) (DB).

(4) Mortgage suit — Preliminary decree against joint owners — Plaintiffs applying for final decree — B, one of joint owners, applying to Debt Relief Court for determination of debt — Final

45. Devolution of joint rights.—When a person has made a promise to two or more persons jointly, then, unless a contrary intention appears from the contract, the right to claim performance rests, as between him and them, with them during their joint lives, and, after the death of any of them, with the representa-

Section 44 — Note 2 (contd.)

decree proceedings stayed — Debt scaled down by such Court and B allowed to pay same in instalments — Plaintiffs applying for revival of final decree proceedings — Relief Court's order held did not release other defendants from liability. AIR 1947 Nag 61 (67) = ILR (1947) Nag 1 (FB).

3. Co-heirs. — (1) Claim for rent barred against some co-heirs — Remaining heirs not separately liable for entire rent. AIR 1919 Cal 861 (862) (DB).

4. Co-judgment-debtors. — (1) The release of a joint judgment-debtor does not operate as a release of the others. AIR 1944 Cal 328 (330) (DB) ** AIR 1933 Lah 505 (507) ** AIR 1924 Cal 209 (211) = 50 Cal 718 (DB) ** AIR 1915 Mad 934 (936) = 39 Mad 548 (DB) ** (1880) 6 Cal LR 212 (214) ** 1965 Cur LJ 485 (Punj).

[See also AIR 1927 All 830 (831). (Joint decree against father and son — Father becoming insolvent and compounding with decree-holder — Son is liable only for such portion of decretal amount as had not already been realised by decree-holder in pursuance of the composition.)]

(2) Where some of the original defendants against whom joint decree for costs was passed died during the pendency of a Privy Council appeal and no substitution was made it was held that it did not amount to a release by the decree-holder of the interests of those judgment-debtors and the interests of all the other judgment-debtors were not also released from all liability under the decree. AIR 1933 Pat 24 (25) (DB).

(3) Release granted to one of several judgment-debtors without any intention to release others will discharge others only pro tanto and not in respect of the entire amount decreed. AIR 1918 Cal 51 (53) (DB).

5. Decree against one co-promisor — Effect. — (1) Where a promisee chooses to proceed against one co-promisor, and obtains a judgment, he has no right to proceed against the other co-contractors or co-promisors. AIR 1936 Bom 344 (345) = 60 Bom 954 (DB).

(2) Where in case of a joint promissory note one of the executants makes certain payment and the promisee agrees to discharge him from his liability, only reserving his right to sue the co-executant for the balance the co-executant is liable for the balance subject to his right to sue his other co-executant for contribution. AIR 1937 Rang 137 (137, 138).

(3) In absence of contract to the contrary, joint executants of pro-note, who have undertaken unconditionally to discharge obligations under pro-note, are jointly and severally liable to discharge liability under pro-note — Some of them cannot maintain the position that they are only sureties. AIR 1966 Ker 303 (304) = 1966 Ker LT 1145 (DB).

6. Contribution, right of. — (1) Where the promisee releases one or more of the joint promisors, the liability as between joint promisors to contribute equally does not end. (1941) 45 Cal WN 357 (361) ** AIR 1957 Raj 267 (274) = ILR (1957) 7 Raj 616.

(2) A case may not be covered by Section 69 of the Contract Act, but that is not to say that the claim for contribution can be negated on this score if it otherwise arises under Sections 43 and 44. AIR 1957 Raj 267 (274) = ILR (1957) 7 Raj 616.

(3) Decree for arrears of putni rent against co-sharers — Execution of decree postponed against one co-sharer by reason of Section 10-C, Bengal Court of Wards Act — Such co-sharer is not absolved from liability to contribute to other co-sharer who pays entire amount. AIR 1949 Cal 242 (244) = ILR (1949) 2 Cal 325.

(4) A case for contribution arising out of excess payment — could and would come into existence only when such excess payment had been made and the limitation would begin to run from the date of such payment. AIR 1957 Raj 267 (275) = ILR (1957) 7 Raj 616.

SECTION 45 — SYNOPSIS

1. Scope.

2. Discharge given by one joint promisee alone.

3. Suit by joint promisees.

4. Devolution of joint rights.

5. Partnership cases.

1. Scope. — (1) It is doubtful whether Section 45 applies to claim for possession of land. Where, however, suit is really for specific performance of contract, defendant may plead Section 45 as bar. 1912 Pun LR No. 49 p. 150 (158) = 1911 Pun Re No. 57, p. 220 (DB).

(2) The words "as between him and them" in Section 45 signify that as between the debtor and original body of creditors, the right to claim payment would rest with the body, but if by part-payment the number of creditors is reduced, the right to claim payment will be a right arising as between the debtor and the remaining creditors. Where a partner of a dissolved firm collects his share of debts, impleading others, the

tives of such deceased person jointly with the survivor or survivors, and, after the death of the last survivor, with the representatives of all jointly.*

Illustration

A, in consideration of 5,000 rupees, lent to him by B and C, promises B and C jointly to repay them that sum with interest on a day specified. B dies. The right to claim performance rests with B's representative jointly with C during C's life, and after the death of C with the representatives of B and C jointly.

[*] For an exception to S. 45 in case of Government securities, see the Indian Securities Act, 1920 (10 of 1920), S. 4, Public Debt Act, 1944 (18 of 1944), S. 8 and Major Port Trusts Act, 1963 (38 of 1963), S. 68.

Section 45 — Note 1 (contd.)

other partners can sue for their share of debts. AIR 1919 Lah 14 (15) = 1919 Pun Re. No. 128, p. 317.

(3) A promise can be made to two persons either jointly or severally but not both ways. A promise to two or more persons unless there is something to show that the intention of the parties was otherwise is only a joint promise made to them. AIR 1954 Cal 303 (304) = ILR (1956) 1 Cal 102.

2. Discharge given by one joint promisee alone. — (1) Payment to one of two joint promisees is not a discharge of the entire debt. AIR 1952 Mys 68 (69) ** ILR (1953) 3 Raj 318 (326) (DB) ** AIR 1917 Sind 71 (72) = 10 Sind LR 203 (DB) ** (1913) 17 Cal L Jour 372 (375) (DB).

[But see AIR 1957 Mad 191 (192). (Payment to one promisee so as to have the effect of discharging the debt as against all joint promisees must be an actual payment and not merely an undertaking to pay in future.) ** AIR 1917 Pat 82 (84) = 2 Pat L Jour 520 (DB). (A joint creditor, in equity, can give a valid receipt to a debtor in full discharge of the claims of himself and of the other joint creditors.) ** (1913) 36 Mad 544 (549, 552) (FB). (One of two or more payees of negotiable instrument can give valid discharge of entire debt without concurrence of other payees.)]

(2) A discharge given by one of the co-promisees is valid only to the extent of his own share in the debt. ILR (1951) 1 Raj 187 (189) ** AIR 1952 Mys 68 (69).

(3) In the absence of any evidence or circumstances which would justify a contrary inference it will be presumed notwithstanding the form of an obligation that a debt due to joint creditors is due to them in severality. AIR 1919 Cal 593 (596) ** AIR 1969 Raj 278 (280) = 1969 Raj LW 343. (Where debts are due in severality, each creditor can bring a suit for recovering his share of the debt after impleading the remaining creditors as defendants irrespective of whether they were asked to join as plaintiffs and they declined to do so.)

(4) The presumption in the absence of any proof as to the proportion in which the loan was advanced by the

co-creditors is that the money was advanced by them in equal shares and on that presumption each of them is entitled to receive his share of the total advances and give a valid discharge qua his share. ILR (1953) 3 Raj 318 (327) ** ILR (1951) 1 Raj 187 (189). (Payment made to one cannot discharge debt due to others.)

(5) One of the promisees jointly entitled with another to a debt cannot when sued upon by the debtor for the recovery of a debt which was due from him alone, set off the joint debt. AIR 1954 Cal 303 (305) = ILR (1956) 1 Cal 102.

(6) A decree-holder holds such a legal character as to be able in law to give discharge on behalf of his co-decree holders. AIR 1924 Cal 710 (713) (DB). (Where succession certificate is taken by all decree-holders, adult certificate holders are not competent to give a valid discharge without the concurrence of the minor decree-holders.)

(7) See also Section 38.

Mortgages.

(8) Mortgagees taking a joint security for the money advanced must, in the absence of anything shown to the contrary, be regarded as tenants-in-common having separate interest in the money advanced and not as joint tenants. AIR 1921 Pat 27 (28) = 5 Pat L Jour 376 (DB).

(9) Co-mortgagees being tenants-in-common their interests are severable or partible among themselves; so that one of them can sue on the mortgage provided those who are unwilling to be joined as plaintiffs are made defendants. Similarly, if some of the co-mortgagees are estopped from suing, Court can sever debt and give decree to others for their share. AIR 1918 Cal 411 (412) (DB).

(10) Where several mortgagees advance money on a joint security without specifying their respective shares the presumption is that they had contributed equally to the raising of the amount advanced. AIR 1918 Oudh 91 (92).

(11) Payment to one co-mortgagee without consent of others does not give discharge of debt due to others. AIR 1930 All 98 (98, 99) (DB) ** AIR 1928 Mad 933 (935) (DB). (One mortgagee accepting smaller amount in full satisfaction of

Section 45 — Note 2 (contd.)

mortgage and agreeing to pay share of co-mortgagor. Latter not consenting to arrangement is entitled to enforce against whole property his share of debt.) ** AIR 1927 Cal 425 (429) (DB) ** AIR 1922 Lah 64 (64) (DB). (Consent is necessary.) ** AIR 1921 Pat 27 (28) = 5 Pat L Jour 376 (DB) ** (1921) 3 Lah L Jour 502 (504). (Consent is necessary.) ** AIR 1920 Pat 464 (468) = 5 Pat L Jour 151 (DB). (Release given by one co-mortgagee is not a discharge of entire mortgage much less a release given by one of heirs of a deceased mortgagee.) ** AIR 1919 Cal 593 (596) (DB) ** AIR 1915 Cal 528 (528) (DB) ** (1911) 14 Oudh Cas 45 (47). (Consent of others is necessary.) ** (1910) 32 All 164 (167) (DB).

[But see AIR 1957 Mad 191 (192). (Arrangement with co-mortgagee that he must remain in possession and appropriate income towards mortgage-debt — Income so appropriated amounts to actual payment and discharges mortgage against all mortgagees though there is no payment of a lump sum.) ** AIR 1925 Mad 261 (263) = 48 Mad 693 (DB). (Payment made to one joint-mortgagee is valid discharge of mortgage liability. But a mere undertaking to pay the amount at some future date is not payment.) ** (1909) 1 Ind Cas 219 (219) (DB) (Mad). (A release of a mortgagor by one of several joint mortgagees, on payment to him of the mortgage-debt, discharges the mortgagor from all liability under the mortgage to the other mortgagees, inasmuch as the mortgagor had made a promise to two mortgagees jointly and the right to claim performance rested with both mortgagees jointly.)]

(11) The principle that payment to one of several joint creditors does not operate as a discharge of the debts in so far as the other creditors are concerned is not applicable to a case where the payment is to a joint mortgagee who was the manager and agent of the others. AIR 1928 Cal 125 (126) (DB) ** (1937) 169 Ind Cas 531 (531, 532) (Lah). (One co-heir cannot give valid discharge without consent of other — Payment to one is valid to the extent of his share; other's right to recover from the debtor is not affected.) ** AIR 1918 Mad 29 (29, 30) = 41 Mad 637 (DB) ** AIR 1916 Mad 1128 (1128) (DB).

(12) Where money was lent on joint account by two brothers who were appointed executors of the deceased testator by his will, the mortgagor in making repayment must see that he made the payment to and obtained a receipt from a person entitled to give him a discharge. AIR 1916 Cal 568 (568, 569) (DB).

(13) Payment to one of heirs of mortgagee does not bind the other heirs.

AIR 1915 Oudh 29 (30) = 18 Oudh Cas 154 (DB).

Payment of rent to one of co-lessors.

(14) Payment by tenant of the rent to one of two co-lessors will not discharge him from liability to pay the share of the other co-lessor unless there is an agreement between the co-lessors that the rent received shall be held by them jointly or a mutual grant of authority between them to receive the rent. AIR 1952 Mys 68 (69).

(15) Where a tenant pays off the entire rent due from him to one of two co-sharers, he can escape liability to the other, if he shows that his payment to that co-sharer was one made bona fide. But if the payment by him was made to defeat the claims of the other co-sharer, the latter's right to recover his share of rent is not affected. AIR 1916 Mad 208 (208, 209) (DB).

(16) Where under a rent-deed its executant describing A as the owner of the property stipulated to pay the rent only to her he cannot elect to pay it to B whose name also has been included in the deed on the ground that she is an elderly member of the family. Neither the mention of B's name in the deed nor the description of the property as "your property" is sufficient, in the face of the express recognition of A alone as the owner, to constitute B a joint lessor so as to entitle the executant to claim that the payment to her has discharged his liability for the rent. AIR 1952 Raj 115 (121, 122) = ILR (1952) 2 Raj 58 (DB).

Debt due to Hindu joint family.

(17) In the case of a debt due to a joint family, the payment made to the manager of the family would discharge the debt so as to bind the junior members of the family as well. AIR 1952 Mys 68 (69). (Even a junior member can be treated as a manager for the purpose where it is clear that he had been so treated by the other members of the family and allowed to receive payments due to the family.)

(18) Transaction of mortgage really entered into by joint Hindu family but executed in favour of minor member. Tender of mortgage money to managing member of family is good and valid tender in law. AIR 1922 All 355 (356) = 44 All 64 (DB).

(19) Payment made to junior member of joint Hindu family during lifetime of its manager in whose favour the bond was executed does not discharge the promisor. AIR 1918 Mad 29 (29) = 41 Mad 637 (DB).

(20) The payment of a debt due to a joint Hindu family to a member other than the karta of the family will not bind the other members of the family and discharge the debt unless the mem-

Section 45 — Note 2 (contd.)

ber receiving the payment had authority to do so from the karta himself. AIR 1951 Ajmer 11 (11, 12) ** AIR 1933 Bom 245 (247) (DB).

(21) Where after mortgage to one member on behalf of family, partition had taken place, payment to one of divided members is not valid discharge. (1910) 20 Mad L Jour 709 (715) (DB).

(22) Order 36, Rule 6, Civil P. C. would certainly restrict the Hindu law powers of a father or manager of a joint Hindu family when he has been appointed as the next friend of the minor members to give a discharge but not when a different person is the next friend. (1949) 27 Mys LJ 74 (80, 82, 83) (DB).

(23) Though the right of a deceased person vests in his legal representatives in several shares, so far as the ancestor's debtor is concerned, they take as one unit and a suit to enforce the right must be instituted by all of them. The right can be exercised even by one also by producing in Court up to date of decree a succession certificate in his favour. 1964 Ker LJ 676.

(24) If a document is executed in favour of two persons who are members of the joint Hindu family, and concerns the business of that joint Hindu family, and one of them is the karta of the family, the karta alone can bring a suit, for he effectively represents the joint Hindu family. The other member of the family may be a proper party to the suit, but not a necessary party to the suit. The case is not at all covered by Section 45. 1960 Raj LW 129.

3. Suit by joint promisees. — (1) Under Section 45 of the Contract Act, it is not open to one of two or more joint promisees to sue alone either for performance of the promise in its entirety or to the extent of his share. AIR 1957 Andh Pra 688 (690) (DB) ** AIR 1927 Mad 84 (84, 85) ** 1889 Pun Re No. 156 p. 518 (540, 541) (FB). (Defendant can object to frame of suit on the ground of non-joinder when all co-promisees have not been impleaded and if plaintiff proceeds with suit without adding all co-promisees even after objection suit must be dismissed. But defendants objection must be made in proper time.) ** ('86) 10 Bom 32 (34) (DB). (All co-owners must join in suit to recover their property — Defendant cannot be deprived of his right to insist on the other co-owners being joined on the record by reason of there being evidence to show that they approve of the suit being brought by the plaintiff alone.)

[See also (1911) 33 All 327 (331) (DB). (As one of several heirs of a deceased cannot sue for his share of debt due to deceased it is also not permissible to

give him a succession certificate to enable him to collect a part of the debt due to the deceased.)]

(2) All the joint promisees are necessary parties to a suit to enforce a joint promise and the omission to implead any would render the suit liable to be dismissed. 1946 Jaipur LR 130 (131) ** AIR 1928 Sind 16 (16) (DB). (Two brokers employed in respect of single transaction — Suit by one for his own share of commission without impleading other broker as co-plaintiff or defendant is liable to be dismissed.) ** AIR 1969 Raj 278 (280) = 1969 Raj LW 343. (Debts of 56 creditors to same debtor — Specified separately in joint agreement relating to debts — Suit by one creditor — Some creditors not impleaded — Suit not maintainable.)

(3) If, when a co-promisee is impleaded as a co-plaintiff, by an amendment of the plaint, the enforcement of the claim by him is barred by limitation, the suit by the other co-promisees should also fail in view of Section 45 of the Contract Act. AIR 1957 Raj 298 (299) = ILR (1957) 7 Raj 613.

(4) Joint promisees have joint right of suit and consequently of appeal which would vest on the death of any one of them in the surviving promisees and the legal representatives of the deceased. Therefore the whole appeal would abate when these representatives are not substituted in the place of the deceased. AIR 1957 Madh Pra 89 (90) = ILR (1957) Madh Pra 21.

(5) One of several joint promisees may sue alone if other promisees refuse to join in action in which case they may be added as co-defendants and notice may be given to them. (1909) 9 Cal L Jour 331 (334) (DB) ** AIR 1957 Andh Pra 688 (690) (DB) ** (1908) 35 Cal 331 (345) = 35 Ind App 73 (PC).

(6) Where a hatchita was executed by a person in favour of himself and three others each having a definite share, it was held that a suit by two of the three promisees for their shares under the hatchita against the executant and the other promisee who refused to join with plaintiffs was maintainable. AIR 1941 Cal 595 (597, 598) (DB).

(7) One co-promisee may sue on his own account. Section 45 does not prohibit this and one plaintiff must not be held to have lost his rights to enforce an obligation because others entitled to share in that right have lost their remedy only by the expiry of the period of limitation, and have been joined as defendants. (1905) 1905 Pun Re No. 57, p. 192 (198) (FB).

(8) Section 45 does not govern the case of co-trustees and therefore, a surviving co-trustee can file a suit for rent from tenants without impleading the legal re-

Section 45 — Note 3 (contd.)

representatives of the deceased co-trustee. AIR 1949 Mad 654 (655, 656).

(9) Where one of the two joint promisees sues to enforce the claim for debt making the co-promisee defendant, the claim cannot be split up in the absence of facts to show that the co-promisee has abandoned his claim. AIR 1959 Raj 254 (256) = ILR (1958) 8 Raj 850.

Co-promisees under promissory note.

(10) One of the co-promisees under a promissory note is not entitled to bring a suit without making the other promisee also a party to it under S. 45 of the Contract Act, claim right to claim performance of the promise rests with them jointly. AIR 1936 Pat 274 (275) = 37 Cri L Jour 848.

(11) Although the plaintiff claims a money decree alleging himself to be the sole promisee the Court is justified in dismissing his suit on the ground of non-joinder of necessary parties where it finds that the debt in fact was not solely due to him but only jointly with two others who have not been impleaded. 1891 Pun Re No. 86, p. 422 (426, 427) (FB). (Where appellate Court finds itself in agreement with the lower Court on the question of non-joinder it has to simply confirm the lower Court's decree of dismissal and refrain from considering the question as to whether plaintiff should be allowed or not to amend the plaint.)

Joint mortgagees.

(12) The rule that all the promisees should combine to enforce a promise which is jointly in their favour applies to mortgages also. Therefore, a suit by a co-mortgagee by himself, without impleading the other mortgagees either as plaintiffs or defendants for the whole or part of the mortgaged property should be dismissed as being not maintainable. AIR 1950 All 598 (599, 603) = ILR (1951) 2 All 475 (FB) ** AIR 1919 PC 24 (26) = 47 Cal 175 = 46 Ind App 272 ** (1913) 20 Ind Cas 151 (151) (DB) (All). (Suit by one co-mortgagee for sale of entire property to recover his share of debt due.) ** 1882 Pun Re No. 175, p. 519 (520) (DB). (Mortgage executed in favour of three persons — Suit by representative of one mortgagee alone — No indication in the bond to show an intention of the parties that right to demand performance was not to rest in all mortgagees — Suit as filed held was not maintainable.) ** AIR 1968 All 201 (202).

(13) Mortgage — Several mortgagees — Suit by one mortgagee to enforce part of security — All mortgagees made parties — Allegation that other mortgagees had received their share of mortgage money — Plaintiff undertaking to increase amount of claim and pay court-

fee if other mortgagees' claim not satisfied — Suit as framed competent — Suit as framed cannot possibly be defeated when all the mortgagees are parties thereto and plaintiffs seek to recover whatever is due in the security. AIR 1914 Cal 788 (789) (DB).

Suits relating to sale.

(14) One only of the several persons in whose favour an agreement to sell a certain property has been made cannot sue to claim specific performance of the agreement. (1912) 11 Mad L Tim 192 (193) (DB).

(15) The defendants sold a certain village to the plaintiff and his brother, fixing the price on the basis of the net income which the defendants stated at the time of the contract to be a certain amount. The plaintiff later on discovered that the defendants had overstated the income and made certain other fraudulent representations, and sued for compensation for the fraud of the defendants at the time of the sale, alleging that on a partition entered into subsequent to the purchase between himself and his brother the village fell to his share. Held, that the suit was not one of pure tort, but was one for a wrong arising out of a contract, and that the suit was bad for non-joinder, it having been brought only by one of the joint promisees; Held also, that the fact that there was subsequent partition between the plaintiff and his brother did not confer on plaintiff the right to sue the defendants for compensation. AIR 1932 Mad 583 (584) (DB).

Joint leases.

(16) Joint lease entered by co-promisees — Some suing for possession — Others impleaded as defendants on their refusal to join — Suit held maintainable 1912 Pun LR No. 49 p. 150 (158) = 1911 Pun Re No. 57, p. 220 (DB).

(17) A suit for ejectment can be brought against a tenant by sufferance by one co-sharer landlord alone. With regard to realisation of arrears of rent, however, all the co-owners must join as the property belongs to them jointly and the liability arises out of the contract of tenancy. AIR 1956 Madh B 35 (37). (Suit for ejectment and recovery of arrears of rent and mesne profits is not wholly a suit to enforce the contract of tenancy. It can be maintained by one of the co-owners as a suit for possession against a trespasser.)

[See however (1964) All LJ 465 (DB). (When a lease is granted jointly by two persons, one of them cannot bring a suit for ejectment and arrears of rent, as he cannot terminate the tenancy and the rent is also payable jointly.)

(18) In the case of a joint lease, one of the co-lessors cannot maintain a separate suit against the lessee for his share of rent but where the lessee

Section 45 — Note 3 (contd.)

collusively and not bona fide pays the rent to one of the co-lessors, the payment operates as a discharge of that co-lessor's share only and the other co-lessor can maintain a suit for his share of rent without making the other co-lessor, who has received the money, party to it. AIR 1945 All 311 (315, 316) = ILR (1945) All 165 (DB).

(19) A suit for enhancement of rent under the Bengal Tenancy Act, 8 of 1885, being an action in which all the landlords are required to act together by the Statute itself the rule which permits one of the landlords to bring a suit by himself provided he makes the other joint landlords parties-defendant to the suit will not apply to such suits. (1911) 38 Cal 270 (277) = 38 Ind App 1 (PC).

Suits by Joint Families.

(20) Joint cause of action by members of an undivided Hindu family against defendant — Suit in name of only one member not maintainable. (1895) 18 Mad 33 (35, 36) (DB).

(21) Where the right of a person to recover certain debt has devolved upon his sons jointly and the sons constitute a joint Hindu family, they can file only one suit against their debtors for the recovery of the whole amount. Some of them cannot split up the claim and institute a suit for a part thereof on their own behalf on the ground that others did not join with them as co-plaintiffs. In such a case, it would be incumbent upon those instituting suit to claim the whole amount on behalf of themselves and their brothers on payment of the full court-fees and to make their brothers who refused to join as co-defendants. AIR 1939 Sind 173 (176) = ILR (1939) Kar 602 (DB).

(22) Plaintiff alone suing defendant for joint debt due to him and three brothers in a joint Hindu family — Defendant can insist on all the contractors being made co-plaintiffs when there is a joint cause of action notwithstanding an expression of willingness by the other members of the family that the plaintiff should sue alone. (1883) 7 Bom 217, (219) (DB).

(23) Members of joint Hindu family firm having a joint cause of action against defendant — Defendant has a right to ask to join all members in suit for enforcement of claim, though plaintiff may afterwards adjust sums recovered with his co-contractors. (1881) 6 Cal 815 (826) (DB).

(24) Suit for recovery of debt, secured or unsecured, due to Hindu Joint family — Some members refusing to join as plaintiffs can be made defendants. (1912) 9 All L Jour 410 (417) (DB).

(25) Manager of joint Hindu family can enforce contract made with family — Junior members not necessary parties. (1911) 33 All 272 (277, 278) = 38 Ind App 45 (PC).

4. Devolution of joint rights. — (1) The rule of survivorship which according to the English common law applies in the case of devolution of joint rights has no place in India inasmuch as Section 45 has not recognised the rule. AIR 1948 Nag 279 (282) = ILR (1947) Nag 553 (DB).

(2) Where the agreement between the parties does not specify any shares and it is impossible to say in what shares the consideration was to be paid by or the land to be divided between the parties, the right to enforce the contract, on the death of one of the parties, vests in his legal representative along with others and not in others alone. AIR 1935 Lah 478 (479) (DB).

(3) Where one of several joint tenants is liable for the whole rent, on the death of one of such joint tenants leaving a number of heirs, the liability is joint and not several because the bundle of rights and liabilities which was in one such joint tenant is, by operation of law transferred to number of co-parceners who constitute in law one heir. AIR 1924 Cal 165 (166, 167) = 50 Cal 737 (DB). (Following 25 Mad 26.) ** AIR 1960 Cal 187 (189). (On the death of original promisee, a single individual, his heirs do not become themselves several joint promisees.)

(4) Where a person solely entitled to a certain amount in deposit with a party wrote to that party asking him to convert the account into a joint account in the name of himself and his wife payable to either or survivor and upon which both of them could operate and that letter was not signed by the wife as well it was held that the wife who was merely a volunteer did not thereby become a joint creditor of that person. Hence where the person entitled to the amount closes the account the amount becomes a part of his own estate and simply because the amount continues to remain with the debtor due to his death before payment could be made it cannot confer any right on the wife towards that amount. AIR 1957 Cal 585 (589).

(5) Mortgage in favour of B and D — Suit by B alone — D dying during course of suit — B acquiring D's rights of recovering debts — Non-joinder of D held immaterial — B, although he had no right to sue on the day when he instituted the suit, had acquired the full and exclusive right when D died. AIR 1939 Nag 242 (244) = ILR (1939) Nag 515 (DB).

Time and place of performance

46. Time for performance of promise, where no application is to be made and no time is specified.—Where, by the contract, a promisor is to perform his

Section 45 — Note 4 (contd.)

(6) Appeal by all plaintiffs in suit by several co-sharers — Common cause — One appellant dying during pendency of appeal — No legal representative brought on record — Court can pass any decree as the case required even though no legal representative is brought on record — Section 45, Contract Act, does not apply. AIR 1941 Oudh 155 (158) = 16 Luck 382.

(7) Part-assignment of debt is valid in law, and action can be maintained thereon by the transferee provided he makes both the transferor and other assignees that may be concerned parties to the suit. AIR 1941 Lah 337 (340) (DB).

(8) In a case of a joint debt, an assignment by one of the joint creditors does not enable the assignee to enforce the payment of the whole debt. AIR 1937 Cal 532 (533).

5. Partnership cases. — (1) Section 45 of the Act has no application to debts due to trading partnerships. Although the right of the deceased partner devolves on his executors, the remedy survives to his co-partners, who alone must enforce the remedy by action. AIR 1923 Lah 197 (200) = 4 Lah 142 (DB) ** AIR 1929 Rang 306 (307) = 7 Rang 806 ** (1894) 17 Mad 108 (117) (DB).

[But see (1897) 21 Bom 412 (421, 422) (Representative of deceased partner alone may sue for recovery of debt to the firm, even where the business of the firm is continued by the surviving partner.)]

(2) Right of suit on death of partner — See Order 30, Rule 4, Civil P. C.

(3) The representatives of a deceased partner are not necessary parties to a suit for the recovery of a debt which accrued due to the partnership in the lifetime of the deceased partner. (1893) 17 Bom 6 (14) (DB) ** (1913) 17 Cal L Jour 648 (651) ** AIR 1961 Madh Pra 314 (315) = 1961 MPLJ 538.

(4) Although one partner alone cannot sue for partnership debt, yet he can use name of firm and of co-partners so as to be able to sue, and unwilling partner can only claim indemnity for costs. AIR 1917 Pat 246 (246) (DB).

(5) If surviving partners refuse to sue for recovery of debts due to firm the remedy of the legal representative of deceased partner lies in suit against others for winding up, for accounts and for appointment of receiver. AIR 1914 Low Bur 58 (61) = 8 Low Bur Rul 130 (DB).

(6) Where a partner of a dissolved firm collects his share of debts, impleading others, the other partners can sue

for their share of debts. AIR 1919 Lah 14 (15) = 1919 Pun Re No. 128 p. 332.

(7) Where firm is dissolved, suit by one partner for individual share of a debt, owing to the firm, is not maintainable even if other partners are made co-defendants. AIR 1924 Nag 196 (197).

(8) Payment to one of two partners constituting firm operates as discharge. AIR 1920 Lah 53 (54).

(9) Section 45 has not been modified by the Civil Procedure Code, save as appears in Order 30, which is confined to cases where suits are brought not by individuals but in the name of firms. AIR 1927 Lah 115 (117) = 8 Lah 1 (DB).

(10) Rule 4, Order 30, Civil P. C., is enacted to set at rest doubt in connection with Section 45, Contract Act, regarding suits by or against firms. AIR 1927 Bom 581 (591) = 51 Bom 986 (DB).

(11) It is true that Order 30, Civil P. C. constitutes an exception to Section 45, Contract Act, but to press that provision into service the plaintiff must disclose that the suit or application has been brought by the firm and the partners signing the same have done so only as partners. A suit in which the plaintiff makes no mention of the firm at all is nothing but a suit brought by an individual partner to enforce a contract entered into by the firm and would therefore be bad for non-joinder of necessary parties if all the other partners are not impleaded. AIR 1958 Punj 260 (262, 263) = 60 Punj LR 27 (DB) ** AIR 1969 Guj 178 (191) = 10 Guj LR 457 (DB).

(12) The suit on behalf of the firm can be filed equally by all the partners who are co-promisees and all of whom are under Section 45 of Indian Contract Act joined together in enforcing a promise against a third party promisor. AIR 1969 Guj 178 (185).

Section 46 — Note 1

(1) When no time is fixed for completion of sale, it must be implied that it is to be completed in a reasonable time. AIR 1930 PC 165 (169) ** AIR 1951 Orissa 291 (294) = ILR (1949) 1 Cut 593 (DB) ** AIR 1967 Guj 130 (137) (Loss or deterioration of goods consigned — Damages for — Question of delay in conveying goods — Test is reasonable time and not the normal time.)

(2) Though "normal" or "usual time" is not always equivalent to the "reasonable time" in determining the question whether the contract is performed in "reasonable time" or not one of the important circumstances that requires to be considered is what is the usual or normal time taken for the performance

promise without application by the promisee, and no time for performance is specified, the engagement must be performed within a reasonable time.

Explanation.—The question “what is a reasonable time” is, in each particular case, a question of fact.

Section 46 — Note 1 (contd.)

of such contracts. Even the question whether it should be taken into consideration or not will depend upon the particular facts of each case. AIR 1967 Guj 130 (137).

(3) Where an agreement to convey land provides that the vendee would be bound to reconvey the land to the vendor it must be taken that the parties contemplated the performance of contract within reasonable time as implied by law and the agreement cannot be challenged on the ground of vagueness. AIR 1951 Mad 767 (768).

(4) The law engrafts on the contract a condition that reasonable time, in the absence of any specific time provided in the contract, will be of the essence of the contract and if the contract is not performed within that reasonable time by any of the parties, that party will be deemed to be guilty of breach of duty or breach of contract. AIR 1958 Punj 111 (115) = ILR (1958) Punj 294 (DB).

(5) Even if time be not of the essence of the contract, under Section 46, it has to be performed within reasonable time. So if there is unnecessary delay on the part of the plaintiff it would be open to the other party to put an end to the contract by giving a notice before its termination. AIR 1950 Nag 238 (240) = ILR (1950) Nag 386 (DB).

(6) The question as to what is a reasonable time is a question of fact. (11) 22 Mad LJ 207 (211) (DB) ** 1967 All LJ 323 ** AIR 1967 Guj 130 (137). (What is “reasonable time” depends upon the circumstances of each case.)

(7) C. I. F. Contract — In absence of any stipulation as to time for payment, payment must be made when bill of lading and other shipping documents are presented to buyer. AIR 1942 Mad 139 (141) = ILR (1942) Mad 33 (DB).

(8) In a contract of purchase of shares, reasonable period for its completion held would be two months. AIR 1950 PC 90 (96) = 77 Ind App 76 = ILR (1950) Bom 606.

(9) B agreeing with A to pay certain debts owing by A — Three years from date of contract held was reasonable time for performance. (1912) 22 Mad LJ 207 (211) (DB).

(10) Contract for sale of goods — Goods to be delivered in instalments — Dates of delivery of instalments not fixed — Instalments must be deemed to be rateably distributed over period appointed for delivery of whole quantity of goods. AIR 1917 Cal 721 (727) = 43 Cal 305 (FB).

(11) Person borrowing ornaments for use in ceremony — It is unreasonable for him to detain them after completion of ceremony and demand by their owner. AIR 1930 Oudh 395 (396, 397) = 6 Luck 80 (DB).

(12) Subsequent mortgagee to redeem prior mortgages — Time not fixed for such redemption — Puisne mortgagee must redeem within reasonable time, i.e., by the first date when redemption is obtainable. AIR 1918 Oudh 331 (332) ** AIR 1925 Oudh 132 (134) ** (1900) 23 Mad 441 (443, 444) (DB).

(13) Mining leases not containing time for payment of royalty — Royalty must be paid within reasonable time of coal being raised and three months held reasonable. AIR 1940 Pat 609 (609, 610) (DB).

(14) Where no time for performance of contract is specified and the contract is not performed by a party within reasonable time, the other party is not bound to give a prior notice to perform the contract within a specified time before treating the contract as revoked or rescinded. AIR 1962 Pat 155 (157) = 1962 BLJR 225 (DB).

(15) There is no difference in law between a contract where the time is fixed by the act of the parties and a contract where no time is fixed and by implication of the law the contract is to be performed within a reasonable time. AIR 1962 Pat 155 (158) = 1962 BLJR 225 (DB).

(16) Time will be of the essence of the contract if it is so provided in the contract or if one of the parties after unreasonable delay on the part of the other party gives a reasonable notice to the other party making time as of the essence of the contract. If none of the two has happened, reasonable time will be deemed to be the time which will be of the essence of the contract. If the contract is not performed within that reasonable time by any of the parties that party will be deemed to be guilty of breach of duty or breach of contract. AIR 1958 Punj 111 (115) = 60 Pun LR 97 (DB).

(17) Ordinarily, in the absence of an agreement to the contrary, time is not of the essence of a contract for sale of immovable property and there is nothing wrong if the plaintiff exercises his right to claim specific performance within the period of limitation prescribed by the law. AIR 1965 Raj 115 (118) = 1965 Raj LW 37.

(18) Where a written contract for supply of large quantity of milk to certain field service depot did not fix any time for the supply and the fixation of time

47. Time and place for performance of promise, where time is specified and no application to be made.—When promise is to be performed on a certain day, and the promisor has undertaken to perform it without application by the promisee, the promisor may perform it at any time during the usual hours of business on such day and at the place* at which the promise ought to be performed.

Illustration

A promises to deliver goods at B's warehouse on the first January. On that day A brings the goods to B's warehouse, but after the usual hour for closing it, and they are not received. A has not performed his promise.

[*] Cf. Sections 49 and 94.

48. Application for performance on certain day to be at proper time and place.—When a promise is to be performed on a certain day, and the promisor has not undertaken to perform it without application by the promisee, it is the duty of the promisee* to apply for performance at a proper place and within the usual hours of business.

Explanation.—The question "what is a proper time and place" is, in each particular case, a question of fact.

[*] Cf. Section 49 and Section 93 infra.

Section 46 — Note 1 (contd.)

was left to the officer operating the contract, it has to be implied that the parties intended that the time fixed would be reasonable. 1965 Pun LR (Sup) 56 (DB).

(19) Where a stipulation in a sale-deed in respect of certain property in the Punjab provided that balance of consideration would be paid "as soon as possible but when vendee would be in position to make payment" its import was that the balance would be payable within reasonable time. AIR 1964 Punj 123 (126) = ILR (1964) 1 Punj 143 (DB).

(20) Agreement for purchase of plot of land after completion of roads—Conveyance to be taken within one month of such completion—Subsequent requisition of land rendering such activity unlawful—No time fixed for development of land—Section 46 held to have been excluded in these circumstances. AIR 1965 SC 1523 (1526) = (1965) 2 SCR 630.

Section 47 — Note 1

(1) Section 47 applies only when a certain day is fixed for performance. (1907) 9 Bom LR 903 (909).

(2) Under a contract governed by the rules of the Bombay Cotton Trade Association the vendor is bound to tender a delivery order backed by the goods before 1 p.m. of due date. Where the vendor has not tendered the goods before the specified time, he fails under Section 47, Contract Act, to perform his part of the contract. AIR 1916 Bom 268 (272) = 40 Bom 517.

(3) Acceptance by mortgagor of part of mortgage money after agreed period does not amount to new contract but is mere acquiescence in late payment. AIR 1924 Pat 825 (829) (DB).

(4) Electric supply company -- Discount to be allowed for prompt payment—Consumer receiving bill after expiry of date fixed for payment with discount is not entitled to fresh bill fixing fresh date for payment. AIR 1934 Lah 292 (292, 293) = 15 Lah 729.

(5) The instalment due in 1947 was payable on the 1st May, 1947. Held, that the remittance of the money order from a different place on 1-5-1947 could not be said to be payment to the creditor on or before the 1st May, 1947. It was not suggested that the remittance reached the creditor on the same day. So the creditor was not bound to accept the remittance towards the instalment due on the 1st May, 1947. AIR 1954 Nag 270 (271) = ILR (1954) Nag 452 (DB).

Section 48 — Note 1

(1) Sections 48 and 49 clearly indicate that the mode of performance of a contract is a question of fact in a particular case. AIR 1944 Nag 330 (332) = ILR (1945) Nag 252.

(2) No doubt a limited company entitled to receive money is not on the same footing as an ordinary individual who may at any moment change his residence and there may be a good reason to infer that money due to a company is to be paid by a debtor in another country at the office of the company. AIR 1944 Nag 330 (332) = ILR (1945) Nag 252.

(3) The plaintiff took a licence from the defendant to take wood from the defendant's forest and deposited a certain amount as security in the treasury maintained by the defendant. The deposit was to be refunded on the expiry of the term of the licence. On a demand being made by the plaintiff by letter for refund of the deposit, the defendant insisted on the personal attendance of the plaintiff at

49. Place for performance of promise, where no application to be made and no place fixed for performance.—When a promise is to be performed without application by the promisee, and no place is fixed for the performance of it, it is the duty of the promisor to apply to the promisee to appoint a reasonable place for the performance of the promise, and to perform it at such place.*

Illustration

A undertakes to deliver a thousand maunds of jute to B on a fixed day. A must apply to B to appoint a reasonable place for the purpose of receiving it, and must deliver it to him at such place.

[*] Cf. S. 94 supra, as to goods sold.

Section 48 — Note 1 (contd.)

the place where the treasury was maintained. In the suit by the plaintiff to recover the security deposit, the defendant contended that he was justified in insisting on the plaintiff's personal attendance at the place of the treasury for payment and should not, therefore, be made liable for costs of the suit. It was not established by the defendant that personal attendance by the plaintiff was a term to be annexed to the contract to refund: **Held**, that though the matter may not be governed directly by Section 48, the plaintiff in applying for refund must be taken to have applied at a proper place in circumstances where performance could be made within usual hours of business by remittance of the amount. AIR 1944 Nag 330 (332) = ILR (1945) Nag 252.

(4) Contract for sale of goods by sample and within specified time—Goods delivered not according to sample nor within specified time or within reasonable time — **Held** there was breach of contract on vendor's part, and he was therefore not entitled to damages from purchaser, and the purchaser was entitled to refund of earnest money. (1965) 31 Cut LT 477.

SECTION 49 — SYNOPSIS

1. Rule that debtor must seek creditor.
2. Place of performance.
3. Place of repayment of deposit.
4. Place of payment of rent.
5. Place of payment in case of contract of agency.
6. Place of delivery of goods.
7. Promissory note payable on demand.

1. Rule that debtor must seek creditor. — (1) It is a common law rule that where no place of payment is specified, either expressly or by implication, the debtor must seek out his creditor. (1905) 7 Bom LR 993 (994) (DB) ** AIR 1955 Cal 413 (414) ** AIR 1950 Madh B 72 (75) (DB) ** AIR 1960 Mad 64 (69) = 1960 Cri LJ 242 = (1959) 2 Mad LJ 521 (FB).

(2) The common law rule is a reasonable rule and is in conformity with justice and equity as it recognises the obligation of the debtor to pay his debt by going to his creditor and imposes this

obligation only when there is no express contract to the contrary. AIR 1956 Bom 111 (112) (DB) ** AIR 1968 Guj 276 (279) = 9 Guj LR 932 ** AIR 1966 Cal 259 (264) ** AIR 1965 Andh Pra 231 (234) = (1965) 2 Andh LT 16 ** AIR 1964 Cal 418 (421) (DB) ** AIR 1961 Raj 93 (97) = 1960 Raj LW 397. (If it is not possible to establish such agreement, the court can apply the rule. If, however, on a consideration of the various circumstances, it is not possible to arrive at a finding as to an express or implied agreement, other factors cannot be considered along with the rule for determining place of performance.)

(3) In applying the general rule regard must be had to the proper place at the time when the money is payable. AIR 1955 Cal 413 (415).

(4) By British law the duty of a debtor to find and pay his creditor is only imposed upon him when the creditor is within the realm. AIR 1925 PC 290 (292) = 53 Ind App 58 = 53 Cal 88 ** 1953 BLJR 626 (627). (This principle is applied in India where both the debtor and creditor are within one realm.)

(5) Section 49 does not preclude the application of the rule of English Common Law that the debtor must seek out his creditor and pay his debt where the creditor happens to reside, unless there is an arrangement to the contrary and does not get rid of the inference which should justly be drawn from the terms of the contract itself or from the necessities of the case. AIR 1941 Mad 695 (696) (DB) ** AIR 1956 Bom 111 (111) (DB) ** AIR 1936 Cal 97 (99) = 63 Cal 726 ** AIR 1936 Rang 251 (252) ** AIR 1915 Nag 65 (67) = 11 Nag LR 189 ** (1913) 20 Ind Cas 683 (683) (Low Bur) ** ILR (1960) 10 Raj 43.

[But see AIR 1961 Raj 93 (97) = 1960 Raj LW 397. (AIR 1936 Cal 97 and AIR 1950 Bom 111, Dissented from.)]

(6) There has been a pronounced disinclination on the part of the Indian Courts to apply to this country unreservedly the English Common Law that a debtor should find and pay his creditor and that generally speaking that place of payment has to be determined, in-

Section 49 — Note 1 (contd.)

dependently of any such general maxim, with reference to the terms of the contract, the circumstances attending on it, the necessities of the case and having regard also to the statutory provision contained in the Code of Civil Procedure and in Section 49 of the Contract Act. AIR 1957 Mad 201 (205, 206) * AIR 1946 Mad 300 (304).

(7) The rule of debtor seeking the creditor is not applicable in India for the purpose of determining the local jurisdiction of the Courts. AIR 1951 Punj 33 (42) (DB) ** ILR (1961) 2 Ker 664 (DB).

(8) Assuming that in regard to the recovery of the amount of deposit or advance upon breach of contract the principle of law is that unless the right is excluded by the terms of the contract, money paid for consideration which fails becomes money received by one party to the use of the other party and is recoverable as a debt, the rule that the debtor must find his creditor would apply only if the suit is confined to a return of the advance and nothing more and then the forum would be the place where the plaintiff resides. AIR 1957 Mad 201 (206).

(9) Where the plaintiff is suing on the basis of a contract and the breach thereof, the question of jurisdiction has to be decided on the determination of the question of the breach of contract and not on the relationship of debtor and creditor and hence the Common Law rule that debtor must find the creditor does not apply. AIR 1957 Mad 201 (206).

(10) In the case of a wife claiming maintenance from her husband and claiming return of ornaments against her father-in-law: **Held**, that neither the husband nor the father-in-law were debtors and the English rule had no application to the case. Even if they were debtors, the common law rule did not apply inasmuch as in the case of husband, his liability, if any, did not arise out of contract. It arose, if at all, because he maltreated his wife to such a degree that she could not live with him any longer and in the case of the father-in-law, it was reasonable to infer that the parties contemplated re-payment and delivery of the cash and articles at the family house or at the place where the wife was residing with her husband. AIR 1941 Mad 695 (696) (DB).

(11) Neither Section 49 nor the English rule of debtor seeking creditor applies when the obligation to be discharged is not the obligation to fulfil a promise express or implied but is different as for example, liability arising out of breach of contract or out of tort or agency. AIR 1960 Ker 188 (190) = 1960 Ker LT 1.

2. Place of performance.— (1) The Contract Act makes no provision for place of performance when no time or

place is fixed and where there is no provision to perform without application (1907) 9 Bom LR 903 (910).

(2) The creditor's place of residence at the time when contract was made will often be deemed, by fair implication of fact, the place of performance contracted for. AIR 1959 All 612 (613) = 1957 All LJ 423 ** AIR 1960 Punj 450 (453, 455) = 62 Punj LR 462 (FB). (AIR 1955 Punj 128, Approved.)

(3) It is only where the contract does not stipulate the place of performance, that Section 49 will come into play. AIR 1957 Mad 201 (204) ** AIR 1959 All 612 (614) = 1957 All LJ 423.

(4) The rule as to the place of performance, whether it be payment or any other mode of performance, is to be determined by Section 49. AIR 1927 PC 156 (158) = 54 Ind App 265 = 5 Rang 451 ** (1905) 7 Bom LR 993 (994) (DB).

(5) Strictly, Section 49 only comes into operation when there is an application by the promisor to the promisee. Where it is not suggested that the promisor made any application to the promisee for the performance of the contract Section 49 would have no application. AIR 1956 Bom 111 (111) (DB).

(6) The promise to pay the creditor implies that the debtor will find the creditor to pay him and will pay where the creditor is; under Section 49, Contract Act, it is reasonable to suppose that if the debtor applies for a place to be appointed the creditor will appoint the place where he himself resides, at any rate, he has the power so to appoint. AIR 1935 Bom 283 (284) = 59 Bom 365.

(7) The duty having been cast on the promisor by Section 49 to apply to the promisee to appoint a place for the performance of his obligation he cannot improve his position by neglecting to perform that duty. AIR 1946 Mad 300 (301) ** AIR 1935 Bom 283 (284) = 59 Bom 365.

(8) Where place of performance is not mentioned in the contract, a Court is not precluded from finding out implied intention of the parties in regard to the place of performance. (1941) 22 Pat L Tim 282 (283) ** AIR 1961 Pat 198 (199) = 1960 BLJR 697 (DB).

(9) Contract silent as to place of payment of liability — Payment should be made where creditor is — Intention of parties to the contract must be seen. AIR 1927 PC 156 (158) = 54 Ind App 265 = 5 Rang 451 ** AIR 1956 Orissa 147 (151) (DB) ** AIR 1946 Mad 300 (301, 304) ** AIR 1933 Sind 62 (64) (DB) ** AIR 1930 Nag 207 (208) = 26 Nag LR 300 ** (1906) 30 Bom 167 (171).

(10) Section 49 clearly indicates that the mode of performance of contract is a question of fact in a particular case.

Section 49 — Note 2 (contd.)

When the manner and the place of repayment of money are not the subject of express contract it is the duty of the Court to gather what, by necessary implication, having regard to the nature of the contract and the circumstances in which it was entered into, the parties must have meant. AIR 1944 Nag 330 (332) = ILR (1945) Nag 252 ** AIR 1964 Cal 418 (421) ** AIR 1961 Pat 198 (199) = 1960 BLJR 697 (DB).

(11) If from the circumstances in which the contract in question was entered into it is reasonable to infer that the intention of the parties was that performance was to be in a certain place, that inference should be drawn whether the rule of the English Common Law which requires the debtor to seek the creditor applies or not to India. AIR 1938 Mad 977 (978, 979).

(12) Where A, a trader at Karachi had business with B in India who contracted to pay A at Karachi and on partition A came to India as displaced person and settled at place X, B was not bound to seek his creditor A at place X. AIR 1960 Raj 243 (244) = 1960 Raj LW 185.

(13) The rule that a debtor must seek his creditor does not entitle the creditor in the absence of contract to the contrary to claim payment beyond the jurisdiction of the country, where the contract was made. The contract was made in Pakistan (the date of the contract being after the partition of India), and the creditor was not entitled on shifting to India to say that the payment should be made at his new place of residence. AIR 1959 All 612 (613, 614) = 1957 All LJ 423.

(14) Neither Section 49 nor the English rule of debtor seeking creditor applies where the obligation to be discharged is not the obligation to fulfil a promise express or implied but is different as for example, liability arising out of breach of contract or out of tort or agency. AIR 1960 Ker 188 (190) = 1960 Ker LT 1.

3. Place of repayment of deposit.—(1) The general rule that debtor must seek the creditor which may be applicable to the case of private money-lender and a borrower, has no application to the case of a fixed depositor in a Bank which is a limited company. AIR 1944 Nag 330 (331) = ILR (1945) Nag 252.

(2) In the absence of any specific contract to that effect, it cannot be said that a fixed deposit with a bank is repayable at any place where the depositor resides. The plaintiff depositor must prove that the money was repayable at the place where he resides. AIR 1940 All 243 (244) = ILR (1940) All 207.

(3) When there is no indication in the contract or otherwise of the intention of the parties where, on breach of the agreement, the deposit has to be returned, it

is the duty of the defendant to return the deposit to the plaintiff at the plaintiff's residence. ILR (1957) Ker 932 (939) ** ILR (1960) 10 Raj 187.

(4) Government not refunding security deposit — Security money became debt due from Government — Rule that debtor must seek creditor applicable. AIR 1966 All 159 (160) = (1966) 2 Lab LJ 365.

(5) Bilticut transaction between defendant and plaintiff — Suit for recovery of amount deposited with seller as advance for transactions which did not materialise — Deposit is in nature of debt — Defendant bound to pay to plaintiff at latter's place. AIR 1962 Raj 122 (126) = 1961 Raj LW 606.

4. Place of payment of rent.—(1) Where a lease is silent as to the place where the rent is to be paid, the question as to where it is payable is to be decided with reference to Section 49. AIR 1938 Mad 977 (978).

(2) Where the contract of lease does not fix a place for the payment of rent and the lessee does not apply to the lessor to fix a place for payment, under Section 49 of the Contract Act, the duty of the lessee is to pay the rent where the lessor is. This duty is not dependent on a demand being made by the lessor. AIR 1955 Nag 202 (203) = ILR (1955) Nag 977 ** AIR 1933 All 147 (148).

(3) The principle of law that a debtor has to find his creditor and discharge his debt to him if the contract does not provide for the place of payment is applicable in case of a tenant who has covenanted to pay rent to his landlord and the covenant does not provide for the place of payment. AIR 1953 Bom 280 (281) = ILR (1953) Bom 633 (DB).

5. Place of payment in case of contract of agency.—(1) In cases where the relationship is one of agency, the place of payment has to be determined independently of the general rule of English common law with reference to the terms of the contract, the circumstances attending on it and the necessities of the case. AIR 1946 Mad 300 (304) ** AIR 1960 Ker 188 (190) = 1960 Ker LT 1.

(2) In the absence of specific terms in a contract the general law that the debtor must find the creditor, will apply in deciding the place where the profits and losses were to be paid in a contract of agency. AIR 1952 Raj 81 (83) = ILR (1951) 1 Raj 531 (DB).

(3) Where certain persons staying at R enter into a contract of agency with a person staying at M, undertaking to sell his goods on commission at R, there is an implied obligation on them, arising from the necessities of the case, that they should pay their principal at his place of residence M. AIR 1936 Rang 251 (253)

Section 49 — Note 5 (contd.)

(4) In the case of Pakki Adat agency primarily the place of payment is the place where the constituent resides but where the constituent has chosen to give directions to the effect that the payment should be made at any other place, it should be so done — Per Chandavarkar J. (1909) 33 Bom 364 (368) (DB).

(5) A firm A carried on the business of commission agents both at Indore and Jodhpur. B from Jodhpur entered into contracts for purchase and sale of bullion through the firm at Indore. These transactions proved unprofitable to B and the amount of loss was paid to third parties at Indore by A on behalf of B. B paid part of the dues to A and for the balance he was sued at Jodhpur. It was held that it was the statutory right which flowed from the contract of agency that A was seeking to enforce against B and the suit had been brought in the Jodhpur Court as the defendant resided within the jurisdiction and the fact that in case of Pakki Adat the place of payment was normally where the constituent resides was immaterial. AIR 1954 SC 500 (502) = 1955 SCR 439.

(6) Insurance company at Lahore appointing certain person working at Meerut as its chief agent for Rajputana and Bundelkhand area — Appointment made at Lahore and all payments to be made at Lahore — Appointment subsequently cancelled — Suit by agent at Ajmer for damages for cancellation of the appointment — Subsequent suit by the company at Lahore for recovery of certain amount due by agent: Held, that the cause of action arose at Lahore and that Section 49 was not applicable to the case. AIR 1940 Lah 85 (86, 87).

(7) If by an agreement, express or implied, by the creditor, the debtor is authorised to pay the debt by a cheque and to send the cheque to the creditor by post the post office is the agent of the creditor to receive the cheque and the creditor receives the payment as soon as the cheque is posted to him. AIR 1966 SC 1466 (1469) = (1966) 2 SCR 651.

(8) Where money was deposited by the plaintiff resident of Sibi in Pakistan, with the defendant at Meerut, who was a commission agent to be utilised by the latter at Meerut for purchasing Jaggery, there was an implied agreement for repayment at Meerut and not at Sibi and hence the rule that 'debtor must find creditor' did not apply. AIR 1961 Raj 93 (98) = 1960 Raj LW 397.

(9) Bank at Madras transferring customer's amount, upon customer's instructions standing in his name at Bank's Head Office at London, to Karachi Branch — Bank's Agency comes to an end as soon as amount is transferred — It is not under obligation to repatriate the amount from Karachi to Madras. AIR 1965 Mad 266 (274) = (1965) 1 Andh WR 351.

6. Place of delivery of goods.— (1) Section 49 applies to promises for payment of money as well as to promises for delivery of goods. AIR 1933 All 147 (148) ** AIR 1927 PC 156 (158) = 54 Ind App 265 = 5 Rang 451.

(2) Section 49 is only a general provision and in the case of a contract for sale of goods is modified by Section 93 of the Contract Act. (1911) 10 Ind Cas 18 (19) (Oudh).

(3) Where a contract provided for delivery of the goods 'at any place in Bengal' and the place of delivery was to be mentioned thereafter and accordingly the buyer specified the place of delivery in a letter sent to the seller it was held that the contract resembled what was contemplated in Section 49. (1897) 24 Cal 8 (17) = 23 Ind App 119 (PC).

(4) Even in a case where goods are sent by V. P. P. the contract is intended to be performed at the place where the goods are to be received and the Court at that place has jurisdiction to try the suit arising out of the contract. AIR 1934 Mad 581 (582).

(5) When a seller takes goods to the buyer without any order from him and negotiates and effects a sale it must be taken, in the absence of anything to the contrary, that, from the very nature of and circumstances of the transaction, the intention of the parties was that payment should be made at the buyer's place. AIR 1960 Ker 188 (190) = 1960 Ker LT 1.

(6) In case of Bilticut transactions delivery of the railway receipt to the buyer after endorsing it in his favour is necessary to give him title to the goods. The place where it is to be delivered is the place where the performance of the contract is to be completed and the place of payment of money is the place where the buyer resides. The Court of that place has therefore, jurisdiction to try a suit arising out of such a contract. AIR 1962 Raj 122 (125) = 1961 Raj LW 606.

7. Promissory note payable on demand.— (1) Section 49 deals with a contract between a promisor and a promisee and has no application to matters governed by the law merchant, which is contained for the most part, in the Negotiable Instruments Act. AIR 1942 Bom 251 (255) = ILR (1942) Bom 620 (DB) ** AIR 1954 Madh B 184 (188, 189) = ILR (1954) Madh B 343 (FB) ** (1963) 4 Gui LR 305. (Sections 49 and 50 apply to a document which is not negotiable instrument but amounts to a promise to pay the stated amount together with interest.) ** AIR 1961 Cal 321 (328) = 65 Cal WN 113 (DB). (AIR 1940 Cal 443, Dissented from.)

50. Performance in manner or at time prescribed or sanctioned by promisee.—The performance of any promise may be made in any manner, or at any time which the promisee prescribes or sanctions.

Illustrations

(a) B owes A 2,000 rupees. A desires B to pay the amount to A's account with C a banker. B who also banks with C, orders the amount to be transferred from his account to A's credit, and this is done by C. Afterwards, and before A knows of the transfer, C fails. There has been a good payment by B.

(b) A and B are mutually indebted. A and B settle an account by setting off one item against another, and B pays A the balance found to be due from him upon such settlement. This amounts to a payment by A and B, respectively, of the sums which they owed to each other.

(c) A owes B 2,000 rupees. B accepts some of A's goods in reduction of the debt. The delivery of goods operates as a part payment.

(d) A desires B, who owes him Rs. 100, to send him a note for Rs. 100 by post. The debt is discharged as soon as B puts into the post a letter containing the note duly addressed to A.

Section 49 — Note 7 (contd.)

(2) Section 49 has no application where money payable under a promissory note is payable on demand. (1908) 31 Mad 223 (228) (DB) ** AIR 1942 Bom 251 (254, 255, 256) = ILR (1942) Bom 620 (DB) ** AIR 1940 Cal 443 (445) = ILR (1940) 1 Cal 323.

[See also (1912) 16 Cal LJ 279 (281) (DB). (Section 49 of the Contract Act does not apply, where the money is payable on demand and not "without application by the promisee.")]

(3) In India the common law rule that a debtor should seek his creditor is not applicable in the case of promissory notes and particularly in promissory note payable on demand. AIR 1951 Punj 33 (37) (DB) ** AIR 1957 Madh B 90 (92) (DB) ** AIR 1954 Madh B 184 (189) = ILR (1954) Madh B 343 (FB) ** AIR 1942 Bom 251 (255) = ILR (1942) Bom 620 (DB).

[But see AIR 1940 Cal 443 (445) = ILR (1940) 1 Cal 323.]

Section 50 — Note 1

(1) The method of payment in discharge of a contract includes also mere transfer of figures in accounts. AIR 1925 Sind 144 (146) = 20 Sind LR 335 ** AIR 1966 SC 170 (174) = (1965) 3 SCR 777.

(2) Where a subscriber of a chit fund conducted by a company deposits money towards the future instalments he has to make in a bank as directed by the rules of the company, the performance of the promise by him is good. And if the bank goes into liquidation, the promisee company has to take the risk. AIR 1942 Mad 337 (338).

(3) Where the defendant, not entitled to have delivery of goods until he had paid for them, procured the delivery from an unauthorised agent of the plaintiff, and paid money to the agent who embezzled the amount so paid to him: Held, that the plaintiff could sue defen-

dant for recovery of the price of goods sold to him. (1874) 12 Beng LR 360 (365) (DB).

(4) When a person agrees with his partner, who is also his creditor for Rs. 600 by setting aside 6 as. of his share of partnership profits towards its liquidation, it was held that the creditor could not recover the debt in any other way than that stipulated for in the contract. (1912) 16 Cal WN 636 (638) (DB).

(5) If the promise prescribes or sanctions any manner of performance, performance in that manner discharges the obligation of the promisor. AIR 1947 Mad 122 (123) ** AIR 1963 Pat 216. (Plaintiff asking defendant to sell plaintiff's rice and send sale proceeds to him — Reasonable to infer implied request to send money by post.)

(6) Where from the previous conduct of the parties, it is evident that sending premium by money order was one of the approved or sanctioned methods of payment the obligation of the party who is to make the payment shall be deemed to have been discharged if the money order was sent on or before the relevant date. AIR 1952 Trav-Co 181 (181) (DB).

(7) By posting a cheque in pursuance of the request of the creditor the debtor performs his obligation in the manner prescribed and sanctioned by the creditor and thereby discharges the contract by such performance. AIR 1954 SC 429 (436).

[See also AIR 1956 Orissa 147 (151) (DB). (No specific or implied request to send cheques by post — Decision in AIR 1954 SC 429 does not apply.)]

(8) There is nothing in Section 20, Limitation Act to suggest that payment in kind should be in pursuance of a previous agreement. (1955) 8 Sau LR 150 (153).

(9) The Post Office Act of 1898 did not enlarge the right of the sender to reclaim the postal article to such an ex-

Performance of reciprocal promises

51. Promisor not bound to perform, unless reciprocal promisee ready and willing to perform.—When a contract consists of reciprocal promises* to be simul-

Section 50 — Note 1 (contd.)

tent as to nullify illustration (d) to Section 50, Contract Act or otherwise to affect the well-known general principle that a contractual obligation is discharged by the performance of the engagement or promise in the manner prescribed or sanctioned by the promisee. **AIR 1954 SC 429 (436).**

(10) Where money is due to a person from another, then the liability to pay that money can be discharged only by repaying it in cash unless the parties expressly agree to some other mode of discharging that liability. If there is an agreement that the liability has to be discharged not by paying cash but by a bank draft this agreement has to be pleaded and proved. In the absence of this, it must be taken that the liability has to be discharged by payment of cash. 1958 Nag LJ 364 = (1959) 29 Com Cas 41 = ILR (1958) Bom 1386 = AIR 1959 Bom 267 (268) = 61 Bom LR 1127 ** AIR 1957 All 293 (293).

(11) The illustration attached to S. 50 clearly indicates that the direction by the drawer of the cheque to the bank to put the amount in the credit of the payee amounts to payment by the drawer to the payee. If the payee deposits the cheques in his current account, it is as good as a payment of cash to the bank unless the drawer had no funds in the bank to meet the amount of the cheque. AIR 1960 Assam 191 (202) = (1961) 31 Com Cas 91 (DB).

(12) If the payee presents the cheque beyond reasonable time, the liability of the drawer stands discharged. AIR 1960 Assam 191 (203) = (1961) 31 Com Cas 91 (DB). **AIR 1965 SC 1679 (1681, 1682) = (1965) 3 SCR 103.** (Creditor accepting cheque from debtor — Sending it for collection and accepting draft in lieu of cash payment — Creditor holding draft for unreasonable time — Draft drawer bank closing business — Debtor, held, stood discharged. AIR 1957 Assam 133, Reversed.)

(13) Subscriber to Railway Provident Fund electing to be governed by Provident Fund Sterling Accounts Rules — Subscriber requesting payment in sterling and by Bank draft in a bank in England — Railway Administration drawing cheques in favour of Reserve Bank of India with instructions to convert it into sterling and then to transmit amount to subscribers banker in England — Obligation of railway administration could not be said to have been discharged till directions of subscriber regarding transmission of fund were complied so long as money remained under control of Rail-

way Administration. **AIR 1969 SC 762 (764) = (1969) 2 SCJ 86.**

(14) In view of Sections 49 and 50, it is open to the promisee to appoint any place he likes for performance of promise. (1963) 4 Guj LR 305.

(15) Mode of performance agreed to cannot be changed or substituted. AIR 1966 Madh Pra 145 (149) = 1966 MPLJ 120 (DB).

(16) Time for the performance of the contract, not fixed — Contract has to be performed within reasonable time — What is reasonable time is always a question of fact. AIR 1966 Madh Pra 145 (149) = 1966 MPLJ 120 (DB).

(17) Contract to be completed within 10 months of commencement — Date of commencement to be when order to commence was given — Promisor enquiring about date — Date communicated was the date wherefrom 10 months had already expired at the time of communicating — Promisor held, had not failed to perform promise at the time prescribed. AIR 1963 Punj 538 (543) = ILR (1963) 2 Punj 463 (DB).

SECTION 51 — SYNOPSIS

1. Scope.
2. Simultaneous performance.
3. Readiness and willingness.
4. Burden of proof.
5. Pleadings.

1. **Scope.** — (1) Where promises are reciprocal each party has always the option to perform his part of the contract but one party cannot insist on the other performing his promise without himself performing what he has agreed to do. AIR 1925 Mad 1029 (1030) ** 1967 Raj LW 498 = ILR (1967) 17 Raj 917. (Contract on behalf of minor for purchase of immovable property.)

(2) Where the agreements between the parties are reciprocal one of them cannot be enforced if the other is void and unenforceable. (1928) 106 Ind Cas 823 (823) (Lah) ** AIR 1962 Assam 41 (46) = ILR (1961) 13 Assam 357 (DB).

2. **Simultaneous performance.** — (1) Unless otherwise agreed delivery of goods and payment of price are concurrent conditions in a contract for sale of goods. AIR 1925 Mad 971 (971) (DB) ** (1870) 2 NWPB CR 60 (61) ** AIR 1962 Cal 103 (108) (DB).

(2) In a c.i.f. contract payment of price for the goods has to be made simultaneously with the delivery of documents. Promise by the buyer to pay on or before the arrival of the steamer cannot be construed as a stipulation to pay even before the tender of documents. AIR 1958 Mad 43 (51) = ILR (1957) Mad 1108 (DB).

taneously performed, no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise.

Illustrations

(a) A and B contract that A shall deliver goods to B to be paid for by B on delivery.

A need not deliver the goods, unless B is ready and willing to pay for the goods on delivery.

B need not pay for the goods, unless A is ready and willing to deliver them on payment.

(b) A and B contract that A shall deliver goods to B at a price to be paid by instalments, the first instalment to be paid on delivery.

A need not deliver, unless B is ready and willing to pay the first instalment on delivery.

B need not pay the first instalment, unless A is ready and willing to deliver the goods on payment of the first instalment.

[*] See S. 2 (f) for definition.

Section 51 — Note 2 (contd.)

(3) Where a decree for maintenance provided inter alia, that from out of the amount of past maintenance to be paid by the defendant, the plaintiff should get a reconveyance in her favour in respect of the property she had sold, it was held that the obligations of the plaintiff and the defendant were concurrent obligations. 1947-2 Mad LJ 361 (363).

(4) Where a consent decree in substance provided that on the defendant paying a certain sum of money the plaintiff company should transfer some shares to the defendant, it was held that the promises were not reciprocal promises to be performed simultaneously. AIR 1950 FC 8 (10, 11) = 1949 FCR 501 ** AIR 1963 Cal 583 (585) = 67 Cal WN 947 (DB).

(5) Where on payment by RD the costs of receiver and on his writing certain letters to receiver F was to pay £5000 to RD it was held that the reciprocal promises were incapable of simultaneous performance within Section 51. AIR 1933 PC 233 (236) = 60 Ind App 368 = 58 Bom 101.

(6) The obligation of a vendee retaining part of consideration to pay off previous mortgage and the undertaking by the vendor to compensate vendee for the defect of title in the property, being wholly independent promises, will not come under Section 51, Contract Act. Therefore, if the vendee does not pay off the mortgage and is subsequently dispossessed of a portion of the property, he cannot, in a suit for damages brought by the vendor, take advantage of the indemnity clause on the ground that the vendor had failed to give him title with respect to that portion of property. AIR 1946 Pat 263 (266) (DB).

(7) Apart from any special contract it is not the law that the consideration money must be tendered as a condition precedent by the party aspiring for speci-

fic performance of a contract of reconveyance. AIR 1962 Cal 103 (108) (DB).

3. **Readiness and willingness.** — (1) Where consideration for contract consists of promise, the party bound to do act promised, fully performs his part of contract if he is ready to do the act when required. AIR 1914 Cal 166 (166) (DB).

(2) The question whether a party to the contract was ready and willing to perform his obligation is one of fact. AIR 1950 PC 90 (96) = 77 Ind App 76 ** AIR 1970 SC 546 (547) = (1970) 1 SCWR 175.

(3) Actual tender of the purchase money or of goods sold is not necessary. Capacity to tender these is sufficient. ILR (1955) 1 Cal 63 (71) ** AIR 1928 Lah 834 (836) = 10 Lah 143 (DB) ** AIR 1927 Lah 176 (177) = 8 Lah 198 (DB) ** AIR 1926 Lah 318 (319) = 7 Lah 442 (DB) ** AIR 1923 Sind 50 (52) = 16 Sind LR 278 (DB) ** (1903) 30 Cal 865 (871).

(4) Contract for sale of Government Securities— Seller in a position to transfer securities by due date and informing purchaser of this by going to his place of business — In absence of evidence to the contrary, this constitutes readiness and willingness. (1883) 9 Cal 791 (797) (DB).

(5) Contract to sell shares — Ability of vendor to constitute vendee the legal owner of shares amounts to "readiness and willingness" on his part. (1864-66) 2 Bom HCR 246 (249).

(6) Tender presupposes a person to whom one can tender. If the buyer closes his usual place of business and absconds, it is clear that he is not ready and willing to perform his part. Tender will be dispensed with in such case. AIR 1932 Sind 9 (14) = 26 Sind LR 167.

(7) Where, before the date fixed for the delivery of goods, the buyer filed an application for insolvency and the interim receiver also did not act within a reasonable time, it was held that from the con-

52. Order of performance of reciprocal promises.—Where the order in which reciprocal promises^a are to be performed is expressly fixed by the contract, they shall be performed in that order; and where the order is not expressly fixed by the

Section 51 — Note 3 (contd.)

duct of the buyer and the interim receiver it could be taken that the contract was abandoned by the buyer, absolving the seller performing his part. AIR 1953 Nag 345 (349, 350) = ILR (1953) Nag 201 (DB).

(8) Where the buyer is in acute financial embarrassment on the date of the delivery of goods, there cannot be any readiness on his part to pay the price and the seller is absolved from the performance of his part. AIR 1940 Rang 284 (285) = 1940 Rang LR 593 (DB).

(9) The readiness and willingness has to be proved continuous from the date of the contract to the time of the hearing and it must be to perform the contract as it really was and not in the way the plaintiff thought. AIR 1932 Lah 265 (267) (DB).

(10) In a contract of sale where the term as to payment was cash on delivery, the seller made some of the deliveries and the buyer paid certain amount on the account leaving a large balance due to the seller. The seller refused to deliver the remainder of goods as the balance was not paid and the buyer set up some cross-claims to be adjusted. It was held that the neglect to pay was after delivery, when reciprocity of obligation had ceased. It was no reason for refusing to make all further deliveries. (1879) 4 Cal 252 (257) (DB).

(11) Where the promisee had agreed to reduce the rate of interest provided that the promisors pay it regularly and pay the principal within certain time but later on the promisee persistently refused to be bound by the agreement and thus prevented the promisors from performing their part of agreement within time, it was held that the promisors were entitled to reasonable time to perform their part after the promisee has performed his part of the agreement. AIR 1939 Rang 84 (86) = 1938 Rang LR 660 (DB).

(12) Illustration (a) is the ordinary case of buying and selling goods when neither the buyer need pay the price nor the seller deliver the goods unless the other party is ready and willing to perform his part. AIR 1930 Mad 364 (371) (DB).

(13) Contract for sale of immoveable property — Time not essence of contract — Failure to find money or prove possession of money before time for performance arrives cannot be taken as breach entitling vendor to resile from the contract — Vendor is bound to give reasonable notice requiring performance within definite time. AIR 1967 Mad 220 (223) = 79 Mad LW 486.

4. Burden of proof. — (1) In a suit for damages for a breach of one of two

concurrent obligations the onus of proving readiness and willingness to carry out his obligation is on the plaintiff. AIR 1934 PC 91 (92) ** AIR 1936 PC 236 (238) ** AIR 1958 Punj 289 (294) = ILR (1958) Punj 1670 ** AIR 1928 Lah 20 (26) = 9 Lah 148 (DB). (Suit for damages for non-delivery of goods.) ** AIR 1925 Mad 971 (971) (DB) ** AIR 1923 All 220 (224) (DB) ** AIR 1958 Punj 289 (294) = ILR (1958) Punj 1670 (DB).

(2) Ordinarily it must be presumed that the goods are to be paid for at delivery. The onus will be on plaintiff who pleads a special contract contrary to this usual practice and very strong and cogent evidence would be required from him. AIR 1923 Lah 363 (365) (DB).

(3) Where the defendant did not repudiate the contract but contended that if the plaintiff had offered money the defendant could have secured the goods from the open market, it was held that it was for the plaintiff to allege and establish that he was in possession of the entire money payable under the contract. AIR 1958 Andh Pra 427 (435).

(4) Suit for specific performance of agreement — Abandonment of contract by plaintiff alleged by defendant — Burden of proving abandonment is on defendant. AIR 1966 Mys 154 (157) = (1965) 1 Mys LJ 442 (DB).

5. Pleadings. — (1) Averments as to the readiness and willingness at all material times must be made in the plaint. ILR (1955) 1 Cal 63 (68).

[See however (1895) 19 Bom 546 (550) (DB).]

Section 52 — Note 1

(1) When a person's right to claim money that was promised to him is dependent upon his performing a particular act, he cannot bring in an action unless he performs his part. AIR 1933 PC 233 (236) = 60 Ind App 368 = 58 Bom 101.

(2) When payment of purchase-money is delayed due to the vendor's delay in showing good title, vendor has no right to claim interest on purchase money. AIR 1918 Mad 716 (717) (DB).

(3) Where the lessee has not performed his part of the contract he cannot say that the lessor committed a breach. AIR 1928 All 360 (362) (DB).

(4) Work is not usually paid for in advance unless there is an express agreement to the contrary by the person for whom it is done. AIR 1927 Oudh 616 (617).

(5) The party desiring to submit a dispute to arbitration ought to specify the nature of the dispute and nominate his own arbitrator first, as performance of his own part of the contract. AIR 1929

contract, they shall be performed in that order which the nature of the transaction requires.

Illustrations

(a) A and B contract that A shall build a house for B at a fixed price. A's promise to build the house must be performed before B's promise to pay for it.

(b) A and B contract that A shall make over his stock-in-trade to B at a fixed price, and B promises to give security for the payment of the money. A's promise need not be performed until the security is given, for the nature of the transaction requires that A should have security before he delivers up his stock.†

[*] For definition of, see S. 2 (f) supra.

[†] See S. 54 infra.

53. Liability of party preventing event on which the contract is to take effect.—When a contract contains reciprocal promises, and one party to the contract prevents the other from performing his promise, the contract becomes voidable at the option of the party so prevented; and he is entitled to compensation* from the other party for any loss which he may sustain in consequence of the non-performance of the contract.

Illustration

A and B contract that B shall execute certain work for A for a thousand rupees. B is ready and willing to execute the work accordingly, but A prevents him from doing so. The contract is voidable at the option of B; and, if he elects to rescind it, he is entitled to recover from A compensation for any loss which he has incurred by its non-performance.†

[*] See S. 73, as to measure of compensation.

[†] Cf. S. 67 infra, and S. 76 of the Negotiable Instruments Act, 1881.

Section 52 — Note 1 (contd.)

Sind 58 (60). (AIR 1921 Mad 58, Disting; (1879) 4 App Cas 337 and (1884) 53 LJQB 133 Rel. on.)

(6) When a person is to perform an act on condition that another person fulfils a certain promise, he is not bound to perform the act in case the latter breaks his promise. 1898 Pun Re No. 17, p. 39 (43) (FB).

(7) Section 52 lays down the order in which parties have to perform reciprocal promises and does not in any way affect the application of the principle in suits for specific performance of contracts for sale which enable the buyer to obtain relief, provided he could satisfactorily explain the delay in performing his part of the promise and where time is not the essence of the contract. AIR 1950 Cal 526 (528) = ILR (1951) 2 Cal 198.

(8) In the case of cross contracts for purchase and re-purchase of goods, entailing delivery of exactly similar quantities of cotton bales on either side there is no necessity for either party to either tender the goods or tender the price. The person who has to get the difference can, without going through the farce of tender, claim the difference which is really in his favour. AIR 1945 Mad 59 (60).

(9) Apart from any special contract it is not the law that the consideration money must be tendered as a condition precedent by the party aspiring for specific performance of a contract of re-

conveyance. AIR 1962 Cal 103 (108) (DB).

(10) Award providing that B 'do pay' a certain sum to D and D 'to deliver' certain number of shares — In default of payment within fortnight B liable to pay interest — Payment of B held not dependent upon tender of shares by D. AIR 1963 Cal 583 (585) = 67 Cal WN 947 (DB).

(11) A to reconstruct house by stipulated date and B to pay yearly rent to A in advance — B paying part of rent on execution of contract — Failure of A to reconstruct by stipulated date — B can recover rent paid in advance. 1965 All LJ 1039. (1 Ch 27, Rel. on.)

Section 53 — Note 1

(1) Wrongful repudiation by one party does not end the obligation unless other party elects to treat it so — Such repudiation by itself does not absolve the other party suing on the contract from proving his performance of a condition precedent. AIR 1933 PC 233 (236) = 60 Ind App 368 = 58 Bom 101.

(2) A sued the obligees to enforce a bond hypothecating immoveable property, the discharge of which he had agreed by the sale of the property. The vendors were willing and ready to give possession of the property, but he failed to pay the stipulated price. Held that A was not at liberty to enforce the bond. (1875) 7 NWP HCR 152 (154).

54. Effect of default as to that promise which should be first performed, in contract consisting of reciprocal promises.—When a contract consists of reciprocal promises, such that one of them cannot be performed or that its performance cannot be claimed till the other has been performed, and the promisor of the promise last mentioned fails to perform it, such promisor cannot claim the performance of the reciprocal promise, and must make compensation to the other party to the contract for any loss which such other party may sustain by the non-performance of the contract.*

Illustrations

(a) A hires B's ship to take in and convey, from Calcutta to the Mauritius, a cargo to be provided by A, B receiving a certain freight for its conveyance. A does not provide any cargo for the ship. A cannot claim the performance of B's promise, and must make compensation to B for the loss which B sustains by the non-performance of the contract.

(b) A contracts with B to execute certain builder's work for a fixed price, B supplying the scaffolding and timber necessary for the work. B refuses to furnish any scaffolding or timber, and the work cannot be executed. A need not execute the work, and B is bound to make compensation to A for any loss caused to him by the non-performance of the contract.

(c) A contracts with B to deliver to him, at a specified price, certain merchandise on board a ship which cannot arrive for a month, and B engages to pay for the merchandise within a week from the date of the contract. B does not pay within the week. A's promise to deliver need not be performed, and B must make compensation.

(d) A promises B to sell him one hundred bales of merchandise, to be delivered next day, and B promises A to pay for them within a month. A does not deliver according to his promise. B's promise to pay need not be performed, and A must make compensation.

[*] See Ss. 2 (j), 53 and 56.

Section 53 — Note 1 (contd.)

(3) When one of the parties to a decree setting forth two reciprocal promises, expressed willingness to fulfil the obligation resting on her, and the other party prevented such performance through evasion, the former does not lose the primary rights under the contract, and would be deemed to have fulfilled her promise. AIR 1958 Andh Pra 504 (507) = ILR (1958) Andh Pra 120.

(4) In a contract with Government, the contractor was not to be supplied with machinery, but was to get assistance in procuring controlled articles. His demand for a crane and iron materials free of cost was refused. Held, the Government by such refusal did not make the performance of the contract impossible. AIR 1958 Andh Pra 533 (539).

(5) In a contract to provide employment for a definite period, the employer wanted to terminate the employment before the period was over. The other party was ever willing to perform his part of the contract. Held that the employer should pay damages equivalent to the salary for the remaining period. AIR 1957 Madh Pra 144 (145).

SECTION 54 — SYNOPSIS

1. "When a contract consists of reciprocal promises."

2. "Such that been performed."

3. "Fails to perform it."

4. "Such promisor cannot claim performance of the reciprocal promise."

5. "Must make compensation to the other party."

1. "When a contract consists of reciprocal promises."— (1) Section 54 relates to a contract consisting of reciprocal promises such that one cannot be performed or its performance cannot be claimed till the other has been performed. In a contract for sale where the passing of title is completely independent of the payment in full of the consideration money, the seller cannot invoke the aid of Section 54 and contend that the purchaser having failed to perform his part cannot claim title to the property under contract. AIR 1949 Orissa 14 (17).

(2) Property mortgaged — Part of property along with other property subsequently sold — Part of consideration left with vendee to pay off mortgage — Vendee not paying off mortgage — Vendee dispossessed of portion of property by third person later on — Mortgagee obtaining decree for sale — Mortgaged property sold and purchased by mortgagee — Suit by vendor for damages, and compensation for breach of contract

Section 54 — Note 1 (contd.)

by vendee — Section 54, Contract Act, held, did not apply, as there was no promise, by vendors, on which payment of mortgage money depended — Section 73, held, applied and plaintiff was entitled to compensation. AIR 1946 Pat 263 (266, 267) (DB).

(3) Where the agreement has been embodied in a compromise decree the judgment-debtor cannot say that, because the decree-holder committed the default first, he was entitled to avoid his own obligations under the terms of the decree; especially, when those terms were independent of each other. AIR 1929 Nag 164 (168) = 25 Nag LR 110.

(4) Where by a deed of compromise the parties relinquished a claim in respect of some property in dispute and recognised the right of the other to a portion of it on the assumption that they had an antecedent title and the agreement acknowledged and defined what that title was. Held, that the deed was a family arrangement and Section 54 was not applicable. AIR 1949 Oudh 1 (5, 6) = 23 Luck 231 (DB).

2. "Such that been performed."

(1) Where the letter of acceptance stated that the acceptance of the proposal for an insurance was conditional upon the continued good health of the applicant and laid upon him the same obligation as at the time of the proposal to inform the Insurance Company of any adverse circumstances connected with his general health which might occur till the date of the issue of acceptance and the applicant failed to inform the company of his illness which occurred just before and after the date of acceptance: Held, that there was a warranty of continued good health up to the date of the issue of acceptance and as the applicant committed a breach thereof by his failure to disclose, the Company was absolved from all liability under the policy; the circumstance that the failure to disclose was after the letter of acceptance was sent made no difference at all. AIR 1948 Mad 182 (183, 184).

(2) When a shipowner has contracted to give a certain notice to a charterer or to do any other act, with a view to inform the charterer when the ship will be ready, the charterer is not bound to ship his goods until the ship owner has given him that notice or has done that act. (1879) 4 Cal 237 (248, 251).

(3) Vendor, desiring to enforce contract for sale, with condition that title adduced should be approved by purchaser's solicitor, must prove that solicitor did approve of title or that such title was tendered, as made it reasonable to approve of it. (1911) 35 Bom 110 (120).

3. "Fails to perform it." — (1) When promisor fails to perform his part of the contract, promisee can rescind the

whole contract; but, if the promisee treats it as a subsisting contract, he must do his part fully to entitle him to insist on the promisor's carrying out the contract. AIR 1925 PC 188 (189, 193) ** AIR 1930 Lah 979 (982) (DB). (Contract to sell certain timber — Vendor insisting on payment of full price before vendee could be allowed to remove timber — Vendor selling part of contract timber to third party — Vendee keeping contract alive but claiming credit for value of timber sold — Vendee cannot be said to be willing to make full payment and could not, therefore, sue vendor for damages.)

(2) Where contract consisted of twelve parts, non-performance of one does not necessarily indicate an intention to put an end to contract. AIR 1914 Bom 312 (315) (DB).

(3) Sale of property — Part of consideration left with vendee to pay off mortgage by vendor — At time of sale vendor failing to put vendee in possession of very small portion of property — Still vendee cannot refuse to redeem mortgage. (Obiter.) AIR 1946 Pat 263 (267) (DB).

(4) Breach of essential term of contract alone, entitles the other party to repudiate contract — Breach of non-essential term entitles the other party to damages only. AIR 1924 Sind 105 (105) (DB).

(5) Seller agreeing to send "delivery telegram" but failing to do so — Buyer is entitled to rescind contract as being broken and to sue seller in damages; for a covenant as to delivery is as much an essential part of a contract for sale as a covenant for payment of price. AIR 1923 Mad 103 (107) (DB).

(6) Shipowner contracting with charterer to give notice of arrival of ship "after completion of two counter-voyages for London" — Notice given after vessel had completed one voyage only — Charterer refusing to ship goods — Clause "after completion of two counter-voyages" held was essential part of contract and charterer was justified in refusing to perform his promise. (1879) 4 Cal 237 (247, 248) (DB).

(7) The plaintiff who had taken a contract from the P. W. D. for clearing the forest produce entered into an agreement with the defendants for sale of the felled timber. Some disputes having arisen regarding payment, the forest authorities attached the timber. Eventually the parties settled their disputes and entered into an agreement with regard to the payment of money. The plaintiff was held responsible to get the attachment of timber vacated within a week but in spite of his best efforts he could not do so. Held that the condition in relation to raising of the attachment could not be deemed to be essential to the main purpose of the contract the breach of which

Section 54 — Note 3 (contd.)

might give rise to a right to treat the contract as repudiated. AIR 1957 Andh Pra 784 (794) (DB).

(8) In a contract with Government for supply of bhusa to its several military farms, the Government agreed to arrange for railway wagons but did not guarantee the supply. Non-supply of wagons was not to be the ground for non-performance of the contract. At the same time there was an oral agreement that Government would supply wagons. R contractor was ready and willing to supply goods and was left under the impression that the wagons would soon be made available and acted under the belief. But wagons were not made available. Held that it could not be said that contractor had failed to perform his part of the contract and therefore his security was not liable to forfeiture. AIR 1957 Punj 141 (144) = ILR (1957) Punj 783 (DB).

(9) The plaintiff contracted with the defendant company to ship cargo in their ship at C. The ship arrived at M enroute for C. The defendant repeatedly asked the plaintiff to advise them if he was ready to make the shipment. The plaintiff intimated to them that owing to war conditions and other causes he was not ready and the ship proceeded to another destination. It was held that the plaintiff having dispensed with the ship's coming from M to C and the defendants having performed their part of the contract the defendants were not liable in damages to plaintiff. AIR 1917 Mad 294 (296) (DB).

(10) Defendants at Mirzapur to despatch goods to plaintiffs at Madras, F. O. R. Mirzapur at earliest booking day, railway receipt to be negotiated through Bharat Bank Ltd. — Defendants not sending goods in spite of fact that booking could be had — Plaintiffs held justified in repudiating contract and defendant was liable in damages. AIR 1949 Mad 858 (859).

4. "Such promisor cannot claim performance of the reciprocal promise." —

(1) A, the lessee of a Government forest transferred his lease rights to B. Under the terms of the agreement it was obligatory on the part of B to pay the second instalment of the lease premium to the Government. Without this payment the agreement with the Government could not be signed by A. B incurred expenses to cut down the forest but in the meanwhile the Government cancelled the lease, because no second instalment was paid and refused to issue export permit. B instituted a suit against A for recovery of the money spent: Held, that it was B who failed to perform his part of the contract by not paying the 2nd instalment without the payment of which A could not sign the agreement which led to the cancellation of the lease. Conse-

quently, it was not open to him to turn round and accuse A of breach of contract. The provisions of Section 54 were attracted. AIR 1957 Him Pra 70 (72).

(2) Where contract loan is for consolidated sum of money to be paid from time to time, and lender refuses to lend small portion remaining due to borrower, lender by his conduct, put an end to contract and cannot claim interest at contract rates. AIR 1914 Mad 210 (215).

(3) A and B were both chelas of C, the late mohunt of a muth. According to custom and practice of the muth, there was one mohunt only and two chelas could not become mohunts at the same time. Both the chelas had become mohunts with the result that dispute had arisen between them. They therefore executed an ekrarnama. They agreed that A should be declared to be the mohunt and B adhikari of the said muth to the end of their lives and that in the event of difference between the parties A would give to B Rs. 40 a year for maintenance. Notwithstanding this agreement B brought a suit against A claiming the mohuntship — Held, that B, by his action, in bringing a suit for mohuntship, broke his promise and defeated the whole intention of the agreement, and that he could no longer hold A to his part of the contract to pay B the maintenance. AIR 1925 Pat 496 (497) (DB).

(4) Hundi given on consideration of execution by A to B of a mortgage for money due on accounts — Mortgage not executed — B suing on hundi — Suit must be dismissed under Section 54, Contract Act — No decree can be passed on consideration other than shown in hundi. (1908) 3 Mad LT 405 (405).

(5) Agreement to sell house for consideration to be paid — Consideration converted into cash debt, evidenced by three bonds — Contract of sale not carried through — Suit for money on bonds — Held, that bonds were without consideration as the contract of sale was not carried through and that the remedy of vendor was to sue for specific performance of contract or for damages for breach. (1936) 19 Nag LJ 232 (236).

(6) A party, cancelling a contract without any justification, is precluded from making any defence, which would have been open to him in an action for damages by the other party. AIR 1920 Bom 181 (182).

(7) M conveyed certain property to S. It was agreed that an account would be made of arrears of rent due from raiyats to M and on such account being made S would have a deed of assignment executed by M in respect of the arrears. The accounts were not made and S did not get the deed of assignment. M filed a suit against S for an amount on the footing of what would be payable by S if the deed of assignment had been exe-

55. Effect of failure to perform at fixed time, in contract in which time is essential.—When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.*

Effect of such failure when time is not essential.

If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such

Section 54 — Note 4 (contd.)

cuted by M. It was held that M not having performed his part of the contract he was not entitled to maintain the suit. AIR 1929 Pat 395 (397).

(8) Mortgagor mortgaged his property for 15 years and the condition was that mortgagee should pay decree-holder of the mortgagor regularly by instalments. Mortgagee failed to pay after some instalments and it was held that mortgagor was entitled to redeem his property before the expiry of the period of 15 years. AIR 1927 Oudh 12 (13, 14) = 2 Luck 279 (DB).

(9) Where vendee could not complete sale due to the vendor's defective title and the broker was helping the vendor, it was held that the broker had in effect committed breach of Contract and was not entitled to any brokerage. AIR 1925 Sind 220 (221) (DB).

(10) Where defendants agreed to charter a ship, of which the tonnage was guaranteed by the plaintiff, and the ship actually was found to weigh more, it was held, that the defendants were justified in repudiating the contract and thus refusing to charter that ship. (1891) 15 Bom 389 (396, 399) (DB).

5. "Must make compensation to the other party." — (1) Where parties to a contract consisting of reciprocal promises failed to perform their respective promises, one wilfully, and the other, because he was not bound to perform his part until the other had fulfilled his, the contract is broken by act of both parties and a suit for specific performance will not lie, though the latter is entitled to compensation for breach of contract. AIR 1915 Mad 210 (216) = 38 Mad 959 (DB).

(2) Where the plaintiff agreed to sell "entire stock of coal or 7 to 8 hundred tons of coal" the words were not only words of estimation but descriptive of the stock; and, therefore, the plaintiff was liable to pay damages to the defendant when the entire stock sold was only 469 tons. (1910) 37 Cal 334 (337, 338) (DB).

(3) Where in a mortgage, the mortgagee does not pay prior mortgagee as per agreement, the mortgagor is entitled, in a separate suit, to claim damages from the mortgagee resulting from non-performance of the contract by him. (1907) 10 Oudh Cas 69 (75).

(4) A contracting to supply B bricks upon B's supplying coal for purposes of manufacturing bricks — Kutcha bricks prepared by A — Failure of B to supply coal in time for baking — Kutcha bricks destroyed by monsoons — B held liable in damages for loss suffered by A on account of breach of contract by B. 1964 All LJ 1092.

SECTION 55 — SYNOPSIS

1. Scope and applicability.
2. Time whether of essence of contract.
3. Time when of essence of contract.
4. Mercantile contracts.
5. Agreement to lease.
6. "Becomes void, at the option of the promisee."
7. Extension of time.
8. Time when not of essence of contract.
9. Sale of land.
10. Performance within reasonable time — Delay.
11. Acceptance of performance after time fixed — Paragraph 3.
12. Effect of non-performance.

1. Scope and applicability. — (1) Section 55 provides for a special rule in regard to the performance of a promise to do a certain thing at or before a specified time namely that (unlike terms of contracts generally) the Court is not to enforce such a promise in accordance with its term but is to enforce it subject to the provisions of Section 55. AIR 1937 Bom 417 (421) = ILR (1937) Bom 782 (DB).

(2) Section 55 does not enable a promisee to keep alive a broken contract in the hope of being able to recover heavier damages for its breach. AIR 1914 Mad 573 (574, 576) = 37 Mad 412 (DB).

(3) Section 55 applies to cases where property in the goods passed by the contract, as much as to contracts where the property did not pass. (1881) 6 Cal 64 (69) (DB).

2. Time whether of essence of contract. — (1) The general rule is that contracts for the performance of which no definite time is specified must be carried out within a reasonable time, and contracts for the performance of which a definite time has been fixed must be completed within the time limited. AIR 1947 Lah

thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.

Effect of acceptance of performance at time other than that agreed upon.

If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of such acceptance he gives notice to the promisor of his intention to do so.†

[*] Cf. S. 65 infra. [†] Cf. Ss. 62 and 63 infra.

Section 55 — Note 2 (contd.)

352 (354) ** AIR 1962 J and K 10 (11) (DB).

(2) It is the duty of the Court, while construing a contract, to look to the pith and substance of the agreement and decide whether time was or was not of the essence of the contract. AIR 1947 Lah 352 (354).

(3) The question whether the time mentioned in the contract is of essence or not depends upon facts and circumstances of each case. AIR 1945 All 70 (74, 75) = ILR (1944) All 743 (DB).

(4) Under both the Contract Act and Sale of Goods Act there is no presumption that time is of the essence of the contract. AIR 1957 Pat 586 (591) = 36 Pat 633 (DB).

(5) The rule is that except in commercial contracts, the ordinary presumption is that time is not of the essence of the contract. This presumption can, however, be rebutted by showing the intention of the parties to the contract. AIR 1947 Nag 193 (199) = ILR (1947) Nag 60 (DB) ** AIR 1957 Pat 586 (590) = 36 Pat 633 (DB) ** AIR 1954 Ajmer 75 (76) ** AIR 1940 Oudh 443 (444) = 16 Luck 357 ** AIR 1932 Cal 493 (494) (DB).

(6) The question whether the stipulation as to time is of the essence of the contract or not depends on the terms of the contract and the intention of the parties. AIR 1954 Madh B 23 (26) = ILR (1954) Madh B 203 ** AIR 1957 Pat 586 (591) = 36 Pat 633 (DB) ** AIR 1949 Cal 661 (662) ** 1967 Raj LW 498 = ILR (1967) 17 Raj 917 ** AIR 1964 Punj 375 (380) = 1965 Pun LR (Supp) 511 ** AIR 1963 Pat 254 (259) (DB) ** AIR 1960 Mad 203 (205) = (1960) 1 Mad LJ 380 (DB).

(7) The intention of the parties is a question of fact. AIR 1949 Cal 661 (662) ** AIR 1957 Pat 586 (591) = 36 Pat 633 (DB).

(8) Intention to make time essence of contract must be expressed in unmistakable language. AIR 1915 PC 83 (84) = 43 Ind App 26 = 40 Bom 289 ** AIR 1955 Pat 201 (205) (DB) ** AIR 1952 Sau 88 (89) ** AIR 1950 Cal 582 (584) = ILR (1951) 1 Cal 216 ** AIR 1949 Cal 510

(511) = ILR (1951) Cal 331 ** AIR 1967 SC 868 (871) = (1967) 1 SCR 227 ** AIR 1964 Orissa 269 (272) ** AIR 1963 Pat 254 (259) (DB).

(9) Intention to make time essence of contract may be inferred from what passed between parties before but not after contract is made. AIR 1915 PC 83 (85) = 43 Ind App 26 = 40 Bom 289 ** AIR 1966 Mad 46 (48) = 78 Mad LW 186 (DB).

(10) The intention of the parties must appear from the contract as it was entered into and the subsequent conduct of the parties is not relevant. AIR 1950 East Punj 278 (280) (DB) ** AIR 1957 Pat 586 (594) = 36 Pat 633 (DB) ** AIR 1963 Pat 254 (259) (DB).

(11) Real intention of parties to agreement has to be deduced from all surrounding circumstances. AIR 1945 All 70 (74, 75) = ILR (1944) All 743 (DB) ** AIR 1923 Bom 441 (444) = 47 Bom 607 ** AIR 1919 Sind 68 (69) = 12 Sind LR 144 ** (1903-1904) 2 Low Bur Rul 99 (100) (DB) ** AIR 1959 Madh Pra 42 (42) = 1959 MPLJ 443.

(12) The intention of the parties that time should be of the essence of the contract should be ascertained not only from the written words of the contract but also from the nature of the property which is the subject-matter of the contract, the nature of the contract itself and also from the surrounding circumstances. AIR 1955 Cal 298 (300) (DB) ** AIR 1957 Pat 586 (591) = 36 Pat 633 (DB) ** AIR 1952 Nag 220 (234) = ILR (1949) Nag 581 (DB) ** AIR 1950 Cal 582 (584) = ILR (1951) 1 Cal 216 ** AIR 1947 Nag 193 (199) = ILR (1947) Nag 60 (DB) ** AIR 1964 Ori 269 (272).

(13) The mere insertion of a term in a contract that a certain act shall be done within a particular period will not necessarily indicate that time is of the essence of the contract. AIR 1950 Cal 582 (584) = ILR (1951) 1 Cal 216 ** AIR 1956 Trav-Co 93 (94) = ILR (1955) Trav-Co 926 (DB) ** AIR 1954 Madh B 134 (135) ** ILR (1952) 2 Raj 1 (3) ** AIR 1949 Cal 510 (511) = ILR (1951) 1 Cal 331 ** AIR 1947 Lah 352 (354) ** AIR 1931 Lah 205 (206) = 11 Lah 99 (DB) ** AIR 1967 SC 868 (871) = (1967)

Section 55 — Note 2 (contd.)

1 SCR 227 ** 1969 All LJ 279 (284) ** 1967 Raj LW 498 = ILR (1967) 17 Raj 917 ** AIR 1964 Ori 269 (272) ** AIR 1960 Mad 203 (205) = (1960) 1 Mad LJ 380 (DB).

(14) The intention as to time being of the essence of the contract may either be expressed or implied. AIR 1956 Trav-Co 93 (94) = ILR (1955) Trav-Co 926 (DB) ** AIR 1967 SC 868 (871) = (1967) 1 SCR 227 ** AIR 1964 Punj 375 (380) = 1965 Pun LR (Supp) 511 (DB) ** AIR 1960 Mad 203 (205) = (1960) 1 Mad LJ 380 (DB).

(15) The question of time being the essence of the contract would only arise in the performance after a concluded contract comes into existence. ILR (1954) Mys 118 (120).

(16) Time will be of the essence of the contract if it is so provided in the contract or if one of the parties after unreasonable delay on the part of the other party gives a reasonable notice to the other party making time as of the essence of the contract. If none of the two has happened reasonable time will be deemed to be the time which will be of the essence of the contract. AIR 1958 Punj 111 (115) = ILR (1958) Punj 294 (DB) ** AIR 1968 Andh Pra 190 (192).

(17) The onus is on the plaintiff to plead and prove that time was of the essence of the contract. AIR 1964 Orissa 269 (279).

3. Time when of essence of contract.

— (1) Where in execution of a money decree, the decree-holder agrees to accept less amount in full satisfaction if paid within two months but on failure the decree-holder is to proceed with the execution, time is of the essence of the contract, and the Court will not relieve against the forfeiture. AIR 1937 Pat 542 (544, 546) = 16 Pat 395 (DB).

(2) Time is always considered of the essence of the contract in following cases:—

(1) Where the parties have expressly agreed to treat it as of the essence of contract.

(2) Where delay operates as an injury; and

(3) Where the nature and necessity of the contract require it to be so construed. AIR 1961 Pat 107 (109).

(3) Where the words of a contract are that in case the judgment-debtor fails to pay up the decretal amount within the time specified, the sale would stand confirmed and no order is necessary, the wording shows that the parties meant that the benefit which was to accrue to the judgment-debtor would be lost to him if the payment was not made within the specified time: or in other words, that time was of the essence of the contract. AIR 1937 Pat 113 (116) = 16 Pat 202 (FB) ** AIR 1925 Pat 691 (692) (DB).

(4) In Kuri transactions, time being of the very essence of the contract, the bidder loses his right to the amount payable to him, unless the security is furnished within the period prescribed. AIR 1920 Mad 822 (823).

(5) Compromise decree — Payment by instalments over a long period — It cannot be laid down as a matter of law that time is not the essence of the contract in such a case. AIR 1931 Lah 696 (702) (DB).

(6) Where by a consent decree, the decree-holder has agreed to accept by way of certain instalments a lesser amount than actually due and there is a default clause in the decree, time will ordinarily be deemed to be the essence of the contract, and in case of default of any of the instalments the decree-holder would be entitled to claim the whole amount. AIR 1940 Lah 46 (46, 47).

(7) Sale by public auction at the instance of equitable mortgagee — Stipulation as to payment by highest bidder of initial deposit and balance of purchase money within certain time — No agreement to extend time — Default in payment by auction-purchaser — Right of mortgagee to resale property — Auction purchaser's suit for specific performance — Time held was essence of contract. AIR 1963 Mad 468 (470) = (1963) 2 Mad LJ 399 (DB).

(8) Where a creditor agree to accept part of debt, in full satisfaction, only if it is paid within certain time, time is essence of such agreement. 1935 Mad WN 1032 (1032) (DB) ** AIR 1937 Mad 234 (235) ** AIR 1926 All 278 (280, 281).

(9) Contract for supply and purchase of molasses — Quantity to be supplied in twelve monthly instalments, each instalment to be delivered within specified period — Held, on the facts of the case that the time was of essence of the contract and that the vendor was, therefore, entitled to put an end to the contract on breach of stipulation to take delivery of one instalment. AIR 1943 All 370 (377, 378) = ILR (1943) All 752 (DB).

(10) Where the railway administration entered into contracts with the plaintiff for supply of foodgrains to the railway needed for the consumption of railway staff, during war period when the foodgrains were becoming scarce and prices were rising abnormally, and it appeared that the parties intended that not only the entire quantity should be delivered within the stipulated period but also the supply should commence immediately — Held, that time was of the essence of the contracts. AIR 1957 Pat 586 (594) = 36 Pat 633 (DB).

(11) Where the defendants employed the plaintiffs as their agents to raise a loan within one month to clear their debts and it appeared that at that time the creditors of the defendants were insisting upon payment, it was held that

Section 55 — Note 3 (contd.)

the time was intended to be of the essence of the contract. (1912) 15 Cal LJ 40 (47) (DB).

4. Mercantile contracts. — (1) In cases of mercantile contracts stipulations as to time are prima facie to be regarded as of the essence of such contracts. AIR 1940 Oudh 443 (445) = 16 Luck 357 ** AIR 1957 Pat 586 (590) = 36 Pat 633 (DB) ** AIR 1953 Mys 66 (67) = ILR (1952) Mys 230 (DB) ** AIR 1935 Nag 111 (112) = 31 Nag LR 250 ** AIR 1916 Cal 901 (901) ** AIR 1916 Sind 4 (6) = 10 Sind LR 4 ** (1909) 5 Mad L Tim 247 (248) (DB) ** AIR 1961 SC 1295 (1296) = (1961) 3 SCR 845 ** AIR 1961 SC 990 (992) = (1961) 3 SCR 639 ** 1967 All LJ 323 ** AIR 1964 Orissa 269 (272) ** AIR 1962 J & K 10 (11) (DB).

(2) Stipulations regarding time for delivery of the goods are deemed to be of the essence of the contract in mercantile transactions, though not necessarily stipulations regarding payment. AIR 1961 Pat 107 (109).

(3) A transaction under which a subscriber to a chitty makes his bid at an auction is on a par with a commercial contract in which time is prima facie the essence of the transaction. ILR (1951) Trav-Co 685 (689) (DB).

(4) Where goods are sold on condition that they would be taken delivery of, on payment within certain time failing which seller being at liberty to re-sell same to another, time is of the essence of the contract. 1913 Punj LR No. 144 p. 493 (496) = 1913 Punj Re No. 80 (DB).

(5) Contract for purchase of 6 cases of printed cloth to be shipped in November-December 1907 — Subsequent alteration in contract, no fresh stipulation made as to time of delivery — Held, in mercantile contracts the stipulations as to time are of the essence of contract and in absence of fresh stipulation the previous stipulation was to hold good. (1910) 8 Ind Cas 945 (947) (Low Bur).

(6) Contract for purchase of bales of yarn — Condition that vendee should take delivery within certain period on payment — Failure to take delivery entitling vendor to sell goods and recover damages from vendee — Held, time was of the essence of contract in such sales and therefore Section 55, Clause (2) was not applicable. 1913 Punj LR No. 144 p. 493 (496) = 1913 Punj Re No. 80 (DB).

(7) In the case of Hazarmal contracts, as distinguished from forward delivery contracts, no date for delivery is fixed, but the expectations of the purchaser and the vendors are that delivery could be demanded and given as soon as possible if the goods are ready or after they become ready. AIR 1926 Nag 410 (412).

(8) Contract for sale, time being of the essence — Custom alleged to exist that the purchaser could take delivery after some days of the fixed date — Definite custom must be proved by the purchaser. AIR 1925 Mad 1232 (1233).

(9) A contract of carriage by rail is a case of contract which does not expressly or by necessary implication fix any time for the performance of the contractual obligation. That being so, the law implies that it shall be performed within a reasonable time. AIR 1959 Madh Pra 276 (279) = 1959 MPLJ 701 (DB).

(10) Where the railway administration entered into contracts with the plaintiff for the supply of food grains needed for consumption of the railway staff, it was held that the contracts were not mercantile contracts and accordingly there was no presumption that the stipulations as to time were of the essence of the contracts. AIR 1957 Pat 586 (590) = 36 Pat 633 (DB).

(11) In the case of perishable goods like oranges, the term of contract that the goods are to be carried by a special type of train which is faster than the ordinary goods train, is clearly of the essence of the contract. AIR 1957 All 193 (195) = ILR (1957) 1 All 425 (DB).

(12) Notices for the purpose of making time the essence of a contract are not expressly mentioned in Section 55 but are no doubt available in relation to mercantile contracts. AIR 1924 Cal 427 (434) (DB).

(13) Where time is not of the essence of the contract, one party cannot subsequently by unilateral action make time the essence of the contract. AIR 1960 Mad 452 (454) (DB).

(14) Where the performance of a contract falls due on a holiday, seller is bound to establish that he was entitled to perform the contract on the day following the holiday, by reason of the existence of a valid usage which is deemed to have been incorporated in the contract between the parties. He must not only prove existence of trade usage, but also establish that usage when read into written contract does not make it insensible or inconsistent. AIR 1921 Cal 809 (812) (DB).

(15) Even if time is the essence of a contract, where the vendor has not perfected his title to the goods by the date when the contract has to be completed, there is no breach of the contract on the part of the vendee, if he failed to pay the consideration on that date and complete the contract. AIR 1958 Punj 289 (293) = ILR (1958) Punj 1670 (DB).

5. Agreement to lease. — (1) Where time is distinctly of the essence of contract, it is within the power of the lessee to rescind it when the lessor has broken the contract by not putting the lessee in

Section 55 — Note 5 (contd.)

possession on the date agreed upon — The Transfer of Property Act and the Contract Act have to be read together, and under Part 1, Section 55, Contract Act the lessee can rescind the contract. AIR 1928 Nag 328 (328).

(2) Renewal of a lease is a privilege and if the tenant wishes to claim the privilege he must do so strictly within the time limited for the purpose. Delay in exercising option of renewal can be condoned only when delay is due to any unavoidable accident; excusable ignorance, fraud or surprise. Delay arising from mere neglect is not sufficient. AIR 1969 SC 405 (407) = (1969) 1 SCJ 783.

(3) Where no time for renewal of lease is fixed, application for renewal of lease may be made within reasonable time before expiry of the term. AIR 1969 SC 405 (407) = (1969) 1 SCJ 783.

(4) Agreement to lease fixing 4 months for giving formal patta — Time not of essence — Lessee in possession paying rent to lessor — Purchaser of leasehold property with knowledge of agreement to lease suing lessee for ejection — Lessee's right to claim specific performance of contract, held, not barred by efflux of time. AIR 1934 Cal 235 (237, 238) = 60 Cal 1372 (DB).

(5) Where the parties agree that a contract of lease for twenty years should commence on a certain date, to ask for a lease of twenty years from a subsequent date is to substitute a different lease for the original one which the Court have no power to do. The doctrine that equity does not ordinarily regard time as essence of contract does not apply to such a case. AIR 1952 Pat 393 (400) (DB).

6. "Becomes void, at the option of the promisee." — (1) Under Section 55, the right of the promisee to avoid the contract after breach is not circumscribed by any chronological limitations. AIR 1946 Bom 429 (435) (DB).

(2) Section 55 read with Section 2 (i) of the Act means that on the promisor's failure to perform within the contract time the promisee loses the power to enforce the contract. It is true the promisee has the option of enforcing the contract or not as may suit him. He may drop it altogether, but if he chooses to enforce it, he can only claim damages as provided for in Section 73 of the Act. ILR (1949) 2 Cal 530 (535).

(3) Under Section 55 where in a contract time is the essence of it and a party who is bound to perform his promise within the time fixed fails to do so the contract becomes voidable at the option of the other party. AIR 1959 Madh Pra 30 (33) = 1959 MPLJ 823 (DB).

(4) The mere mentioning of the fact that time should be deemed to be of the

essence of the contract does not make it voidable at the instance of one of the contracting parties. Under Section 55 the contract becomes voidable after the lapse of the specific time if the intention of the parties was that time should be of the essence of the contract. AIR 1955 Cal 298 (300) (DB) ** (1969) 1 Andh WR 344 (DB).

(5) Time is essence of contract — Exercise of option after expiry of period not permissible. Madh BLJ (1954) HCR 1610 (1625).

(6) Where time is of the essence of the contract and the contract is not performed within stipulated time, it does not get automatically determined. AIR 1968 Andh Pra 190 (192).

(7) The expression "voidable at the option of the promisee" occurring in Section 55 does not confer upon the promisee, although the promisor may have broken the contract by non-fulfilment thereof within the specified time, the discretionary right of tacitly treating the contract as subsisting for as long as he, the promisee, likes until it suits him to formally rescind it. ILR (1949) 2 Cal 530 (534, 535).

(8) It is open to the promisee not to exercise the option or to exercise the option given to him under Section 55 at any time. But the promisee cannot by the mere fact of not exercising the option change or alter the date of performance fixed under the contract itself. AIR 1946 Bom 1 (4, 5) = ILR (1946) Bom 218 (DB).

(9) Where the primary obligation under a contract is secured by a secondary covenant to pay a penalty or liquidated damages the obligor obtains no option of breaking his primary obligation. AIR 1957 Cal 217 (219).

(10) Sale of house site by municipality — Stipulation that construction of house should be completed within three years and that, in default, title of vendee would cease and vendee will be entitled only to 90 per cent of the purchase money — Default by vendee — Contract, held, did not become void on happening of contingency but was only voidable at the option of Municipality and vendee was not entitled to claim refund. AIR 1934 Mad 135 (136).

7. Extension of time. — (1) Under Section 55 the right of the promisee to avoid the contract after breach is not circumscribed by any chronological limitations. AIR 1946 Bom 429 (432) (DB).

(2) If the time is originally of the essence of the contract, it does not cease to be of the essence of the contract because a party agrees to grant a short extension. AIR 1940 Oudh 443 (445) = 16 Luck 357 ** AIR 1964 Punj 375 (380) = 1965 Punj LR (Supp) 511 (DB) ** AIR 1961 Patna 107 (109).

[But see AIR 1943 Bom 229 (235).]

Section 55 — Note 7 (contd.)

(3) When the purchaser seeks to have damages for breach of contract, assented to at a later date than that fixed by the contract for delivery, the effect of Section 55 is to put an end to the agreement, come to, after the original date of performance of a contract has expired, on the same footing as the original agreement. Mere forbearance from suing or giving a formal notice of rescission does not amount to extension of time for the performance of contract so as to alter the relevant date on which damages are to be assessed. AIR 1946 Bom 429 (431) (DB). (AIR 1922 PC 178, Relied on.) ** AIR 1946 Bom 1 (5) (DB) ** ILR (1960) Mys 1079 (DB).

(4) Compromise between parties that amount due under mortgage-decree should be paid by instalments and that the mortgagor should furnish additional security within specified time — Time essence of contract — Failure of mortgagor to furnish security within time — Court, held, could not enlarge time. AIR 1940 Rang 62 (64) (DB).

(5) Parties by consent fixing date for payment of decretal amount — Sale to be cancelled on payment — Time being of the essence of the contract could not be extended by Court. AIR 1925 Pat 691 (692).

(6) Contract for delivery of goods within specified time — Failure to perform — Several agreements extending time for performance — There need not be continuous and unbroken chain of extension — Final agreement of extension is necessary. AIR 1946 Bom 429 (432, 435) (DB).

(7) Though time is of the essence of the contract, a default by payee such as renders proper tender by the purchaser by due date impracticable would be interpreted as extending time when purchaser was prepared with ready and willing tender. AIR 1924 Rang 57 (60) = 1 Rang 472.

(8) Where the compromise decree itself has provided for an automatic dismissal of the suit if the conditions mentioned therein regarding the filing of the draft sale deed within 15 days are not performed, the terms as to the filing of the draft sale deed was an essential term of compromise and the Court cannot extend the time for the filing of the draft sale deed. AIR 1962 Mad 489 (490).

8. Time when not of essence of contract.— (1) Where the defendant avails of the benefits of the contract even if there was default on the part of the plaintiff, it cannot be said that time was of the essence of the contract. AIR 1957 Andh Pra 784 (794) (DB).

(2) Where the goods were to be delivered 'as soon as possible' time in the sense of a date-line was not of the

essence of the contract. AIR 1960 Mad 452 (454) (DB).

(3) Where time is not of the essence of the contract, one party cannot subsequently by unilateral action make time the essence of the contract. AIR 1960 Mad 452 (454) (DB).

(4) Stipulation either to transfer certain bonds and decrees in two months or to pay the amounts due under them, does not of itself show that time is of essence of contract. (1909) 5 Mad L Tim 247 (248) (DB).

(5) Where there is an express provision that time is of the essence of the contract and at the same time the contract provides for extension of time in certain contingencies, and provides for the payment of a fine or penalty for every day or week the work undertaken under the contract remains unfinished on the expiry of the time provided in the contract, such provision is inconsistent with time being of the essence of a contract, and would be calculated to render ineffective an express provision in a contract to that effect. It cannot be said in such a case, that it was intended that time should be of the essence of the contract. The principle applies equally to P. W. D. contracts. AIR 1940 Sind 1 (7) (DB) ** AIR 1923 Nag 140 (140).

(6) Where an agreement to cut timber stipulated for payments in instalments and against any area being cut until the corresponding portion of the consideration money had been paid, held the clause about payment of the instalments every quarter did not show that time was of the essence of contract. AIR 1922 Oudh 259 (262) = 25 Oudh Cas 169 (DB).

(7) Contract of sale and act of transfer embodied in same deed — Clause as to cancellation on failure to satisfy the dues of certain creditors by a certain date — Finding that appellants were not responsible for failure of the respondents to pay the whole dues by the fixed date; Held, that the time was not of the essence of the contract. AIR 1936 PC 24 (25, 26) = 15 Pat 127 = 63 Ind App 26.

(8) Agreement granting remission of part of debt if debtor paid the rest of the debt in two instalments on specified dates — In case of default in payment of instalment on date fixed the remitted amount was to become due and was to be recoverable from the properties given as security for the debt or personally from the debtor — Time fixed for payment of instalments, held, was not essence of contract. (1861) 8 Moo Ind App 239 (257) (PC).

(9) Contract to deliver linseed in two instalments at specified periods — Terms as to payment were cast on delivery — Part delivery made by defendant — Claim by plaintiff for excess refraction

Section 55 — Note 8 (contd.)

— Defendant refusing to deliver remainder of linseed unless plaintiff paid in full for the portion already delivered. **Held**, time was not of essence of contract so as to entitle defendant to cancel the contract. (1879) 4 Cal 252 (257) (DB).

(10) A consent decree or order is only the order of the Court carrying out the agreement between the parties and consequently no greater sanctity can be placed upon a consent decree than upon the agreement itself and if such an order names a specific time by which a particular term embodied in order has to be performed unless the language shows unmistakably that it was the intention of the parties to make the right of the parties depend on the observance of the time limit prescribed, the stipulation as to time is tantamount to this, that the term shall be carried into effect within a reasonable time. AIR 1930 Pat 234 (235).

(11) Consent decree providing for exchange of houses of plaintiff and defendant, after plaintiff had constructed well in his house — Exchange to be effected by a certain date — Plaintiff failing to construct well but applying for execution of decree — Defendant contending that time being of essence of decree it was voidable — Time, held, was not of essence as conduct of defendant in not protesting against the delay showed that he did not regard time as of vital importance. AIR 1916 Bom 282 (283).

9. Sale of land.— (1) Time is not ordinarily of the essence of a contract of sale unless the parties can make it so by express agreement in the contract itself or it can be inferred if the nature of the property intended to be sold requires it. AIR 1950 Trav-Co 61 (64) = 1950 Trav-Co LR 519 (FB) ** AIR 1958 Madh Pra 295 (297) = ILR (1957) Madh Pra 330 (DB) ** AIR 1957 Andh Pra 307 (328) = ILR (1955) Andhra 170 ** AIR 1955 Punj 189 (190) (DB) ** ILR (1955) Nag 236 (247) (DB) ** AIR 1953 All 529 (529) (DB) ** AIR 1953 Orissa 105 (107) (DB) ** AIR 1952 Sau 88 (89) ** ILR (1952) 2 Raj 1 (3) ** AIR 1949 Lah 72 (74) = Pak LR (1948) Lah 94 (DB).

(2) In the case of a contract for sale of immovable property there is no presumption that time was of the essence of the contract. AIR 1950 Nag 78 (80) = ILR (1950) Nag 397.

(3) In the case of contracts for sale of immovable property, the presumption is that time is not of the essence of the contract. AIR 1950 East Punj 278 (280) (DB) ** AIR 1953 Trav-Co 161 (165) (DB) ** AIR 1953 Trav-Co 90 (94) = ILR (1952) Trav-Co 823 (DB) ** AIR 1967 SC 868 (871) = (1967) 1 SCR 227 ** AIR 1967 Mad 220 (222) = 79 Mad

LW 486 ** 1967 Raj LW 498 = ILR (1967) 17 Raj 917 ** AIR 1966 Mad 46 (48) = 78 Mad LW 186 (DB) ** ILR (1966) 2 Mad 117 (DB) ** AIR 1964 Ori 269 (272). (The rule is, however, subject to some well recognised exceptions: (i) when one party is guilty of undue delay in performing his part of the contract and the other party has given reasonable notice that the contract is to be completed within reasonable time; (ii) When the character of the property is such that the Court would not exercise jurisdiction in allowing specific performance; (iii) When from other circumstances it would appear to the Court that decreeing specific performance is likely to result in injustice.) ** AIR 1964 Punj 375 (380) = 1965 Punj LR (Supp) 511 (DB). (Presumption is rebuttable.) ** AIR 1963 MP 31 (32) = 1962 MPLJ 517 (DB) ** AIR 1961 Mad 289 (290) = (1960) 2 Mad LJ 477.

(4) Agreement to sell leasehold property — Vendee given possession on payment of money — Pucca documents to be executed and registered within six months after obtaining the consent of the lessor — Time, held, was not essence of contract. AIR 1933 Bom 71 (73) = 57 Bom 292 (DB).

(5) Where A contracted to purchase a plot of land from a company, but when A by letters enquired as to when he might expect to be called upon to complete the conveyance, the Company did not reply to the letters: **Held**, that the omission of the company to answer the letters would not constitute a waiver on its part, but it was a significant piece of conduct which would tend to show that the company had never intended that the contract would automatically come to an end if it was not performed within the time specified. AIR 1955 Cal 298 (301) (DB) ** AIR 1963 Madh Pra 31 (32) = 1962 MPLJ 517 (DB). (Contract cannot be cancelled unilaterally and without giving reasonable notice.)

(6) Defendant agreeing to sell property to plaintiff — Plaintiff to pay consideration within three years with interest — Plaintiff in possession executing rent note in favour of defendant on same day — **Held**, defendant's amount was carrying interest in form of rent — Hence, time not of essence of contract. AIR 1949 Bom 193 (196) (DB).

(7) Contract for sale of land— Circumstance that price of land is rising is no ground for holding that time was essence of contract. AIR 1955 Punj 189 (190) (DB).

(8) In the case of a contract for the sale of a house, the circumstances that the house was required for the personal residence of the purchaser and he wanted vacant possession, that a period was specified within which vacant possession was to be given, that the purchaser

Section 55 — Note 9 (contd.)

had given on previous occasion one extension and that liquidated damages had been settled upon in case of default are not sufficient to make time as the essence of the contract. AIR 1950 East Punj 278 (280) (DB).

(9) The presumption that, time is not the essence of a contract to sell land is rebuttable, when sale is arranged to meet expenses of a marriage taking place on a certain date. AIR 1915 Mad 546 (547).

(10) There were penal clauses binding on both parties. If the purchaser failed to complete the purchase before the 10th January 1942 the vendor was to forfeit the deposit of Rs. 5,000 in his hand. On the other hand, if it was the vendor who had been delaying the completion of the transaction he had entered into he would be liable not only to refund the deposit of Rs. 5,000 but also to pay a compensation of another sum of Rs. 5,000. Held that the very fact that there were reciprocal agreements to compensate each other would make it clear, within the ambit of Section 55 of the Contract Act, that the intention of the parties was that time should be the essence of the contract. 1950 Bur LR (SC) 98 (104).

(11) Agreement to sell property — Purchaser to pay part of purchase-money on or before 20-10-1117 — Balance to be paid within certain time — Purchaser further agreeing that in case he was ready with money on or before 20-10-1117 to take sale-deed seller would get compensation of certain amount — Compensation to be charged on purchaser's property — Time held was essence of contract and that sale-deed was to be executed on or before 20-10-1117. AIR 1953 Trav-Co 377 (379) = ILR (1953) Trav-Co 1011 (FB).

(12) Contract of sale of real property expressly stating that seller would be entitled to dispose of property on expiry of period fixed for effecting conveyance and buyer would have no right left — Time held essence of contract. 1954 All WR (HC) 446 (447).

(13) The doctrine that time was not of the essence of the contract is not applicable to contracts for resale, within a time limit, of the property conveyed. The reason is that in the case of an option of repurchase there is no mutuality; the purchaser cannot compel the repayment of the consideration money and the power of purchase is only a privilege. Madh BLJ (1954) HCR 1610 (1625) (DB) ** AIR 1958 Madh Pra 295 (297) = ILR (1957) Madh Pra 330 (DB) ** AIR 1954 Assam 54 (55) = ILR (1953) 5 Assam 128 (DB) ** AIR 1954 Mad 799 (801) = ILR (1954) Mad 926 (DB) ** AIR 1952 Cal 32 (33) ** AIR 1947 Nag 208 (209) = ILR (1947) Nag 127 ** AIR 1927 All 321 (324) = 49 All 405 ** AIR 1919 Mad

544 (544) = 42 Mad 802 ** AIR 1960 Mad 203 (205) = (1960) 1 Mad LJ 380 (DB).

(14) Contract of reconveyance — Payment of considerations to be simultaneous with execution of deed in absence of special contract — Time essence of contract — Delay in performance largely due to defendant's attitude — Plaintiff held not disentitled to relief of specific performance. AIR 1962 Cal 103 (110) (DB).

(15) Where time is not of the essence of the contract of resale, reconveyance should be within reasonable time. AIR 1964 Mad 304 (305) = (1963) 2 Mad LJ 386.

10. Performance within reasonable time — Delay.— (1) Section 55 of Contract Act does not lay down any principle which differs from law of England as to contracts for sale of land. In such cases, equity looks at substance and not at letter of agreement in order to ascertain whether parties notwithstanding that they named specific time within which sale was to be completed really and in substance intended more than that it should take place within reasonable time. Prima facie equity treats importance of such time limits as being subordinate to main purpose of parties. AIR 1915 PC 83 (84, 85) = 40 Bom 289 = 43 Ind App 26. (AIR 1914 Bom 233, Reversed.) ** AIR 1952 Sau 88 (89) ** ILR (1952) 2 Raj 1 (3) ** AIR 1934 Pat 518 (519, 520) (DB) ** AIR 1933 Bom 71 (76) = 57 Bom 292 (DB) ** AIR 1927 Sind 49 (50) = 19 Sind LR 41 ** (1926) 98 Ind Cas 890 (891) (DB) (Lah) ** AIR 1924 Lah 151 (153, 154) = 4 Lah 327 ** AIR 1921 Cal 356 (360) (DB).

(2) In the case of contracts for the sale of land, the presumption is that the parties intended that performance should take place within a reasonable time even though the time was mentioned. ILR (1955) Nag 236 (247) (DB) ** AIR 1953 All 529 (529) (DB) ** AIR 1960 Mad 203 (205) = (1960) 1 Mad LJ 380 (DB).

(3) The maxim on which the rule of equity is based that time shall not be of the essence of the contract, can have no application where the agreement contains a plainly expressed stipulation that time shall be of the essence of the contract or the Court can hold that the implied intention of the parties was that time should be of the essence of the contract. In such a case and also in cases where, having regard to the general circumstances of the case, the Court cannot disregard the stipulation as to time, the special jurisdiction that can be exercised by the application of the rule of equity stands excluded. ILR (1960) Mys 96 (DB).

(3) In the case of contracts to sell immovable property, specific performance

Section 55 — Note 10 (contd.)

can be compelled if a tender is made within a reasonable time. AIR 1958 Madh Pra 295 (297) = ILR 1957 Madh Pra 330 (DB).

(4) Even where time is not essence of contract, purchaser must show his readiness and willingness to perform his part of contract within reasonable time. AIR 1917 Mad 8 (9) ** (1969) 1 Andh WR 344 (DB).

(5) In the absence of express stipulation on other circumstances, the date fixed in the contract to sell land is not of the essence of contract, but it can be made so by serving notice by either party to complete within reasonable time. AIR 1926 Cal 339 (342, 343) (DB) ** AIR 1957 Andh Pra 307 (328) = ILR (1955) Andhra 170 ** AIR 1957 Pat 586 (596) = 36 Pat 633 (DB) ** 1955 Andh WR 609 (610) ** AIR 1952 Nag 220 (234) = ILR (1949) Nag 581 (DB) ** AIR 1951 Mys 59 (62) = ILR (1951) Mys 196 (DB) ** AIR 1924 Bom 473 (474) = 49 Bom 1 ** AIR 1924 Bom 357 (358) = 48 Bom 368 ** AIR 1920 Cal 651 (654) (DB).

(6) Where the nature of the property intended to be sold requires that time should be of the essence as for instance, if the contract is for sale of a life interest or a mining lease given for a fixed period, the parties can make it so by express agreement in the contract itself or subsequently giving reasonable notice to complete on a certain day. AIR 1936 Cal 51 (52, 53) = 63 Cal 804.

(7) The time specified by notice demanding performance must be reasonable in the sense that enough time should be given to the other party for the doing of the things required in a proper manner. If the period fixed is not reasonable, the notice will be inoperative. 1955 Andh WR 609 (611).

(8) The Court can enforce contract beyond time fixed, if notice is unreasonably short. AIR 1922 Bom 14 (16, 17).

(9) Even if time was not of the essence originally, a much shorter time for performance would be considered reasonable when a demand for performance within a fixed space of time is made in a case where a commercial element is involved. AIR 1952 Nag 220 (234) = ILR (1949) Nag 581 (DB).

(10) The reasonableness of time is determined by the Court with reference not merely to what remains to be done at the date of the notice, but all circumstances of the case, including the previous delay of the party in default and attitude of the other side in relation to it. AIR 1920 Cal 651 (654) (DB) ** AIR 1957 Pat 586 (596) = 36 Pat 633 (DB) ** 1955 Andh WR 609 (611).

(11) A party who is ready and willing to perform the contract can alone complain of the unreasonableness of the time engrafted into the contract by the sub-

sequent notice. If he refuses to receive notice and to take advantage of the opportunity given by the party not in default he cannot subsequently complain that the time was unreasonable and therefore, the notice should be treated as inoperative. 1955 Andh WR 609 (611).

(12) The presumption that contracts of sale in respect of real property are intended to be carried within a reasonable time may be displaced by the clear language of the agreement of sale itself. 1954 All WR (HC) 446 (447).

(13) Where the contract has to be completed within a fixed period and, therefore, time is of the essence of the contract, to require of the vendor that he should allow reasonable time beyond the fixed period to enable the purchaser to do what he was required to do by the terms of the contract, would amount to making a new contract for the parties. AIR 1948 PC 192 (194).

(14) Although in a contract for sale of land, time may not be of the essence of the contract, yet unreasonable delay by the vendee will entitle the vendor to terminate the contract. AIR 1921 Mad 141 (142).

(15) Equity will not come to rescue where there has been undue delay in performance by a party. AIR 1953 Orissa 105 (107) (DB) ** AIR 1947 Nag 193 (199) = ILR (1947) Nag 60 (DB).

(16) It is not every delay which will give the other side a right to rescind, and each case must be decided on its own facts. AIR 1952 Nag 220 (235) = ILR (1949) Nag 581 (DB).

(17) In certain circumstances the Court of Equity will condone the delay and enforce the contract. The Court has no power, however to make a new contract between the parties. AIR 1952 Pat 393 (400) (DB).

(18) Where there has been inordinate delay on both sides, it may be inferred that the contract has been abandoned although no notice fixing a reasonable time has been given. AIR 1950 Nag 238 (240) = ILR (1950) Nag 386 (DB).

11. Acceptance of performance after time fixed — Paragraph 3.— (1) Acceptance of payment after the expiry of the time fixed operates as a waiver of limitation as to time in the contract. AIR 1917 Pat 82 (83) = 2 Pat LJ 520.

(2) Acceptance of performance of contract in which time is of essence after expiry of time without notice to claim compensation forfeits right to such compensation. (1910) 8 Mad L Tim 40 (46) ** AIR 1930 Oudh 417 (420) (DB).

(3) Time made expressly of the essence — Equity Court will not decree specific performance unless parties have waived the provision as to essence. AIR 1915 PC 94 (95).

(4) Purchaser may by his conduct waive although time is made the essence of the contract and where the time is

Section 55 — Note 11 (contd.)

once allowed to pass and, parties continue to negotiate for completing the purchase then time no longer remains the essence of the contract. But simple extension of time without anything more amounts only to a waiver to the extent of substituting such extended time for the original time and does not destroy the essential character of the time. AIR 1925 Cal 324 (326) (DB) ** AIR 1964 Bom 76 (81) = 65 Bom LR 516 (DB).

(5) Mere delay on the part of a party to the contract should not be taken to amount to waiver or abandonment by him, unless the parties have expressly or impliedly by their conduct made time the essence of the contract, delay is no valid plea in a suit on contract. Undue delay on the part of one party to a contract coupled with reasonable notice given to him by the other party will disentitle the party delaying from claiming any relief in equity. AIR 1925 Nag 58 (58) ** AIR 1929 Nag 164 (168) = 25 Nag LR 110.

(6) Sale — Time as essence of contract — Earnest money paid and balance to be paid within thirty days — Balance paid by instalments extending beyond such period and accepted by vendor — Right to recover entire money within thirty days is waived — He cannot contend that time was essence of the contract. AIR 1938 Rang 367 (367) (DB).

(7) Time fixed for delivery but no delivery called for — Subsequently plaintiffs manufacturing goods and defendants taking delivery in small quantities for long time — Plaintiffs giving notice to defendants to take delivery of remaining goods and on defendants' default selling by auction and claiming difference — Written contract had come to an end and there being no second contract plaintiffs were not entitled to relief. (1922) 24 Bom LR 142 (147, 148).

(8) Contract to deliver goods within a specified time — Time essence of contract — Breach of contract — Promisee not avoiding contract but extending time — Failure to deliver within extended time—Held there was breach of contract at the extended dates, and plaintiff was entitled to damages — Section 55 (3) means that the promisee cannot claim damages for non-performance at originally agreed time, not that he cannot claim damages for non-performance at the extended time. AIR 1922 PC 178 (180) = 43 All 257 = 48 Ind App 175 ** AIR 1959 Cal 472 (474) (DB).

12. Effect of non-performance.— (1) Specific performance of contract to sell land will be granted although there has been failure to keep dates assigned to it, if justice can be done between parties and if nothing in express stipulations of parties, nature of property or surrounding circumstances make it inequitable to grant relief. AIR 1915 PC 83 (84, 85) =

43 Ind App 26 = 40 Bom 289 ** AIR 1955 Pat 201 (205, 206) (DB) ** AIR 1953 Orissa 105 (107) (DB) ** AIR 1952 Sau 88 (89) ** AIR 1949 Cal 510 (511) = ILR (1951) 1 Cal 331 ** AIR 1967 SC 868 (871) = (1967) 1 SCR 227 ** ILR (1966) 2 Mad 117 (DB) ** (1964) 68 Cal WN 611.

(2) Where time is not of the essence of the contract, the expiry of the time limit given in the agreement does not make the agreement impossible of performance — The agreement can still be specifically enforced. AIR 1949 Cal 510 (511) = ILR (1951) 1 Cal 331.

(3) Where time is not the essence of the contract for the purchase of immovable property, the failure to pay a portion of the purchase money within the stipulated period will not ipso facto, disentitle him to get a decree for specific performance. AIR 1950 Cal 526 (527) = ILR (1951) 2 Cal 198.

(4) Where the purchaser does not complete the contract within time which is of the essence of the contract, the remedy is to claim specific performance. ILR (1949) 2 Cal 530 (534).

(5) Where in a contract for the sale of land time is expressly made of the essence of the contract in all respects, specific performance cannot be decreed in favour of the party in default and the default, though trivial, will entitle the other party to stand on the letter of the agreement — Time being of the essence of the contract, the vendor is entitled to rescind it on the expiry of the prescribed period. AIR 1916 PC 152 (157).

[See also AIR 1963 Mad 468 (471) = (1963) 2 Mad LJ 399 (DB). (Sale by public auction at the instance of equitable mortgagee — Stipulation as to payment by highest bidder of initial deposit and balance within certain time — Default in payment by auction purchaser — He is not entitled to decree either for specific performance or for damages. AIR 1933 Mad 376, Foll.)]

(6) Where an express stipulation as to payment of entire consideration before execution and registration exists between the purchaser and the seller and the latter by his conduct in accepting a part of the consideration when the sale deed could not be registered clearly indicates that the stipulation was not of the essence of the contract, the purchaser is entitled to specific performance of the contract when the seller sells the property to a third party. AIR 1955 Pat 201 (206) (DB).

(7) Where the vendors were guilty of unreasonable delay on their part in the matter of obtaining the sanction of the High Court which was a condition requisite for the sale to be effected and there was notice from the vendee asking them to complete the sale, it was held that the vendee was entitled to get back

56. Agreement to do impossible act.—An agreement to do an act impossible in itself is void.

Contract to do act afterwards becoming impossible or unlawful.

A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.*

Compensation for loss through non-performance of act known to be impossible or unlawful.

Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know

Section 55 — Note 12 (contd.)

his earnest money. AIR 1958 Punj 111 (115) = ILR (1958) Punj 294 (DB).

[See Also AIR 1958 Madh Pra 239 (241) = 1958 MPLJ 370 (DB). (Agreement for sale of land — Obtaining sanction of revenue authority necessary — Vendors not taking diligent steps to obtain — Breach of obligation — Vendors are bound to return earnest money.)]

(8) Where there is neither any evidence to show that in absence of sanction from Government to transfer the land, the transfer would be rendered void nor such sanction was contemplated under the terms of contract for sale, the purchaser cannot insist to complete contract only on the vendor's obtaining such sanction. 1965 Pun LR (Supp) 251 (DB).

(9) Where the vendor agrees to sell land after obtaining requisite sanction from Government, but later on abstains from taking such permission, and time is not of the essence of contract, he can be compelled by Court to apply for permission and specific performance enforced if permission is obtained. AIR 1964 SC 978 (979, 980) = (1964) 2 SCR 495.

(10) The defendants contracted to sell their property to the plaintiff by an agreement d/- 10-1-49. It was stipulated that the conveyance of the property would be executed within 60 days and in case the defendants failed to do so, they would be liable to pay Rs. 3000 as damages. The plaintiff paid Rupees 1500 as earnest money at the time of the contract. The last day of the expiry of 60 days fell on 11-3-1949. On 10-3-1949 the plaintiff sent a telegraphic notice alleging breach of contract and claiming return of the earnest money and Rs. 3000 as damages. It was held that the time was not of the essence of contract and the breach of the contract was on the part of the plaintiff. The plaintiff having wrongfully repudiated the contract on 10-3-1949 he was not entitled to the return of the earnest money. AIR 1952 Sau 88 (90) ** (1950) 3 Sau LR 252 (254) (DB).

(11) Where time is not of essence of contract failure to comply by specified time entitles promisee to damages only. AIR 1916 Sind 71 (72) = 9 Sind LR 137 ** AIR 1924 Bom 282 (286, 287).

(12) As soon as contract for sale of goods within a specified date is broken obligation of purchaser to take delivery vanishes; he is not bound to take the goods when delivered later. AIR 1915 Cal 194 (197) (DB).

(13) Contract for sale of immovable property to be performed within a certain time — Time not essence of contract — Vendee performing his part but not vendor — Vendor disentitled to claim specific performance — Vendee entitled to avoid the contract and claim return of purchase money. AIR 1933 Bom 71 (76) = 57 Bom 292 (DB).

(14) In a contract purchaser agreed to purchase some land and paid advance, the agreement was that the balance would be paid within a fixed time. In part performance of the contract, some land was transferred to the nominee of the purchaser and the vendor served a notice on the vendee for completion of sale by a fixed date; otherwise sale would be avoided. The purchaser failed:

Held, the purchaser was not entitled to return of the deposit as the contract was avoided on failure of the purchaser to perform his part at a fixed time when time was of the essence of contract. (1910) 33 Mad 375 (382) (DB).

(15) Where the plaintiff claims remuneration on the basis of the contract in which time was of essence and that contract which was foundation of the claim, fails completely the plaintiff is not entitled to remuneration on the basis of quantum meruit of his services. (1912) 15 Cal LJ 40 (49) (DB) ** (1913) 19 Ind Cas 48 (50) (Low Bur).

(16) Agreement for sale of immovable property — Property capable of identification by description — Agreement giving full description and not including any term for demarcation before execution of sale deed — Purchaser demanding demarcation before executing deed — **Held**, that there was breach on part of purchaser and vendors were not liable for any damages. AIR 1968 Goa 98 (100).

SECTION 56 — SYNOPSIS

1. Scope.
2. Becomes impossible.
3. Becomes unlawful.

to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise.

Illustrations

- (a) A agrees with B to discover treasure by magic. The agreement is void.
- (b) A and B contract to marry each other. Before the time fixed for the marriage, A goes mad. The contract becomes void.
- (c) A contracts to marry B, being already married to C, and being forbidden by the law to which he is subject to practise polygamy. A must make compensation to B for the loss caused to her by the non-performance of his promise.
- (d) A contracts to take in cargo for B at a foreign port. A's Government afterwards declares war against the country in which the port is situated. The contract becomes void when war is declared.
- (e) A contracts to act at a theatre for six months in consideration of a sum, paid in advance by B. On several occasions A is too ill to act. The contract to act on those occasions becomes void.

[*] See S. 65. See also the Specific Relief Act, 1963 (47 of 1963), S. 12, Explanation. For other sections relating to void agreements, see Ss. 24-30 supra.

Section 56 — Synopsis (contd.)

4. Contract containing arbitration clause.

5. Decree for specific performance.

6. Refund and compensation.

1. Scope.— (1) Section 56, Contract Act, clearly does not apply to a case, in which, although consideration of contract is lost, performance of promise on other side is still possible. (1880) 2 Mad 187 (190).

(2) Section 56, contemplates that a contract may be void under its provisions and yet compensation may be payable by the person, who is unable to perform it, whether the impediment is impossibility or unlawfulness, and whether the impediment existed at the time of the contract or supervened. The real question that must be considered, when it has to be determined whether Section 56 is applicable or not in any suit, except where the contract is sought to be specifically enforced, is not whether the contract was or became void, but whether the promisor has to make compensation for non-performance. The substance of Section 56 (viz., the payment of compensation being excused can only apply when there is no contract to the contrary. AIR 1928 Sind 21 (24).

(3) Part of compromise decree, directing payment direct out of Court, to minor's next friend can be ignored on analogy of Section 56 as unlawful. AIR 1939 Mad 814 (816) (DB).

(4) Maintenance given under compromise in settlement of disputed claim to taluqdari — Profits of taluqdari dwindling — Held, that the maintenance rate can be reduced on principles of justice, equity and good conscience, rules of which can be applied, if they are not in conflict with the provisions of Contract Act. AIR 1937 Oudh 82 (84, 86) = 13 Luck 65 (DB).

(5) Co-sharer zamindar contracting to sell 800 acres of his undivided share to P — Land specified adjoining to P's — Sale-deed written crudely — Two postscripts— Co-sharer promising in sale deed to get land measured out and handed over to P — Held, that postscript could not be cut off from agreement and that P could not give general character instead of specific to his claim — Contract was contingent and Section 32 applied. Section 56 did not apply. AIR 1936 Sind 26 (28) (DB).

(6) Contract impossible of fulfilment owing to supervening condition can be relied on in defence. AIR 1926 Sind 27 (30) ** AIR 1918 Cal 830 (834) = 45 Cal 28 (DB).

(7) It is not accurate to say that impossibility excuses breach, without further qualification. It would be more correct to say that precisely opposite is the rule (Obiter.) AIR 1919 PC 85 (90).

2. Becomes impossible. — (1) In English law, a contract to do act which becomes impossible in law after contract is made, becomes void when act becomes impossible, but contract to do act which becomes impossible in fact does not become void, unless according to true intention of parties, agreement was conditional on its performance being or continuing possible in fact. Indian Contract Act makes no distinction of this kind. In second paragraph of Section 56, so far as contract to do act which becomes impossible in fact are concerned, it lays down as general rule what was English law only in certain exceptional cases. 1910 Upp Bur Rul 2nd Qr 22 (24 and 25).

(2-3) Performance of a contract may become impossible because of the destruction of the subject-matter or of anything essential to the performance of the contract or in case of contracts of service

Section 56 — Note 2 (contd.)

by death or illness of the party concerned. A contract may become impossible by change in law which has the effect of rendering a contract unlawful which was lawful at the time it was made. A contract may also become impossible of performance because a state of things which was the basis of the contract had ceased to exist and finally a contract may become impossible of performance in the sense that circumstances have intervened which render the performance within the time, in the way contemplated, impossible. AIR 1954 Tripura 17 (20).

(4) Test of impossibility is whether it was practically impossible for party to perform the contract within specified time. AIR 1917 Mad 509 (510).

(5) 'Impossible' includes what has become impracticable but it does not include what has become more onerous and burdensome. 1910 Mad WN 686 (687).

(6) A security bond is, in essence a contract for the due performance of a certain thing, and a party is entitled to have that contract enforced by the Courts, unless it cannot be enforced due to some reason, viz., if the latter falls ill. AIR 1928 Lah 61 (62).

(7) What is reasonable time for performance of contract is to be decided by circumstances of particular case. AIR 1919 Mad 287 (291, 292).

(8) In commercial contracts, where the contract becomes impossible of performance by reason of a state of war or by an act of the executive Government, or the contract which would otherwise be expected to be ordinarily performed, is delayed by reason of certain regulations imposed by the Government making the performance of such contract dependant upon the grant of licence or permit, the parties need not wait for an indefinite period in the hope of the relaxing of the control orders or the granting of licence and permit. AIR 1954 Mad 119 (123) = ILR (1955) Mad 302 (DB).

(9) Section 13 of the Specific Relief Act, 1877, provides that notwithstanding anything contained in Section 56 of the Contract Act, a contract is not wholly impossible of performance because a portion of its subject-matter, existing at its date, has ceased to exist at the time of the performance.

Frustration.

(10) Section 56 does not cover every case of frustration. It applies only to cases of physical impossibility. A subsequent unforeseen event or contingency, for which neither of parties is responsible and for which they have not provided, may sometimes operate to avoid the contract. Regard must be had to the nature and circumstances of the transaction and the implied terms. But

no Court has power of absolution and special care must be taken to avoid making a new contract for parties. AIR 1921 Cal 509 (513, 514) ** AIR 1960 SC 588 (594) = (1960) 2 SCR 793 ** AIR 1960 J and K 91 (94) ** AIR 1959 Cal 576 (580) = 63 Cal WN 549 (DB).

(11) In a suit on the basis of a contract it is open to the defendant to admit the contract and the contractual liability and to avoid the effect of that admission on the pleas of frustration or of performance. AIR 1969 All 571 (581) = 1968 All LJ 1079 (DB).

(12) The doctrine entrenched in S. 56 can come into operation only when the performance of a contract becomes impossible or unlawful by an event that intervened subsequently. AIR 1957 Andh Pra 71 (72).

(13) In order that the doctrine of frustration as embodied in Section 56, Contract Act, may apply the following three conditions must be satisfied, viz.—

- (a) a valid and subsisting contract between the parties,
- (b) there must be some part of the contract yet to be performed,
- (c) the contract after it is made, becomes 'impossible.' AIR 1961 Cal 70 (73).

(14) The doctrine of frustration known to English law has been statutorily recognised under the Indian law, in this section. AIR 1954 Trav-Co 10 (20) ** 1965 All LJ 689 = ILR (1965) 2 All 458. (It is not permissible to import the principles of English law 'dehors' statutory provisions of Section 56.) ** AIR 1964 Raj 205 (212) = 1964 Raj LW 313 (DB) ** AIR 1960 J and K 91 (94). (Section 56 is exhaustive and it is not necessary to import principles of English law into it.)

(15) Section 56 lays down a rule of positive law and does not leave the matter to be determined according to the intention of the parties. AIR 1968 SC 522 (526, 527) = (1968) 1 SCR 821 ** AIR 1969 SC 110 (116) = (1969) 2 SCJ 31.

(16) The real question is whether the event which has occurred is such and whether its relation to the contracts is such that a Judge considering the contract and the surrounding circumstances must hold that it would not be just and reasonable to hold the parties any longer to the terms of the contract. AIR 1952 Cal 397 (402) (DB).

(17) The doctrine of frustration is really an aspect or part of the law of discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done and hence comes within the purview of Section 56 of the Indian Contract Act. AIR 1954 SC 44 (47) = 1954 SCR 310 ** AIR 1969 SC 110 = (1969) 2 SCJ 31. (Appeal No. 367 of 1958, D/- 16-3-1962 (Mad), Reversed.) ** AIR 1968 SC 522 (527) = (1968) 1 SCR

Section 56 — Note 2 (contd.)

821 ** AIR 1961 Raj 277 (279) = 1961 Raj LW 563 ** ILR (1961) 11 Raj 390 (DB) ** AIR 1959 Assam 75 (93) (DB) ** AIR 1959 Cal 576 (580) = 63 Cal WN 549 (DB).

(18) Before the doctrine of frustration can be invoked, it must be shown that the event which has produced frustration was an event which the parties to the contract did not foresee and could not with a reasonable diligence, have foreseen. AIR 1955 Pepsu 51 (56) = ILR (1954) Patiala 563 (DB) ** AIR 1958 Andh Pra 576 (580) (DB) = 1958 Andh LT 163 (DB).

(19) If the contract is absolute in its terms and covers the frustrating event parties are bound by the contract. ILR (1949) Nag 718 (734) (DB).

(20) "Force majeure" clause should be construed with a close attention to words which precede or follow it and with due regard to the nature and general terms of the contract. Therefore, the words "any other happening" in such a clause must be given ejusdem generis construction so as to engulf within its fold only such happenings and eventualities which are of the nature and type illustrated in the same clause with close attention to the nature of terms of the contract and would not reasonably be within the power and control of the party. AIR 1969 Orissa 152 (162) = ILR (1969) Cut 93 (DB).

(21) The expression "force majeure" includes strikes, break down of machinery and such things which are normally not included in the expression "vis major". Where reference is made to "force majeure", the intention is to save the performing party from the consequences of anything of the nature stated above or over which he has no control. AIR 1969 Orissa 152 (162) = ILR (1969) Cut 93 (DB).

(22) If the adventure survives as a reasonable and recognisable whole with only a little damage here and there if a very small portion of the contract becomes impossible or difficult of performance, performance is not excused. ILR (1949) Nag 718 (736) (DB).

(23) Contract performed in part — Principle of compensation on account of frustration of contract could not come in aid. AIR 1955 Mad 606 (607).

(24) The doctrine of frustration is applicable to contracts for sale of land in India. AIR 1954 SC 44 (49) = 1954 SCR 310 ** 1955-2 Mad LJ 339 (355) (DB) ** AIR 1951 Cal 332 (337) (DB).

(25) Doctrine of frustration — Provisions of S. 56 are exhaustive— S. 56 lays down a positive rule relating to frustration of contracts and it is not permissible for the Courts to travel outside the provision of that section and import the

principles of English law de hors the statutory provisions. AIR 1954 SC 44 (47) = 1954 SCR 310 ** AIR 1968 SC 1024 (1026) = (1968) 3 SCR 339. (AIR 1949 E. P. 301, Overruled.)

(26) Doctrine of 'frustration of venture' is based not upon existence of any actual impossibility in fact but upon existence in the circumstances of the case, of an implied condition, which must be absolutely necessary to give effect to the transaction which parties must have intended. AIR 1942 Cal 291 (292) = ILR (1941) 2 Cal 78 ** AIR 1934 Mad 85 (86) (DB).

(27) Where at the time contract was entered into there were in fact some uncertainties and subsequently those uncertainties become realities, the commercial venture gets frustrated and both parties are excused from performing the contract. AIR 1966 Madh Pra 145 (150) = 1966 MPLJ 120 (DB).

(28) Where it has not become impossible for a party to perform his obligation under contract, but merely burdensome to him, doctrine of frustration can have no application. AIR 1945 Pat 300 (303, 304) = 24 Pat 197 (DB) ** AIR 1960 SC 588 (593, 594) = (1960) 2 SCR 793. (Contract is not frustrated merely because of a wholly abnormal rise or fall in prices, a sudden depreciation of currency, or an unexpected obstacle to execution or the like.) ** AIR 1964 J and K 26 (28) = 1964 Kash LJ 49 ** AIR 1962 Mad 122 (125, 126) = 74 Mad LW 716 ** 1961 Ker LT 449 ** AIR 1961 Orissa 75 (78, 79) = (1960) 2 Orissa JD 481 (DB).

(29) Disappointed expectations do not lead to frustrated contracts. AIR 1964 Punj 482 (485) = 66 Pun LR 943. (Company agreeing to pay bonus to its employees — Ratification of agreement even after company incurred losses — Subsequent refusal of company to pay bonus on grounds of losses cannot be justified on the doctrine of frustration.)

(30) Whether frustration occurs or not depends on the nature of the contract and on the events which have occurred. The doctrine of frustration may apply to a contract of unascertained goods. Where the specification of goods to be supplied does not define what was to be the source of the goods, the contract cannot be said to have frustrated if only one of the many ways of performing it has become illegal or impossible. AIR 1945 PC 144 (145, 146) ** AIR 1952 Cal 335 (338).

(31) If the seller has no goods at all ready for shipment, he cannot take advantage of the circumstance that shipment was impossible; that defence should be available only to a person who, but for the impossibility of shipment by reason of circumstances beyond his control, was in fact in a position to fulfil his

Section 56 — Note 2 (contd.)

engagement. AIR 1921 Cal 305 (306, 307, 308).

(32) When there is frustration the dissolution of the contract occurs automatically. It does not depend, on the choice or election of either party. AIR 1954 SC 44 (49) = 1954 SCR 310 ** AIR 1957 Pat 586 (597) = 36 Pat 633 (DB) ** AIR 1954 Mad 119 (124) = ILR (1955) Mad 302 (DB) ** AIR 1964 Raj 205 (212) (DB) = 1964 Raj LW 313 (DB).

(33) The doctrine of frustration is applicable only where the frustrating event is outside the contemplation of the contracting parties. It is not applicable to an express contract to repay money in case of supervening impossibility of performance of a major obligation. AIR 1947 Bom 98 (104) ** AIR 1964 Pat 250 (251) = 1963 BLJR 426 (DB) ** AIR 1961 Raj 277 (279) = 1961 Raj LW 563 ** 1958 Andh LT 960.

(34) Contract Act does not enable a party to a contract to ignore the express covenants thereof, and to claim payment of consideration for performance of the contract at rates different from the stipulated rates, on some vague plea of equity. AIR 1960 SC 588 (594) = (1960) 2 SCR 793.

Implied term.

(35) Sections 56, 73 — Contract between A and B that B should manufacture certain goods for A who was to sell them in Australia — A accepting delivery of goods for some time — Subsequent prohibition of import of such goods in Australia — A losing market for goods and asking B to cancel his orders — B ceasing to manufacture goods but claiming damages for breach of contract — Contract, held, did not contain implied term as to its enforceability depending upon A's finding customers and did not become impossible of performance and could be fulfilled — A, held, guilty of breach and liable to pay damages. AIR 1945 Mad 291 (293, 294) = ILR (1946) Mad 192 (DB).

(36) Contract to sell Penang tin "for forward delivery" — Contract held did not imply term that tin already ordered by sellers should arrive in Calcutta before delivery to purchasers — It was not such a necessary term that both parties must have intended it to be a term of the contract — Onus was on sellers to prove that contract became impossible of performance due to outbreak of war with Japan — Burden was not discharged. AIR 1948 PC 217 (220).

(37) Even if the parties had made a provision in their contract for the event which has frustrated, the law would im-

ply for them what it assumes they would have agreed had they contemplated this unforeseen contingency at the time they entered into contract. 1958 Andh LT 960.

(38) It is not permissible to imply a term which is not consistent with the express terms of the contract. Even if such a term could be implied, it must at least be proved that the common intention of both the parties was that in the event of non-fulfilment of the implied term the defendant would be excused from performance of his obligations under the contract. AIR 1952 Cal 397 (400) (DB).

(39) In contract for delivery of goods, buyer is not entitled to claim damages on sinking of goods, in the absence of any condition in contract specially providing for a contingency. AIR 1930 Lah 193 (195).

(40) Hire-purchase — Covenant that hirer to make good loss by fire is valid and the stipulation cannot be avoided under Section 56, hirer being liable as bailee under Sections 151 and 152, Contract Act. AIR 1937 Sind 207 (207) (DB).

(41) Contract to supply tapestries manufactured to specification given by vendee for selling them in Australia — Australian Government prohibiting import of such goods — Market having been lost vendee informing vendor to cancel order — Sale to clients in Australia held was no term of contract — Vendee held liable for damages. AIR 1945 Mad 291 (293, 294) = ILR (1946) Mad 192 (DB).

Commercial impossibility.

(42) Impossibility must be physical or legal impossibility and not impossibility in reference to ability or circumstances. "Commercial impossibility" i.e., extreme or unforeseen cost or difficulty of performance is no excuse. AIR 1921 Cal 305 (307, 308) ** AIR 1923 PC 105 (111) = 50 Ind App 142 = 47 Bom 563 ** AIR 1957 Pat 256 (258, 259) (DB) ** AIR 1956 Hyd 190 (191) = ILR (1956) Hyd 646 ** AIR 1952 Punj 34 (38) (FB) ** AIR 1951 Ajmer 65 (66) ** 1949-1 Madh BLR 244 (248) (DB) ** (1947) 52 Mys HCR 41 (45) (DB) ** AIR 1945 Pat 300 (303, 304) = 24 Pat 197 (DB) ** AIR 1931 Lah 347 (348, 349) (DB) ** AIR 1927 Mad 89 (89, 90) ** 1910 Mad WN 686 (687) ** AIR 1921 Nag 42 (45) ** AIR 1920 Nag 161 (163) = 17 Nag LR 1 ** AIR 1915 Bom 232 (236) = 40 Bom 301 ** AIR 1967 All 253 (255) = 1968 All LJ 725. (In absence of any incapacity to perform contract parties are not absolved from their obligation to carry out the contract.) ** AIR 1962 Mad 132 (137) = (1962) 2 Mad LJ 452 ** AIR 1962 Mad 122 (125) = 74 Mad LW 716.

(43) The word "impossible" has not been used in the sense of physical or

Section 56 — Note 2 (contd.)

literal impossibility. The performance of an act may not be literally impossible but it may be impracticable and useless from the point of view of the object and purpose which the parties had in view; and if an untoward event or change of circumstances totally upsets the very foundation which the parties rested their bargain it can be said that the promisor finds it impossible to do the act which he promised to do. AIR 1954 SC 44 (46) = 1954 SCR 310 ** AIR 1957 Andh Pra 71 (72, 73) ** ILR (1957) Andh Pra 382 (387) ** 1955-2 Mad LJ 339 (355) (DB) ** AIR 1963 All 201 (203) ** AIR 1963 All 194 (197) ** 1963 Raj LW 621 = ILR (1963) 13 Raj 1188 ** AIR 1961 Mys 29 (33) = 38 Mys LJ 106 (DB) ** AIR 1961 Pat 41 (55) = ILR 38 Pat 1007 (DB) ** AIR 1960 J and K 91 (94).

(44) The Court will not apply the doctrine of impossibility to assist a party which does not want to fulfil its obligations under the contract and relies on literal impossibility to back out of it. The doctrine of impossibility, which is based on equity and common sense cannot be permitted to become a device for destroying the sanctity of contract. AIR 1963 All 201 (203).

(45) Any and every change of circumstance would not justify a Court in declaring a contract to be inoperative. The principal thing to be considered in each case is how far the altered circumstances affect the contract itself and the working of it. The change of circumstance must be such as would remove the very foundation of the contract itself. ILR (1951) 2 Cal 386 (394) (DB) ** AIR 1965 Mad 400 (402) = (1965) 1 Mad LJ 227 (DB) ** 1961 Ker LT 449.

(46) Commercial men must not be asked to wait till the end of a long delay to find out from what in fact happens whether they are bound by a contract or not; they must be entitled to act on reasonable commercial probabilities at the time when they are called upon to make up their minds. ILR (1948) 2 Cal 11 (32).

(47) Where there is a positive contract to do a thing, not itself unlawful, the contractor has to perform it or pay damages for not doing it, although in consequence of unforeseen accidents the performance of contract may become unexpectedly burdensome or even impossible. AIR 1957 Madh B 53 (55) = ILR (1956) Madh B 182 (DB).

(48) The change must be of a fundamental and sweeping character which kills the contract itself and not merely one of a temporary nature which leaves the contract alive and capable of being performed at a future date. That ques-

tion is a question of fact to be determined on a consideration of all the facts. AIR 1953 Mad 300 (304) = ILR (1953) Mad 831 (DB) ** 1967 Ker LR 774 = 1968 Ker LJ 31 ** AIR 1964 Raj 205 (212) = 1964 Raj LW 313 (DB) ** AIR 1962 Mad 132 (136) = (1962) 2 Mad LJ 452 (DB). (Self-induced frustration — Party is not absolved from its obligations.) ** AIR 1960 J and K 91 (94) ** (1958) 1 Andh WR 180 (DB).

(49) Lease of dry dock — Lessee covenanting to insure — Insurance Company not insuring at current premium — Covenant containing no limitation that insurance must be at current premium only — Covenant is not impossible of performance. AIR 1919 PC 85 (90).

(50) Strike of workmen employed by lessee of salt pans does not of itself make performance of contract impossible, when the strike was not unforeseen and there was no condition that in such contingency the parties were to be excused from further performance. The lessee is liable for rent and costs of repairs to the salt pans. AIR 1928 Bom 61 (62) = 52 Bom 142.

(51) Where the specification of goods to be supplied does not define what was to be the source of the goods, the contract cannot be said to have frustrated if only one of many ways of performing it has become illegal or impossible. AIR 1945 PC 144 (145, 146).

Default of party.

(52) Section does not apply to cases of impossibility due to the default of contracting party himself. AIR 1924 Pat 586 (589) = 3 Pat 581 ** AIR 1952 SC 9 (11) = 1952 SCR 36 ** AIR 1935 PC 128 (131) ** AIR 1957 All 143 (146) (DB) ** AIR 1954 Tripura 17 (20, 21) ** AIR 1953 Mad 300 (308) = ILR (1953) Mad 831 (DB) ** AIR 1952 Cal 397 (403) (DB) ** AIR 1949 Cal 510 (514) = ILR (1951) 1 Cal 331 ** AIR 1948 Pat 311 (312) ** (1907) 4 All LJ 778 (802) ** AIR 1965 Mad 400 (402) = (1965) 1 Mad LJ 227 (DB) ** AIR 1963 Cal 163 (174) = 1963 Cal LJ 43. (Self-induced frustration — Party is not absolved from its obligation.) ** AIR 1959 Assam 75 (90) (DB).

(53) The provisions of Section 56 of the Contract Act cannot apply to a case of "self-induced frustration" i.e., where the event which is alleged to have frustrated the contract arises from the act or election of a party. AIR 1969 SC 110 (118) = (1969) 2 SCJ 31.

(54) Auction-purchaser agreeing with judgment-debtor to reconvey property purchased at Court auction after applying for cancellation — Judgment-debtor depositing the amount as agreed upon — Auction-purchaser failing to get the sale

Section 56 — Note 2 (contd.)

cancelled — Suit for specific performance — Auction-purchaser held liable to perform the contract as failure to apply for cancellation did not make the contract impossible of performance. AIR 1917 Mad 67 (67, 68).

(55) Sections 56 and 2 (d) — Original patti divided into sub-pattis — Owner of one sub-patti agreeing to be responsible for rents of whole original patti — Agreement is for consideration and he is responsible for failure to realize amount — Section 56 does not apply. AIR 1944 Nag 307 (308) = ILR (1944) Nag 412.

(56) Contract for sale becoming impossible by act of defendant-seller — He is liable to refund advance paid by plaintiff purchaser. AIR 1963 Ker 247 (247) = 1963 Ker LT 73.

Act of third party.

(57) Contract to sell goods on getting them "as and when" from a third party but third party failing — Original contract is not frustrated — "As and when" did not mean "if and when". AIR 1923 PC 54 (56) = 50 Ind App 9 = 47 Bom 344.

(58) Vendor agreeing to supply goods "under manufacture by mill" — Contract anticipating supply — Mill failing to supply goods to vendor — Neither party held liable to the other. AIR 1920 Bom 187 (188) = 44 Bom 907.

(59) Agreement to refer dispute to three named arbitrators — One arbitrator dying before reference — Agreement held impossible of performance. 1936 Mad WN 407 (408).

(60) Where plaintiff, who had contracted to cultivate indigo for defendant in different lands, lost possession of some of such lands, on account of failure of his immediate landlord to pay rent, the case falls under Section 56 and the mere possibility of plaintiff paying rent due and retaining possession is not enough to take the case out of section. Plaintiff therefore is entitled to have that portion of contract which related to such lands cancelled on ground of impossibility of performance through no neglect on his part. (1881) 7 Cal 474 (478, 479).

(61) Where a sub-lease is entered into in the belief that the original contract will be subsisting during the period, the cancellation of contract terminates the sub-contract as well. AIR 1916 Mad 619 (619) ** (1909) 6 Mad LT 375 (375) (DB).

(62) Where the elder brother agrees to execute sale deed along with his younger brother he cannot plead that the contract has become impossible of perform-

ance due to refusal of his younger brother to join. (1907) 17 Mad LJ 37 (38, 39).

(63) First part of 2nd para of Section 56 does not speak of act having become impossible by reason of the act of promisors. The Legislature did not intend to depart from general common law rule, which is that where party has not qualified his obligation under contract he is liable to make compensation in damages for non-performance although the performance has been rendered impracticable by some unforeseen cause beyond his control (such as failure to return hired lights due to damage caused by rioters.) AIR 1941 Pat 429 (429, 430).

Act of Government.

(64) Contract on C. I. F. terms to ship certain goods of a certain brand to a certain port in a certain period — Contract containing a force majeure clause — The steamer commandeered by the Government for purposes of war — Accommodation for that cargo on any other steamer not obtained — Force majeure clause held applicable — Contract is avoided and damages cannot be claimed. AIR 1925 Mad 626 (630) = 48 Mad 538.

(65) Contract for sale of goods — Parties aware of restrictions imposed by Government on the supply of waggons but expecting normal conditions by date of performance — Waggon restriction still existing at date of performance — Failure to supply — Contract held void being impossible of performance — Parties relieved of their liabilities. AIR 1920 Cal 1021 (1024) = AIR 1952 Cal 335 (338).

(66) Flower garden acquired by the Government under the Land Acquisition Act, during the continuance of a lease — Contract having become impossible of performance becomes void and the lessor is bound to compensate the lessee. AIR 1922 All 6 (6, 7) = 44 All 229.

(67) Parties not liable if contract for delivery of goods becomes impossible of performance owing to Government requisitioning ships. AIR 1928 Sind 21 (24).

(68) Contract of suretyship to produce judgment-debtor in Court becomes void, the latter being in Criminal jail and cannot be enforced. AIR 1923 Rang 26 (26) = 4 Upp Bur Rul 99.

(69) Agreement between Corporation of district of North Vancouver and Electric Power Company for supply of electricity by latter — Corporation to be entitled to acquire the system after 10 years — Portion of district incorporated as City of North Vancouver in the meantime — Right of Corporation under agreement is not lost there being no abrogation of

Section 56 — Note 2 (contd.)

terms by supervening event. AIR 1917 PC 103 (105). (Case under British Columbia Act, 1909, Cl. 35, S. 23.)

(70) A requisition by Government of the subject matter of a contract made during the period of performance creates a supervening impossibility and frustrates the contract unless the parties by express terms contemplated such an event and provided against it. AIR 1952 Cal 397 (402) (DB).

(71) Held, on the facts that having regard to the nature and terms of the contract (for sale of house sites by a development company) the actual existence of war conditions at the time when it was entered into, the extent of the work involved in the development scheme and the total absence of any definite period of time agreed to by the parties within which the work was to be completed it could not be said that the requisition order as to the lands in question under the Defence of India Rules vitally affected the contract or made its performance impossible. AIR 1954 SC 44 (50) = 1954 SCR 310. (AIR 1951 Cal 332, Reversed.)

(72) Defendant contracting to supply jaggery by rail — Delivery by rail becoming impossible by issue of Government notification controlling movement of jaggery by rail — Plaintiff refusing to bear additional expenditure entailed by change in mode of transport — Held that even assuming that contract had not become impossible of performance, defendant did not commit breach of the contract. AIR 1952 Mad 670 (670).

(73) Where the goods were imported for sale, but its sale became prohibited by law by the time the goods arrived, there is no self-induced frustration and the contract to supply goods becomes void. AIR 1969 SC 110 (118) = (1969) 2 SCJ 31. (Appeal No. 367 of 1958, dated 16th March, 1962 (Mad), Reversed.)

(74) Agreement between Government of former Jodhpur State and plaintiff for setting up mill by latter — State agreeing to exempt plaintiff from payment of excise duty — Agreement not enforceable against State of Rajasthan or Union of India. AIR 1960 Raj 92 = 1960 Raj LW 44.

(75) Contract for supply of rice outside State — Ban by Government on export of foodgrains to other States — Contract stands discharged. AIR 1966 MP 145 (150) = 1966 MPLJ 120 (DB).

Burden of proof.

(76) Where in a contract for sale of certain goods the seller alleges that it was impossible for him to supply them owing to the restrictions placed by the Government on their purchase and sale

by various notifications, the burden is on him to prove that the performance had become impossible. 1949-1 Madh BLR 244 (247, 248) (DB) ** AIR 1957 Madh B 186 (187) ** AIR 1957 Madh B 53 (54) = ILR (1956) Madh B 182 (DB).

(77) The burden of establishing that the frustration is self-induced is on the plaintiff. AIR 1953 Mad 300 (308) = ILR (1953) Mad 831 (DB).

(78) The onus of proving neglect or default by the party pleading frustration as defence is on the opposite party. AIR 1955 Pepsu 51 (57) = ILR (1954) Patiala 563 (DB).

Temporary Interruption.

(79) Sale of right to collect tolls — Destruction of bridges by unprecedented floods and temporary obstructions to traffic — Held, (1) damage caused by temporary obstruction to traffic did not make any difference and (2) contract did not become impossible of performance. AIR 1934 Mad 85 (87) (DB).

(80) Temporary interruption followed by the possibility of proceeding with the contract does not avoid the contract. But unconditional contracts are, as a general rule, not dissolved by their performance becoming impossible owing to war. AIR 1917 Cal 411 (415).

(81) Where the requisition of a part of land comprised in a tenancy is not expected to last for a very long period of time and is in respect of less than half the area covered by the tenancy with the result that the tenant is left in possession of the greater part of the tenanted lands, the doctrine of frustration cannot be invoked. AIR 1952 Cal 380 (381) = ILR (1950) 1 Cal 324 (DB).

(82) For cases of temporary interruptions due to war conditions. See Note 3 below.

Partial Impossibility.

(83) A lease both for cultivation and manufacturing bricks is not void though land leased is found unfit for the manufacture of good bricks and cultivation. AIR 1930 Lah 772 (774).

(84) Portion of the contract becoming incapable of performance—Contract is not void or unenforceable — Toll contractor, purchasing right to collect tolls, cannot recover the purchase money from District Board on the ground that certain nature of traffic (foodgrains) was stopped by Government Ordinance. AIR 1925 Mad 907 (908).

(85) There is a clear distinction between a completed conveyance and an executory contract, and events which

Section 56 — Note 2 (contd.)

discharge a contract do not invalidate a concluded transfer. By its express terms Section 56 does not apply to cases in which there is a completed transfer. A covenant to do an act may become void when the act becomes impossible or unlawful. AIR 1968 SC 1024 = (1968) 3 SCR 339. (AIR 1952 Cal 380 and AIR 1950 Bom 89 and AIR 1963 Mad 94 and AIR 1962 Mad 132 and (1881) ILR 7 Cal 474, Approved; AIR 1963 Punj 49 (FB), Overruled.)

Landlord and tenant.

(86) Tenant cannot refuse rent of lands under lease silted by floods, when there is possibility of putting them right. AIR 1929 Mad 575 (576).

(87) Neither civil law nor Transfer of Property Act provides that contract to pay rent is to be void if owing to failure of rain the tenant does not get crop. 1910 Upp Bur Rul 2nd Qr 22 (24 and 25).

[See also AIR 1963 Mad 94 (DB). (Lease of shandy tope for a term of years at annual rent — No provision for remission on account of loss due to unexpected causes — Lessee not entitled to remission for loss suffered due to cyclones.) ** (1962) 75 Mad LW 423 = (1962) 2 Mad LJ 203 (DB).]

(88) The provisions relating to the remission of rent are not intended to apply to the case of lessees of Zemindari property — Section 56 is not applicable to such a case. AIR 1935 Oudh 433 (434) = 11 Luck 317 (DB).

(89) Doctrine of frustration does not apply where there is a lease as the estate vested in the lessee by the lease is not extinguished by the order of requisition under R. 75 (a) of the Defence of India Rules (1939) which is of a temporary nature. AIR 1950 Bom 89 (92).

(90) The doctrine of frustration, even if it may be applicable to a contract for a lease, does not apply to a case where the contract had already been executed and the tenant had been put in possession of the land in question when the military authorities on whose behalf the Government requisitioned the land during the currency of the lease occupied it. AIR 1952 Cal 567 (570).

(91) A lease is something more than a mere contract or agreement in so far as it results in the creation of an estate in favour of the lessee. This additional feature present in a lease cannot by itself rule out the applicability of the doctrine of frustration to a lease transaction. At any rate, the applicability of this doctrine to a lease at least to a limited extent has been given statutory recognition in India as is clear from Cl. (e), S. 108, Transfer of Property Act. AIR 1956 Trav-Co 59 (60) = ILR (1955) Trav-Co 606 (DB).

(92) Section 56 is not applicable when the rights and obligations of the parties arise under a transfer of property under a lease. AIR 1968 SC 1024 (1026, 1027) = (1968) 3 SCR 339. (Doctrine of frustration does not apply to leases including those of agricultural land. AIR 1963 Punj 49 (FB), which overruled AIR 1961 Punj 143, Overruled.) ** 1965 All LJ 689 = ILR (1965) 2 All 458 ** AIR 1962 Mad 132 (140) = (1962) 2 Mad LJ 452 ** AIR 1961 Cal 70 (74). (Section 108 (e) of T. P. Act will apply so far as frustration relating to leases is concerned.) ** (1960) 64 Cal WN 932.

Illustrative cases.

(93) Contract to supply cotton piecegoods on future dates — After certain number of delivery notifications by Government under Defence of India Rules — Held on construction of notification that the contract did not become impossible — Performance of contract under the notification held was left at the option of parties — Whether parties had agreed to treat contract as at an end or operative depended on facts. ILR (1950) All 215 (226) (DB).

(94) Mortgaged property in possession of tenants of mortgagor — Mortgagee to obtain possession by evicting tenants by filing suit if necessary — Mortgage to run for 12 years after mortgagee had reduced property to possession — Supervening legislation preventing obtaining of possession — Frustration — Term of 12 years for purposes of redemption begins from date of document and not from supervening impossibility — Result of frustration was to relieve parties from obligation. AIR 1958 Ker 245 (246).

(95) The plaintiff let certain premises for a restaurant to the defendant at somewhat higher rent. The vital clause in the agreement was: "This agreement will remain in force so long as British European troops will remain in this town." After some months the locality where the restaurant was situated was declared out of bounds to British troops. Held, that the defendant was liable for rent the contract not being frustrated. AIR 1949 Cal 240 (240) = ILR (1945) 2 Cal 90.

(96) Agreement to reconvey zamindari lands sold—Subsequently lands vesting in State under U. P. Zamindari Abolition and Land Reforms Act. 1950 (1 of 1951) — Agreement becomes impossible to perform in respect of land vested in State. AIR 1963 All 201 (202).

(97) Goods, the subject-matter of contract damaged through fault of no party — Contract cannot be enforced. 1948 Bur LR (HC) 527 (536).

(98) Both parties, fully aware of the fact, bargaining that sale deed was to be executed within specified time and possession to be given to purchaser simultaneously — Time made essence of

Section 56 — Note 2 (contd.)

contract and whole contract proceeding on basis that purchaser getting possession was the all-important factor — Vendor's failure to persuade lessee to surrender possession — **Held**, case was one where contract as conceived by the parties had become wholly impossible of performance and not one where there was the possibility of substantial performance and therefore was not governed by Section 13, Specific Relief Act but was hit by 2nd para. of Section 56, Contract Act. AIR 1954 Trav-Co 10 (20) (DB).

(99) Contract for purchase of cotton seed bags for export requiring permit — Unexpected failure to obtain necessary permit — Case held was one of frustration. AIR 1958 Andh Pra 576 (580) (DB).

(100) The performance of contract of service is not rendered impossible by reason of Section 3 (1) of the Bombay Labour Welfare Fund Act (40 of 1953). AIR 1958 SC 328 (338) = 1958 SCR 1122.

(101) Contract for sale of land — Scheme for developing land — Agreement to construct roads on receipt of earnest money and to complete conveyance thereafter — Requisition of land by Government for indefinite period interrupting construction of roads — Contract held was frustrated. AIR 1951 Cal 332 (336, 337) (DB).

(102) Where the office held by an employee is abolished by statute and thereby it becomes illegal for the executive to continue him in that office and for the employee to exercise his office, further performance of the contract becomes impossible and it stands discharged. AIR 1960 Raj 138 (148) = ILR (1959) 9 Raj 1217 (DB). (Abolition of post by a statute — Employee holding that post cannot claim damages.)

[See also AIR 1963 Mad 297 (298) = (1963) 1 Mad LJ 402 (DB). (Termination of service of employee of company because of its compulsory winding up — Doctrine of frustration applies — Employee not entitled to any compensation.)]

(103) Licenced liquor shops — License fee payable monthly — Liquor supplied by licenced still owners — Distillers receiving rice for distillation from Government — Failure to supply rice, during subsistence of contract — Distillers unable to supply liquor to licensee for one month — Closure of shops for some period — Licensee is not entitled to claim refund of license fee for such period. AIR 1959 Assam 75 (98) (DB).

(104) Agreement between management and workers effective for three years — Clause in agreement to the effect that parties trust that industrial peace would exist for three years as a result of agreement — Clause held not a condition essential for continuance of contract — Strike

by workers on demands other than those provided in agreement held did not amount to breach of contract — Workers not disentitled to claim bonus under the agreement. (1960) 1 Lab LJ 628 (Mad).

(105) Contract becoming impossible of performance by partition of India — Contract void. AIR 1961 Punj 66 (71) = 63 Pun LR 152 (DB).

(106) Purchase of right to levy octroi from Government — No undertaking given by Government that control on cloth would not be re-imposed — Allegation of reduction in recovery of octroi due to control — **Held** that there was neither a breach of contract nor frustration of contract due to re-imposition of control. AIR 1960 Him Pra 1 (10).

(107) Sureties in Criminal case — Transfer of case — Sureties will not stand discharged — Sec. 56 is not applicable. AIR 1960 All 419 (419) = 1960 Cri LJ 873.

(108) Contract for sale of plots made during pendency of suit for ejectment of tenant under U. P. Tenancy Act — Condition to execute sale deed after passing of decree for ejectment — Ejectment suit dismissed in trial Court but decreed in appeal — Failure to execute sale deed — Suit for specific performance of contract — Meanwhile notification issued under U. P. Urban Area Zamindari Abolition and Land Reforms Act and plots vested in Government — Specific performance of contract not possible. AIR 1966 All 185 (187) = 1965 All LJ 446.

(109) Prohibition on future transactions in gur — Settlement of outstanding transactions not prohibited — Imposition of restraint on transport of gur except with Government's permission — No impossibility leading to frustration of outstanding contracts. AIR 1968 SC 772 (779) = (1968) 2 SCR 252.

(110) Contract of sale of goods at particular price — Subsequent Government order raising price without retrospective effect — No frustration of contract. AIR 1959 Pat 477 (480).

(111) Agreement to re-convey a particular land — Subsequent deprivation of ownership of land by the scheme of consolidation under Uttar Pradesh Consolidation of Holdings Act — Agreement not saved by exception to Section 168-A — Agreement becomes void and impossible of performance and is not saved by Section 30 of U. P. Consolidation of Holdings Act of 1951. (1966) All WR (HC) 641 (645) = 1966 All LJ 1004. (Agreement to convey the entire holdings may however be specifically enforced by compelling the transferor to transfer the holding allotted to him in lieu of the former holding.)

3. Becomes unlawful — Effect of War — Trading with enemy. — (1) If after contract is entered into, it becomes illegal owing to declaration of war, etc.,

Section 56 — Note 3 (contd.)

it cannot be enforced. AIR 1916 Low Bur 7 (8) ** AIR 1918 Cal 830 (834) = 45 Cal 28 ** AIR 1918 Low Bur 46 (48) ** AIR 1917 Bom 182 (185) = 42 Bom 473 ** AIR 1916 Bom 251 (252, 255) = 40 Bom 570.

(2) Contract of supply of goods by agent of enemy firm — Declaration of hostilities before arrival of vessel — Capture of vessel by condemnation by Prize Court and subsequent release — Agents, held not liable on the contract — Condemnation of goods divested owners of goods from date of seizure — Defendants were under no obligation to purchase goods subsequently from Prize authorities. AIR 1918 Mad 515 (516) = 41 Mad 225 ** AIR 1921 Cal 509 (514) ** AIR 1918 Mad 1124 (1128) ** AIR 1918 Mad 322 (323).

(3) Contract made before hostilities remains in abeyance during the continuance of hostilities and can be enforced when peace is established. But if the contract requires continuous performance of mutual duties by the parties to it and such duties cannot be so mutually performed during the war, and further if the suspension of such mutual rights and obligations for an indefinite period would go much beyond merely placing the contract in abeyance, the contract becomes on the outbreak of war, void. AIR 1917 Bom 182 (185) = 42 Bom 473.

(4) Unconditional contracts are, as a general rule, not dissolved by their performance becoming impossible owing to war. AIR 1917 Cal 411 (415).

(5) Contract between parties in India for purchase of goods — Condition that contract to become void if there was any fluctuation in rates of Syndicate composed of firms of German producers — War with Germany and deliveries ceasing — Considerable stocks in India: **Held**, that there was no fluctuation in rates by reason of Syndicate becoming inoperative; condition avoiding contract therefore, did not come into existence and that original obligation of sellers to give deliveries remained untouched. AIR 1921 PC 46(47).

(6) Insurance contract — Issue of warranty before issue of policy — Both warranty and policy containing endorsement that settlement of claims and legal proceedings in respect thereof to be in Rangoon — Policy issued after fall of Rangoon — Continued occupation by enemy — Condition held became impossible of performance — Condition held was essence of contract — Whole contract held frustrated. AIR 1949 Cal 390 (394, 395) = ILR (1945) 1 Cal 638.

(7) Where due to the outbreak of war the performance of the contract by the

insured by making payments of the premium to the enemy Insurance Company with whom the insured was insured became impossible and illegal under R. 104 of Defence of India Rules, the contract became frustrated and void. AIR 1954 Pat 596 (605) (DB).

Total or partial prohibition.

(8) P firm contracting to purchase goods from D at Rs. 77 per cwt. on 16th September 1943 — Goods delivered to railway on 27th December 1943, D being consignee — Government order fixing price at Rs. 48 per cwt. as from 1st January 1944 — P company taking delivery and making payment at contract rate on 3rd January 1944 — Suit by P to recover difference between two prices—**Held**, Government order affected contract — Contract held void under Section 56 — **Held**, neither S. 65 nor Section 72 applied and P firm could not recover difference from D company. AIR 1946 Cal 245 (247, 248, 249) = ILR (1945) 2 Cal 41.

(9) Where the control imposed on the sale and purchase of a certain commodity is only partial the performance cannot be said to be impossible. 1949-1 Madh B LR 244 (247) (DB).

(10) N. W. P. Rent Act, 1873, making right of occupancy tenant non-transferable — No provision saving contract entered into prior to enactment — Such contracts of sale became void on passing of enactment. 1884 All WN 160 (160).

(11) Contract of sale of rights of defendant conditional on sanction of Cantonment authority becomes void if subsequent to execution of sale deed sanction is refused. AIR 1929 All 837 (839).

(12) Defendants contracting to convey passengers arriving from Singapore to Jedda — Defendants refusing to take them on board their steamer on ground that passengers had arrived from Singapore on board a ship which was infected with smallpox and that by their conveyance defendants would commit offence under Section 269, I. P. C. — **Held**, defendants had failed to show that carrying out of contract would have been in contravention of any law or regulation. If any special precautions were necessary, under the circumstances, it was for the defendants to have taken such precautions. Contract on the part of the defendants was thus lawful as well as possible, so that they were bound to carry it out. (1890) 14 Bom 147 (156, 157).

(13) Contract to carry bales — Motor trucks demanded by Transport Authority under D. I. Rules — Breach punishable — **Held**, there was frustration of contract and no damages could be claimed. AIR 1945 Nag 192 (196) = ILR (1945) Nag 475.

Section 56 — Note 3 (contd.)

(14) On December 4, 1939, defendant contracting to purchase from plaintiff fourteen bags of coriander seeds at Rs. 13-8-0 per maund — Plaintiff delivering bags to defendant on December 6, 1939, as per contract — On December 5, 1939, Government notification fixing maximum retail price of coriander seeds at 4 annas per seer — Plaintiff can recover at contract rate — Notification applied to retail price and it did not make it impossible or unlawful for defendant to pay — Doctrine of "frustration of venture" did not apply. AIR 1942 Cal 291 (292) = ILR (1941) 2 Cal 78.

(15) Contract for rebate on freight paid for carriage of goods from Trinidad to New York made between British subjects in British territory — Meanwhile Act of U. S. A. penalizing such contract — Contract held not frustrated or rendered impossible of performance since British Law not prohibiting such contracts alone applied (Case from Trinidad and Tobago). AIR 1920 PC 117 (119).

(16) An arrangement entered into between the Executive Officer and the Devadasis for rendering service by the latter in lieu of wages or remuneration became void when Madras Devadasis Act (31 of 1947) came into force and made the rendering of dancing service in a temple an offence punishable under Section 4. AIR 1957 Andh Pra 643 (649) (DB).

(17) No prohibition in sending goods outside State at time of contract — Subsequent prohibition and railway booking closed — Contract held became impossible of performance — Plaintiff has no right or title to goods in possession of defendant, upon contract becoming void. AIR 1955 Hyd 233 (235) = ILR (1955) Hyd 607 (DB).

(18) Where there is absolute prohibition as to sale, the fact that there is a legislation to that effect is sufficient to make the defence of frustration complete. But, where the prohibition is not absolute and complete, but qualified it has to be examined whether the party has discharged his obligation. AIR 1954 Mad 119 (124) = ILR (1955) Mad 302 (DB).

(19) Unless the subsequent change in law rendered the entire contract illegal, the question of frustration does not arise at all. AIR 1957 Pat 586 (599) = 36 Pat 633 (DB).

(20) If the performance of contract is rendered unlawful either for determinate or indeterminate period of time, the contract would not stand discharged unless the ban on its performance existed on the day or during the time in which it has to be performed. AIR 1965 SC 1523 (1525) = (1965) 2 SCR 630. (AIR 1959 Cal 576, Affirmed.)

(21) Forward contracts in linseed subsisting on the date of the promulgation of

the Oilseeds (Forward Contracts Prohibition) Order, 1943, are to be deemed to be closed out. As the performance of such contracts has been rendered unlawful, such contracts must be held to be void under Section 56. Parties to such a contract are under no obligation to perform his part of the contract. AIR 1951 Nag 320 (321).

(22) Goods purchased by plaintiff on behalf of defendant — Defendant refusing to take delivery on due dates — Contracts entered into in February 1952 — Section 3 of T. C. Act 5 of 1950 found to be valid — Relevant Prohibition Order prohibiting forward contracts continued to remain in force under Proviso to Section 17(4) of Essential Supplies (Temporary Powers) Act (1946) — Contracts held to be against law — Suit for damages for breach of those contracts held to be not maintainable. AIR 1969 SC 504 (513) = (1969) 2 SCJ 313. (AIR 1964 Ker 92, Reversed.)

4. Contract containing arbitration clause. — (1) Frustration of contract containing arbitration clause — Application clause may remain enforceable — It depends on the way in which the clause is worded — Held on facts that there was enforceable agreement to go to arbitration on all matters connected with contract including question whether contracts became void, and for those matters and that question to be decided by the arbitrators. ILR (1946) 1 Cal 312 (315, 316).

(2) In cases of frustration, it is the performance of the contract which comes to an end but the contract would still be in existence for purposes such as the resolution of disputes arising under or in connection with it. The question as to whether the contract became impossible of performance and was discharged under the doctrine of frustration would still have to be decided under the arbitration clause which operates in respect of such purposes. AIR 1968 SC 522 (528) = (1968) 1 SCR 821. (AIR 1959 SC 1362, Foll.)

(3) A piecegoods contract C. I. F. Karachi was entered into between two parties at Amritsar before partition. The contract contained an arbitration clause. After partition, the seller called upon the buyer to refer the dispute arising consequent on the buyer's refusal to take delivery to arbitration in the manner provided by the arbitration clause, Held that the contract of arbitration was not frustrated by reason of the partition. AIR 1952 Punj 34 (38) (FB).

(4) Before the partition of India, the applicants had entered into a contract with the respondents, both of Amritsar. One of the terms of the contract was that any dispute or claim of whatever nature relating to or arising out of the contract should be referred to arbitration of two European Merchants at Karachi, one to

57. Reciprocal promise to do things legal, and also other* things illegal.— Where persons reciprocally promise, firstly, to do certain things which are legal, and, secondly, under specified circumstances to do certain other things which are illegal, the first set of promises is a contract, but the second is a void agreement.

Illustration

A and B agree that A shall sell B a house for 10,000 rupees, but that, if B uses it as a gambling house, he shall pay A 50,000 rupees for it.

The first set of reciprocal promises, namely, to sell the house and to pay 10,000 rupees for it, is a contract.

The second set is for an unlawful object, namely, that B may use the house as a gambling house, and is a void agreement.

[*] Cf. S. 24 supra which deals with two sets of promises which are not distinct.

Section 56 — Note 4 (contd.)

be appointed by each party and in accordance with the provisions of the Arbitration Act. Karachi subsequently became a part of foreign Dominion, which contingency was never contemplated by the parties — Held, that due to change of circumstances the contract of arbitration was frustrated and must, therefore, be held to have been dissolved as a whole. AIR 1951 Punj 189 (202) (DB).

5. Decree for specific performance. —

(1) Reading Section 56 of the Contract Act with Section 35 of the Specific Relief Act the court itself, which passed the decree for specific performance can and should declare its own decree void if the act becomes impossible of performance or by reason of some event which neither party could prevent. AIR 1954 Mad 1040 (1041) (DB).

6. Refund and compensation. — (1)

Contract becoming impossible — Benefit under contract must be returned. AIR 1944 Mad 239 (243) = ILR (1944) Mad 124 ** AIR 1970 Raj 36 (47) (DB) ** AIR 1981 Raj 277 (280) = 1981 Raj LW 563 ** AIR 1960 J and K 91 (96, 97) ** (1959) 2 Mad LJ 498.

(2) Contract to secure repayment of money advanced by usufructuary mortgage with possession to be given to lender — Land, however, already attached under decree and under management of Collector — Performance of contract becoming impossible — Lender held entitled to compensation, damages being amount of advance with interest from date when land should have been made over to him, had performance been possible (1890) 17 Cal 432 (434).

(3) Contract with defendant German firm, having office in Bombay, becoming void on declaration of war — Plaintiff waiving breach committed by giving defendants time after breach — Defendants held were entitled to return of their deposit. AIR 1916 Bom 251 (255) = 40 Bom 570.

(4) Lease becoming void by acquisition of land by Government — Consideration for lease paid — Lessor is bound to compensate lessee. AIR 1922 All 6 (6, 7) = 44 All 229.

(5) In a Hindu family a betrothal is in the nature of a contract to which the Contract Act is applicable. Where the contract becomes impossible on account of the death of the bride the parties to the contract will be entitled to the return of the gifts made in consideration for the proposed marriage and also to expenses legitimately incurred in connection with the ceremonies preceding marriage. AIR 1950 All 592 (594, 595) = ILR (1952) 2 All 681 (DB).

(6) Contract to obtain licence — Contract becoming impossible owing to defendant's negligence — Defendant is bound to compensate plaintiff for loss sustained by plaintiff through non-performance of contract. AIR 1955 Orissa 49 (54) = ILR (1955) Cut 1 (DB).

(7) Where the contract is not incapable of being performed, the seller can enforce the clause of forfeiture of earnest money provided the purchaser does not carry out his part of the contract. AIR 1967 All 253 (255) = 1968 All LJ 725.

(8) As to obligation of person who has received advantage under void agreement or contract that becomes void, see Section 65.

Section 57 — Note 1

(1) Section 57 refers to persons who promise, firstly, to do certain things which are legal and, secondly, under specified circumstances to do certain other things which are illegal. AIR 1937 Rang 47 (49).

(2) In a contract consisting of legal and illegal parts separable from each other, Court is bound to give effect to the legal part and reject the illegal part unless the whole transaction is prohibited by statute or is otherwise void. AIR 1938 Nag 335 (343) = ILR (1939) Nag 1 (FB) ** 1879 Pun Re No. 106, p. 293 (294) (DB) ** (1875) 23 Suth WR 66 (68) (DB) ** (1968) 69 ITR 819 (All) = (1968) 2 ITJ 377 (DB). (Registration of firm — Some objects of firm lawful while others unlawful — Deed of partnership is partly valid.)

(3) Where the parties treat the legal as well as illegal parts as forming one

58. Alternative promise, one branch being illegal.—In the case of an alternative promise, one branch of which is legal and the other illegal, the legal branch alone can be enforced.

Illustration

A and B agree that A shall pay B 1,000 rupees for which B shall afterwards deliver to A either rice or smuggled opium.

This is a valid contract to deliver rice, and a void agreement as to the opium.

Appropriation of Payments

59. Application of payment where debt to be discharged is indicated.—Where a debtor, owing several distinct debts to one person, makes a payment to him, either with express intimation, or under circumstances implying that the payment is to be applied to the discharge of some particular debt, the payment, if accepted, must be applied accordingly.

Illustrations

(a) A owes B, among other debts, 1,000 rupees upon a promissory note which falls due on the first June. He owes B no other debt of that amount. On the first June A pays to B 1,000 rupees. The payment is to be applied to the discharge of the promissory note.

(b) A owes to B, among other debts, the sum of 567 rupees. B writes to A and demands payment of this sum. A sends to B 567 rupees. This payment is to be applied to the discharge of the debt of which B had demanded payment.

Section 57 — Note 1 (contd.)

indivisible contract. the whole becomes void. (1885) 9 Bom 176 (178, 179) (DB)
** AIR 1917 Mad 77 (77) (FB).

Section 58 — Note 1

(1) Section 58 does not apply where there is no alternative promise separable from illegal portion of agreement. (1913) 18 Ind Cas 9 (10) (All).

(2) Promisee who had paid good consideration can enforce the legal promise where the contract contains also another distinct promise which is illegal. AIR 1942 Oudh 1 (6) = 17 Luck 249 (DB).

(3) Where an option is given to the executant either to transfer the inheritance or to transfer his share in a certain property, the case is directly covered by the illustration to Section 58. AIR 1931 All 589 (593) (DB).

(4) Where a debtor pledged certain shares with a Bank for moneys advanced by it, and the company issued bonus shares and right shares for the holding, the Bank is not entitled to such accretions. The accretions remain the property of the promisee. AIR 1969 Delhi 313 (315) (DB).

SECTION 59 — SYNOPSIS

1. Scope and applicability.
2. Distinct debts.
3. "With express intimation."
4. Circumstances implying appropriation.
5. "Must be applied accordingly."

1. Scope and applicability. — (1) Single debt payable by instalments — Section 59 of the Contract Act has no

application. (1906) 3 All L Jour 430 (431) ** AIR 1927 Bom 479 (479, 480). ** 1965 Pun LR (Supp) 86. (Decretal amount directed to be paid by instalment — Payment to be adjusted towards which instalment not specified — Decree-holder can adjust amount towards payment of time barred instalments.)

(2) Sections 59 to 61 do not deal with cases in which principal and interest are due on a single debt or where a decree has been passed on such debt. AIR 1941 Lah 386 (388) = ILR (1941) Lah 740 (FB) ** AIR 1954 Madh B 151 (152) ** AIR 1951 Nag 155 (157) = ILR (1952) Nag 172 ** AIR 1951 Trav-Co 80 (81) = 1950 Trav-Co LR 472 (DB).

(3) Section 59 applies to payments of Government revenue. AIR 1926 Cal 866 (871) = 53 Cal 886 (DB) ** AIR 1951 Nag 155 (157) = ILR (1952) Nag 172 ** (1950) 54 Cal WN 946 (950) (DB) ** AIR 1928 Cal 68 (71) = 55 Cal 624 (DB) ** (1964) 15 STC 335 (338) (All). (Deposits made towards sales tax, tax due on sales made inside State — Sales Tax Authorities have no power to appropriate those deposits towards liability under S. 8-A (4).)

(4) Sections 59 and 60 of the Contract Act apply to a debt under the Public Demands Recovery Act. (1910) 14 Cal WN 607 (610) (DB).

(5) The law as to appropriation of payments is the same both under Sec. 55 of the Bengal Tenancy Act and also under the more general Contract Act (Sections 59 and 60) and in this respect, the same basic principle underlies both the statutes. AIR 1956 Cal 570 (573) (DB).

Section 59 — Note 1 (contd.)

(6) There is nothing in law under which a Court can order an appropriation. Appropriation is a matter which arises when payment is made and accepted. Where payment is not accepted by the decree-holder the appropriation towards an earlier debt or a later debt does not really arise, and there is no law under which a Court could force a decree-holder to accept payment against his wishes, particularly when the judgment-debtor is in default. AIR 1945 Nag 277 (280) = ILR (1945) Nag 885.

(7) Statement made by tenant regarding payment of amount in terms of proviso to S. 13 (2) (i) of East Punjab Urban Rent Restriction Act (3 of 1949)—Tenant is not debarred by S. 59 of Contract Act from subsequently showing that there was mistake and that he had fully complied with the proviso. 1966 Cur LJ 530. (Overruled on another point in AIR 1969 Punj 367.)

2. Distinct debts. — (1) Sections 59 to 61, Contract Act, embody the general rules as to appropriation of payments in cases where a debtor owes several distinct debts to one person and voluntarily makes payment to him. AIR 1941 Lah 386 (388) = ILR (1941) Lah 740 (FB) ** AIR 1965 Punj 375 (375) = 67 Pun LR 192. (Interest cannot be regarded as debt distinct and separate from the principal.)

(2) Arrears due in respect of separate kists are distinct debts. AIR 1926 Cal 866 (871) = 53 Cal 886 (DB).

(3) Appropriation — Separate debts — Debtor can make payment towards any of them unless there is an agreement regulating the order of payment. AIR 1938 Pat 8 (10) (DB).

(4) The test to determine whether the dues to the plaintiff was one debt or several distinct debts within the meaning of S. 59, Contract Act, is whether he could sue for such dues under O. 2, R. 2, Civil P. C. AIR 1961 Orissa 148 (150). (The salary payable to the plaintiff being a monthly pay became due for one month's work at the end of the month and accordingly each month's salary was a several and distinct debt for which the plaintiff could sue under O. 2, R. 2, Civil P. C.)

(5) Arrears of rent constitute a debt. The provision of S. 59 apply to the payment of rent. AIR 1965 All 189 (190).

3. "With express intimation." — (1) Section 59 provides that the debtor has, at the time of making payment, a right to intimate that the payment is to be applied towards the liquidation of a particular debt. AIR 1954 Madh B 151 (152) ** 1966 All LJ 588 = ILR (1966) 2 All 382. (Creditor is not entitled to appropriate payment by debtor to any

debt he likes unless debtor fails to indicate appropriation.)

(2) The words used in Section 59 are with express intimation. These words imply that the intimation should synchronise with the payment. An intimation made after the creditor has demanded the dues is not an intimation of the nature contemplated by the section. 1958 All L Jour 311 (311, 312) ** AIR 1926 Pat 330 (333) = 5 Pat 326 ** AIR 1926 Lah 183 (183, 184) = 7 Lah 17.

[But see AIR 1962 Mys 190 (191) = 40 Mys LJ 858. (It is unnecessary to insist that the intimation of appropriation should be necessarily synchronise with the payment.) ** (1966) 2 ITJ 592 = (1966) 2 Mad LJ 452 (DB) ** AIR 1926 Mad 792 (795). (Debtor can direct appropriation in a particular manner until he gets an intimation of an appropriation in a particular manner by the creditor.)]

4. Circumstances implying appropriation. — (1) Under Section 59 the Court may have regard not only to the debtor's express intimation but also to circumstances "implying that the payment is to be applied to the discharge of some particular debt." (1907) 11 Cal WN 939 (942) (DB) ** 1966 All LJ 588 = ILR (1966) 2 All 382.

(2) Mortgagor subscriber to a fund under obligation to pay Rs. 20 to a fund — Money advanced on mortgage — Covenant to discharge debt by monthly payments — Payments to be applied towards discharge of mortgage debt and not his subscriptions. (1909) 1 Ind Cas 909 (909) (Mad).

(3) Balance struck out in a running account — Subsequent payments are to be applied towards the balance. AIR 1936 Pesh 143 (144) (DB).

(4) Arrears of land revenue paid in respect of certain kist — Amount paid exceeding dues under that kist but very much less than under subsequent kist — Held it should be appropriated only in respect of former as there was implied direction to do so. (1908) 35 Cal 636 (639) (DB).

(5) Principal and interest due — No implied indication as to appropriation of amount towards principal can be inferred in the absence of express direction. AIR 1915 Lah 248 (249) = 1915 Pun Re No. 24.

(6) Method of appropriation having been determined by the parties, law does not require specific appropriation to be made on each payment. AIR 1937 Oudh 87 (98) = 12 Luck 435 (DB).

(7) In a matter between creditor and his debtor, in the absence of the debtor exercising a preference, it may be

Section 59 — Note 4 (contd.)

presumed that the creditor has appropriated it towards outstanding interest and then only to the principal. But this rule of appropriation has no application where it is a question between an assessee and the Revenue. In such a case the intention of the assessee must be presumed to be in favour of an appropriation least disadvantageous to himself. (1966) 2 ITJ 592 = (1966) 2 Mad LJ 452 (DB).

(8) Whether payment made by debtor is for a particular debt or all debts is a question of fact. 1966 All LJ 588 = ILR (1966) 2 All 382.

(9) When the crops were charged for the debt and the proceeds of the sale of the paddy obtained by the harvest of the crops were allowed to be drawn by the creditor, the proper inference to be drawn is that the payment was towards the liquidation of the debt for which the crops were hypothecated. Where the debt evidenced by hypothecation bond was the earliest among other debts and no specific debts were stipulated for repayment, the creditor could appropriate the proceeds of crops towards other debts only with the consent of the debtor. Where there was no evidence that debtor ever gave consent for such appropriation, election to appropriate cannot rest with the creditor. AIR 1959 Ker 233 (234) = 1959 Ker LT 19 (DB).

5. "Must be applied accordingly". —

(1) Section 59 deals with the application of payment where debt to be discharged is indicated, in which event the intention of the debtor is the paramount factor in determining to which particular debt a certain payment would be appropriated. AIR 1956 Pat 522 (525) (DB).

(2) When a debtor makes a payment with express directions, the creditor has to appropriate it accordingly. AIR 1922 PC 26 (27) = 48 Cal 839 ** AIR 1938 Cal 20 (21) = ILR (1937) 1 Cal 697 (DB) ** (1958) 1 Andh WR 400 (DB). (If he does not do so he must return the amount to the debtor.)

[See also AIR 1931 Sind 73 (74) = 24 Sind LR 437 = 32 Cri L Jour 922 (DB).]

(3) If money has been deposited with the Collector with a distinct direction by the depositor that the money is to be applied for certain definite payments the Collector has no authority without the consent of the depositor to apply any part of such deposit to a debt which may have subsequently arisen. (1950) 54 Cal WN 946 (951) (DB) ** (1952) 56 Cal WN (4 DR) 15 (16, 18).

(4) A creditor has the option to refuse a payment at all with directions regarding appropriation — Once accepted,

the direction will have to be carried out. AIR 1925 Rang 4 (5) = 2 Rang 204 ** AIR 1922 PC 26 (27) = 48 Cal 839 ** AIR 1962 Mys 190 (191, 192) = 40 Mys LJ 858.

(5) The law gives considerable latitude to the creditors in making appropriations of payments made by the debtors. The creditors have the right of election upto the last payment. But they may do so only when debtors do not themselves make appropriations of the payments they make at the time when the payments are made. AIR 1951 Trav-Co 80 (81) = 1950 Trav-Co LR 472 (DB).

(6) The law gives the first right of appropriation to the debtor which has to be exercised at the time of payment unless it is reserved for exercise at a subsequent point of time, and, failing that, the right of appropriation passes on to the creditor and he can exercise it irrespective of and even contrary to any intermediate direction from the debtor. AIR 1956 Cal 570 (573) (DB).

(7) Plaintiff paid defendants money on behalf of S, in satisfaction of debt due by S to defendants — Defendants refused to appropriate the payment towards S's debt, appropriated it towards an alleged debt due by plaintiff and recovered from S the sum owed — Plaintiff sued defendants to recover money paid by him — Held the defendants were bound to restore the money to the plaintiff. (1900) 2 Bom LR 706 (707) (DB).

(8) Payment by principal debtor — In absence of special agreement, surety has no right to control the appropriation. AIR 1917 Cal 537 (544) (SB).

(9) Appropriation made by both parties towards particular dues cannot be subsequently changed by one party without the consent of the other. (1911) 38 Cal 537 (541) = 38 Ind App 80 (PC) ** AIR 1953 Trav-Co 70 (71) = ILR (1952) Trav-Co 361.

(10) Where the debtor alleges appropriation in a particular way, it is for him to prove the same. AIR 1966 J & K 64 (66) = 1966 Kash LJ 212.

(11) Where a decree provides for payment by instalments subject to the condition that in the event of default of two consecutive instalments decree-holder would be entitled to realise the entire outstanding balance at once, and if the judgment-debtor tenders payment to the decree-holder with an indication, that it should be appropriated in a particular way, then, unless the penalty clause has already come into operation it will not be open to the decree-holder to accept the payment, but appropriate the amount in a different manner. AIR 1962 All 586 (589) = 1962 All LJ 707 (DB). (3 All LJ 430, Diss. from.)

60. Application of payment where debt to be discharged is not indicated.—Where the debtor has omitted to intimate and there are no other circumstances indicating to which debt the payment is to be applied, the creditor may apply it at his discretion to any lawful debt actually due and payable to him from the debtor, whether its recovery is or is not barred by the law in force for the time being as to the limitation of suits.

SECTION 60 — SYNOPSIS

1. Applicability.
2. Creditor's right to appropriate.
3. Lawful debt actually due.
4. Whether recovery is barred by law or not.
5. Circumstances indicating particular appropriation.
6. Mode of appropriation.
7. Re-appropriation.
8. Proof of intention.
9. Appropriation to save limitation.

1. Applicability. — (1) A debt under the Public Demands Recovery Act is nothing but a debt and Sections 59 and 60 apply to arrears of road cess. (1910) 11 Cal L Jour 266 (269) (DB).

(2) As between a creditor and his debtor, the law is that the creditor has the right of appropriation up to the very last moment. The right terminates when the creditor has made an appropriation and communicated it to the debtor. But this law is not necessarily applicable when the question, arises between a creditor and another person such as an Income-tax Officer. ILR (1963) 1 All 517 = (1963) 49 ITR 167 (All) ** (1966) 2 Mad LJ 452 = (1966) 2 ITJ 592 (DB).

(3) Sections 59 and 60, Contract Act, apply to appropriation of payments under the Revenue Sale Law Act 11 of 1859. (1908) 35 Cal 636 (640) (DB).

(4) Arrears due in respect of separate kists are distinct debts and therefore the question of the right of the collector to appropriate a payment made by one of the co-proprietors will be governed by the provisions of the Contract Act. AIR 1926 Cal 866 (871) = 53 Cal 886 (DB) ** (1908) 35 Cal 636 (640) (DB).

(5) Assuming that Sections 59 and 60 of the Act apply to payments made towards arrears of revenue a deposit in the nature of an advance towards a specific kist to fall due in the future is not a payment towards one of several debts in terms of those sections. (1950) 54 Cal WN 946 (950, 951) (DB).

(6) Sections 59 to 61, Contract Act, apply only where the debtor owes several debts to a person and voluntarily makes payment and not to a case where principal and interest are due on a single debt or a decree has been passed carrying interest on the sum adjudged to be due. AIR 1941 Lah 386 (388) = ILR (1941) Lah 740 (FB) ** AIR 1951 Trav-Co 80 (81) = 1950 Trav-Co LR 472 (DB).

(7) The test to determine whether the dues to the plaintiff was one debt or

several distinct debts is whether he could sue for such dues under O. 2, R. 2, Civil P. C. AIR 1961 Orissa 148 (150). (Contract of service on monthly salary — Each month's salary is a distinct debt.)

[See however AIR 1954 Madh B 151 (152).]

[But see AIR 1952 All 514 (515) (DB).]

(8) A mortgagee lessor who allows his decree for rent against the mortgagor to become barred cannot, when the mortgagor sues for redemption successfully claim the right to appropriate an amount received by him on behalf of the mortgagor from a third party towards the barred decree and insist that redemption should be allowed only on payment of full mortgage debt. Such a case does not fall under S. 60 as there are no several distinct debts due by the mortgagor to the mortgagee and a payment by the former without an intimation as to which of them it is to be appropriated. 1955 Mad WN 613 (614).

2. Creditor's right to appropriate. —

(1) Where debtor omits to indicate to which of several debts the payment is to be appropriated, the creditor has the right to appropriate it to any debt actually due and payable to him by the debtor. (1899) 26 Cal 39 (44) = 25 Ind App 179 (PC) ** AIR 1956 Cal 570 (573) (DB) ** AIR 1954 Trav-Co 233 (234) = ILR (1953) Trav-Co 721 ** ILR (1950) 1 Cal 578 (586) (DB) ** AIR 1937 Nag 198 (199) ** AIR 1935 Cal 39 (60) = 61 Cal 711 (DB) ** AIR 1935 Oudh 209 (210) = 10 Luck 307 (DB) ** AIR 1934 Cal 40 (42) = 60 Cal 1265 (DB) ** AIR 1933 Pat 267 (268) (DB) ** AIR 1926 Lah 183 (184) = 7 Lah 17 (DB) ** AIR 1916 Pat 326 (327) = 1 Pat L Jour 474 (DB) ** 1966 All LJ 588 = ILR (1966) 2 All 382 ** ILR (1963) 1 All 517 = (1963) 49 ITR 167 (All). (A creditor may not be allowed to contend that he is not bound by appropriation made by him because he has not communicated it to his debtor.)

(2) The same basic principle underlies Ss. 59 and 60 of the Contract Act and also S. 55 of the Bengal Tenancy Act, 8 of 1885, and therefore where the landlord becomes entitled to appropriate a payment due to the tenant's failure to himself appropriate it he can exercise the right irrespective of and even contrary to any intermediate direction given by the tenant. AIR 1956 Cal 570 (573) (DB).

Section 60 — Note 2 (contd.)

(3) A creditor is not bound to accept a payment on the conditions proposed by the debtor. Where he refuses he should return the money or the cheque by which money is preferred. AIR 1922 PC 26 (27) = 48 Cal 839.

(4) The creditor's right to appropriate a payment towards any debt to him can be exercised even up to the time of trial. AIR 1926 Lah 183 (183, 184) = 7 Lah 17 (DB) ** AIR 1937 All 1 (2) = 58 All 791 (FB) ** AIR 1933 Pat 267 (268) (DB) ** AIR 1916 Mad 1196 (1201) (DB) ** AIR 1960 Andh Pra 174 (175).

[See however AIR 1919 Mad 534 (535) (DB).]

(5) The right of the debtor and his creditor to appropriate payments will in no way be affected by the fact that security has been given for the debtor in respect of a particular liability and therefore nothing prevents them from appropriating a payment to clear off a prior indebtedness before giving credit in reduction of the liability for which the security has been given. AIR 1919 Mad 471 (471, 472) (DB) ** AIR 1941 Lah 16 (18) = ILR (1941) Lah 323 (DB).

(6) In appropriating a particular debt the probable prejudice that may be caused to third persons having claims against the debtor is no concern of the creditor — He can place himself in the most advantageous position so long as he does not act either unconscionably or inequitably. AIR 1919 Mad 534 (535) (DB).

(7) Executor de son trot cannot remit any debt due to beneficiary and give preference to his own dues. AIR 1935 Cal 39 (60, 61) = 61 Cal 711 (DB).

(8) The right given by S. 60 of the Contract Act can be exercised by the creditor only at the time when he receives the payment. Section 60 does not give him any right to consolidate all the debts unilaterally, i. e., without the consent of the debtor and it does not allow him to treat a particular payment or payments as having been made towards all the debts as a whole. ILR (1960) 10 Raj 43.

(9) Payment of decretal amount in Court by mortgagor — Its appropriation towards interest first and then towards principal is normal rule, unless mortgagee was informed that payment was towards principal. AIR 1970 SC 161 (163).

3. Lawful debt actually due. — (1) The creditor invoking this section must establish the existence of a lawful debt actually due towards which the appropriation was made. AIR 1928 Cal 229 (229) ** AIR 1954 Orissa 130 (130, 131) = ILR (1954) Cut 199.

(2) Bond silent as to post diem interest — No post diem interest will be actually and lawfully due in respect of

which appropriation can be made. AIR 1917 Pat 510 (511).

(3) Creditor is not entitled to appropriate towards arrears of rent unless the arrears on the date of appropriation are proved. AIR 1922 Pat 446 (446) (DB) ** AIR 1960 Pat 145 (146) = 1959 BLJR 549 (DB).

(4) The principle of this section applies not only to distinct debts but also to distinct parts of a single loan transaction. The creditor can appropriate payment by the debtor to any one of such parts. AIR 1937 All 1 (3, 4) = 58 All 791 (FB).

[See also AIR 1948 Nag 290 (291, 292) = ILR (1948) Nag 310.]

(5) Part of debt incurred by manager of joint family for future immoral purpose — Creditor who has obtained decree cannot appropriate from sale proceeds of the joint family property towards that part of debt which was illegal and not binding because of its immorality. AIR 1938 All 437 (440) (DB).

(6) Decree partly set aside in appeal — Unless Court directs the defendant to recover his costs in the first Court there is no lawful debt to which he can appropriate. AIR 1927 Cal 906 (907) (DB).

(7) Where the plaintiff, who had license under the Bihar Cotton Cloth and Yarn Dealers (Licensing and Control) Order, 1944, supplied standard cloth, as defined in Section 2 (10) of the Order, to the defendant who had no license for being sold in his shop, the amount due as the price of standard cloth is not a lawful claim made by the plaintiff and, therefore, the appropriation of a portion of the payment made by the defendant towards the price of standard cloth is also not permissible in the eye of law. AIR 1960 Pat 145 (146) = 1959 BLJR 549 (DB).

4. Whether recovery is barred by law or not. — (1) That the debt is barred by limitation is no bar to the creditor's right to appropriate towards it any payment not specifically paid towards any other debt. AIR 1940 Lah 166 (169) ** AIR 1930 Mad 594 (595) ** 1965 Punj LR (Supp) 86. (Decretal amount directed to be paid by instalment — Payment by judgment-debtor — To be adjusted towards which instalment not specifically stated — Amount could be adjusted towards payment of time barred instalment.) ** 1963 All WR (HC) 390 = 1963 All LJ 496 ** 1958 All WR (HC) 62.

5. Circumstances indicating particular appropriation. — (1) In the absence of any stipulation regarding appropriation it is the duty of the Court to see whether there was any intention on the part of the parties to appropriate the payment to any particular debt. AIR 1937 Pat 432 (433).

Section 60 — Note 5 (contd.)

(2) Two debts owing, one bearing compound interest and the other simple interest — Debtor not indicating the appropriation — Creditor appropriating payments towards the simple interest dues — The fact that debtor was unwilling at the time of the execution of the bond to pay compound interest is not a circumstance which indicates that the payment ought to be appropriated towards the compound interest first. (1899) 26 Cal 39 (44) = 25 Ind App 179 (PC).

(3) Where accounts are taken and balance struck in a running account between the parties the inference is that any payment made subsequently should be applied towards the discharge of the balance. AIR 1936 Pesh 143 (144) (DB).

(4) Madras Agriculturists' Relief Act (4 of 1938), Section 8 (1) — Debtor making open payment before 1st October 1937 in excess of interest then due — Debtor knowing the extent of his indebtedness and the amount of interest — Intention of debtor unascertainable — Held, that the debtor in 1936 did intend to pay off part of the principal of his debt and indicated that intention by the very act of the payment. AIR 1943 Mad 236 (238, 241) = ILR (1943) Mad 563.

(5) Entries in books of the creditor may be taken as indicative of agreement to a proposed appropriation by the debtor. AIR 1922 PC 26 (27) = 48 Cal 839.

(6) Decree-holder filing accounts in execution application, merely entered credit and debit items and calculated interest on both and claimed execution for the balance: Held, that it resulted in appropriating the payments towards principal. AIR 1933 Lah 126 (126).

(7) Demand for January Kist and time extended for payment — Payment made in excess of January Kist and amount far below March Kist — No direction as to appropriation by debtor — Held, payment was to be treated as for January Kist. (1908) 35 Cal 636 (639) (DB).

6. Mode of appropriation. — (1) The creditor is entitled to appropriate a payment to debts in their chronological order. AIR 1926 Pat 330 (333) = 5 Pat 326 (DB) ** AIR 1956 Pat 522 (525) (DB) ** Madh BLJ 1954 HCR 636 (639) ** AIR 1947 Pat 273 (274) ** AIR 1933 Pat 267 (268) (DB) ** AIR 1921 All 325 (325) (DB) ** (1913) 19 Ind Cas 6 (7) (DB) (Cal) ** (1966) 2 All LT 198. (Payment of part amount towards sum due under two mortgages — Payment cannot be appropriated towards sum due under any one mortgage only, but must be appropriated proportionately.) ** AIR 1966 J & K 64 (66, 67) = 1966 Kash LJ 212 ** AIR 1962 All 586 (589) = 1962 All

LJ 707 (DB). (Instalment decree with default clause — Appropriation of payment — Right of appropriation accrues to decree-holder creditor only when judgment-debtor makes no appropriation to any particular instalment — Where judgment-debtor tenders payment to decree-holder with an indication as to appropriation in a particular way, then unless the default clause is held to have come into operation it would not be open to decree-holder to appropriate the accepted payment otherwise than indicated. (1906) 3 All LJ 430, Dissented from.)

(2) The mode of payments of debts may be more than one; it may be actual payment; it may be by adjustment or it may be by any other means as agreed to between the creditor and the debtor. There can be a payment of adjustment and it is not necessary that there should always be an actual payment for appropriation or adjustment. AIR 1963 Mys 64 (65) = 40 Mys LJ 901.

(3) Creditor who appropriates need not declare his intention in express terms. AIR 1934 Cal 40 (42) = 60 Cal 1265 (DB) ** AIR 1937 Nag 94 (95) = ILR (1938) Nag 344 ** AIR 1926 Mad 292 (795) (DB).

(4) Appropriation is a matter which arises when payment is made and accepted — Creditor not accepting — Court cannot force him to accept payment in respect of a particular debt. AIR 1945 Nag 277 (280) = ILR (1945) Nag 885.

(5) Though Sections 59 to 61 do not expressly deal with interest, the principles underlying these sections apply to interest as well. AIR 1922 Pat 369 (370) (DB) ** AIR 1918 Cal 605 (607) (DB) ** (1964) 1 Ker LR 363 ** AIR 1960 Andh Pra 174 (175) ** (1958) 1 Andh WR 400 (DB). (If the mortgagor has made the payment without any express directions it is open to the creditor to appropriate it either towards principal or interest but the appropriation should be made known to the debtor by the creditor.)

(6) Monies received by creditor on behalf of debtor must be credited as on the dates received for the current interest and principal. (1887) 9 All 713 (719) = 14 Ind App 142 (PC) ** AIR 1946 PC 145 (150) ** AIR 1922 PC 233 (234) = 48 Ind App 150 = 44 Mad 570 ** AIR 1950 FC 38 (44) = 1949 FCR 537 ** ILR (1953) 3 Raj 318 (328) (DB) ** AIR 1952 Ajmer 27 (28) ** AIR 1952 Pat 453 (454) (DB).

(7) Decree providing for interest — The rule that in the absence of any appropriation by the debtor the creditor may appropriate a payment first towards interest applies. AIR 1918 Cal 605 (607) (DB) ** AIR 1923 Pat 322 (324) (DB).

Section 60 — Note 6 (contd.)

(8) Where interest due largely exceeds the amount paid towards liquidation of debt, the creditor can properly appropriate it towards interest. AIR 1919 Cal 235 (240) (DB).

(9) Creditor can be allowed to prepare his account so as to appropriate towards interest monies paid from time to time, though he did not appropriate them at the time when payments were made. (1910) 7 Mad L Tim 199 (200).

(10) Payment by debtor after dismissal of one claim and decree of another cannot be appropriated towards dismissed claim. (1894) 7 CPLR 57 (58).

(11) Two debts — One debt agreed to be liquidated by payment in kind — Payment in kind cannot be appropriated towards the other debt. (1886) 13 Cal 164 (168) (DB).

(12) A joint deposit cannot be appropriated towards the debt of one of the depositors. AIR 1928 Lah 316 (316) (DB).

(13) The amount deposited for a special purpose cannot be regarded as a repayment which the debtor at a subsequent date may claim to appropriate to any other debt. AIR 1921 Nag 133 (134).

(14) Explanation 1 of Section 8 of Madras Agriculturists Relief Act, 4 of 1938 takes away the right of the creditor to appropriate payments towards interest unilaterally as he would otherwise be entitled to under Section 60 of the Contract Act. AIR 1953 Mad 458 (460) = ILR (1953) Mad 295 (FB).

[See also AIR 1960 Andh Pra 174 (175). (Explanation 1 to Sec. 8 of the Madras Agriculturists' Relief Act relates only to the debts contracted on or before 1st October 1932. Where the debt was of 15th June 1952, the provision which has direct application is Section 13 and to that section there is no explanation similar to Section 8, curtailing the creditor's right under Section 60 of the Contract Act. The creditor in such a case is therefore, free to deduct alleged sum in abatement of outstanding interest.) ** (1958) 1 Andh WR 480 (DB).]

(15) In Section 13 of the Madras Agriculturists Relief Act, 4 of 1938 the general law of appropriation has been departed and therefore in a case governed by that provision the creditor cannot in spite of the debtor's omission to indicate any appropriation appropriate the payment of the debtor towards interest according to the contract rate and in excess of the rate specified by the section. AIR 1949 Mad 497 (499).

(16) Debt contracted prior to 1st October 1932 — Payments made by debtor without any direction for appropriation — Payments not appropriated by creditor prior to 1st October 1937 — Section 8, Madras Agriculturists' Relief Act

(4 of 1938), applies for scaling down debt and wipes out all interest — Creditor cannot appropriate payments towards interest thereafter. AIR 1962 Andh Pra 233 (234) = (1962) 1 Andh LT 132.

(17) A, the agent of B, had to receive certain amounts of remuneration earned by him and there was also certain amount due by A to B under a compromise decree, B informed A that the remuneration earned by A had been adjusted or appropriated towards his dues under the said compromise decree :

Held, that B made the payment of the debt due by him to A by legal and valid adjustment. AIR 1963 Mys 64 (66) = 40 Mys LJ 901.

7. Re-appropriation.— (1) So long as notice had not been given as to the appropriation of any amount to any particular account, it is open to the creditor to alter it and make re-appropriation. AIR 1930 Mad 874 (878) = 53 Mad 826 (DB) ** AIR 1926 Mad 792 (795) (DB) ** AIR 1926 Pat 330 (333) = 5 Pat 326.

(2) An entry in the creditor's books applying a particular debt does not constitute an election which will preclude the creditor from afterwards applying it to another debt unless the entry has been communicated to the debtor; once the election is made and communicated to the debtor it is irrevocable. ILR (1950) 1 Cal 578 (586) (DB) ** AIR 1926 Mad 792 (795) (DB).

(3) Money paid expressly for being appropriated for January Kist and appropriated as such — The appropriation cannot be altered subsequently without the consent of parties. (1911) 38 Cal 537 (541) = 38 Ind App 80 (PC).

(4) Chitti debt and rent debt due from the person to the landlord — Payment appropriated by landlord towards Chitti debt — Court holding that under Section 75, C. P. Tenancy Act the appropriation ought to have been towards rent dues — **Held**, new cause of action arose in respect of the Chitti debt as a result of the re-appropriation of the payment to the rent dues. AIR 1946 Nag 130 (131).

8. Proof of intention. — (1) Proof of intention as to how a payment was to be appropriated may be by circumstantial evidence. AIR 1943 Mad 236 (241) = ILR (1943) Mad 563.

(2) Burden of proof is on the debtor who alleges appropriation in a particular way. AIR 1927 PC 50 (51) ** AIR 1915 Lah 248 (249) = 1915 Pun Re No. 24 (DB) ** AIR 1966 J and K 64 = 1966 Kash LJ 212.

(3) Account of creditor in which he pays in full interest due to him on date of settlement and applies balance towards principal is clear indication of intention to make appropriation towards

61. Application of payment where neither party appropriates.—Where neither party makes any appropriation the payment shall be applied in discharge of the debts in order of time, whether they are or are not barred by the law in force for the time being as to the limitation of suits. If the debts are of equal standing, the payment shall be applied in discharge of each proportionably.

Section 60 — Note 8 (contd.)

interest in first place. AIR 1916 Mad 1196 (1201).

(4) Whether payment made by debtor is for a particular debt or all debts is a question of fact. 1966 All LJ 588 = ILR (1966) 2 All 382.

9. Appropriation to save limitation.—

(1) The creditor may appropriate payments towards debts which could otherwise be barred by limitation. AIR 1933 Pat 267 (268) (DB) ** AIR 1925 Cal 937 (939).

(2) Limitation is not saved by the mere appropriation by the creditor unless the debtor's intention to save limitation is also proved. AIR 1919 Lah 288 (289) = 10 Lah 750 (DB) ** 1966 All LJ 588 = ILR (1966) 2 All 382. (Circumstances leading to inference that payment by debtor is made towards all the debts in a series of debts — Limitation for each of the debts extended by such payment.)

(3) Customer making payments to trader from time to time without directions as against what item it ought to be credited — Trader cannot credit it towards the entire balance due up-to date so as to save limitation. AIR 1921 All 325 (325).

(4) Where, with respect to goods sold at different dates, no fixed period of credit was agreed upon and a payment within meaning of Section 20, Limitation Act (1908) was made towards the account, the creditor was entitled to appropriate it towards all the items which were outstanding on the date of payment and it would give fresh limitation to items which were not barred by limitation on the date of that payment. AIR 1961 Raj 154 (156) = 1959 Raj LW 166.

(5) Goods supplied from time to time — Payments made from time to time appropriated in the order of time of deliveries — Suit for balance due — Article 52 of Limitation Act (1908), applies — If date corresponding to the delivery and the date of subsequent deliveries which remain unadjusted, fall within period of limitation, claim for corresponding amounts will be in time. AIR 1961 Mad 388 (390) = (1961) 1 Mad LJ 288.

(6) It is always open to the parties to consolidate the various debts and then treat them as one transaction. If debts are so consolidated and payment is made thereafter, it would extend the period of limitation for the entire loan. ILR (1960) 10 Raj 43.

(7) Creditor advancing several sums at different times — Debtor making part payment not intimating towards which debt payment is to be appropriated — Creditor in his option appropriating payment towards all outstanding debts — Section 20, Limitation Act, gives fresh period of limitation for all debts provided debts were not barred by limitation at the date of payment. 1961 Jab LJ 144.

Section 61 — Note 1

(1) The application of Section 61 is always subject to the condition that the parties have indicated no intention inconsistent with its application. AIR 1914 Bom 290 (291) = 38 Bom 255 (DB).

(2) Where neither party makes any appropriation, payments are to be applied in the discharge of debts in order of time. (1924) 78 Ind Cas 910 (911) (Pat) ** AIR 1956 Pat 522 (525) (DB) ** AIR 1942 Oudh 311 (312) (DB) ** AIR 1915 All 378 (379, 380) = 37 All 649 (DB) ** (1970-1971) 6 Mad HCR 32 (33) (DB). [But see AIR 1922 Nag 219 (221).]

(3) Payments made from time to time by the judgment-debtor towards an instalment decree must be held to have been made towards the instalments as they fell due, when there is no indication of any intention that payment would be appropriated towards a particular instalment. AIR 1956 Pat 522 (525) (DB) ** 1965 Pun LR (Suppl) 86. (Time-barred instalments — Payments can be appropriated towards satisfaction of those instalments.)

(4) Suit for recovery of money due on mortgages — Plaintiff as lawyer of defendant in another case recovering sum of money towards refund of Court-fee to defendant and also withdrawing from time to time sums towards pension bill of defendant — Plaintiff failing to prove existence of any debt towards which he could appropriate money received by him on defendant's behalf — Held, that plaintiff not being entitled to benefit of Section 60 and there being no other debt proved before Court, total amount received by plaintiff was to be applied in part satisfaction of the plaintiff's claim in suit under Section 61. AIR 1954 Orissa 130 (131) = ILR (1954) Cut 199.

(5) The Court should, in the absence of any appropriation by the debtor or creditor, direct that the payment should be applied in discharge of the debts in order of time if there be such, and if they are all of the same date, in discharge of each of such debts proportionately. AIR 1935 All 221 (228) = 57 All

Contracts which need not be performed

62. Effect of novation, rescission, and alteration of contract.—If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed.*

Illustrations

(a) A owes money to B under a contract. It is agreed between A, B and C that B shall thenceforth accept C as his debtor, instead of A. The old debt of A to B is at an end, and a new debt from C to B has been contracted.

Section 61 — Note 1 (contd.)

605 (FB) ** AIR 1937 All 1 (2) = 58
All 791 (FB) ** AIR 1916 Pat 326 (327,
328) = 1 Pat L Jour 474 (DB) ** 1959
Ker LR 654 = 1959 Ker LT 677 = 1959
Ker LJ 753 = AIR 1960 Ker 90 (90)
(DB). (Court should wait till creditor
has exercised his right to appropriate
payment to particular debt.)

(6) Successive advances by creditor and successive payments by debtor — Each item of debt if unpaid becomes time-barred on expiry of three years — Balance outstanding in favour of creditor is not considered to consist of the oldest items of debts — Each payment ought to be appropriated towards the oldest then outstanding debt. AIR 1940 Pat 52 (53, 54) (DB).

(7) Payments by some debtors towards joint debt can be appropriated in order of time towards barred debt even though all debtors did not concur in making payment. AIR 1918 Cal 802 (803).

(8) Money received without any definite appropriation as to principal or interest must first be applied in payment of interest and then in payment of the capital. AIR 1922 PC 233 (234) = 48 Ind App 150 = 44 Mad 570 ** AIR 1941 Lah 386 (389) = ILR (1941) Lah 740 (FB). (AIR 1938 Lah 289 = ILR (1938) Lah 403, Overruled.) ** AIR 1951 Pat 453 (454) (DB) ** AIR 1936 All 712 (715) (DB) ** AIR 1928 Lah 901 (901) ** AIR 1923 Oudh 123 (138) = 25 Oudh Cas 349.

(9) Where creditor has not appropriated in taking accounts, debt which does not carry interest should rank last. (1913) 17 Cal WN 25 (35).

(10) Where the creditor treats the account as a running account, it is assumed as a matter of law that the payments would go towards the earlier items in the account. AIR 1933 Pat 267 (268).

(11) In running account payments within three years can be treated as appropriated to the satisfaction of earlier time-barred advances. AIR 1923 Bom 82 (83) = 47 Bom 128.

(12) Rule of appropriation under this section does not apply to fiduciary relation — Executor de son tort cannot therefore remit any debt due to beneficiary and give preference to his own

debt. AIR 1935 Cal 39 (60, 61) = 61 Cal 711 (DB).

(13) Where a customer has executed a mortgage to secure floating balance of account to certain limit and there is overdrawing above this limit, and repayments are made by the customer, the presumed intention should be to apply the payments in discharge of unsecured items in order of date in priority to the secured items. AIR 1948 Pat 18 (23) = 26 Pat 231 (DB).

(14) Income-tax officer is not a Court nor can he have any right under S. 61 of the Contract Act to make any appropriation. AIR 1952 All 514 (515) (DB).

(15) Running account — No indication in accounts or in suit that payments were to be appropriated to particular items of credit — Creditor can set off payments even against time-barred items. AIR 1966 J and K 64 (67) = 1966 Kash LJ 212.

(16) Suit for arrears of salary — Court finding that contract of service had expired on 1-10-1951 but that the plaintiff having continued to serve was entitled to reasonable compensation under Section 70 for subsequent period — No evidence to show that amounts paid by defendant had been appropriated before institution of suit towards compensation payable under Section 70 — Held, that the amounts should be appropriated to the earlier debt, namely, the salary payable upto 1-10-1951. (1962) 3 Guj LR 149.

(17) Where the defendant owed money to the plaintiffs on two khatahs and in a suit brought on the basis of those khatahs, the only dispute in respect of certain payment made by the defendant to the plaintiffs was as to the khata towards which the payment was made, and there was no dispute as to appropriation, Section 61 does not come into play. 1959 Raj LW 451 = ILR (1959) 9 Raj 1144.

SECTION 62 — SYNOPSIS

1. "If the parties to a contract agree."
2. Novation of contract — Effect.
3. Illustrative cases.
4. Novation by substitution of new party.
5. Cross contracts.
6. Agreement to substitute in future.
7. Section 62, whether applies after breach of original contract.

(b) A owes B 10,000 rupees. A enters into an arrangement with B, and gives B a mortgage of his (A's) estate for 5,000 rupees in place of the debt of 10,000 rupees. This is a new contract and extinguishes the old.

(c) A owes B 1,000 rupees under a contract. B owes C 1,000 rupees. B orders A to credit C with 1,000 rupees in his books, but C does not assent to the arrangement. B still owes C 1,000 rupees, and no new contract has been entered into.

[°] See the Specific Relief Act, 1963 (47 of 1963), S. 18 (c); Evidence Act 1872 (I of 1872), S. 92 and Registration Act, 1908 (16 of 1908), S. 49.

Section 62 — Synopsis (contd.)

8. Invalid novation — Effect.

9. Negotiable instrument invalid — Whether plaintiff can fall back on original consideration.

10. Alteration of documents — Effect.

11. Consideration under Section 62.

12. Burden of proof

13. Limitation.

1. "If the parties to a contract agree." — (1) Parties are not in a position to avoid a contract under Section 62 without the other side's consent. AIR 1935 Bom 225 (227) (DB) ** AIR 1949 FC 211 (216) = 1949 FCR 379 ** 1949 Bur LR (SC) 46 (51).

(2) A contract is concluded when in the mind of each contracting party there is a consensus ad idem and a modification or revocation of the contract requires a like consensus. AIR 1925 PC 232 (232).

(3) No legal novation or modification of an existing contract is created in a case where one party proposes the novation but the other party accepts the proposal in a qualified manner. AIR 1915 Oudh 31 (53) (DB).

(4) Rights under leases granted already cannot be affected except by agreement by lessee. AIR 1920 PC 136 (138).

(5) Where a party to a contract repudiates the contract it is not effective till it is accepted by the other party and rights under the contract are not given up but retained. AIR 1953 Trav-Co 161 (165) (DB) ** (1962) 66 Cal WN 29. (Repudiation must be bilateral act of agreement between parties.)

(6) Where there is no mutual agreement among all the parties to substitute a new contract for the old contract there cannot be a novation. (1958) 60 Pun LR 42 (44) ** AIR 1966 Ker 303 (305) = 1966 Ker LT 1145 (DB) ** AIR 1960 Punj 549 (552) = 62 Pun LR 703 (DB). (A mutual abandonment, cancellation or rescission must be clearly expressed. In absence of any express or implied terms, conduct of parties is a fairly safe guide.)

(7) One party to a contract cannot unilaterally alter the terms of the contract. AIR 1957 Punj 140 (141) = ILR (1957) Punj 1165.

(8) A party to a contract is not entitled in law to cancel a concluded con-

tract unilaterally. AIR 1958 Ker 195 (201).

(9) There is nothing repugnant to the law of contract to have as one of the express terms of the contract itself that it will be alterable at the instance of one party alone. AIR 1950 Cal 232 (235).

(10) A party to a contract cannot transfer his liability thereunder without the consent of the other party and such liabilities can only be transferred by a tripartite agreement which in such cases will amount to novation. AIR 1969 Cal 238 (244). (AIR 1962 SC 1810, Foll.)

2. Novation of contract — Effect. — (1) Section 62 deals with novation of contract. It comes into operation when a new contract is substituted for the contract in existence. AIR 1957 Pat 408 (412).

(2) A contract will be said to be rescinded by another between the same parties when the latter is inconsistent with or renders impossible the performance of the former. AIR 1957 Andh Pra 784 (789).

(3) In a novation there must be immediate and present substitution of another contract, and there is no true novation, if the liability under the original contract is not extinguished by the new contract and if there is reversion to the old contract. AIR 1956 Madh B 25 (27) = ILR (1956) Madh B 13 (DB) ** AIR 1954 Nag 142 (147, 148) = ILR (1953) Nag 746 (DB).

(4) Essence of novation lies not in the dissimilarity of the terms between the two contracts but in the intention of the parties to supersede the old by the new. AIR 1957 Andh Pra 784 (787) ** AIR 1945 Oudh 29 (30) (DB) ** AIR 1936 Nag 37 (38, 40) = 31 Nag LR (Sup) 154 ** AIR 1935 Oudh 366 (369) ** AIR 1925 Mad 1260 (1261) (DB) ** 1883 All WN 254 (255).

[See also AIR 1942 Bom 15 (16) = ILR (1942) Bom 101.]

(5) A collateral agreement must be, in every sense a complete legal contract and the effect must be to vary or add to the terms of the contract. Such collateral agreements are viewed with suspicion and so must be proved strictly. The terms of the agreement and also the animus contrahendi on the part of all the parties must be established clear-

Section 62 — Note 2 (contd.)

ly. No laxity in this respect would be allowed. AIR 1945 PC 144 (145).

(6) (Per majority, Sarkar, J., Contra.) An arbitration clause is a collateral term of a contract as distinguished from its substantive terms; but none the less it is an integral part of it. It is not because the arbitration clause survives, but because it does not put an end to their liability to pay damages for any breach of the contract. The contract is still in existence for certain purposes. But where the dispute is whether the said contract is void ab initio, the arbitration clause cannot operate on that dispute for its operative force depends upon the existence of the contract and its validity. So too, if the dispute is whether the contract is wholly superseded or not by a new contract between the parties, such a dispute must fall outside the arbitration clause, for, if it is superseded, the arbitration clause falls with it. AIR 1959 SC 1362 (1368, 1370) = (1960) 1 SCR 493 = 1961 Andh LT 20.

(7) If after a contract is concluded and its terms settled further negotiations are started with regard to new matters, that would not prevent full effect being given to the contract already existing, unless it is established as a fact that the contract was rescinded or varied with the consent of both the parties or that both parties treated it as incomplete and inconclusive. AIR 1949 FC 211 (216) = 1949 FCR 379.

(8) Whether there is a novation or not depends on the intention of parties. One should look to the substance and not to mere form. AIR 1927 Cal 538 (542) (DB) ** AIR 1957 Andh Pra 784 (789) ** AIR 1947 Cal 294 (299) = ILR (1947) 1 Cal 101 ** ILR (1946) 1 Cal 543 (551) (DB).

(9) Whether the parties intended the substitution of a new contract depends upon the circumstances of each case. AIR 1944 Oudh 63 (64, 65) ** AIR 1942 Cal 87 (90) = ILR (1941) 2 Cal 237 (DB).

(10) The question whether a creditor of two or more persons has released one of them and converted the others into his sole debtors by what is called novation is a question of intention. To succeed on this ground what debtor has to prove is conduct inconsistent with the continuance of his liability, from which conduct an agreement to release him may be inferred. 1949 Bur LR (SC) 46 (52).

(11) Under Section 62, it is not always necessary to prove that a new contract has been substituted; it is enough if an alteration in the original contract is proved. Consequently, where an instalment bond is actually executed by the debtor after striking of the balance on the bahi account, the terms of the original contract are varied, and this

variation will be sufficient to absolve the debtor from the performance of the original contract. The creditor cannot, therefore, fall back upon the original contract and cannot sue thereon. AIR 1935 Lah 897 (898).

(12) Whether there has been a mere variation of terms or abandonment depends upon the facts of each particular case and is often not easy to determine but the following test may be applied, viz., that in the first case (variation) there are no such executory clauses in the second agreement as would enable one to sue upon that alone if the first did not exist; in the second (rescission) one could sue on the second arrangement alone, and the first contract is got rid of either by express words to that effect, or because, the second dealing with the same subject-matter as the first, but in a different way, it is impossible that the two should be both performed. AIR 1935 Cal 347 (353, 354) = 62 Cal 175 (DB).

(13) Parties must rescind the prior contract altogether in order that there may be valid novation; if there is no such intention, there is no substitution and original contract is available. AIR 1928 Mad 1201 (1203) = 52 Mad 465 (DB) ** (1874) 1 Ind App 241 (263) (PC) ** AIR 1958 Pat 162 (164) ** AIR 1956 Raj 12 (13) = ILR (1955) 5 Raj 85 (DB) ** AIR 1941 Rang 37 (39, 40) = 1940 Rang LR 603 (DB) ** AIR 1940 Pat 121 (124) (DB) ** AIR 1938 Lah 757 (758) ** AIR 1936 Lah 51 (53) (DB) ** AIR 1923 Nag 213 (213, 214) * AIR 1920 Cal 143 (149) = 46 Cal 534 ** (1908) 4 Low Bur Rul 365 (366, 367) (DB) ** AIR 1960 Pat 400 (405) = 1960 BLJR 224 (DB).

[See also AIR 1939 Pat 323 (328).]

(14) Mere alteration or modification of the terms of a contract does not amount to its rescission. The modifications are read into and become part and parcel of the original contract. The original terms also continue to be part of the contract and are not rescinded or superseded except in so far as they are inconsistent with the modifications. AIR 1955 Cal 65 (67).

(15) When a contract is novated there is a fresh contract coming into existence, directly, or by implication in place of the original contract. AIR 1925 Pat 228 (236) (DB) ** AIR 1955 Cal 65 (67) ** AIR 1953 Cal 642 (644).

(16) There is implied rescission of contract when new and inconsistent contract is agreed upon regarding same subject-matter between same parties. AIR 1917 Cal 52 (62) (FB) ** AIR 1955 Cal 65 (67) ** AIR 1916 Cal 136 (146) = 43 Cal 790 (DB).

(17) Where parties enter into a contract, which, if valid, would have the effect, by implication, of rescinding a

Section 62 — Note 2 (contd.)

former contract, and it turns out that the second transaction cannot operate as the parties intended, it does not have the effect, by implication, of affecting their rights in respect to the former transaction. AIR 1958 Raj 303 (304) = ILR (1958) 8 Raj 617.

(18) In order to constitute novation, there must be a new contract and not merely a new agreement, i.e., there must be a new enforceable agreement. AIR 1946 Nag 260 (261) = ILR (1946) Nag 500 ** AIR 1957 Andh Pra 784 (787) ** AIR 1963 Pat 131 (135).

(19) After the novation, if the subsequent contract is enforceable, that will govern the relationship of the parties and the obligor will stand relieved of his prior obligation. AIR 1954 Trav-Co 419 (421) = ILR (1954) Trav-Co 93 (DB) ** AIR 1938 PC 67 (69) = 65 Ind App 66 = ILR (1938) 2 Cal 72 = 32 Sind LR 374 ** (1914) 41 Ind App 142 (146) (PC) ** (1874) 1 Ind App 124 (142) (PC) ** AIR 1958 All 313 (316) ** AIR 1958 All 26 (27) ** AIR 1955 Pepsu 122 (124) (DB) ** AIR 1953 Cal 642 (644) ** AIR 1951 Ajmer 66 (67, 68) ** AIR 1937 Cal 57 (58) (DB) ** AIR 1936 Rang 396 (397, 398) (DB) ** AIR 1934 All 246 (248) (DB) ** AIR 1934 Lah 128 (129) (DB) ** AIR 1929 Sind 49 (49) (DB) ** AIR 1925 Sind 144 (147) = 26 Sind LR 335 ** AIR 1923 Oudh 3 (4) = 26 Oudh Cas 201 ** AIR 1917 Bom 262 (264) ** AIR 1915 Mad 254 (256) (DB) ** AIR 1914 Lah 88 (88) ** (1902) 6 Cal WN 905 (910, 911) (DB) ** AIR 1966 Madh Pra 313 (316) = 1966 MPLJ 659 (DB).

[See also AIR 1942 Cal 45 (46) = ILR (1941) 2 Cal 103 ** AIR 1921 Low Bur 44 (46) = 11 Low Bur Rul 137 (DB).]

(20) If a contract is clear and unambiguous, its true effect cannot be changed merely by the course of conduct adopted by the parties in acting under it. Such conduct, if it is clear and unambiguous, may in certain events raise the inference that the parties have agreed to modify their contract, but short of that such conduct cannot have the effect of changing the operation of an unambiguous agreement, though it might possibly, in special cases, support along with other appropriate evidence, a claim for rectification. AIR 1938 PC 26 (29).

3. Illustrative cases.— (1) A balance signed by the defendant which states as payable a rate of interest different from the rate usually charged in the previous accounts, amounts to a new contract which can form the basis of a suit. AIR 1915 Lah 402 (402) = 1915 Pun Re No. 42 (DB) ** (1909) 32 Mad 284 (288) (DB).

(2) Voluntary payment of interest at a higher rate, without consideration is

not a novation. (1867) 11 Moo Ind App 129 (137) (PC).

(3) Where a contract is performed but payment thereunder is not finally made; variation in the rates of contract can be made. ILR (1966) 1 Punj 49 (DB).

(4) Renewal of a debt does not ipso facto extinguish the security which a person has unless such renewal is accompanied by a fresh contract giving fresh security. AIR 1915 Mad 137 (143) ** (1913) 35 All 211 (225) = 40 Ind App 105 (PC).

(5) Surety for treasurer renewed thrice — Old bonds not returned — Treasurer found guilty of defalcation — Surety is liable on all bonds — Renewal of bonds was no novation. (1872) 4 Moo Ind App 86 (88) (PC).

(6) A renewed bill or promissory note for debt giving time to the debtor in consideration of increased interest does not operate as novation. AIR 1927 Cal 538 (542) (DB).

(7) A pronote renewing a promise to pay the debt due under a former pronote wipes out the old debt and creates a new liability and Court need not enquire into the old transaction unless where the debt acknowledged is barred by time so as to exclude the application of Section 19, Limitation Act. AIR 1929 All 980 (983) = 52 All 169 (DB).

(8) Where after a contract is concluded the promisor makes a suggestion to the promisee that he should in view of certain difficulties cancel his contract at par and receive back his advance and that suggestion is accepted by the offeree it constitutes a second contract between the parties. AIR 1952 Mys 111 (113).

(9) Agreement to give time for the payment of money due under a pronote is operative in India. AIR 1917 Mad 539 (540) = 39 Mad 129 (FB).

[See however 1960 Raj LW 129. (Promissory note — Subsequent arrangement giving facilities to debtor in making payments — There is no novation of contract and on failure of debtor to avail himself of facilities, creditor can file suit upon original promissory note.)]

(10) The binding nature of the agreement as to the extension of the time for performance is established by the general law of contract — Section 62 does not prohibit such an agreement. AIR 1959 Cal 472 (474) (DB).

(11) Acknowledgment of existing debt does not change nature of debt or operate to create a new debt. (1891) 14 Mad 258 (262) = 18 Ind App 37 (PC) ** AIR 1942 Pat 170 (174) (DB) ** AIR 1939 Pat 323 (328) (DB) ** AIR 1933 Lah 174 (175) ** AIR 1932 Oudh 49 (50) = 7 Luck 313 (DB) ** AIR 1920 Nag 244 (244).

[See also AIR 1929 Oudh 529 (529) (DB).]

Section 62 — Note 3 (contd.)

(12) Accounts settled between parties and certain sums acknowledged by defendant and entry made in plaintiff's account books of defendants' agreement to pay with interest — Case held to be one of novation. AIR 1931 Oudh 97 (98) ** AIR 1952 Vindh Pra 58 (61).

(13) Where there is an existing debt, and the payment of it is secured by a deed intended to operate as a mortgage, there is no novation wiping out the pre-existing personal liability of debtor. AIR 1926 Cal 318 (318).

(14) Taking a bill of exchange or a promissory note on account of a pre-existing debt does not operate as a discharge in the absence of intention to that effect. It operates only as a conditional payment and if the promissory note is dishonoured, then the original debt is revived and the original rights are restored to the promisee. AIR 1963 Mad 16 (17) = (1962) 2 Mad LJ 518.

(15) When mortgagor agreed to accept part of the mortgage money by a certain period and actually accepted it after that period there is no new contract at the time of the acceptance of the part amount but there is merely an acquiescence in the late payment. AIR 1924 Pat 825 (829) (DB).

(16) Where mortgagee releases a part of mortgaged property, there is no question of new agreement or contract between mortgagee and mortgagor, and therefore no novation of contract of mortgage. AIR 1961 Punj 202 (203) = ILR (1960) 1 Punj 679.

(17) Lease by manager of joint family — Addition of coparcener's name while getting it confirmed by widow of lessor on death of lessor does not operate as novation of lease. AIR 1925 Mad 919 (921).

(18) Where one person executed a bond for a debt due by another and afterwards came to a settlement that the latter should pay the debt by instalments, should execute mortgage for the balance and that default in payment should make the latter liable as before: Held, that failure to carry on the settlement, though some of the instalments were paid, did not revive the former's liability as it was absolved by the settlement subsequent to the bond. AIR 1933 Lah 464 (465) (DB).

(19) Where the plaintiffs entered into a contract with the defendants for the supply of liquor at stipulated rates for 7 years, it is open to the parties to agree to an increase in the agreed rates at any time during the stipulated period even if the plaintiffs had supplied liquor for sometime and received payment at the original rates. AIR 1958 Madh Pra 71 (75).

(20) A mortgage is essentially a debt plus a security and can be discharged

either by the payment of the mortgage debt or by such other satisfaction as the mortgagee may by a novated agreement allow to the debtor. AIR 1954 Nag 84 (89) = ILR (1953) Nag 797 (DB).

(21) Certain persons mortgaging 60 bighas of land for Rs. 3500 — In settlement operations area found to be 51 bighas — On statement of mortgagors and some of mortgagees mortgage shown to be for Rs. 3000 in favour of six persons in mutation entry — In absence of evidence that parties entered into a new contract, mutation entry held did not create any fresh mortgage. AIR 1952 Pepsu 6 (7).

(22) Where the defendant was holding the properties for a particular period under a particular kanom document and after that period he was holding the properties under another kanom document executed by way of renewal, to such a case Section 62 has no application as there is no substitution or rescission or alteration of the original contract. AIR 1954 Trav-Co 377 (378, 379).

(23) Where the parties do not say anything at the time the hundies are executed as to whether they are intended to operate as an absolute discharge of the debt or as a conditional payment only, the legal effect of the transaction is that the original debt remains but the remedy for that debt stands suspended till the maturity of the instrument in the hands of the creditor. AIR 1956 Raj 12 (14) = ILR (1955) 5 Raj 85 (DB).

(24) It cannot be held that a contract for the repayment of a debt can never be discharged or substituted by a new contract involving the payment of a reduced amount to the creditor in a specified manner. Illustration (b) to Sec. 62 clearly indicates that such a new contract extinguishes the old debt. AIR 1956 Madh B 25 (28) = ILR (1956) Madh B 13 (DB).

(25) Contract with Government of State of Bhopal—Candidature for election to Assembly of State of Madhya Pradesh after States' reorganisation — Contract with Government of Bhopal was held to be novated statutorily to substitute for that State the Government of the State of M. P. AIR 1959 Madh Pra 58 (62) = 1958 MPLJ 786 (DB). (Overruled on another point in AIR 1964 SC 1200.)

(26) (Per majority, Sarkar, J., Contra.) — Where the clause in a settlement in express terms declares that the earlier contracts should be finally concluded in terms of the settlement and no party will have any claim against the other; the substituted agreement gives a new cause of action and obliterates the earlier ones. AIR 1959 SC 1362 (1367) = (1960) 1 SCR 493.

(27) A motor insurance policy being a contract of personal indemnity cannot be

Section 62 — Note 3 (contd.)

assigned; when it is transferred, there is only a novation of the contract by which the original assured is released and a new assured is accepted. AIR 1963 Madh Pra 164 (170) = 1963 MPLJ 162 (DB).

(28) A collateral or an earlier illegal contract cannot be the basis of an action in a Court of law after a novation of the contract as the novated contract would still continue to be illegal or immoral. AIR 1963 Madh Pra 323 (328) = 1963 MPLJ 325 (DB).

(29) Parties can vary or substitute arbitration agreement by mutual contract. AIR 1963 Punj 165 (166) = ILR (1962) 2 Punj 468.

(30) Purchase of goods from Mills on forward contracts — Agreement by purchaser with third parties for sale of those goods — Instructions to Mills to deliver goods to third parties — There was held no novation — Transaction between purchaser and third parties amounted to separate sale. (1959) 10 STC 560 (Andh Pra).

(31) Agreement in favour of plaintiff to sell land for Rs. 8,000 — Proceedings before Revenue Court for according sanction — Plaintiff making offer at Rs. 12,000 — Defendant accepting — Plaintiff not paying — Sale in favour of defendant 2 for Rs. 12,000 sanctioned — Suit by plaintiff for specific performance of agreement to sell at Rs. 8,000 — Held that there was novation of contract and that original contract did not subsist and that suit was incompetent. AIR 1960 Mys 59 (63, 64) = 37 Mys LJ 358 (DB).

(32) Contract to supply paddy — Defendant's failure to supply the full quantity — Undertaking executed by him to supply balance within specified date or refund proportionate part of price and commission already received by him — On further failure plaintiff suing on original contract to recover money paid for paddy not supplied — Held that as the suit was based on the original contract which was still alive and not on the new contract no question of novation arose in the case. ('61) 27 Cut LT 397.

(33) A contract entered into by an insolvent, after the insolvency proceedings have been initiated but before he is adjudged an insolvent, is not per se void. Nor does insolvency per se operate as rescission of a contract. AIR 1964 Andh Pra 299 (301, 303) = (1964) 1 Andh LT 178 (DB).

4. Novation by substitution of new party.— (1) To supersede a contract by another contract, all the parties to the first contract must be parties to the second contract. AIR 1925 Mad 261 (263) = 48 Mad 693 (DB) ** AIR 1951 Raj 74 (76) (DB).

(2) A person not a party to a novation is not discharged from his liability under the original contract. (1913) 21 Ind Cas 222 (223) (DB) (Burma) ** 1903 Pun LR No. 80, p. 318 (319).

(3) In each case the question is not only whether a new debtor has consented to assume liability but whether the creditor has agreed to accept his liability in substitution of the liability of the original debtor. AIR 1942 Cal 87 (90) = ILR (1941) 2 Cal 237 (DB) ** AIR 1944 Sind 205 (206, 207) = ILR (1944) Kar 208 (DB) ** (1903) 5 Bom LR 617 (617) (DB).

(4) An assignment of contract to be operative must amount to a novation, requiring the consent of the other party to the contract. (1892) 16 Bom 441 (448).

(5) If the promisor being requested by the promisee, agrees to pay the debt to a third party, the original contract is replaced by a new one and the original promisee cannot enforce his claim against the promisor. The substituted contract is supported on this consideration namely, the original promisee's forbearance to demand the payment from the promisor. AIR 1925 Nag 66 (68).

(6) If a landlord came to know after the execution of the kabuliyat that the tenant had allowed his brother an interest in the tenancy, that would not amount to novation. (1912) 16 Cal L Jour 271 (278) (DB).

(7) Defendant purchasing all property of plaintiff's debtor and agreeing to pay plaintiff's debt out of consideration — Simultaneous agreement between plaintiff and defendant, latter admitting and accepting liability — Plaintiff held entitled to decree against purchaser. AIR 1914 Cal 129 (132) = 41 Cal 137 (DB).

(8) A contract by the purchaser of a property to pay the whole or part of the consideration retained by him for payment to the vendor's creditors can be enforced by the latter, though they were not parties to the contract. Basis of liability is not novation but purchaser in that case becomes a trustee for vendor's creditors. AIR 1918 Cal 941 (941) (DB).

(9) In a suit by A against B and C the plaint averred that certain amount was due to A from B and that C had undertaken to make the payment. It was alleged that C had intimated this fact to A but subsequently C withdrew his undertaking to pay to A as B had failed to pay him. Held that there was no novation within Section 62. All that C did was to assume responsibility to A on behalf of B and that later on C resiled from this undertaking. AIR 1933 Lah 335 (335).

(10) To determine, whether an incoming partner becomes liable to an existing creditor of the firm, two questions have to be answered. Firstly whether

Section 62 — Note 4 (contd.)

the new firm has assumed the liability to pay the debt, secondly, whether the creditor has agreed to accept the new firm as his debtor and to discharge the old partnership from its liability. A creditor cannot rely merely on agreement between the partners inter se. He must prove novation of contract. AIR 1957 Mad 8 (12) (DB).

(11) Where the original debtor is given up by the creditor and another person undertakes the liability for a portion of the debt and executes a hypothecation bond, the case is one of novation and the debt cannot be said to have been renewed, included or merged in the hypothecation bond. AIR 1951 Trav-Co 182 (182) (DB).

(12) A had contracted with B that he (A) shall give his daughter in marriage to B, and received Rs. 3,900 from the latter by way of consideration for that marriage. Later on A refused to perform the marriage and B called a Panchayat. As a result of the decision of the Panchayat, A was required to deposit Rs. 3900 with the panchayat on the understanding that the money would be returned to A if he performs the marriage of his daughter with B and that otherwise the money would be paid to B. Rs. 3265 out of Rs. 3900 were paid in cash to the Panchayat and for Rs. 635 A executed a promissory note in favour of E as representing the Panchayat. Held, that it was a case of novation of contract. 1946 Jaipur LR 84 (88) (DB).

(13) In every case where with the consent of the creditor another debtor is substituted for the original debtor there is in effect assignment of liability. The new debtor would be an assignee of the original debtor so long as the identity of debt is maintained. AIR 1956 Mad 364 (367) = ILR (1956) Mad 837 (DB).

5. Cross contracts. — (1) In "cross contracts" the second contract does not operate to extinguish the first contract completely nor is it effective as a novation. The two contracts are distinct and separate and intention of parties only to pay differences does not extinguish them. AIR 1925 Sind 144 (146) = 20 Sind LR 335.

(2) Where there are two contracts one for sale and the other for purchase for the same amount of the same class of goods, e. g., one hundred bales of cotton for settlement on the same day, the obvious intention of the parties is that the contracts should not be carried out according to their terms but should be treated as balancing each other. In such a case, generally speaking the parties intended that the contracts shall be cancelled and that in lieu the existing contracts, there shall be a fresh

contracts under which one party has to pay and the other to receive on the due date the difference and neither party is to insist on the original contracts being carried out according to their terms. The Court may readily infer such a fresh contract, either from the terms of the instructions for the second contracts in referring to an intention to close the first contract, or from the manner in which the contracts have been dealt with in the books, e. g., by treating the first two contracts as cancelled, and replaced by a liability to pay or a right to receive the difference, or by other sufficient evidence. But, the liability to pay or receive the difference on the contracts would only arise, in the absence of agreement to the contrary, on the day fixed for the performance of the original contracts. AIR 1934 Bom 91 (92) (DB).

6. Agreement to substitute in future.—

(1) In order to operate as a novation under Section 62 the new contract must involve present supersession or extinguishment of the liability arising under the old contract. A mere agreement between the parties to effect such a supersession or extinguishment at a future date cannot constitute novation. AIR 1928 Nag 289 (289, 290) ** AIR 1936 Lah 476 (477) ** AIR 1929 All 503 (503) = 51 All 799 (DB).

[See also AIR 1967 Andh Pra 44 (46) = (1965) 2 Andh WR 468 (DB). (By a subsequent agreement, parties agreeing that on payment of certain amount by the fixed date, plaintiff would cancel and return the previous promissory note executed by defendant — Mere execution of agreement would not put an end to liability of defendant under promissory note — Actual payment, as stipulated, would constitute accord and satisfaction.) ** AIR 1939 Nag 224 (224) = ILR (1941) Nag 464 ** 1888 Pun Re No. 66, p. 167 (169) (DB).]

7. Section 62, whether applies after breach of original contract. — (1) Section 62 contemplates that the original contract subsists and that the parties have agreed to replace it by a new contract. If there is a breach of the original contract Section 62 does not apply. AIR 1916 Mad 823 (824) (DB) ** AIR 1953 Cal 642 (644) ** AIR 1942 Cal 87 (90) = ILR (1941) 2 Cal 237 (DB) ** AIR 1939 Rang 413 (415) ** (1888) 15 Cal 319 (325) (DB).

[See also (1936) 63 Cal 194 (201, 202).]

[See however AIR 1946 Nag 148 (150) = ILR (1946) Nag 36 (DB).]

[But see AIR 1922 Mad 314 (315, 316) = 45 Mad 180 (DB).]

(2) Section applies not only to complete substitution of contract or to rescission of contract but also to alteration or variation of contract. (1968) 1 Mys

Section 62 — Note 7 (contd.)

LJ 69 = 13 Law Rep 62 (DB) ** 1966 Raj LW 580 = ILR (1967) 17 Raj 517.

(3) Where the original contract has not been substituted by a new contract nor has it been rescinded or altered, but is still in existence and enforceable, Section 62 does not apply. 1959 All WR (HC) 644 = 1959 All LJ 789.

(4) If after a breach of contract parties enter into a new contract to settle the amount of damages suffered in the breach of old contract, cause of action on the old contract is wiped out and the plaintiff can only sue on later contract. AIR 1923 All 518 (519) = 45 All 472 (DB) ** AIR 1923 Nag 332 (333).

(5) The effect of non-payment of the mortgage money within the stipulated period is merely to furnish a cause of action to the mortgagee to sue on the mortgage; the mortgage remains in force so long as it is not discharged and until this is done, it can be substituted by a new contract. AIR 1939 Pat 477 (488).

8. Invalid novation — Effect. — (1) Novation means the wiping out of the original contract as well as the creation of a new valid contract. If the new agreement is invalid it cannot serve as novation, and the original contract continues unless the rights thereunder are expressly abandoned. AIR 1925 Nag 26 (26, 27, 28) ** AIR 1916 PC 68 (70) = 44 Ind App 60 = 39 All 178 ** AIR 1957 Andh Pra 784 (787) ** AIR 1957 Him Pra 11 (14) ** AIR 1955 Madh B 49 (56) = ILR (1954) Madh B 237 (DB) ** AIR 1955 Nag 306 (311) = ILR (1958) Nag 10 (DB) ** AIR 1954 Nag 142 (148) ** AIR 1949 Nag 5 (8) = ILR (1948) Nag 913 ** AIR 1946 Nag 260 (261) = ILR (1946) Nag 500 ** AIR 1941 Mad 772 (779) = ILR (1942) Mad 95 (FB) ** AIR 1937 Lah 816 (818) ** AIR 1937 Nag 104 (104) = ILR (1937) Nag 353 ** AIR 1930 Lah 985 (989) = 12 Lah 239 (DB) ** AIR 1928 Mad 1201 (1203) = 52 Mad 465 (DB) ** AIR 1927 Nag 83 (84) ** AIR 1921 Lah 80 (80, 81) = 2 Lah 323 (DB) ** AIR 1920 Mad 352 (353) (DB) ** (1912) 14 Bom LR 26 (29) (DB) ** (1910) 6 Nag LR 164 (166, 167).

(2) Where plaintiff sued defendant for a certain amount for which the defendant had executed a sarkhat bearing an unobliterated one-anna stamp and there was no promise to pay contained in the sarkhat, but there was only an acknowledgment that a certain amount had been borrowed: Held, that if the plaintiff was able to prove aliunde by oral evidence that the defendant had the money then he was entitled to a decree. AIR 1927 All 503 (504).

(3) When an oral agreement is subsequently embodied in a deed unenforceable due to improper stamp, the creditor

cannot fall back on the oral agreement. AIR 1939 Lah 266 (267) (DB).

(4) To effect novation, contract substituted must be capable of enforcement in law. (1912) 16 Cal L Jour 264 (268) (DB).

[See also AIR 1930 Pat 442 (450) = 10 Pat 63 (DB).]

9. Negotiable instrument invalid — Whether plaintiff can fall back on original consideration. — (1) Where there is a pre-existing debt or liability and a promissory note or bill of exchange is passed in respect of it the plaintiff can fall back on the original consideration if for any reason the new contract fails. AIR 1933 Pat 575 (576) = 12 Pat 862 (FB) ** AIR 1958 Andh Pra 713 (716) = ILR (1957) Andh Pra 429 ** AIR 1954 Orissa 124 (125) = ILR (1954) Cut 46 (DB) ** AIR 1931 Nag 113 (115) = 27 Nag LR 56 ** AIR 1928 Mad 1238 (1243) (DB) ** (1912) 8 Nag LR 7 (8, 9) ** 1903 Pun Re No 7 p. 26 (28) ** 1897 Pun Re No. 71 p. 326 (328) ** AIR 1969 Pat 110 (111) = 1969 BLJR 812 (DB) ** AIR 1959 Orissa 176 (176) = ILR (1958) Cut 176. (Where plaintiff sues on a defective handnote, the handnote failing, he is entitled to sue on the loan itself, but he cannot do so without amending the plaint. AIR 1932 Pat 324 Rel. on.)

(2) The execution of a promissory note in satisfaction of a debt does not necessarily mean that original debt is extinguished but the note may operate as a substitute for that debt and the original debt is kept in abeyance pending the discharge or otherwise of the promissory note. It is however certainly open to parties to treat the original debt as discharged and substitute therefor the obligation under the promissory note. AIR 1923 Mad 317 (318) = 46 Mad 415 (DB) ** AIR 1928 Lah 424 (425) ** (1911) 9 Ind Cas 896 (897) (Sind).

(3) The giving of a hundi in payment of the price of goods sold operates as a payment, only if the hundi is honoured and that if the hundi is dishonoured the right to sue on the original cause of action is revived; but if another hundi is substituted, it would operate as discharge of the first one only if the new contract could be legally enforced failing which the plaintiff can fall back on the first hundi. AIR 1922 Lah 56 (57).

(4) Renewed promissory note inadmissible in evidence for want of proper stamp — Plaintiff can fall back on old note. AIR 1931 All 560 (562) (DB).

(5) The following views are held as regards the question as to whether where the giving of a bill of exchange or a promissory note is contemporaneous with the loan the plaintiff can

Section 62 — Note 9 (contd.)

sue for the original debt if the new contract fails.

(a) When a loan has been granted on the security of a negotiable instrument, there is no cause of action independent of the negotiable instrument itself and when that negotiable instrument is inadmissible in evidence the suit must fail. AIR 1927 Lah 89 (90) (DB) ** AIR 1958 Andh Pra 713 (716) ** AIR 1935 Mad 23 (24) = 58 Mad 261 (DB) ** AIR 1926 Pat 432 (432).

(b) Where money is lent and at the same time a promissory note is given therefor the creditor can sue for the money due as on the original contract of loan. AIR 1925 Rang 37 (38) ** AIR 1945 Cal 268 (275) (DB) ** AIR 1927 Mad 378 (378) ** AIR 1927 Rang 159 (160) (DB) ** AIR 1926 Mad 1148 (1150).

(c) The question depends on the facts and circumstances of each case. The instrument may be given only as a collateral security or conditional payment. If the obligation to pay is proved to exist independently of the instrument the plaintiff can sue the defendant. AIR 1936 Nag 225 (228) (DB) ** AIR 1929 All 254 (256) = 51 All 530 (DB) ** AIR 1928 All 371 (376) = 50 All 839 (SB) ** AIR 1927 Bom 437 (437, 438) ** AIR 1923 All 529 (530) (DB) ** AIR 1921 Pat 317 (318) (DB) ** AIR 1921 Sind 80 (81) = 15 Sind LR 135 (DB).

10. Alteration of documents — Effect — (1) The rule relating to the effect of material alterations in a deed is that, if an alteration (by erasure, interlineation or otherwise) is made in a material part of a deed after its execution, by or with the consent of any party thereto or person entitled thereunder, but without the consent of the party or parties liable thereunder, the deed is thereby made void. AIR 1940 PC 160 (163) = ILR (1940) All 625 = ILR (1940) Kar (PC) 287 = 67 Ind App 318 ** AIR 1958 Pat 211 (216) = 37 Pat 88 ** AIR 1957 Andh Pra 784 (788) ** 1950 Trav-Co LR 377 (383) ** AIR 1947 Nag 145 (153) = ILR (1946) Nag 796 (DB) ** 1948 Bur LR (HC) 722 (724) ** AIR 1936 Lah 1016 (1018) ** AIR 1933 All 443 (449) (DB) ** 1966 Raj LW 466 = ILR (1966) 16 Raj 651.

(2) The deed materially altered no longer continues the same deed and no person can maintain an action upon it. AIR 1943 All 24 (25) = ILR (1942) All 938 (DB) ** AIR 1954 Madh B 31 (32) ** AIR 1940 Pat 245 (246, 247) (DB) ** AIR 1933 Cal 196 (197) ** AIR 1959 Andh Pra 596 (599).

(3) Any material alteration in an instrument even with the consent of the parties vacates the original instrument and makes it a new instrument. AIR 1919 Low Bur 45 (46) ** 1964 Ker LJ 536 = 1964 Ker LT 455. (Variation in terms of agreement — Agreement raising rent and fixing term of lease amounts to new lease.)

(4) Where the alteration makes no material change as regards the rights of the parties, the party is entitled to sue on the instrument. AIR 1939 Cal 181 (182) ** AIR 1945 Lah 177 (179) (DB) ** AIR 1939 Lah 486 (487, 488) ** AIR 1936 Lah 659 (659).

(See also AIR 1934 Lah 543 (544) (DB).]

(5) In order to decide whether alteration in a document is material it has to be seen whether alteration in question varies rights, liabilities, or legal position of the parties, or it otherwise varies the legal effect of the instrument, or it reduces to certainty some provision which was unascertained and as such void. 1966 Raj LW 391 = ILR (1966) 16 Raj 768.

(6) Where there has been a material alteration in the document, which is fraudulent, the courts will not allow the plaint to be amended and the plaintiff to fall back on the original cause of action but where the alteration, though material is innocent and the plaint is based on the original cause of action as well as on the altered document the claim, if properly proved, can be allowed on the original cause of action. AIR 1930 Bom 66 (68).

(7) An alteration made in good faith to carry out the original intention of the parties does not vitiate the instrument. AIR 1945 Lah 177 (179) (DB) ** AIR 1957 Trav-Co 189 (192) = ILR (1956) Trav-Co 998.

(8) The defendant executed a mortgage bond to the plaintiff in 1919. Subsequent to this, a simple bond was executed in 1922 for the balance, then owing under the bond of 1919. The plaintiff sued on the bond of 1922 but the suit was dismissed on the ground that the plaintiff had materially altered the terms of the bond. The plaintiff then sued on the original bond of 1919: Held that the execution of the bond of 1922 was a novation of the contract embodied in the bond of 1919, and the fact that the plaintiff had, by his own act, rendered the bond of 1922 invalid could not have the effect of reviving the mortgage bond of 1919 and the suit was, therefore, not maintainable. AIR 1931 All 325 (326) (DB).

(9) Suit on hand-note — Hand-note found tampered — No cause of action independently of hand-note — Decree, held, cannot be awarded even if the

63. Promisee may dispense with or remit performance of promise.—Every promisee may dispense with or remit, wholly or in part, the performance of the

Section 62 — Note 10 (contd.)

defendant admits the debt. AIR 1937 Pat 572 (573, 575) = 16 Pat 527 (DB).

(10) No decree can be given on any previous oral agreement. AIR 1923 Lah 628 (629).

(11) Existence of subsequent oral agreement to modify contract may be proved — Contract between A and B — Despatch of letter and telegram by A to B to delete arbitration clause — No response from B — A is bound by arbitration agreement. (1966) 70 Cal WN 199.

(12) Any alteration or interpolation appearing on the face of a document is presumed, in the absence of evidence to the contrary to have been made before the execution of the deed. The burden of proving that the interpolation was made later on would lie upon the contesting executant, more particularly when the deed was registered with the interpolation in question already in it. AIR 1945 Lah 177 (179) (DB).

[But see 1963 Ker LT 241.]

(13) A contract note, relating to certain shares, was originally drawn in the plaintiff's favour. He requested the defendant, a share-broker, to delete his name from the note, so far as certain shares were concerned, and to substitute for it the name of another person H. A fresh contract note relating to these shares, was made out in the name of H, and sent to him by the defendant. The defendant admitted this, but maintained that the transactions relating to these shares were entered into by him not for H, but for the plaintiff, and that the plaintiff was liable in respect of them; Held, that the onus rested on the defendant of showing that despite the altered terms of the contract note, the plaintiff remained liable to him in respect of the transactions in the shares, and that the Court would require very strong evidence to discharge that onus. AIR 1935 PC 93 (94).

11. Consideration under Section 62. —

(1) Section 62 does not require any further consideration for the validity of the substituted contract than the putting an end to the obligation under the original contract. AIR 1918 Mad 297 (299) (DB) ** AIR 1943 PC 147 (153) = ILR (1944) Kar (PC) 85 ** AIR 1957 Pat 408 (412) ** AIR 1956 Madh B 25 (27) (DB) ** AIR 1942 Cal 87 (90) = ILR (1941) 2 Cal 237 (DB) ** AIR 1931 Mad 200 (202).

(2) Plaintiff filed a suit for Rs. 810 — Defendants pleaded a reference to arbitration, under which award was made for payment of Rs. 400 with annual instalments of Rs. 50 — Held, settlement of a dispute was a valid consi-

deration and Section 62 applied. AIR 1934 Lah 163 (1) (163).

(3) A mere promise by a creditor, made at the request of his debtor, to forbear from suing him is regarded as a voluntary promise and is of no effect. AIR 1914 Lah 121 (123) = 1914 Pun Re No. 4 (DB).

(4) Section 63, Contract Act, would be applicable only if it were merely a case of an extension of time. Where a mortgagee not only gives further time to the mortgagor but enters into a new contract for the transfer of property, in payment of the outstanding mortgage debt, there is a substituted contract and Section 63 has no application. Such a case is governed by Section 62, and the agreement would not be binding if it is not supported by consideration. AIR 1931 All 589 (592) (DB) ** AIR 1953 Cal 642 (644) ** AIR 1966 Madh Pra 313 (317) = 1966 MPLJ 659 (DB).

12. Burden of proof. — (1) When a party wants to make out a case of novation, he should plead the necessary facts to found novation, and state what was the original contract and in what way it has been replaced by a new contract. AIR 1941 Nag 100 (102) = ILR (1941) Nag 144 (DB) ** AIR 1939 Pat 477 (486) (DB).

(2) Burden of proof of the fact that there has been by consent of parties, a departure from the terms of the original contract is on the person asserting it. AIR 1935 Cal 347 (353, 354) = 62 Cal 175 (DB).

(3) Where a plea of novation of contract is not pleaded either in written statement or in evidence adduced on behalf of defendant, it cannot be allowed at the time of argument in appeal. AIR 1963 Pat 131 (132).

13. Limitation. — (1) Novation of contract gives a fresh and independent cause of action, and limitation begins to run from the day on which new promise is broken. AIR 1925 Oudh 632 (632) = 29 Oudh Cas 24.

SECTION 63 — SYNOPSIS

1. Applicability and scope.
2. "Promisee."
3. "Dispense with or remit."
4. Extension of time.
5. "May accept instead of it any satisfaction."
6. Necessity for consideration.
7. Evidence.
8. Composition with creditors.

1. Applicability and scope. — (1) Section 63 constitutes a wide departure from the principles of the English Common law and those principles cannot

promise made to him, or may extend the time for such performance,* or may accept instead of it any satisfaction which he thinks fit.†

Illustrations

(a) A promises to paint a picture for B. B afterwards forbids him to do so. A is no longer bound to perform the promise.

(b) A owes B 5,000 rupees. A pays to B, and B accepts, in satisfaction of the whole debt, 2,000 rupees paid at the time and place at which the 5,000 rupees were payable. The whole debt is discharged.

(c) A owes B 5,000 rupees. C pays to B 1,000 rupees, and B accepts them, in satisfaction of his claim on A. This payment is a discharge of the whole claim.‡

(d) A owes B, under a contract, a sum of money, the amount of which has not been ascertained. A, without ascertaining the amount, gives to B, and B, in satisfaction thereof, accepts, the sum of 2,000 rupees. This is a discharge of the whole debt whatever may be its amount.

(e) A owes B 2,000 rupees, and is also indebted to other creditors. A makes an arrangement with his creditors, including B, to pay them a §[composition] of eight annas in the rupee upon their respective demands. Payment to B of 1,000 rupees is a discharge of B's demand.

[*] But see Section 135.

[†] See Section 44 supra.

[‡] See Section 41 supra.

[§] Substituted for "compensation" by the Amending Act, 1891 (12 of 1891), S. 2 and Sch. II.

Section 63 — Note 1 (contd.)

be relied on to interpret the section. AIR 1946 Bom 1 (6) (DB) ** AIR 1942 Cal 87 (91) = ILR (1941) 2 Cal 237 (DB) ** AIR 1933 Bom 245 (250) (DB).

[See also AIR 1958 Ker 290 (297) = 1958 Ker LT 233. (The doctrine of quasi-estoppel evolved in England goes no further than Section 63 and therefore there is no occasion to borrow it.)]

(2) Pre-existing agreement, as under the English law, is not necessary for the promisee to do any of the acts mentioned in this section. AIR 1928 PC 99 (102) = 9 Lah 510 = 55 Ind App 154. (28 Bom 66 (71, 72), Overruled.) ** AIR 1957 Pat 408 (412) (DB) ** AIR 1949 All 440 (442) (DB) ** AIR 1948 Sind 91 (93) = ILR (1947) Kar 182 (DB) ** AIR 1943 Cal 181 (184) = ILR (1943) 1 Cal 101 (DB).

(3) Section 63 does not apply to the case of a substituted contract. AIR 1931 All 589 (591, 592) (DB) ** AIR 1931 Mad 636 (638, 639) = 54 Mad 889 (DB).

(4) Section 63 does not apply where the parties stand in the position of decree-holder and judgment-debtor. AIR 1914 Cal 697 (700) (DB).

(5) Agreement made after breach of contract may be enforced. AIR 1946 Nag 148 (150) = ILR (1946) Nag 36 (DB) ** AIR 1929 Sind 153 (153) = 23 Sind LR 294 (DB).

(6) Section 63, Contract Act, has nothing to do with the interpretation of Section 92 of the Evidence Act. AIR 1930 All 721 (723) = 53 All 157 (FB).

(7) Section 55, Presidency Towns Insolvency Act, overrides Section 63, Con-

tract Act, in insolvency matters. AIR 1935 Mad 1009 (1011) = 58 Mad 702.

(8) Relinquishment of estate under Section 19, Sind Encumbered Estates Act — Revival of claims even assuming all of them revive, cannot be always in their original character — Revival is subject to Section 63. AIR 1948 Sind 91 (94) = ILR (1947) Kar 182 (DB).

2. "Promisee". — (1) Suit on promissory notes executed by defendants' father and their separated brother. — Father dying pendente lite — Defendants also impleaded and decrees obtained — Defendants executing promissory note in consideration of the plaintiff not executing the decrees or filing suit against them and agreeing to make over decrees to defendants — Subsequent notice rescinding agreement as defendants failed to pay — Held, he could not do so, so long as the decree was in force and capable of execution and that he was not a promisee within the meaning of this section to take advantage of it. AIR 1935 Bom 225 (227) (DB).

3. "Dispense with or remit." — (1) Promisee is not bound to accept part performance of a contract. (1921) 3 Lah L Jour 141 (144) (DB).

(2) A claim which arises, not out of any promise, cannot be claimed to have been remitted or dispensed with. AIR 1944 Nag 122 (123) = ILR (1944) Nag 327.

(3) Dispensation should be by a voluntary conscious effort. Mere omission to assert does not amount to dispensation

Section 63 — Note 3 (contd.)

of the performance — Even negligence does not amount to it. AIR 1946 Bom 469 (476) ** (1968) 9 Guj LR 164 = ILR (1967) Guj 1159.

(4) Actual remission and not mere agreement to remit is permitted by the section. AIR 1929 Mad 794 (799) = 53 Mad 127 (DB).

(5) Conditional remission is not enforceable under the section. AIR 1915 Mad 1144 (1145) (DB).

(6) A notice to promisor that, if he did not perform a certain act the contract will be cancelled, does not operate as a rescission of the contract. AIR 1929 Nag 321 (324) = 26 Nag LR 88 (DB).

(7) Promisor or his assignee, though not party to agreement, can take benefit of release. AIR 1931 Bom 123 (124) (DB). (Release in favour of one member of firm operates as absolute release in favour of the firm.)

(8) Remission by person on verge of insolvency, without consideration is not operative against Official Receiver — Section 53, Provincial Insolvency Act, invalidates it. AIR 1940 Mad 737 (738) (DB) ** AIR 1963 SC 250 (254) = (1963) 2 SCR 168. (A owing large sum of money to B — C offering to pay B a lesser sum in full satisfaction of B's claim on A — Acceptance by B — B cannot recover balance from A after receiving payment in full satisfaction.)

(9) No suit lies for the recovery of the amount remitted when a remission had been made and communicated by the creditor to the debtor. (1911) 9 Ind Cas 763 (764) (Mad). (19 Mad 391, Foll.)

(10) A remission in praesenti which is suspended until a certain future event occurs is valid. AIR 1952 Mad 675 (677, 678).

(11) A remission of a debt in praesenti whether in whole or in part, which is not a mere promise to remit in the future, is valid. AIR 1947 Mad 414 (415).

(12) Where A makes a proposal to B that the latter should reduce his claim and B accepts the proposal and reduces his claim, the compromise falls within Section 63. AIR 1948 Sind 91 (93) (DB).

(13) An agreement for supply of electricity was entered into between the Government and a Company with a certain guarantee clause. During the winding up proceedings, the Government gave an assurance to the provisional liquidator not to enforce the guarantee clause. Subsequently Government made a claim based on the guarantee clause against the liquidator. Held that Government's claim could not be sustained taking into consideration the conduct and surrounding circumstances. AIR 1948 PC 159 (163).

(14) The promisee is the State — Sureties in criminal case — By transfer of a case it cannot be said that the promisee has dispensed with the performance of the promise. AIR 1960 All 419 (420) = 1960 Cri LJ 873.

4. Extension of time. — (1) There must be mutual agreement between the buyer and the seller for extension of time. Unilateral act to extend time by promisee of his own accord for his own benefit is of no consequence. Agreement to extend time need not necessarily be reduced to writing. AIR 1958 SC 512 (517) ** ILR (1949) 2 Cal 530 (535) ** AIR 1947 Sind 141 (143) = ILR (1946) Kar 331 (DB) ** AIR 1923 Lah 117 (119) (DB) ** AIR 1914 Mad 573 (574) = 37 Mad 412 (DB) ** 1968 MPLJ 438 (DB) ** AIR 1959 Cal 472 (474) (DB).

(2) Party choosing contract as broken, and resale ordered — Promisee postponing the date of resale for want of bidders — There is no extension of time and Section 63 does not apply. AIR 1933 Mad 704 (706).

(3) A creditor can extend the time under Section 63 even after expiry of time for performance. AIR 1931 All 589 (592) (DB).

(4) Mere forbearance to sue or to give notice of rescission does not amount to an extension of time for the performance of a contract. Extension can be granted only at the request of the promisor. Nor does negligence result in extension of time. AIR 1946 Bom 1 (5): ILR (1946) Bom 218 (DB) ** 1968 MPLJ 438 (DB) ** ILR (1960) Mys 1079.

(5) Ultimate agreement to extend time — Gaps between intervening agreements to extend time since the expiry of date in the original contract — The gaps are of no importance — Final agreement to extend time alone is necessary under the section. AIR 1946 Bom 429 (432) (DB).

(6) Written agreement, collateral to promissory note, postponing time for payment is valid and enforceable. AIR 1917 Mad 539 (540) = 39 Mad 129 (FB).

(7) Calculation of damages for breach of contract, where time has been extended, is to be made from date of extension and not from original date. AIR 1922 PC 178 (180) = 48 Ind App 175 = 43 All 257 ** AIR 1943 Bom 229 (235) ** AIR 1959 Cal 472 (474) (DB).

(8) By mere extension of time for delivery, the contract does not necessarily become a new contract, but the promisee gets certain rights under Section 63, Contract Act. AIR 1914 Cal 294 (296) = 41 Cal 35.

(9) It is always open to a party to forbear from insistence on the performance of contract by due date but the forbearing party is not entitled to fix a date of his own accord which will

Section 63 — Note 4 (contd.)

benefit to it and put the other party to disadvantage. AIR 1957 Pat 586 (596) = 36 Pat 633 (DB).

5. "May accept instead of it any satisfaction." — (1) Promisee may accept any satisfaction, but until the satisfaction agreed upon remains executory, the original cause of action is not discharged — But where the promisee accepted the promise itself in satisfaction, the original cause of action is immediately discharged. AIR 1946 Nag 148 (150) = ILR (1946) Nag 36 (DB) ** AIR 1957 Assam 133 (135) (DB) ** (1922) 65 Ind Cas 812 (813) (DB) (Pat) ** (1908) 4 Low Bur Rul 365 (367) ** (1888) 15 Cal 319 (326, 327) (DB) ** AIR 1960 Pat 259 (260) = 1959 BLJR 651 (DB). (Plaintiff entering into contract for supply of goods by paying advance — Plaintiff accepting back advance on cancellation of contract and placing another order for supply of goods — Plaintiff, held, to have dispensed with the first contract.)

(2) Accord and satisfaction imply an agreement to take the money, in satisfaction of the claim, in respect of which it is sent, which must be evident from an actual agreement between the parties or from the conduct of one of the parties. Therefore, mere retaining of the money sent by promisor does not imply satisfaction. AIR 1922 All 461 (463) = 44 All 718 (DB) ** AIR 1968 Bom 294 (298) = 69 Bom LR 843 ** AIR 1965 Cal 541 (545) ** AIR 1963 Pat 152 (153) = 1963 BLJR 455 (DB). (Whether or not the money is taken in satisfaction is a question of fact to be determined keeping in view all the circumstances of the case.) ** AIR 1962 Cal 166 (167, 168) = 65 Cal WN 754 (DB) ** AIR 1961 Pat 37 (39) (DB).

[But see AIR 1960 Pat 30 (31) ** AIR 1960 All 544 (545) = 1960 All LJ 152.]

(3) Before a party can be said to accept something other than the performance stipulated for, in satisfaction of the contract it should be open to him to refuse such satisfaction and to insist on performance of the contract in accordance with its terms. ILR (1937) 1 Cal 757 (763).

(4) The fact that remission was made under an oral agreement will not prevent the discharge taking effect under Section 63, independently of such agreement, which is not illegal. (1903) 26 Mad 195 (196).

[See however (1966) 2 Andh LT 198.]

(5) Agreement to accept a further part payment, in addition to the one made at the time, in full satisfaction is valid. (1913) 20 Ind Cas 544 (545, 546) (DB) (Oudh).

(6) Promissory note taken to reimburse loss on breach of contract for sale — Receipt for one of the payments

under it stating that whole amount is recoverable if not paid within a particular time — Held there was no agreement reviving original cause of action. AIR 1931 Rang 189 (190).

(7) Agreement to sell property in satisfaction of debt may operate as a discharge of the debt if that is the intention of parties. AIR 1944 Mad 218 (220) = ILR (1944) Mad 742 (DB).

(8) Where a creditor discharges a person from his liability under a promissory note, directing the debtor to apply the sum for a particular purpose the discharge operates as a discharge of the note. AIR 1921 Cal 480 (481) (DB).

(9) The accord and satisfaction discharges the causes of action for breaches of contract already committed. Where the accord and satisfaction is by substituted agreement it is a question of construction of that agreement whether it also extinguishes all pre-existing rights and obligations and totally discharges the original contract. AIR 1953 Cal 642 (645).

(10) Antecedent contracts cannot be looked into when parties have entered into a new contract superseding the former. (1968) 2 Andh LT 240 (244) = (1969) 2 Andh WR 33 (DB).

(11) Contract that debtor should sell and creditor should accept any property in satisfaction of the debt may operate in any of the three ways, viz., (1) the contract by itself may operate as an absolute discharge or (2) as a conditional discharge or (3) it may be an independent transaction in the sense that it does not affect rights and obligations of the creditor and debtor respectively till the sale is actually completed. In which of these ways the contract is to have operation will depend upon the intention of the parties to be gathered from their conduct and surrounding circumstances. AIR 1956 Madh B 25 (28) = ILR (1956) Madh B 13 (DB) ** AIR 1961 Cal 620 (625) = ILR (1962) 1 Cal 118. (If, however, all the disputes in respect of original contract containing arbitration clause are not settled and some remain still outstanding, the contract is still alive with the arbitration clause. But the arbitration clause is alive only in respect of such dispute under the contract as has not been settled.) ** AIR 1966 Madh Pra 313 (318) = 1966 MPLJ 659 (DB).

(12) Where remission is made, which does not require any independent consideration it binds the promisor. 1968 Jab LJ 995.

6. Necessity for consideration. — (1) In a case failing under S. 63 no fresh consideration is necessary. AIR 1957 All 143 (145) = ILR (1958) 1 All 407 ** AIR 1953 Cal 642 (644) ** AIR 1949 All 440 (442) =

64. Consequences of rescission of voidable contract.—When a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained in which he is promisor. The party rescinding a voidable contract shall, if he have received any benefit thereunder from another party to such contract, restore such benefit, so far as may be, to the person from whom it was received.*

[*] See Section 75: but what is to happen if restitution be impossible is not stated.

Section 63 — Note 6 (contd.)

ILR (1949) All 735 (DB) ** AIR 1947 Mad 414 (415) ** AIR 1946 Bom 469 (476) ** AIR 1943 Cal 181 (184) = ILR (1943) 1 Cal 101 (DB) ** AIR 1939 Rang 84 (86) = 1938 Rang LR 660 (DB). (Held AIR 1928 Rang 144 = 6 Rang 191, impliedly overruled by AIR 1928 PC 99 = 55 Ind App 154 = 9 Lah 510). ** 34 Mad 156 (158) (DB) ** (1896) 20 Bom 636 (644) (DB) ** (1896) 19 Mad 398 (403) ** AIR 1966 Madh Pra 313 (317) = 1966 MPLJ 659 (DB).

(2) Where there is no actual dispensation or remission, but an agreement to remit in future, consideration is necessary for such agreement. AIR 1943 Cal 181 (184) = ILR (1943) 1 Cal 101 (DB) ** AIR 1952 Mad 675 (677) ** AIR 1939 Mad 688 (689) (DB) ** AIR 1935 Rang 188 (189) (DB) ** AIR 1965 Andh Pra 171 (173) = (1964) 2 Andh LT 287 (DB).

(3) Under S. 63 a fresh contract is a good consideration for dispensing with the performance of a previous contract. AIR 1958 Raj 10 (12) = ILR (1957) 7 Raj 129 ** AIR 1958 Raj 10 (12) = 1958 Raj LW 169. (Fresh contract to pay time-barred debt.)

7. Evidence. — (1) Though an agreement to extend time cannot be proved by oral evidence, where the mortgage is in writing satisfaction of part of the debt by payment and balance of remission can be proved by oral evidence. AIR 1930 All 721 (723) = 53 All 157 (FB) ** AIR 1929 Mad 794 (797, 798) = 53 Mad 127 (DB).

(2) Assignment of decree — Agreement reciting certain sum as consideration — Part of the amount shown as received was only paid — Suit for balance — Defendant should be allowed to prove orally, in rebuttal of his claim that the part not paid was never intended to be paid where the plaintiff is allowed to prove orally that only part was received. AIR 1926 Mad 35 (36) (DB). (Reversing AIR 1925 Mad 660.)

(3) Conduct of party may be evidence of waiver by a party of his rights under a contract. (1922) 64 Ind Cas 461 (469) (Nag).

(4) A mere debit entry in the account of the bank does not necessarily amount to payment unless factually proved. AIR 1957 Assam 133 (137) (DB) ** AIR 1959 Assam 162 (165) (DB).

(5) Evidence can be given to prove that the contract was not to be acted upon, but no evidence can be led to show

that one or some of the terms of the agreement were not to be acted upon. It is, however, open to the parties to show that the promisee had dispensed with or remitted, wholly or in part the performance of the promise made to him. (1962) 3 Guj LR 149.

8. Composition with creditors. — (1) A composition is an arrangement between the compounding debtor and all or some of the creditors by which the creditors agree expressly or impliedly with the debtor and also with each other to accept from the debtor lesser amounts in full satisfaction of the amounts due. AIR 1938 Lah 769 (771, 772) (DB).

(2) Composition deed — Every creditor need not execute deed — Signifying acquiescence by other means is sufficient — But he cannot simply stand by idly. AIR 1938 Mad 199 (201) (DB) ** AIR 1935 All 441 (442).

(3) Defendant entering into composition with creditors, including plaintiffs — Plaintiffs' general agent refusing to accept payment at composition rate — Other creditors paid at that rate — Plaintiffs' firm cannot resile from the arrangement. AIR 1933 Oudh 361 (362) ** 1960 MPLJ 742 = 1960 Jab LJ 533.

(4) As to discharge of surety when creditor compounds with, gives time to or agrees not to sue, principal debtor, see S. 135.

(5) Where in a suit on promissory note, the parties accepted a particular mode of paying the debt before a deity by way of a compromise petition under Order 23, Rule 3 Civil P. C., it was held that the same was binding and the defendant could not resile from it. AIR 1957 Andh Pra 69 (71).

(6) The defendant having acknowledged the debt, the creditors accepted pro rata distribution of proceeds from sale of certain properties. This amounts to substitution of new contract and composition with the creditor and therefore the creditor cannot maintain a suit on the original obligation. AIR 1956 Madh B 25 (29) = ILR (1956) Madh B 13 (DB).

SECTION 64 — SYNOPSIS

1. Scope.
2. Contracts by minors and their guardians.
3. Option to rescind.
4. Restoration of benefits received.

1. Scope. — (1) A party to a contract cannot both avoid the contract and re-

Section 64 — Note 1 (contd.)

tain the benefit received under it. (1872) 14 Moo Ind App 53 (65) (PC) ** AIR 1943 PC 34 (38, 39) = ILR (1943) Kar PC 30 = ILR (1943) 2 Cal 213 = 70 Ind App 35 ** AIR 1922 Oudh 259 (263) = 25 Oudh Cas 169 (DB).

(2) The principle "one who seeks equity must do equity" applies to person seeking to set aside voidable transfer. AIR 1922 Cal 150 (151, 152) = 49 Cal 911 (DB) ** AIR 1931 All 201 (202) = 52 Ali 831 (DB).

(3) When a voidable transaction is avoided, the avoidance is effective not from that date but from the date of the original transaction itself. (1963) 29 Cut LT 137 = (1963) 5 Orissa JD 268. (AIR 1932 PC 89 and AIR 1957 Mad 451, Rel. on.)

(4) The principle on which Sections 64 and 65 rest is not confined to cases expressly included in either of them and is that no man can at once treat the contract as avoided by him so as to resume the property which he parted with under it and at the same time keep the money or other advantage which he received under it. The rule is applied as a rule of equity and good conscience. AIR 1932 Mad 303 (305) (DB) ** AIR 1926 Mad 398 (400) (DB) ** AIR 1922 Cal 150 (151, 152) = 49 Cal 911 (DB) ** (1965) 1 Mad LJ 438 = ILR (1965) 1 Mad 167.

(5) Section 55 shows that the contracts referred to therein are voidable. Therefore, Section 64 is not limited to contracts voidable under Section 19 or Section 19A. (1910) 33 Mad 375 (396) (DB).

(6) Where a person agrees to advance monies to another from time to time upto a certain limit with object of financing litigation by latter, but fails or refuses to pay the full amount, he is nevertheless entitled under Section 64 to a refund of the amount actually advanced by him. AIR 1919 Mad 718 (728) (DB).

(7) Neither Section 64 nor Section 74 is applicable to a deposit, the stipulation for forfeiture of which in case of breach of contract is not one by way of penalty. AIR 1944 Mad 526 (527) = ILR (1945) Mad 269 (DB) ** 1958-2 Mad L Jour 528 (529) ** AIR 1955 Orissa 20 (23) (DB) ** AIR 1952 Cal 93 (98) ** (1947) 52 Mys HCR 56 (67) (DB) ** (1958) 2 Mad LJ 528.

(8) Material facts were fraudulently concealed from the life insurance company by the assured and so policy became void. The assured cannot recover the premiums paid even in absence of forfeiture clause. Sections 64 & 65 do not apply. AIR 1944 Mad 281 (283, 284) = ILR (1944) Mad 842 (DB) ** AIR 1962 SC 814 (821) = 1962 Supp (2) SCR 571

** AIR 1962 Cal 625 (635) = 66 Cal WN 774.

(9) No equitable charge is created under Section 64 on the property in favour of the purchaser for the amount advanced by the purchaser spent by the vendor for discharging the incumbrances as Section 64 has nothing to do with the question of charge. AIR 1927 Mad 204 (206).

(10) Section 64 applies only to cases where the contract is voidable at the option of one party and therefore where a contract is rescinded by mutual consent the question of refund of moneys received by one of the parties from the other under the original contract does not fall under Section 64. AIR 1950 Cal 236 (238) = ILR (1950) 2 Cal 158 ** AIR 1959 Madh Pra 39 (42) = 1959 MPLJ 74 (DB).

(11) The principle of keeping alive can have application only when the contract is executory or where there is still something to be performed under the contract. It can have no application where time for performance has arrived and there has been a breach. Even if the defendant contends that the plaintiff is in breach, his only remedy is to counter-claim for damages and he cannot avoid the application of Section 64. (1965) 1 Mad LJ 438 = ILR (1965) 1 Mad 167.

(12) Sections 64 and 65 do not refer by the words 'benefit' and 'advantage' to any question of 'profit' or 'clear profit', nor does it matter what the party receiving the money may have done with it. Whether the investment made by the vendor with the consideration paid under the impugned sale ended in a profit or a loss, is of no consequence to the alienee. He can neither claim the benefit of the investment nor be bound by the loss resulting therefrom. He is concerned only with what he paid, and nothing more. 1961 Ker LJ 1226 = 1961 Ker LT 1018.

(13) The principle for refund of earnest money is independent of the considerations laid down in Sections 64, 65 and 74. AIR 1968 Assam 26 (27) = ILR (1964) 16 Assam 513 (DB).

2. Contracts by minors and their guardians.— (1) Sections 64 and 65 are applicable only to contracts between competent parties and not to cases, where there is not, and could not be, any contract. A contract entered into by a minor is absolutely void, and therefore this section has no application to contracts by minors. (1904) 26 All 342 (342) (DB) ** (1903) 30 Cal 539 (548) = 30 Ind App 114 (PC) ** AIR 1936 Nag 15 (16) = 31 Nag LR 62 (Sup) (DB) ** (1910) 32 All 25 (27, 30) (DB).

(2) The terms 'person' and 'party' in Section 64 are interchangeable terms. They have reference to such person as is

Section 64 — Note 2 (contd.)

mentioned in Section 11 of the Act i.e., a person competent to contract. (1899) 26 Cal 381 (389) (SB).

(3) Where a minor sues to cancel a mortgage executed by him during his minority, the Court cannot direct repayment of consideration by the minor as a condition of his getting the relief, the contract itself being void. AIR 1915 All 209 (211) ** AIR 1936 Lah 943 (944) (DB) ** AIR 1924 Lah 294 (295) ** (1898) 25 Cal 616 (625).

(4) Where a minor having induced another party to enter into a contract with him by fraudulently misrepresenting himself to be a major subsequently sues to set aside the contract on the ground of his minority he is bound in equity to restore the benefit received by him under the contract. AIR 1922 Oudh 30 (31) = 24 Oudh Cas 348. (Sale.) ** AIR 1921 All 326 (327) (DB). (Mortgage.) ** (1921) 60 Ind Cas 519 (520) (Lah) ** (1909) 31 All 21 (30) (DB) ** (1908) 7 Ind Cas 1000 (1001) = 1910 Pun Re No. 76 (DB).

[But see (1911) 8 All L Jour 1058 (1058, 1059) (DB).]

(5) In suits for possession, the Court may give the minor a decree to the effect that he will be entitled to regain possession of his property only if he pays the mortgagee or the vendee at least that part of the consideration which was required by him for necessary purposes. AIR 1936 Lah 943 (944) (DB).

(6) A contract entered into by a certificated guardian, without authority, is not void but only voidable and the party rescinding the contract must, if he has received any benefit thereunder from the other party to the contract, restore such benefit so far as may be. AIR 1929 All 890 (893) = 51 All 1027 (DB) ** AIR 1958 Madh Pra 373 (378) ** AIR 1938 All 369 (372) = ILR (1938) All 614 (DB) ** AIR 1928 Lah 250 (253) (DB) ** AIR 1925 Bom 499 (499) = 49 Bom 576 (DB).

(7) Transfer of minor's property by a person not duly appointed as guardian, is void ab initio but minor must under Sections 64 and 65, restore any advantage received under it or make compensation for such advantage. (1908) 11 Oudh Cas 1 (13) (DB) ** AIR 1927 Lah 722 (723).

(8) Minor's property sold by guardian and some land purchased with purchase-money — Land so purchased does not constitute benefit within meaning of Section 64 and hence need not be returned by ward in setting aside sale. AIR 1919 Mad 650 (650, 651) = 42 Mad 36 (DB) ** 1965 Ker LJ 265 = 1964 Ker LT 952 (DB). (Purchase of particular property with consideration money in contemplation of

parties — Such property is benefit received under the sale.)

(9) Where a sale by a guardian on behalf of minor is declared void ab initio the vendee cannot claim for the improvement effected by him on the property. Sections 64 and 65 do not apply. 1913 Pun LR No. 98, p. 359 (361).

(10) The minor's right to repudiate a contract entered into by his guardian need not necessarily be by the minor himself. It may be done by the guardian on behalf of the minor. AIR 1940 Pat 661 (662) (DB).

3. Option to rescind.— (1) The word 'rescinds' implies an express and unequivocal cancellation of the contract. Where a domestic servant leaves his service without notice and the master engages another servant, the contract with former servant is not necessarily rescinded by the master and the servant is not entitled to get the pay for the work done. AIR 1938 Rang 207 (208).

(2) Where one party to the agreement has executed his part under it and the obligation still remains executory so far as the other party is concerned it is not voidable under this section at the option of the party whose promise still remains executory. AIR 1935 Bom 225 (227) (DB).

(3) In the case of a breach of a revocable contract or trust, the choice of the remedy lies with the party whose rights are infringed and not with the promisor or trustee. (1913) 20 Ind Cas 783 (788) (DB) (Oudh) ** AIR 1965 Ker 187 (188) = 1964 Ker LT 546.

(4) Under Section 64 person who puts an end to contract under Section 39 is party rescinding voidable contract. AIR 1916 Nag 104 (110) = 12 Nag LR 177 (DB).

(5) Contract with stipulation to rescind may be rescinded for reasons not necessarily specified. AIR 1923 Bom 75 (76, 77).

(6) Where time is not the essence of the contract the non-performance in time does not entitle any party and especially the party who is in default to avoid the contract. AIR 1949 Cal 510 (514) = ILR (1951) 1 Cal 331.

(7) N an insolvent owed money to A and N was to get some money from P. By an arrangement between the parties P paid A. This arrangement was avoided at the instance of the official receiver as a fraudulent preference. P sued A for the return of money. It was held that his claim could not stand as it was the official receiver who rescinded the contract and so he alone could invoke Section 64. AIR 1936 Mad 978 (980) (DB).

(8) When time is of the essence of contract and it becomes voidable due to

65. Obligation of person who has received advantage under void agreement or contract that becomes void.—When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under

Section 64 — Note 3 (contd.)

non-performance by the other party, the contract does not automatically get determined. The party having right to rescind it has to, expressly or in unambiguous words, determine it under Section 64. AIR 1968 Andh Pra 190 (193).

(9) As to whether a party rightfully rescinding a contract is entitled to compensation, see Section 75.

4. Restoration of benefits received.—

(1) Under Section 64 the obligation to restore the benefit is cast on the party rescinding a voidable contract and not on the other party even though it was the other party's default that led to the rescission. ILR (1955) Mad 528 (547) ** AIR 1966 Assam 95 (100) (DB) ** AIR 1963 Cal 70 (72) (DB). (Reversed on another point in AIR 1967 SC 378.) ** AIR 1959 Pat 176 (179) = 1958 BLJR 626.

(2) Where a person at whose option, under Section 55 a contract is voidable, rescinds it, while he gets compensation under Sections 73 and 74 for the breach, he has to restore under Section 64 any benefit so far as may be to the other party, the object being to replace the parties in the position which they occupied before the contract was made. (1910) 33 Mad 375 (395) (DB).

(3) Where a party to marriage contract, having accepted cash and jewels, subsequently repudiates the marriage contract he is bound to return what he has taken. (1922) 65 Ind Cas 812 (813) (DB) (Pat).

(4) Where the vendor rescinds a contract of sale for the default of the buyer he is bound to restore to the buyer the instalments of the price paid by him but without any interest thereon. AIR 1942 Sind 37 (39) = ILR (1941) Kar 495 (DB) ** AIR 1927 Nag 168 (169).

(5) Where A executed a sale deed in favour of B for cash consideration and also in consideration of his services it was held that A who subsequently sought to have the sale set aside was bound to refund the cash consideration and also a sum of money as compensation for services. AIR 1934 Oudh 170 (171) (DB).

(6) Where an unauthorised sale by an executor or administrator is set aside, and a bona fide purchaser is deprived of the property purchased by him, then he is entitled in equity to be reimbursed for any expenditure incurred by him which has the effect of improving the permanent value of the property. AIR 1938 Bom 71 (74, 75) (DB).

(7) The term "benefits under the contract" extends only to the money paid

as consideration and not to the improvements effected by a usufructuary mortgagee. AIR 1931 All 201 (203) = 52 All 831 (DB).

(8) The principle underlying the section is that the person made liable to refund must have received benefit under the contract. AIR 1926 Mad 398 (400) (DB).

(9) Section 64 cannot mean that the person rescinding a contract must restore all that he has received under it, irrespective of what he has given under it. The reasonable view is that he may be made to restore any balance of advantages received under the contract which can be clearly separated from the advantage for which consideration has been given by him. AIR 1922 Oudh 259 (263) = 25 Oudh Cas 169 (DB).

(10) Even if the defendant has not set up the plea, the Court before making an order for rescission of the contract on the ground of fraud, must make an order that the opposite party should restore the benefit he has received under the contract. AIR 1954 Pat 439 (441) = 33 Pat 52.

(11) Defendant carrying on business of manufacture and sale of safety matches under a licence — Defendant entering into partnership with plaintiff in respect of that business — Failure of defendant to get licence amended under Rule 178 (4), Central Excise Rules — Contract becoming impossible of performance — Rescission — Plaintiff entitled to restitution of monies paid to defendant in pursuance of such contract. AIR 1962 Mad 240 (242, 243) = (1962) 2 Mad LJ 109 (FB).

(12) Upon rescission of the contract by the seller on account of the wrongful refusal by the buyer to perform it, the contract becomes void and the duty of restitution of the benefit received under it arises under Sections 64 and 65 of the Act. Therefore the defaulting buyer is entitled to recover from the seller the instalment of price paid by the buyer subject to a set-off by the seller for damages caused by the breach of contract on the part of the buyer. (1964) 68 Cal WN 476 (DB) ** AIR 1968 Bom 35 (36) = 69 Bom LR 250 (DB).

(13) Exchange of tarwad immovable property for convenience of enjoyment is invalid — Alienee before being ousted entitled to get back his property. 1963 Ker LJ 395 (DB).

SECTION 65 — SYNOPSIS

1. Scope.

2. Discovered to be void.

3. "Becomes void."

4. Obligation to refund benefit — General.

such agreement or contract is bound to restore it, or to make compensation for it to the person from whom he received it.

Illustrations

(a) A pays B 1,000 rupees in consideration of B's promising to marry C, A's daughter. C is dead at the time of the promise. The agreement is void, but B must repay A the 1,000 rupees.

(b) A contracts with B to deliver to him 250 maunds of rice before the first of May. A delivers 130 maunds only before that day, and none after. B retains the 130 maunds after the first of May. He is bound to pay A for them.

(c) A, a singer, contracts with B, the manager of a theatre, to sing at his theatre for two nights in every week during the next two months, and B engages to pay her a hundred rupees for each night's performance. On the sixth night, A wilfully absents herself from the theatre, and B, in consequence, rescinds the contract. B must pay A for the five nights on which she had sung.

(d) A contracts to sing for B at a concert for 1,000 rupees, which are paid in advance. A is too ill to sing. A is not bound to make compensation to B for the loss of the profits which B would have made if A had been able to sing, but must refund to B the 1,000 rupees paid in advance.

Section 65 — Synopsis (contd.)

(a-b) "Benefit" and "advantage" —
Meaning of.

(c) Contracts void for illegality.

(d) Contracts void in part.

(e) Collateral covenants.

(f) Contract of minors.

(g) Contracts on behalf of minors.

(h) Contracts by persons of unsound mind.

(i) Refund in cases of frustrated contracts.

(j) Earnest money.

(k) Obligation of heirs and representatives-in-interest.

(l) Contract by manager of joint Hindu family.

(m) Contract by co-sharer.

(n) Sale.

(o) Mortgages.

(p) Leases.

(q) Marriage contracts.

(r) Other instances.

5. Compensation.

6. Pleadings and proof.

7. Limitation.

1. Scope. — (1) The doctrine of restitution in integrum, which is of general application underlies the provisions of Section 65, Contract Act. AIR 1958 Andh Pra 427 (437) (DB) ** AIR 1959 AP 277 (278) = (1959) 1 Andh WR 63 (DB).

(2) The underlying principle seems to be that a party who by some act of his benefits another with the knowledge that the purported agreement is void acts as a volunteer and a payment made by him is like a gift and cannot be recovered under Section 65. 1958 Cal LJ 95.

(3) Section codifies rules of equity. AIR 1945 Lah 164 (168) (DB).

(4) Section 65 enunciates the principles of restitution and should be liberally con-

strued in order to do equity and justice between parties. The intention of the section is to prevent a party from avoiding an agreement and retaining the benefits received under it. AIR 1955 Assam 33 (44).

(5) The object of Section 65 is not to make a new contract between the parties when the contract entered into by them has been discovered to be void but only to restore the advantage received by one party thereunder to the other. AIR 1958 Andh Pra 427 (437) (DB).

(6) Section 65 starts on the basis of there being an agreement or contract between competent parties. It has no application to a case in which there never was, and never could have been, any contract. (1903) 30 Cal 539 (548) = 30 Ind App 114 (PC) ** AIR 1929 Bom 89 (90) = 53 Bom 309 (DB) ** AIR 1921 Bom 147 (147) = 45 Bom 225 (DB) ** (1904) 26 All 342 (343) (DB).

(7) Unless a Court can restore the parties to their original position having regard to circumstances of each case there is no scope for the application of Section 65. AIR 1958 Andh Pra 427 (437) (DB) ** AIR 1951 Pat 463 (468) = 30 Pat 137 (DB). (Where there is no contract because there is no mutuality section will not apply.) ** AIR 1959 Andh Pra 277 (278) = (1959) 1 Andh WR 63 (DB).

(8) A contract which is void on the ground of the utter incapacity of parties to enter into contracts cannot attract the provisions of Section 65. AIR 1952 Pat 455 (456, 457) ** AIR 1956 Andhra 182 (188). (Contract with minor — Section cannot be invoked as there is no contract at all.) ** AIR 1953 Sau 177 (179) ** AIR 1948 Cal 269 (273) = ILR (1948) 2 Cal 485. (Contract on behalf of minor by person not competent to do so — There is no contract at all in law.) **

Section 65 — Note 1 (contd.)

AIR 1940 Nag 327 (328) = ILR (1940) Nag 632. (Contract to which minor is a contracting party.) ** AIR 1936 Nag 15 (16) = 31 Nag LR (Sup) 62 (DB). (Case of Government ward.) ** AIR 1927 Nag 116 (116) = 23 Nag LR 8. (Minor contracting party.) ** AIR 1921 Bom 147 (147) = 45 Bom 225 (DB). (Contract to which minor is party.) ** AIR 1919 Nag 76 (78) = 15 Nag LR 149. (Minor a contracting party.) ** (1911) 8 All LJ 1058 (1058, 1059). (Minor a contracting party.) ** (1904) 26 All 342 (343) (DB). (Minor a contracting party.)

[But see AIR 1959 Mys 188 (190) = 37 Mys LJ 496. (Agreement by minor — Section 65 applies.)]

(9) Where a person himself is not disqualified from entering into contract but the contract is void and unenforceable because it has failed to comply with the conditions laid down by an Act or rules there is no bar to a party to such a contract from suing under Section 65 of the Act. AIR 1942 Mad 111 (112). (Panchayat Boards — Loan taken without previous sanction of Local Government as required by Local Authorities Loans Act — Contract is void but creditor is entitled to restoration of his money under Section 65 of the Contract Act.) ** AIR 1955 Mad 82 (84) = ILR (1955) Mad 128 (FB). (Contract of municipality not complying with S. 81, Madras City Municipal Act.) ** AIR 1951 All 736 (745) (FB). (Section does not apply where the law has denied the statutory body the capacity itself to enter into the contract.) ** AIR 1958 Pat 203 (208) = 37 Pat 113. (Non-compliance with Section 175 (3), Government of India Act, 1935.) ** AIR 1955 Assam 86 (94) (DB). (Contracts not complying with Section 175 (3), Government of India Act, 1935.) ** (1952) 89 Cal LJ 342 (371, 372, 380). (Governor-General is not a disqualified person without contractual capacity — Appeal from AIR 1952 Cal 306.) ** AIR 1939 Mad 957 (960, 961, 962) = ILR (1939) Mad 928 (DB) ** AIR 1936 Mad 98 (98). (Madras District Municipalities Act (IV of 1884), Section 69— Lease of land by municipality — Lease not complying with Section 69 — Suit for damages for use and occupation lies.) ** AIR 1934 Mad 335 (336). (The defendant must restore benefit received by him under contract which is found to be unenforceable under Section 69, Madras District Municipalities Act.) ** AIR 1938 Mad 746 (748). (Contract by Municipality infringing positive provision of law.) ** AIR 1934 Mad 480 (481) = 58 Mad 65 (DB). (Do.) ** AIR 1927 Cal 465 (472) = 54 Cal 189 (DB). (Contract entered into by Port Commissioners in contravention of requirements of law.) ** AIR 1963 Ker 278 (285) = 1963 Ker LT 393 (FB) ** AIR 1966 All 507 (508) ** AIR 1964 Andh Pra 188

(190). (Suit on promissory note — Promissory note inadmissible due to its being insufficiently stamped — Suit can be decreed on basis of money had and received. AIR 1938 Mad 785 (FB), Not foll.) ** 1961 MPLJ 1441 = 1961 Jab LJ 700. (AIR 1958 Madh Pra 239 and AIR 1930 PC 287, Rel. on. — Sale becoming void for want of necessary sanction under Section 4 (2) of C. P. Act (2 of 1916).) ** (1961) 27 Cut LT 397 ** AIR 1959 Madh Pra 172 (176) = 1959 MPLJ 301 (DB). (Agreement in excess of authority by a registered society — Does not become unenforceable when it is not shown to be illegal, by mere fact that it was ultra vires the powers of the society.) ** AIR 1959 Cal 165 (168) = 62 Cal WN 377 (DB). (Agreement ab initio unlawful as contravening provisions of Iron and Steel (Control of Production and Distribution) Order, 1941.) ** 1958 Cal LJ 95.

[But see AIR 1955 Cal 626 (628, 629). (Contract not in compliance with Section 175 (3), Government of India Act, 1935 — Section 65 cannot be invoked.) ** AIR 1933 Mad 332 (335). (Section 65 does not apply to contracts void under Madras District Municipalities Act, Sections 44, 45. Principles of quantum meruit or quantum valeat do not apply.) ** AIR 1932 Oudh 193 (195) = 8 Luck 1 (FB). (A party who has worked for Municipality under a contract, which is void, not being in conformity with Section 97, U. P. Municipalities Act, cannot claim any relief under Section 65.) ** AIR 1966 Raj 14 (18) = 1965 Raj LW 173 (DB). (Contract by association formed in contravention of Section 4 of Companies Act (1913) — Association not entitled to benefit of Sections 65 and 70.) ** AIR 1963 Mad 154 (154) = 75 Mad LW 223 ** AIR 1963 Pat 254 (257) (DB) ** AIR 1962 Punj 423 (425) = 64 Punj LR 438 ** AIR 1961 Cal 663 (666) = 63 Cal WN 907 (DB).]

(10) Where the incapacity of the parties to enter into a contract is not a general incapacity but only an incapacity in relation to the property, S. 65 would come into operation even if the contract is void ab initio. AIR 1952 Pat 455 (456). (Sale in favour of person who is disqualified by statute from becoming vendee of the particular kind of property sold.) ** AIR 1958 Madh Pra 88 (91). (Lease of forest by third grade jagirdar who is prohibited by robkar from granting such lease.) ** AIR 1925 Mad 885 (886). (Transfer of karnam service Inam.) ** AIR 1962 Pat 140 (148) (DB). (Section 65 applies even when the incapacity to transfer in relation to any property arises under a statute like Bihar Land Reforms Act — AIR 1941 Pat 510, Overruled.) — (Note: This case was however reversed on facts in AIR 1968 SC 90.)

Section 65 — Note 1 (contd.)

(11) Defendant being incompetent to alienate the field under Paragraph 2 of Schedule III to the Code of Civil Procedure, plaintiff suing for refund of consideration money and damages — Section 65 of the Contract Act applied and plaintiff was entitled to a refund. AIR 1924 Nag 132 (133) = 20 Nag LR 87 ** AIR 1943 PC 29 (33, 34) = 70 Ind App 1 = 18 Luck 130 = ILR (1943) Kar (PC) 19. (Lender is entitled to get back the money on principle that, where a defendant, who, when sued for money, pleads that the contract was void, can hardly regard with surprise a demand that he should restore what he received thereunder. AIR 1937 Oudh 410 = 13 Luck 531, Reversed.) ** AIR 1929 Nag 257 (259). (Decree for possession in favour of vendor should be made conditional on his returning consideration.) ** AIR 1949 Nag 292 (295) = ILR (1949) Nag 52 ** AIR 1959 All 788 (789) = 1959 All LJ 498 (DB).

[But see AIR 1937 Nag 330 (332) = ILR (1937) Nag 111. (A person incompetent to transfer property under Para 2 of Schedule III, Civil P. C., is incompetent to contract.)]

(12) Section 65, Contract Act, applies to transfers also. AIR 1937 Oudh 410 (413) = 13 Luck 531 (DB).

[But see AIR 1967 All 262 (263) = 1966 All LJ 960 (DB) ** AIR 1961 Bom 97 (103) = 62 Bom LR 360 (DB).]

(13) Section 65 is a departure from English law. It does not favour a person guilty of wilful default. (1940) 44 Cal WN 11 (37) (SB) ** AIR 1957 Mad 715 (716, 717) = ILR (1957) Mad 987. (Promissory note rendered unenforceable and void on account of unilateral material alterations made by promisor — Promisor cannot invoke aid of Section 65 to recover money advanced.) ** AIR 1951 Pat 463 (466) = 30 Pat 137 (DB). (Parties in pari delicto — Section will not apply.) ** AIR 1949 Mad 252 (254) (DB). (Parties in pari delicto — not entitled to relief under Section 65.) ** AIR 1943 Pat 374 (375) = 22 Pat 334 (DB). (Agreement to transfer excise shop in contravention of Rule 143 framed under Bihar and Orissa Excise Act 2 of 1915 — Parties in pari delicto — Licencee is not entitled to claim advance licence fee paid by him and the price of stock from the transferee.) ** AIR 1925 Nag 119 (120). (Plaintiff's own act rendering performance of contract by other party impossible — Plaintiff is not entitled to relief under Section 65.) ** AIR 1960 Andh Pra 190 (193) ** AIR 1959 Andh Pra 596 (600, 601).

[See however AIR 1925 Nag 243 (245) ** AIR 1920 Mad 64 (65) = 43 Mad 703 (DB). (Fact that the receipt for the advance is endorsed on the same document affects his right in no way.)]

(14) A transferor of property who sues on the strength of his original title to recover the property on the plea that the transfer was void can be given relief on such terms as the Court may think fit, even though he is a *particeps criminis*, provided his case is one which falls within one of the exceptions to S. 84, Trusts Act or where such relief must be given in the interest of the public or third parties or to give effect to a legal prohibition or in furtherance of public policy. AIR 1958 Cal 713 (729).

(15) Section 65 applies only if agreement was discovered to be void or became void after it had been entered into. (1913) 18 Ind Cas 9 (10) (All) ** ILR (1942) All 817 (819) (DB) ** AIR 1950 Bom 313 (318) = ILR (1951) Bom 248 (DB). (When contract or transfer is not void neither the section nor the principles underlying it will apply.) ** AIR 1947 Bom 392 (394) = ILR (1947) Bom 156. (Transfer liable to set aside under Section 54, Provincial Insolvency Act can neither be said to be discovered to be void or to have become void.) ** 1969 Cur LJ 589 (593) (Punj) ** AIR 1959 Andh Pra 277 (278) = (1959) 1 Andh WR 63 (DB).

(16) Section 70 is wider in scope than Section 65 and should not be invoked for a refund of benefit. Where a contract is void not on account of mistake of law, but a mistake of what has been done, Section 65 would apply. AIR 1926 Oudh 388 (391, 392) = 1 Luck 444 (DB).

(17) The cause of action under Section 65 cannot exist side by side with the original cause of action under the contract. Before the new right can come into being the old right must die. AIR 1956 Cal 138 (144) ** AIR 1956 Assam 23 (30) (DB). (Claim for damages which arise only when there is a breach of contract does not fall under Section 65, Contract Act.) ** AIR 1942 Oudh 231 (237) = 17 Luck 530 (DB). (Lessee entering into possession under defective lease — Case is not one of void agreement — Lease must be deemed to be subsisting for working out equities between parties — Section 65 of Contract Act does not apply to case.) ** (1880) 2 All 173 (179, 181) (DB). (An award under which the several debts of a person are compounded and the creditors are to be paid out of the sale proceeds constitutes a sufficient and valid contract binding on the debtor as well as the creditors who are parties to it. Where the award has been carried out and is in full operation it will not be open to any one. One of the creditors to rescind the agreement and fall back upon the original debt. Such a case is not one of a contract found to be void or which had become void and hence merely because the creditor had sued only for the balance of his debt after giving credit to the amount received

Section 65 — Note 1 (contd.)

by him under the award it cannot be said his claim falls under S. 65.)

[See also AIR 1944 Mad 281 (283) = ILR (1944) Mad 842 (DB). (Sections 64 and 65 do not apply to the case of contract of insurance becoming void by a breach of warranty.)]

(18) The principle underlying S. 65 is that a right to restitution may arise out of the failure of a contract though the right be not itself a matter of contractual obligation. AIR 1957 Tripura 37 (43).

(19) The fact that Sections 64 and 65 do not apply to the facts of a case does not exclude the application of the rules of equity contained therein. 1910 Punj LR No. 98, p. 279 (281) = 1910 Punj Re No. 76 (DB).

(20) Sections 69 and 70, U. P. Municipalities Act cannot be held to have repealed Section 65, Contract Act. That being a rule of statutory law must be given effect to. AIR 1926 Oudh 388 (392) = 1 Luck 444 (DB).

(21) The principle of the section does not apply to a case where the claim for recovery of money is based on tort. AIR 1957 Tripura 37 (43).

(22) Section 65 does not apply to a case in which there is a stipulation that by reason of a breach of warranty by one of the parties to the contract, the other party shall be discharged from the performance of his part of the contract. (1902) 25 Mad 183 (214) (DB) ** AIR 1962 SC 814 (821) = 1962 Supp (2) SCR 571.

2. Discovered to be void.— (1) Section 65 also applies to agreements that are void ab initio. AIR 1936 Mad 98 (98) ** AIR 1941 Bom 378 (380) = ILR (1941) Bom 666 (DB). (Illegal agreement by village panchayat to farm out right to collect ground rent.) ** AIR 1941 Nag 273 (277) = ILR (1942) Nag 294 ** AIR 1938 Lah 721 (723) (DB) ** AIR 1936 Oudh 280 (289) = 12 Luck 185 (DB) ** AIR 1922 PC 403 (404) = 50 Ind App 69 = 45 All 179 = 26 Oudh Cas 223. (The agreement to sell the right of reversioner is manifestly void from its inception. Vendee is entitled to get back consideration with interest.) ** AIR 1959 Mys 188 (190) = 37 Mys LJ 496.

[But see AIR 1916 Cal 266 (269) = 43 Cal 115 (DB) ** (1913) 7 Sind LR 58 (60) (DB). (Section 65 does not apply to contracts that are void ab initio.)]

(2) A contract which is "discovered to be void" must have been void ab initio as distinguished from a contract which becomes void subsequently. AIR 1952 Pat 455 (456, 457) ** (1964) 2 Andh WR 183 (DB).

(3) The words 'discovered to be void' in Section 65 refer to an agreement which was void ab initio, but was not known to be void by the parties. AIR 1918 Mad 444 (447) = 41 Mad 197 (DB) **

AIR 1926 Rang 7 (9) (DB). (The term 'is discovered to be void' imparts that agreement, though found to be void, was not void on the face of it.) ** AIR 1955 Hyd 69 (75) = ILR (1955) Hyd 101 (FB). (Even agreements void ab initio can be discovered to be void subsequently.) ** Madh B L J 1955 HCR 1225 (1228). (Sale void ab initio to the knowledge of parties — Section does not apply.) ** AIR 1954 Mad 528 (531) (DB). (Contract void ab initio and known to be such to the parties — Section 65 does not apply.) ** (1954) 20 Cut L Tim 591 (594, 595). (Both parties aware of illegality when entering into contract — Contract cannot be said to be discovered void subsequently. If even one party had no such knowledge it would be otherwise.) ** (1954) 7 Sau LR 168 (170) ** 1953 Raj LW 220 (222). (Contract entered into with knowledge of its illegality — Section does not apply.) ** AIR 1951 Pat 463 (466) = 30 Pat 137 (DB). (Parties knowing unlawfulness of agreement acting upon it and deriving benefit — Section does not apply.) ** AIR 1965 Andh Pra 191 (193) = (1965) 1 Andh WR 176 (DB) ** AIR 1964 Raj 50 (52) = 1963 Raj LW 491. (Partnership by minor can be shown to have been discovered to be void in the proceedings — Section 65 applies.) ** AIR 1961 Orissa 75 (79) = (1960) 2 Orissa JD 481 (DB) ** AIR 1960 Andh Pra 186 (188) = (1959) 2 Andh WR 241 (DB) ** AIR 1959 Mys 188 (192) = 37 Mys LJ 496 ** 1959 Raj LW 487 (DB).

(4) An agreement executed by a person who even at the time of its execution is known to the other party to be a minor is an agreement which is known to be void ab initio and therefore can never be discovered to be void later. 1888 Punj Re No. 96, p. 258 (261) (DB).

(5) If an agreement is void ab initio it cannot be discovered to be void when the Court finds it to be so because the parties are presumed to know the law. But under special circumstances, Court may hold that discovery was made later. Mortgage void for no necessity if acted upon by both parties shall be regarded as 'discovered to be void' only after decree to that effect. AIR 1925 Oudh 212 (215) ** AIR 1952 Cal 306 (313).

(6) When the consideration to an agreement is unlawful and opposed to public policy under Section 23, Section 65 of the Contract Act is inapplicable, this being neither the case of an agreement which was discovered to be void, nor of a contract which became void, but of agreement which was void ab initio. 1893 Punj Re No. 86, p. 346 (347) ** AIR 1944 Mad 415 (415, 416) ** AIR 1940 Pat 573 (575) = 19 Pat 424 (DB) ** AIR 1917 Nag 57 (57). (Contract not in accordance with statutory requirements is no contract at all and does not

Section 65 — Note 2 (contd.)

'become void' and 'is not discovered to be void.')

[See also AIR 1950 Mad 444 (449) = ILR (1950) Mad 987 (FB). (Partnership to carry on business in arrack or toddy on licence granted to one partner only is opposed to public policy — Suit for balance due on settlement of account does not lie.)]

[But see AIR 1960 AP 186 (189) = (1959) 2 Andh WR 241 (DB).]

(7) The word 'discover' in Section 65 should not be given a restricted meaning which would make that word applicable only to cases where either the discovery is made by an outside agency other than the parties to the agreement or it is a discovery made by the parties which they could not have made even if they had shown all the diligence which could have been expected from any one. AIR 1963 All 294 (300) (DB).

3. "Becomes void."— (1) 'Becoming void' pre-supposes enforceability — What is not enforceable cannot become void. AIR 1920 Nag 183 (184).

(2) The words "when contract becomes void" are wide enough to cover the case of avoidable contract which has been avoided. AIR 1932 PC 89 (91) = 59 Ind App 147 = 7 Luck 64 ** AIR 1921 Lah 299 (300) (DB).

(3) Difference between a voidable instrument and one void ab initio — In former case restoration cannot be claimed unless the instrument is avoided; while, in the latter, relief can be claimed independently of the instrument. AIR 1938 Nag 335 (346) = ILR (1939) Nag 1 (FB).

(4) The word "agreement" as used in expression "agreement discovered to be void" has no application to transactions which are "contracts" under Contract Act. AIR 1920 Bom 192 (201) = 44 Bom 631 (DB).

(5) A contract the enforcement of which alone is barred by the operation of law cannot be considered to have become void because in such a case it is not the right under the contract itself which is extinguished but it is only the right to sue to enforce the same that is barred. AIR 1953 Pat 259 (263) = 31 Pat 963. (Loan advanced by person who is not registered as money-lender under the (Bihar) Money-lenders (Regulation of Transactions) Act, 7 of 1939.)

[But see AIR 1952 Hyd 142 (143, 144) = ILR (1952) Hyd 28. (Loan by money-lender not licensed under Hyderabad Money-lenders Act.) ** AIR 1951 Hyd 44 (44, 45) (DB). (Loan by money-lender not licensed under Hyderabad Money-lenders Act — He cannot recover money lent under Section 65, Contract Act even.)]

(6) It is wrong to say that when a contract has become unenforceable by

reason of the fact that the claim to enforce the contract had become barred by limitation, it becomes void so as to attract the provision of Section 65, Contract Act. AIR 1945 Mad 171 (172) ** AIR 1948 Nag 382 (384) = ILR (1948) Nag 50.

[But see 1957 All LJ 222 (223).]

(7) Agreement is "void" when its terms, being ascertained, have no legal effect. An agreement, which is inadmissible for want of registration, does not become "void" within Section 65 of the Act. (1909) 33 Bom 610 (624) (DB).

(8) Contract by a grantee of Government land to concede a portion of the land to another on condition of his helping him to comply with the stipulations on which the grant was made to him, becomes void if the Government cancels the grant and the grantee can sue for declaration that the contract is void irrespective of the promisee's right to damages. 1911 Punj WR No. 16 p. 40 (41).

(9) Lambardar transferring occupancy rights in property after 16th March 1950— Transfer prior to vesting of property under M. P. Abolition of Proprietary Rights Act on 31st March 1951 — Transfer became void only on 31st March 1951 — Matter is covered by expression "becoming void". AIR 1959 MP 315 (316) = 1959 MPLJ 586 (DB).

4. Obligation to refund benefit — General.— (1) Questions of refund for failure of a contract must be decided with reference to provisions of Contract Act and not English law. AIR 1925 Nag 109 (110) = 20 Nag LR 192 ** AIR 1960 Andh Pra 190 (192).

(2) Refund of benefit can be claimed either under Section 65 or on the principle of quantum meruit even for a contract invalid under statute. AIR 1933 Mad 145 (146) ** AIR 1933 Mad 344 (344). (Relief on quantum meruit cannot be granted unless asked for.) ** AIR 1958 SC 560 (577) = 1959 SCR 379. (A claim for quantum meruit is a claim for damages for breach of contract and the value of materials is a factor relevant only as furnishing a basis for assessing the amount of compensation. The claim is not for goods sold and delivered but damages.) ** 1958 Andh LT 762. (The principle of quantum meruit applies even where no valid contract was executed in accordance with the statutory rules framed under Madras Local Boards Act.)

(3) The obligation of the person to refund the consideration which had been received by him under a contract which is discovered to be void or which has become void exists even in the absence of any specific contract between the parties for such a refund. AIR 1950 Nag 229 (231) = ILR (1950) Nag 467.

Section 65 — Note 4 (contd.)

(4) Where a law imposes only a bar on the right to sue to enforce the rights under a contract the principle of Section 65 namely, that a right to restitution may arise out of the failure of contract though the right itself is not a matter of contractual obligation, will not apply because in such a case the contractual rights themselves are in no way impaired. AIR 1953 Pat 259 (263) = 31 Pat 963.

(5) Only a party who is clearly shown to have received an advantage under the contract can be ordered under the section to return the same. AIR 1937 Oudh 10 (12) = 12 Luck 478 (DB). (Contract between father and uncle for the marriage of former's son with latter's niece — Contract becoming void by marriage of the girl to another. Uncle who is not shown to have benefited by the ornaments given to the girl cannot be ordered to return the ornaments.) ** AIR 1969 Tripura 26 (28, 29).

(6) Under Section 65 each of the parties become bound to restore the benefit received under the contract and the plaintiff cannot recover any sum unless he proves that value of the advantage the other party received under the contract was greater than the sum received by him under the contract. AIR 1948 PC 56 (59) = 74 Ind App 295 = ILR (1947) Bom 860.

(7) A third party who is not a beneficiary under the contract which is set aside at his instance cannot be ordered under this section to refund any amount paid by one party to the other under the contract. AIR 1938 Nag 451 (452, 453). (Lambardar getting transfer of occupancy right set aside under Section 13, C. P. Tenancy Act.)

(8) The liability for restitution attaches also to a party who rescinds a contract under Section 39 of the Act. AIR 1957 Madh B 53 (55) ** AIR 1927 Nag 168 (169). (Seller rescinding contract to sell must restore under Section 64 and purchaser doing so under Section 65.) ** AIR 1915 Mad 1059 (1059) (DB). (Rescission of contract to sell — Seller rescinding must restore benefit under Sec. 64 and purchaser under Section 65.)

(9) A party to an executory contract who has fulfilled his part of the contract can validly rescind the contract when the other party repudiates the contract and demand restitution under Section 65 of the Act. ILR (1955) Mad 528 (547).

(10) Party fulfilling his part of the contract can claim a return of benefit though the contract was invalid as being not reduced to writing. AIR 1929 Lah 742 (744) = 11 Lah 121 (DB).

(11) Section 65 applies only to a case where benefit or advantage is derived under an agreement before it is discovered to be void. If the benefit is received after the agreement is discovered to be

void, then the advantage cannot be said to have been received under the agreement. AIR 1955 Assam 33 (41) (DB) ** AIR 1955 Orissa 49 (54) = ILR (1955) Cut 1 (DB). (But transaction itself must be honest and not designed to defeat any provisions of law.) ** AIR 1946 Cal 245 (248) = ILR (1945) 2 Cal 41 ** 1958 Cal LJ 95.

(12) A party who becomes entitled to rescind a contract under Section 39 of the Act can set off against his liability to reconstitute his cross claim for damages for a breach of contract. AIR 1957 Madh B 53 (55). (Cross claim although it arises under the same contract stands on an independent footing.)

(13) Section 65 contemplates a benefit a gain, an item of property which has gone into the hands of the other party. Unless it can be said that the defendants came into possession of something tangible from the plaintiff, the plaintiff cannot succeed. The section, it is clear, does not contemplate reparation for any loss sustained by one party but only restoration of any benefit which has accrued from the one to the other. AIR 1960 Andh Pra 190 (192). (AIR 1960 Andh Pra 186, Dissented from.)

4 (a-b). "Benefit" and "advantage" — Meaning of.— (1) Sections 64 and 65 do not refer, by the words "benefit" and "advantage", to any question of 'profit' or 'clear profit' nor does it matter what the party, receiving the money, may have done with it. AIR 1943 PC 34 (40) = ILR (1943) 2 Cal 213 = 70 Ind App 35 = ILR (1943) Kar (PC) 30.

(2) Halves of currency notes received by a party to a contract when they have been actually used by him in his business amount to an advantage received by that party under the contract within the meaning of Section 65. 1894 All WN 157 (157, 158) (DB).

(3) Plaintiff cannot be said to have received advantage when he has applied money to meet losses arising from carrying on instructions of defendant. AIR 1938 PC 4 (6) = 32 Sind LR 235.

(4) Agreement between defendant and plaintiffs — Latter to deliver rice to defendant or his nominees — Rice delivered to nominees — Nominees cannot be said to have received any advantage under agreement. AIR 1960 Pat 19 (26) = 1959 BLJR 527 (DB).

(5) A lessor who had received a premium cannot be said to have received any advantage, if in pursuance to the contract he had delivered possession of land to the lessee. AIR 1967 All 262 (263) = 1966 All LJ 960 (DB).

4 (c). Contracts void for illegality.— (1) Per Bose J.—When a contract is void for illegality as opposed to being merely nugatory, money paid or goods delivered in pursuance of it cannot ordinarily be recovered unless it is still executory

Section 65 — Note 4 (c) (contd.)

because of the maxim *ex turpi causa non oritur actio*; in fact the test of illegality is the applicability of the maxim. But there are several exceptions to this rule, one of which is where the contract is made illegal by statute with the object of protecting a particular class of persons to which the plaintiff belongs. In such a case, restitution can be ordered. AIR 1938 Nag 335 (344) = ILR (1939) Nag 1 (FB) ** 1969 Ker LR 659 (667). (Chitti for more than Rs. 100 chitti not registered — Transaction of subscription illegal — Subscriber is not in *pari delicto* with foreman — Subscriber can claim refund.)

[See (1905) 28 Mad 520 (525) (DB). (Agreement in restraint of trade — Only amounts paid as security and as price of monopoly were allowed to be recovered.)]

[See also (1905) 1 Cal LJ 261 (268, 269).]

[See however AIR 1967 Guj 46 (49) = (1965) 6 Guj LR 817. (Suit based on first part of Section 65 — Agreement need not be at executory stage.)]

(2) Criterion which makes Court to assist or not to assist party in recovering money paid under unlawful agreement, is morality and public policy and not *locus paenitentiae*. AIR 1936 Rang 358 (363) = 14 Rang 597 (DB) ** AIR 1938 Bom 54 (61) (DB).

(3) Where circumstances under which the defendant received the money constitute an offence under Penal Code the plaintiff's suit for recovery of the money is not maintainable. 1895 Pun Re No. 66. p. 330 (332) ** AIR 1931 Rang 83 (85) = 32 Cri LJ 934. (Money paid as bribe.)

[But see AIR 1960 Andh Pra 186 (189) = (1959) 2 Andh WR 241 (DB). (1957 Andh LT 607, Overruled.)]

(4) An agreement which is in the nature of a bribe offered to the other party to secure a job for the person who pays is opposed to public policy and as such is not one to which Section 65 would apply. AIR 1951 Madh B 113 (1) (113).

(5) Section 65 cannot be taken advantage of in case of wagering contracts. (1885) 9 Bom 358 (362) ** AIR 1926 Mad 168 (169) (DB). (Chit fund.) ** AIR 1918 Mad 163 (163, 164) (DB). (But person who is not a party to the fraud can get back the money left by him with another.) ** (1902) 25 Mad 561 (567) (DB) ** AIR 1947 All 14 (15) ** 1966 MPLJ 379 = 1966 Jab LJ 399.

[See also AIR 1936 Mad 225 (229) = 59 Mad 562 (FB). (Suit for recovery of subscriptions paid under a prize kuri — Subscriber cannot claim benefit under Section 65, Contract Act, but may rely on Section 84, Trusts Act.)]

(6) An illegal debt although it cannot be enforced would not justify the re-

covery of any payment actually made to discharge the same. AIR 1955 Trav-Co 144 (144) (DB). (Debts of wager — Hundi executed for — Hundis amount to actual payment — Executant cannot resist suit on Hundi by alleging illegality of original debt.)

(7) Agent entering into a contract on behalf of principal cannot recover commission or insist on his indemnity where the act done by him on behalf of the principal is not only void but also illegal. AIR 1951 Kutch 50 (52).

(8) If illegal contract remains totally unperformed, a party can claim a refund even in the very suit brought for the enforcement of such illegal contract. (Per Carr J. — He must bring another suit.) AIR 1925 Rang 49 (53, 54) = 2 Rang 414 (DB) ** AIR 1959 Cal 165 (167, 168) ** 1949 Trav-Co LR 244 (245) ** AIR 1937 Sind 211 (212) = 31 Sind LR 170 (DB). (Person paying money for arranging his marriage can claim refund when marriage is not performed.) ** AIR 1944 Nag 159 (160) = ILR (1944) Nag 535 (DB). (Do.) ** AIR 1937 Pat 330 (330, 331). (Two kinds of marriage brokerage agreements, immoral and those that are not immoral, but unenforceable, explained.) ** AIR 1934 Pesh 22 (22) ** (1909) 32 Mad 185 (190) (SB) ** AIR 1968 Andh Pra 375 (378) = (1967) 2 Andh WR 465. (Presents and money given in connection with an admittedly illegal contract, subsequently repudiated — Amount paid is recoverable.)

(9) So long as an unlawful or void agreement remains unperformed, any money paid under it may be recovered back to the use of the person who so paid it. AIR 1926 Lah 159 (160) (DB) ** AIR 1968 Andh Pra 375 (378) = (1967) 2 Andh WR 465. (In such cases the parties are restored to their original position.) ** AIR 1959 Cal 165 (167) = 62 Cal WN 377 (DB).

(10) Section 65 does not apply to contracts void *ab initio* and still less to those which are tainted with fraud or other moral turpitude. Money paid for an unlawful purpose cannot be recovered under Contract Act. AIR 1947 Bom 392 (394) = ILR (1947) Bom 156.

(11) An agreement which amounts to fraudulent preference is not 'void' as between the parties under Section 65. AIR 1936 Mad 978 (980) (DB).

(12) Though *brit* is not saleable contract for sale of *Jajmanka brit* is not illegal and suit lies for repayment of consideration. AIR 1924 Pat 321 (322).

(12-A) Where an agreement is hit by Section 24 of Contract Act Section 65 may not apply. AIR 1955 Assam 33 (43) (DB).

(13) Section 65 does not apply where the object of the agreement was illegal to the knowledge of both parties at the time it was made; and both parties are

Section 65 — Note 4 (c) (contd.)

in pari delicto. (1911) 15 Cal WN 408 (409) (DB) ** AIR 1941 Pat 510 (511) ** AIR 1940 Mad 719 (722) ** AIR 1940 Oudh 119 (119) = 15 Luck 265 (DB). (Contract with minor.) ** AIR 1937 Oudh 521 (523). (Do.) ** 1904 Pun Re No. 33 p. 116. (Do.) ** AIR 1938 Bom 54 (61) (DB). (Agreement creating false evidence and purporting to non-compoundable case.) ** AIR 1916 Cal 74 (74, 75) = 42 Cal 286 (DB). (Do.) ** AIR 1938 Oudh 24 (25, 26) ** AIR 1929 Lah 68 (68) ** AIR 1926 Lah 159 (159) (DB) ** AIR 1926 Oudh 119 (120) ** (1921) 61 Ind Cas 604 (604) (Lah) ** AIR 1920 Bom 192 (201) = 44 Bom 631 (DB) ** AIR 1920 Nag 157 (159) ** AIR 1915 Lah 480 (481) ** 1893 Pun Re No. 62, p. 279 (283) (DB). (Both parties aware of condition against alienability — Contract fully carried into effect — Alienor found without title — Principle of caveat emptor applied.) ** 1888 Pun Re No. 23, p. 64 (66) (DB) ** AIR 1969 Raj 155 (162) = 1969 Raj LW 377 ** AIR 1965 J and K 39 (42) = 1964 Kash LJ 306 (DB) ** AIR 1964 Raj 232 (234) = 1964 Raj LW 362. (Parties entering into forward contract in hydrogenated groundnut oil not aware of existence of order issued under Defence of India Rules prohibiting such contracts — Parties are not in pari delicto — Contract discovered to be void subsequently — Purchaser who has advanced money under the contract is entitled to a refund of it.) ** AIR 1963 All 294 (300, 301) (DB). (Money deposited with National Chamber of Commerce, Kanpur, as margin money under rules of Chamber by one constituent for registering contracts entered into with another constituent of Chamber — Contracts prohibited under Government Control Orders — Parties not aware of Control Orders at time of deposit — Parties held not in pari delicto — No public policy justifying retention of money by Chamber — Contract with Chamber held not tainted or illegal — Plaintiff entitled to claim benefit of Section 65.) ** AIR 1959 AP 277 (278) = (1959) 1 Andh WR 63 (DB).

[See also AIR 1959 Cal 165 (167, 168). (Parties not in pari delicto — More innocent party could be given relief under Section 65.) ** AIR 1960 AP 186 (188) = (1959) 2 Andh WR 241 (DB) ** AIR 1959 Cal 165 (167) = 62 Cal WN 377 (DB).]

(14) Where the illegal purpose of an arrangement contravening the provisions of a statute was carried out in full, the exception of locus paenitentiae does not apply and the Court will not render any assistance in the recovery of the money even if there is a part performance of the illegal contract. AIR 1968 Andh Pra 315 (319) = (1968) 2 Andh WR 267 ** AIR 1968 Andh Pra 375 (378) = (1967) 2 Andh WR 465.

4 (d). Contracts void in part. — (1) Purchasers cannot claim a refund for a partial deprivation of the property purchased under an unenforceable deed. AIR 1927 Sind 62 (66).

(2) A simple mortgage providing for possession in case of default is not wholly void in view of Section 8 (2), Punjab Alienation of Land Act and Section 21, Contract Act Section 65 does not apply to such case. AIR 1932 Lah 630 (632) = 13 Lah 508 (DB).

(2-A) Where there is no total failure of consideration by reason of two different properties having been sold in one lot for a single consideration and the defaulter being found to have title in one of them then unless the consideration is severable the purchaser would not be entitled to proportionate refund of money. AIR 1964 Ker 109 (111) = 1964 Ker LT 102.

4 (e). Collateral covenants.—(1) Where covenant to compensate is collateral and not merely dependent upon the main contract which has created the obligation then, though the main contract is wholly null and void, the plaintiff is entitled to claim under the covenant. AIR 1915 Bom 102 (105) = 39 Bom 358 (DB).

(2) A valatdan patta (mortgage of an unrecognised portion of a Bhag) was held void, but a personal covenant to compensate if possession of the mortgagee were disturbed could be enforced. AIR 1914 Bom 102 (103) = 38 Bom 249 (DB).

(3) Even though an agreement between two persons that one of them should buy tenancy from Collector while both of them would share the price and the lands as well is inoperative in view of the provisions of Section 19 of the Colonization of Government Lands (Punjab) Act of 1912 a subsequent agreement between the parties after both of them have acted under the original agreement for a long time to continue the then existing state of affairs and providing for indemnity if there is a breach of the agreement is an independent contract. Therefore the party who had advanced half-share of the purchase money is entitled to recover it from the other when he commits a breach of the contract. AIR 1933 Lah 291 (292) (DB).

(4) Even assuming that Section 65 does not help the transferee of an interest to recover the money paid when he had paid that money with full knowledge that the interest transferred was in law not capable of being transferred there is no bar to his claiming back the amount on the ground that there was a collateral agreement to repay the money by an arrangement of which the transfer was an integral part and that agreement had failed when the transfer was declared void and not binding on him. (1886) 9 Mad 441 (444) (DB).

Section 65 — Note 4 (e) (contd.)

(5) Although it is open to the lender to enforce the personal covenant contained in a document which, as affecting security of immovable property, must be registered, but in fact is not registered and as such it is void, but he cannot necessarily be thrown upon his right to enforce the personal covenant, it is open to him to repudiate the contract altogether and claim a relief outside it in the form of restitution under Section 65. ILR (1965) 44 Pat 917 (DB).

(f). Contract of minors.— (1) A transaction in which a minor is a contracting party does not amount to a contract at all and therefore the minor cannot be compelled under Section 65 to return any money received by him in such a transaction. AIR 1940 Nag 327 (328) = ILR (1940) Nag 632 ** AIR 1936 Nag 15 (16) = 31 Nag LR (Sup) 62 (DB) ** AIR 1929 Nag 156 (160) = 25 Nag LR 85. (Contract by minor declared void — Money alone lent under contract — No decree for return of money can be passed against minor.) ** AIR 1927 Nag 116 (116) = 23 Nag LR 8 ** AIR 1924 Lah 294 (295). (Sale by minor — Repudiation of — Minor cannot be ordered to refund the money even in equity.) ** AIR 1921 Bom 147 (1) (147) = 45 Bom 225 (DB) ** AIR 1919 Nag 76 (78) = 15 Nag LR 149. (Minor cannot be compelled to restore even in equity. Difference however should be made between cases where specific property capable of recovery passes and cases where money passes.) ** (1911) 8 All LJ 1058 (1058, 1059) (DB) ** (1904) 26 All 342 (343) (DB) ** AIR 1967 Orissa 68 (69) = 32 Cut LT 1149 ** AIR 1959 Andh Pra 100 (101) = 1959 Andh LT 152 (DB).

[But see AIR 1959 Mys 188 (190) = 37 Mys LJ 496.]

(2) A minor, who on attaining majority pays off debts incurred by him during minority, cannot recover those amounts subsequently on the ground that the contracts were void. AIR 1940 All 12 (14, 15) (DB).

(3) One who has knowingly dealt with the minor is not entitled to claim from him equity, whilst compelled to restore matters to the 'status quo.' 1904 Pun Re No. 33, p. 114 (116) ** AIR 1940 Oudh 119 (119) = 15 Luck 265 (DB) ** AIR 1937 Oudh 521 (523).

(4) Section 65 applies where the plaintiff is under a mistake of fact as to the defendant's minority, which is not discovered till after the institution of the suit. AIR 1926 Nag 108 (109).

(5) A Court while setting aside a lease executed by a minor can take into consideration the facts that the minor was very nearly of age when he executed the lease and put him on term that before he could deprive the lessee of possession

he should return the money received by him. AIR 1928 All 286 (287) (DB).

(6) Minor fraudulently representing himself to be major cannot recover the property sold by him unless he refunds the consideration. AIR 1930 Mad 945 (951, 954) = 54 Mad 112 (DB) ** AIR 1933 All 371 (372) ** (1921) 3 UPLR 94 (97) (Lah). (Minor not bound to return benefit unless guilty of fraud.) ** AIR 1917 Bom 221 (222) = 41 Bom 480 (DB). (Minor guilty of fraud may be deprived of plea of minority.) ** 1910 Pun LR No. 98, p. 279 (281) = 1910 Pun Re No. 76 (DB) ** ILR (1963) 1 Punj 22 (DB).

[But see AIR 1941 Pesh 38 (40) (DB) ** AIR 1937 All 610 (613, 616, 617, 618) = ILR (1937) All 860 (FB). (Fraudulent concealment of fact of minority — Property transferred to minor and traceable — Money decree against him as compensation cannot be passed.) ** AIR 1922 Oudh 30 (31) = 24 Oudh Cas 348 ** AIR 1919 All 453 (453) = 40 All 558 (DB). (A minor cannot be made to repay money which he has spent merely because he received it under a contract induced by his fraud.) ** AIR 1919 Mad 224 (225) (DB). (Minor cannot be held liable to refund the mortgage money even if he misrepresented his age.)]

(7) Party alleging fraud must prove that he was thereby deceived into action. Minor not knowing the extension of his minority by law commits no fraud or misrepresentation and is not bound to refund consideration. AIR 1935 Cal 198 (199) = 61 Cal 1075.

(8) A minor is entitled to recover under Section 65 his contribution to a partnership which is found to be void under Sections 4 and 30 of the Partnership Act. AIR 1952 Mys 131 (133) = ILR (1953) Mys 16.

(9) Vendee, who was minor at the date of purchase, can recover consideration money, if he is subsequently dispossessed of the property purchased. (1913) 35 All 370 (373) (DB).

(10) Where in a suit by minor for recovery of purchase money the defendant raised the plea that the contract was void due to plaintiff's minority it was held that the defendant should under Section 65 return the property or pay the purchase price as compensation. Madh BLJ 1954 HCR 1749 (1750, 1751).

4 (g). Contracts on behalf of minors.—

(1) Where the money received under a contract entered into on behalf of a minor was not used for the minor's benefit he cannot be compelled to return the money on the contract being set aside as not binding on him. AIR 1929 Lah 279 (281) (DB). (Compromise entered into on behalf of minor by next friend.) ** AIR 1936 Mad 595 (597) (DB). (Mortgage of family property including minor member's interest in property — Money obtained not applied to minor's benefit —

Section 65 — Note 4 (g) (contd.)

Relief under Section 65 not available against minor.)

(2) Sale of ancestral property in Mahomedan minor's hands by his guardian for satisfying father's debts is not for minor's benefit and no equitable relief by way of refund can be granted to the vendee. AIR 1929 Lah 331 (332).

(3) A minor who has received the benefit under a transaction entered into on his behalf must be compelled to restore that benefit when the transaction is set aside. (1908) 11 Oudh Cas 1 (13) (DB). (Liability arises not only under Sections 64 and 65 but also under equity.) ** AIR 1925 Bom 499 (499, 500) = 49 Bom 576 (DB). (Sale by step-mother of minor to pay off a binding mortgage debt and defray marriage expenses of minor — Though sale can be set aside, minor must refund money received as consideration.) ** (1887) 9 All 340 (347) (DB). (Mortgage set aside as void under Section 18 of Act 40 of 1858.) ** 1888 Pun Re No. 96, p. 258 (261) (DB). (Mortgage effected by mother as de facto guardian neither proper nor beneficial to minors — Mortgage must be declared invalid but possession must be given to minors on condition that they repay so much of the consideration which has been applied to the benefit of their estate.)

(4) If it is proved in a suit by minor for possession of properties alienated by guardian, that a substantial part of the money was not required for minor's benefit the whole sale is void and the minor shall have to pay the remaining portion of the purchase money to the purchaser but if a substantial portion is spent for his benefit, the sale would be upheld. AIR 1916 Mad 239 (240) (DB).

(5) A contract effected on behalf of the minor by a person not qualified in law to represent the minor is void and the minor is not required to refund the consideration. AIR 1927 Nag 290 (293). (Disqualification under personal law.) ** AIR 1929 Mad 110 (113) (DB). (Sale by person who is neither legal nor de facto guardian of minor — Purchaser legal guardian himself — Money although applied to relieve burden on the estate of minor cannot be recovered when sale is set aside.) ** (1896) 18 All 373 (375) (DB). (Mortgage of minor's property by unauthorised person — Lease back of property — Suit against minor for arrears of rent — Held suit must be dismissed because mortgage on which validity of lease depended was itself void.)

(6) A minor entered into a contract of sale and paid certain sum to the other party for purchasing a stamp. The stamp was purchased and was put on record. In the case for specific performance of the contract, by the minor: Held that the other party derived no benefit from

the stamp and so was not liable to refund. AIR 1929 All 332 (333).

(7) Where a contract for purchase of immovable property entered into by guardians of a Muhammedan minor was found to be void ab initio, the defendant who had received money from the guardians was liable to repay the amount to the minor. (1964) 2 Andh WR 183 (DB).

4 (h). Contracts by persons of unsound mind. — (1) Section 65 cannot bind a party to a contract with a person of unsound mind. Such contract being void no refund of money paid to unsound person can be claimed. 1912 Pun LR No. 149 p. 450 (453) = 1912 Pun Re No. 41 (DB) ** AIR 1917 Cal 566 (567) (DB).

[But see (1904) 1 All LJ 43 (43, 44). (Money lent by a lunatic to another can be recovered in a suit on his behalf by his next friend under Section 65 even though the contract under which it was lent was void in law.)]

4 (i). Refund in cases of frustrated contracts. — (1) Party to the contract is liable to return benefit derived under a contract which becomes impossible of performance. AIR 1944 Mad 239 (243) = ILR (1944) Mad 124 ** AIR 1950 All 592 (594, 595) = ILR (1952) 2 All 681 (DB). (Marriage contract frustrated by death of bride — Parties to contract are entitled to return of ornaments gifted in consideration of marriage and also legitimate expenses incurred for the ceremonies which precede actual marriage.) ** AIR 1935 Nag 208 (209) = 31 Nag LR 368. (Shop let out burnt down — Lessee entitled to lease money paid in advance.)

(2) If after the execution of the contract or at any stage during the operation of the contract its performance becomes impossible by any supervening event then each party is bound to restore to the other any advantage which he had taken under the contract. AIR 1970 Raj 36 (49) (DB) ** AIR 1961 Raj 277 (280) = 1961 Raj LW 563. (Contract to cut trees for a fixed term — Intervening legislation rendering cutting of trees without licence unlawful — Licence to cut trees refused by Government — Contract becoming impossible of performance — Each party to restore benefit received under contract.) ** AIR 1949 East Punj 301 (305). (Lease of right to collect fees at tonga stand — Lessee not able to collect fees due to reasons beyond the control of parties to lease, i.e. tongas not using the stand — Held, lessee was entitled to recover the amount paid by him for the lease on the principles underlying Section 65 even though the section itself did not apply in terms to the case.) ** AIR 1915 Lah 310 (311) (DB). (Covenant to sell land becoming impossible of performance by subsequent legislation —

Section 65 — Note 4 (i) (contd.)

Vendee entitled to compensation under Section 65.)

[But see AIR 1919 Lah 142 (144) = 1919 Pun Re No. 42. (Contract for advertisement of plaintiff's book in defendant's almanac — Defendant doing every thing under the contract but contract failing on account of almanacs having been seized by the Government — Money paid to defendant cannot be recovered.) ** AIR 1943 All 327 (327, 328) = ILR (1943) All 745. (Ejection of tenant and settlement of occupancy tenancy on third person — Third party dispossessed when original tenant was restored possession under subsequent legislation — Third Party's claim for refund of money paid will not lie.)]

(3) A shipowner may refuse to ship goods on a reasonable apprehension of "restraints of prices" although no restraint is actually in existence at the time. The impossibility of performance of a contract makes it void. AIR 1917 Sind 53 (56, 57) = 10 Sind LR 100.

(4) Contract with ship company — Performance made impossible by Government prohibition — Company asked charterer to deposit freight charges for unloading, etc. — Held, that plaintiffs were entitled to recover with interest freight amount and defendants were entitled to charge reasonable expense for unloading. AIR 1916 Bom 265 (268) = 40 Bom 529 ** AIR 1926 Mad 175 (177) = 49 Mad 200 (DB) ** AIR 1925 Mad 727 (729) = 48 Mad 459 (DB). (Ship is destroyed before commencing voyage.)

(5) Even if parties had made no provision in their contract for the event which has frustrated the contract, the law would imply for them what it assumes they would have agreed had they contemplated this unforeseen contingency at the time they entered into the contract. Certainly the claim of the party to recover the money would have arisen from a remedy in quasi contract for not having got what the plaintiff had bargained for. At any rate in such cases, Secs. 56 and 65 of the Contract Act would have come to the rescue of the aggrieved party. 1958 Andh LT 960.

[But see AIR 1930 Sind 282 (283) (DB). (Advance freight paid for fulfilment of contract need not be returned if contract becomes impossible for no fault of the party. AIR 1925 Mad 727 = 48 Mad 459 and AIR 1916 Bom 265 = 40 Bom 529, Distinguished.)]

4 (j). Earnest money. — (1) Sections 64 and 65 of Contract Act, though they must be taken to deal also with the return of benefits and/or advantages received under contract validly rescinded, have no application to cases of forfeiture of earnest money paid under the contract. AIR 1952 Cal 93 (98) ** AIR 1968 Assam 26 (27) = ILR (1964) 16 Assam 513 **

AIR 1959 Pat 176 (179) = 1958 BLJR 626.

[See however AIR 1939 Cal 14 (15). (Principle of section applies and hence earnest money can be ordered to be refunded.)]

(2) Where the basis of an agreement to purchase a plot was that permission to build a small house thereon would become available it was held that the purchaser was entitled to recover the earnest money paid by him when the permission sought was refused. AIR 1937 Lah 781 (782).

(3) Where after a decree for specific performance of a contract of sale was passed and while the appeal against the decree was pending the rights in the property sold became vested in the Government under the Zamindari Abolition Act it was held that the contract of sale itself must be deemed to have become void. In the circumstances a decree for refund of the purchase money and compensation by way of damages granted to the purchaser would constitute the most appropriate relief. AIR 1954 All 450 (452) (DB).

(4) An amount of money paid as payment of the price can be recovered under Section 65. AIR 1958 Mys 10 (14) = ILR (1957) Mys 72.

4 (k). Obligation of heirs and representatives-in-interest. — (1) Hindu son is bound to discharge liability of father to make restitution under Section 65. AIR 1927 Oudh 177 (180) (DB).

(2) Where the trust estate received the consideration paid under a transfer of its properties which was ultra vires the powers of the trustee the receiver in possession of the trust properties is bound under Section 65 to return the consideration when the transfer is set aside as void. AIR 1940 Pat 81 (87) = 18 Pat 654 (DB).

4 (l). Contract by manager of joint Hindu family. — (1) Section 65 has no application to a mortgage becoming unenforceable for want of legal necessity and benefit to the family. AIR 1920 Pat 441 (445) = 5 Pat LJ 622 (DB) ** AIR 1929 All 387 (388). (A coparcener avoiding an alienation by the karta for want of legal necessity is not bound to refund the consideration.)

(2) A mortgage by the karta without legal necessity is a void contract and hence under Section 65 which applies to void contracts as well the mortgagor is bound to return the money obtained as soon as it is discovered that it is void. AIR 1927 Oudh 177 (178, 179) (DB).

(3) Money obtained by some members of joint Hindu family including father, by sale of joint family property applied to pay off simple money debt and partly for payment of an antecedent debt under usufructuary mortgage — Sale if challenged, purchaser is entitled for return

Section 65 — Note 4 (l) (contd.)

of consideration paid on behalf of mortgage debt only. AIR 1929 All 659 (661) (DB).

4 (m). Contract by co-sharer. — (1) A joint occupancy tenant cannot repudiate the mortgage made by his co-sharers without paying the mortgage-money realised by the latter from the mortgagee. AIR 1924 All 746 (747).

4 (n). Sale. — (1) When the agreement for purchase of land is declared to be ineffectual in a suit for specific performance of the same, the intending vendor is bound to restore the consideration money received by him. (1889) 11 All 47 (56) = 15 Ind App 211 (PC).

(2) In a suit by vendee for specific performance of agreement of sale, the Court, while refusing specific performance on the ground that the terms of the contract were uncertain, can grant the alternative prayer of the plaintiff for the refund of purchase money paid in furtherance of the contract. The contract being declared void by the very judgment, the question of limitation does not arise. (1903) 25 All 618 (627) (DB).

(3) Where under a contract for the sale and purchase of a car the parties acting under a bona fide mistake fixed a price which was in excess of the current controlled price it was held that the remedy of the purchaser whether the contract was treated as voidable on the ground of mutual mistake or as void on the ground of transgressing the control order, was to return the car and claim the price paid by him and not to sue for the difference in the price. AIR 1955 Mad 662 (663) = ILR (1956) Mad 712 (DB). (Section 72 does not apply as there was no question of the money having been paid under mistake. AIR 1952 Mad 779, *Reversed*.)

(4) Where the sale is void because the parties were under a mutual mistake as to the essential facts the purchaser can recover the sale consideration but not any damages or interest. AIR 1930 All 252 (254) (DB).

(5) Where a sale of his minor son's property was executed by a father but the sale was subsequently set aside at the suit of the minor on the ground that it amounted to fraud on the law of registration it was held that the father was bound to return the consideration to the purchaser under Section 65. His plea that he had paid over the money to the person who had given an indemnity bond to the purchaser to persuade him to buy the property of the minor would not save him from the liability. AIR 1944 Mad 211 (216, 218) = ILR (1944) Mad 663 (DB).

(6) Where because of the happening of an eventuality which was not in the contemplation of the parties at the time of their entering into the contract the

purchaser rescinded the bargain and sued for the recovery of the purchase price paid by him it was held that he was entitled to recover the same. AIR 1934 Nag 248 (249).

(7) A party paying money for transfers of occupancy and ordinary tenant rights under C. P. Tenancy Act is entitled to a refund on failure of consideration. AIR 1925 Nag 375 (375) ** 1942 Nag LJ 324 (324, 325).

(8) Where the purchaser of occupancy rights redeemed the mortgage of those rights from the landlord-mortgagee and the latter subsequently evicted him by obtaining a cancellation of the sale it was held that the purchaser was entitled to the refund of the money which he paid to him. AIR 1921 Lah 299 (300) (DB).

(9) On sale becoming void for want of title in seller of which vendee has knowledge, vendee can claim return of earnest money but neither interest nor damages. AIR 1924 Lah 476 (478, 479) (DB) ** AIR 1963 Ker 148 (151) = 1962 Ker LT 12. (But he cannot claim interest unless fraud is proved. AIR 1938 All 593 (FB), *Dissented from*.) ** AIR 1961 J & K 66.

(10) Judgment-debtor found not to have saleable interest in property sold in execution — Suit by auction purchaser for refund of purchase money is not maintainable. The doctrine of money had and received cannot be invoked. AIR 1965 Andh Pra 239 (247) = (1965) 1 Andh LT 391 (FB).

(11) Where the purchaser's suit under Order 21, Rule 63, Civil P. C. against his vendor, the vendor's transferor and the creditors of the latter who had attached the property failed it was held that the purchaser was entitled to recover the money paid by him from his vendor. AIR 1936 Nag 268 (269) = ILR (1937) Nag 94.

(12) The purchase of a property from the judgment-debtor, after it has been sold in execution, with the condition that the purchaser would get back the purchase money if he failed to have the sale set aside is not opposed to public policy and the purchaser is entitled to have his money back in the event of his application to set aside the sale being dismissed. AIR 1919 All 72 (2) (74) = 42 All 7 (DB).

(13) Consideration failing, vendor must refund money received by him under sale of mortgage rights. AIR 1938 Lah 566 (567).

(14) Alienation of trust property not provided by trust deed and in order to purchase one's own property, is invalid and does not bind trust and as such alienee is entitled for refund of consideration money. AIR 1930 Mad 372 (374) (DB).

Section 65 — Note 4 (n) (contd.)

(15) An alienation to a non-agriculturist does not become void when the conditions prescribed by Section 14 of the Punjab Alienation of Land Act, 13 of 1900 are not complied with and therefore the alienee cannot recover the money paid by him. AIR 1938 Lah 820 (822) = ILR (1939) Lah 30.

(16) A purchaser cannot recover back the redemption money paid for an undisclosed mortgage, after his purchase was found to be sham and unenforceable. It is not an advantage under agreement and also the sale was not "discovered to be void." AIR 1931 Bom 39 (41).

(17) Unregistered sale deed relating to property worth more than Rs. 100 is not void. Under Section 49 it only does not affect the property. Provisions of Sec. 65 are attracted to it. ILR (1954) Patiala 244 (250). (AIR 1939 PC 110, Rel. on.)

(18) The principle that a purchaser is entitled to sue and recover the purchase money in an action for money had and received if there is a total failure of consideration applies to cases of sale under Revenue Recovery Act also. AIR 1964 Ker 109 (111) = 1964 Ker LT 102.

(19) A vendee agreeing to purchase land on the happening of an event is entitled to refund of money agreed to be adjusted against the sale, in case the happening of the event subsequently becomes impossible. AIR 1969 Orissa 171 (175) = 34 Cut LT 1227.

(20) Agreement to sale land — Payment of advance towards purchase — Subsequent cancellation of agreement by purchaser requesting refund of advance as soon as land is sold — Seller accepting cancellation and desiring to refund advance as soon as land is sold — Claim for refund of advance before land is sold — Facts proving that no specific land was agreed to be sold to purchaser — Held, expression 'as soon as land is sold' could be ignored as 'meaningless addendum' and purchaser could claim refund even before land is actually sold to another purchaser. (1965) 67 Punj LR 824.

4 (o). Mortgages.— (1) Where a mortgagor seeks to recover possession of property from a mortgagee under a void mortgage he can do so only on payment of the mortgage money. AIR 1951 All 589 (590) = ILR (1953) 1 All 907 (DB). (Mortgage deed executed in 'fraud of registration law is invalid.) ** AIR 1956 All 639 (640). (Mortgage of ex-proprietary and occupancy tenancy is void—Mortgagor should be given relief even though his action is in the suit for redemption and not for possession.) ** AIR 1955 J & K 20 (22). (Mortgage executed without observing legal formalities — Mortgagor seeking to recover possession must return consideration received by him.)

(2) Mortgage of insolvent's property by Receiver set aside and adjudication annulled — Mortgagee was entitled to possession until he was repaid the sum advanced. AIR 1935 Lah 112 (113).

(3) Mortgage, without previous sanction of Deputy Commissioner, required under Punjab Colonization of Government Lands Act, Section 19 — Parties knowing that sanction was necessary but not knowing that contract was void — Case falls within Section 65. AIR 1935 Lah 401 (402) (DB) ** AIR 1944 All 276 (278) = ILR (1944) All 574 (DB). (Even where there is no personal covenant in an illegal mortgage or zarpeshgi lease deed, the plaintiff is entitled to claim refund of consideration.) ** AIR 1942 All 409 (409) = ILR (1942) All 817 (DB). (Cause of action arises when agreement is made — Section 68, T. P. Act, is not applicable.) ** AIR 1940 PC 204 (207, 210) = 67 Ind App 431 = ILR (1940) Kar PC 419. (Execution proceedings of mortgage decree pending — Fresh mortgage of suit properties without Collector's permission.) ** AIR 1935 All 256 (257) ** AIR 1934 Lah 853 (857) = 15 Lah 751 (FB). (61 Ind Cas 604 (Lah) and Letters Patent Appeal No. 131 of 1921, Overruled.) ** AIR 1929 Nag 241 (243) ** AIR 1925 Oudh 212 (214). (Invalid mortgage acted upon by both parties.) ** AIR 1918 Oudh 22 (24) = 20 Oudh Cas 306 (DB). (Mortgage found to be void for want of proper attestation.)

(4) Section 65 does not apply to mortgages which are valid up to the mortgagor's life time; therefore the mortgagee cannot recover the mortgage money when after the mortgagor's death, the mortgage becomes void under Section 28 Broach and Kaira Encumbered Estates Act. AIR 1916 Bom 65 (65, 66) = 41 Bom 546 (DB).

(5) Mortgagee of a void usufructuary mortgage cannot recover money from mortgagor if he is not put in possession. (1910) 32 All 383 (388, 389).

(6) Where after the death of the mortgagor the mortgagee purchased the property fraudulently from the guardian of the minor sons of the mortgagor it was held when the sale was set aside subsequently that mortgagee could only recover the specific sum lost by him by the sale having been set aside. The mortgage security which was abandoned by him by the acceptance of the sale did not revive and give him cause of action to sue upon the mortgage. AIR 1942 Pat 247 (249) (DB).

4 (p). Leases.— (1) Where after the transferor had accepted the benefit and put the transferee in possession the transfer is found to be void as forbidden by law it would not be open to the former to oust the latter without refunding the benefit he had received. AIR 1936 All

Section 65 — Note 4 (p) (contd.)

215 (216). (Joint family getting perpetual lease granted by one of its members.) ** 1961 Jab LJ 1446 (DB).

(2) Lease of sir land in perpetuity for a premium over Rs. 100 requires registration — In absence of a registered lease, the lessee becomes a tenant from year to year, and if the landlord desires to eject him he must return the premium amount. AIR 1927 Nag 353 (353).

(3) Where a lease, although it was compulsorily registrable, was not registered and therefore it fell through it was held that the money paid under it to the lessor was to be treated as money had and received by him and returnable as such. AIR 1949 Nag 389 (394) = ILR (1949) Nag 849 (DB).

(4) When a lease is void or the ground of the term of the lease exceeding the statutory term there is no actual illegal purpose carried into effect and Section 65 applies. Maxim, in pari delicto potior est conditio possidentis will not apply. On lease becoming void after expiry of statutory period, lessor is entitled to get back possession on payment of compensation to the lessee. AIR 1935 Nag 58 (59) = 31 Nag LR 208.

(5) Where a malguzari forest was leased without sanction in ignorance of the fact that such sanction was needed and subsequently the Deputy Commissioner took the forest under protection under C. P. Land Revenue Act it was held that the lessees could recover the consideration paid by them from the lessor under Section 65. AIR 1931 Nag 137 (138).

(6) A landlord who has received under the agreement of tenancy rent from his tenant which is found to be in excess of the fair rent due on it is bound to refund the excess. AIR 1957 Raj 392 (395) = ILR (1957) 7 Raj 145.

[See also AIR 1952 Sau 93 (95). (Contract or receipt of rent voluntarily paid by tenant is not ipso facto void — When contingency of its becoming void to the excess of standard rent when fixed is removed by Rent Control Act being repealed no question of refund by landlord can arise.)]

(7) The settlement regarding the payment of quit rent for a village was effected under the Bombay Summary Settlement Act between the Government and the parties under a mutual mistake that the latter were the superior holders of all lands in the village while in fact some wanta lands were the property of certain girassias it was held that the quit rent paid by the parties so far as the wanta lands were concerned was liable to be returned under Section 65. (1893) 17 Bom 407 (413) (DB).

4 (q). Marriage contracts.— (1) Under Section 73 the promisee can recover compensation for any loss or damage

caused to him by the breach of marriage contract. Under Section 65 he can get the refund of money, ornaments, etc., given by him as consideration for the promise or compensation as on a failure of consideration. AIR 1917 Bom 61 (62) = 42 Bom 499 ** (1909) 33 Bom 411 (416, 417) (DB). (Marriage brokerage agreement.) ** AIR 1954 Orissa 17 (23) = ILR (1953) Cut 558 (DB) ** AIR 1949 Pat 250 (252, 253) = 27 Pat 287 ** (1905) 1 Cal LJ 261 (268, 269). (Presents given to bride or money paid under a contract of marriage can be recovered when marriage is broken.)

[See however AIR 1947 Pat 132 (134). (Party paying tilak rescinding contract of marriage — He cannot recover the amount.)]

4 (r). Other instances.— (1) A suit by the members of an association, which at its formation was illegal by reason of Section 4 (2) of the Companies Act of 1913, for the refund of their subscription is maintainable, even though the association had carried out a part of the business for which it was formed. AIR 1930 Rang 21 (25) = 7 Rang 540 (DB). (In granting the relief the Court is not giving effect to an illegal contract but on the other hand brings such a contract to an end. The suit is governed by Article 120 of the Lim. Act and not by Article 62.)

(2) Where a corporation receives money or property under an agreement which turns out to be ultra vires or illegal, it must either return it or make compensation. AIR 1916 Cal 136 (149) = 43 Cal 790 (DB).

(3) Agreement void ab initio as contravening provisions of Section 28 of the Legal Practitioners' Act — A client is bound to make compensation to the vakil for the advantage received. AIR 1930 Mad 132 (135) = 53 Mad 309 (DB).

(4) Person exchanging a house worth more than 100 rupees by an unregistered deed, can recover possession of the same but must refund the consideration. 1913 Punj LR No. 203, p. 687 (688, 689) (DB).

(5) Co-operative Credit Societies Act, Section 29 — An agreement to advance money to non-member cannot be enforced — But if it is advanced it can be recovered on principle of implied contract to repay. AIR 1929 Lah 330 (331) (DB).

(6) Though benami character of transactions cannot be proved by virtue of Section 66, Civil P. C., still they are not illegal — Suit would lie to recover consideration. AIR 1923 Nag 11 (12).

(7) Though partnership between partners to jointly work liquor shop is void refund is allowable under Sec. 65. AIR 1937 Nag 250 (251) = ILR (1937) Nag 376.

[But see AIR 1944 Mad 415 (415, 416). (No refund is allowable either under Section 84, Trusts Act or Section 65, Contract Act.)]

Section 65 — Note 4 (r) (contd.)

(8) A party who received some advantage under a champertous agreement which was found to be void, should be refunded to the other party. AIR 1957 Raj 89 (94) = ILR (1957) 7 Raj 204 (DB).

(9) An agreement between a landlord and transferee from a tenant that the former would not object to the transfer in consideration of the payment made by the latter is a valid compromise of a disputed claim which is binding on both. So long as the landlord has not raised any objection to the transfer there is no failure of consideration on his part and the transferee cannot compel him to refund the amount paid by him if the transfer is avoided by his transferors themselves. AIR 1916 Nag 71 (72) = 13 Nag LR 114.

(9-A) Suit for stay order — Alternative claim under Section 65 — Alternative claim becomes nugatory when there is a valid contract containing an arbitration clause. AIR 1967 Cal 372 (375).

(10) Contract to fell trees from Government forest land — Agreement providing for felling of some sound trees and some unsound trees — Soundness of trees to be determined by Government by external appearances — Contractor knowing this fact when he entered into the contract — Contractor, finding 75 p. c. trees unsound, rescinding the contract requesting refund of security deposit — Held, Section 65 did not apply. AIR 1963 Orissa 217 (220) = (1963) 5 OJD 361.

(11) Contract by managing director without consent of directors with other private company of which he is member — Contract is not void — Managing director is not liable to make restitution. AIR 1959 Cal 715 (727) = (1960) 30 Com Cas 582.

(12) Defendant being highest bidder at auction of right to collect fees in markets — Defendant however failing to execute registered lease deed representing terms of auction — Defendant exercising his right under auction — Held, Ss. 65 and 70 applied and defendant was bound to pay compensation to plaintiff. AIR 1965 Andh Pra 191 (193) = (1965) 1 Andh WR 176 (DB).

(13) Goods purchased taken away by police as stolen goods — Seller prosecuted and discharged — Goods ordered to be handed over to P. W. D. authorities — Purchaser was entitled to recover purchase money. AIR 1961 Punj 437 (438) = ILR (1960) 1 Punj 465.

(14) Policy vitiated by suppression of material facts — No right to refund of money paid by insured to insurance company — Action for money had and received cannot be entertained. AIR 1962 SC 814 (821) = 1962 Supp (2) SCR 571.

(15) Confirmation of sale — Suit by third party — Judgment-debtor found to have no saleable interest in property — Dispossession of auction-purchaser — Auction-purchaser can recover purchase money from decree-holder except in certain circumstances — Right of auction-purchaser may be founded on principle underlying Section 65, Contract Act, or on principle of money had and received. AIR 1964 Raj 140 (145) = 1964 Raj LW 178 (DB).

(16) Agreement to sell contract — No intention to cheat at the time of agreement — Contract itself having spent its force no obligation to transfer contract — Only obligation on the transferor was to return the consideration. 1964 (1) Cri LJ 374 (J & K).

(17) Settlement of debt and amount of debt paid, during pendency of creditor's application under Bombay Agricultural Debtors Relief Act for adjustment — Debtor not aware of application — Settlement is void — Creditor held bound to refund amount received under settlement. AIR 1967 Guj 46 (47, 48) = (1965) 6 Guj LR 817.

5. Compensation.— (1) Compensation is awarded under the section as an alternative for specific restitution where such restitution is found to be impossible. AIR 1948 PC 56 (58) = 74 Ind App 295 = ILR (1947) Bom 860 ** AIR 1957 Raj 89 (94, 95) = ILR (1957) 7 Raj 204 (DB) ** AIR 1939 Lah 564 (565) (DB) ** AIR 1939 Mad 957 (960, 961, 962) = ILR (1939) Mad 928 (DB). (Vendee unable to restore goods must make compensation.) ** 1968 MPLJ 425 = 1969 Jab LJ 304 (DB). (Contract between plaintiff and defendant, Cantonment Board for repairs of road — Work carried out by plaintiff — Contract found void — Advantage gained by defendant not restorable it being the material supplied and labour bestowed — Advantage gained therefore can only be refunded by compensating the plaintiff in terms of money. In such a case Section 65 is perhaps inapplicable.)

(2) Section 41 of the Specific Relief Act, 1877 makes a special provision for a case of cancellation of an instrument and it is unnecessary to have resort to the more general provision in Sec. 65 of the Contract Act. Nevertheless it is useful to consider that section since it gives an indication of what compensation justice may require in such cases. 1963 Ker LT 1022.

(3) The compensation contemplated by the section is only the equivalent of the benefit retained in terms of money and not the loss or damage which has arisen to the party claiming compensation by the breach of the contract. AIR 1948 PC 56 (58) = 74 Ind App 295 = ILR (1947) Bom 860 ** AIR 1955 All 408 (414) (DB). (Section does not contemp-

Section 65 — Note 5 (contd.)

late payment of loss or damage on the ground of breach of contract.)

[See also AIR 1958 SC 560 (577) = 1959 SCR 379. (Works contract — Suit where claim is in quantum meruit is suit for damages for breach of contract and not for price of goods sold and delivered under the contract.)]

(4) Relief contemplated by Section 65 is that the party prejudiced by the mistake should be relieved from the consequences thereof — He is entitled to be placed in the same position as he would be if there had been no mistake and also to be compensated for any loss which may have necessarily resulted from the mistake. (1904) 14 Mad LJ 443 (459) (DB). (Release of debt by mistake—Debt barred by limitation on date when mistake is discovered — Party will not only be entitled to declaration that release is not binding but also for compensation against loss which resulted from the debt having become barred.)

(5) The section does not impose on party any obligation to make compensation in respect of that of which he has not enjoyed the benefit. (1905) 27 All 592 (602) (DB) ** AIR 1940 All 340 (341, 342). (Case of lease not binding on lessee.)

(6) A right to compensation when it is clearly established to have arisen under this section cannot be denied on a consideration of any contrary principle contained under the English law. AIR 1955 Assam 86 (93) (DB).

(7) Where a contract had been performed in part, the principle of compensation on account of frustration of contract could not come in aid and Section 65 cannot be invoked for refund of the balance. AIR 1955 Mad 606 (607).

(8) Right to compensation does not depend upon the possibility of apportionment. (1899) 23 Bom 15 (21).

(9) In the absence of any contract there is no liability to pay any interest on compensation granted under S. 65. AIR 1939 Mad 957 (963) = ILR (1939) Mad 928 (DB) ** Madh BLJ 1955 HCR 400 (404). (Frustrated contract. No evidence that party refused to restore benefit or earned interest on the amount retained — Held, other party is entitled only to a refund of money actually advanced by him.)

(10) Mortgage decree containing no provision as to interest — Defendant taking several adjournments to pay the decretal amount — Plaintiff including interest in the amount — Subsequently defendant contending that he was not liable to pay interest — Held that though the contract of the defendant created a contractual obligation to pay interest, such an agreement was void for mistake of fact. (Interest was awarded as compensation for the benefit obtained under a void

agreement. (1904) 28 Bom 393 (399) (DB).

(11) Compensation should be made by a person who received unlawful advantage under an agreement which is void ab initio. An unlawful agreement does not render the agreement for restitution unlawful. (1909) 11 Bom LR 693 (698) (DB).

[But see AIR 1954 Kutch 7 (8). (Compensation cannot be awarded under a contract which is void under Section 23.)]

(12) A contract may be void on the ground of non-compliance with statutory requirements but still the party who has performed under it will be entitled to restitution by way of compensation for damages under Sections 65 and 70 of the Act. AIR 1956 Cal 203 (204) (DB). (Contract invalid on the ground of non-compliance with Section 103 (2), Bengal Municipal Act, 1932.) ** AIR 1936 All 723 (728, 729, 730) = 58 All 1069 (DB). (Contract violating Section 96 (1) (b) of U. P. Municipalities Act.)

(13) The vendor under a transfer which is set aside as being without the permission of the Collector under para. 11 of Sch. III of the Civil P. C. is entitled to compensation under Section 65 of the Contract Act. AIR 1951 All 630 (632) (DB).

(14) Where the sale deed executed in favour of a person in return for the help rendered by him to the vendor in recovering his share of inheritance is set aside on the ground of undue influence the vendee is entitled to be compensated to the extent of the expenditure incurred by him in helping the vendor to recover his share. AIR 1927 Oudh 92 (95) = 1 Luck 144 (DB).

(15) When a contract between the employer and employees is rendered void by a subsequent act of legislature, the employer is liable to make compensation to the employee for work done by him and the liability can be enforced against him in spite of the fact that he has paid the unclaimed wages to the Board under Section 3 (1) of Bombay Labour Welfare Fund Act. AIR 1958 SC 328 (338) = 1958 SCR 1122.

(16) Invalid mortgage of tenancy rights under Oudh Tenancy Law serves as a valid acknowledgment of old debts and only a money decree can be passed on the original transaction. But the mortgage being void, compensation under Section 65 cannot be awarded. AIR 1925 Oudh 401 (402).

(17) Where property of a lunatic is mortgaged without authority of Court, it is void; but mortgagee who had spent money in causing a previously subsisting attachment to be raised, is entitled to be compensated for the money thus spent. (1913) 14 Mad LT 489 (490, 491) (DB).

(17-A) A lessor delivering possession of land to the lessee is not liable to refund

Section 65 — Note 5 (contd.)

the premium received by him, if after the creation of tenancy, there is a change in legislation and the tenant has to hand-over possession of the land to a third person. All that he is entitled to do is to stop payment of rent but he is not entitled to any refund for the amount that he might have paid earlier for obtaining the tenancy. AIR 1967 All 262 (263) = 1966 All LJ 960 (DB). (AIR 1922 All 6, Overruled.)

(18) Where the sale deed is discovered to be void or becomes void, the legal representatives of the deceased vendor can be sued for compensation. AIR 1961 Bom 97 (103) = 62 Bom LR 360 (DB).

6. Pleadings and proof. — (1) Claim under Section 65 involves mixed question of law and fact — Plaintiff must allege and prove that there was agreement which was discovered to be void and advantage was received after discovery — Such a claim must be specifically pleaded. (1954) 93 Cal LJ 373 (375) ** AIR 1963 Madh Pra 240 (241, 242) = 1963 MPLJ 261 (DB) ** AIR 1961 Raj 6 (8) = 1960 Raj LW 345 (DB). (If there is no need for further investigation and there is no difficulty in granting the equitable relief under Section 65, it would be unreasonable to refuse it on any technicality.)

(2) The trial of an issue as to whether relief can be given necessarily involves the trial of two questions namely one is to the time when the agreement was discovered to be void and another as to the advantages received by a party which it must restore or compensate for. These being questions of fact an issue which involves a trial of them will not be allowed to be raised unless it is to be found in the pleadings. AIR 1956 Cal 138 (142).

(3) A relief under Section 65 should be claimed as a substantive relief and court-fee should be paid therefor. AIR 1947 Oudh 33 (35) (DB).

(4) Where in a suit upon a contract the defendant sets up the plea that the contract is void because it does not comply with the conditions prescribed by an Act or rules the plaintiff should be allowed to amend his plaint so as to include a claim for relief under Section 65. AIR 1942 Mad 111 (112, 113) ** ILR (1965) 2 Mad 325.

[See also AIR 1959 Cal 585 (589, 593) = ILR (1960) 1 Cal 776 (DB). (Per Das Gupta C. J. — Claim not pleaded — Further investigation not necessary — Court can give relief even without formal amendment of plaint. Per Bose J. — Claim specifically not pleaded no such plea can be allowed to be raised.)]

(5) Relief under Section 65 cannot be claimed at the last moment in appeal. AIR 1937 Oudh 410 (414) = 13 Luck 531 (DB).

(6) Normally discovery is a question of fact and where no evidence on this

point is adduced by the plaintiff the Court cannot come to any conclusion as to when it was made. But where the void nature of the agreement is patent, it may be held that the time when the agreement was discovered to be void is the date of the agreement itself. 1958 Cal LJ 95 ** ILR (1963) Cut 249.

7. Limitation. — (1) In the absence of special circumstances the time at which an agreement is discovered to be void under S. 65, is the date of the agreement. AIR 1933 PC 63 (65) = 60 Ind App 13 = 54 All 1067 ** AIR 1942 All 409 (410) = ILR (1942) All 817 (DB). (Parties must be deemed to have had information of provisions of statute and it must be assumed that they knew that the agreement was void when they entered into it.) ** AIR 1939 Nag 27 (31) = ILR (1940) Nag 553 (DB) ** AIR 1937 Oudh 87 (97) = 12 Luck 435 (DB). (In special circumstances it may be later.) ** AIR 1926 Nag 241 (243). (Cause of action does not arise on date on which agreement is found impossible of performance.) ** AIR 1925 Oudh 737 (737) ** AIR 1955 Ajmer 54 (55).

(2) Suit for refund of advance paid under void agreement should be brought within three years of discovering agreement to be void. When the agreement is one forbidden by law ordinarily plaintiff must be deemed to have been aware of the fact when he entered into it. AIR 1925 Mad 885 (886).

(3) Where the lease is void, lessee is entitled to return of money — Article 116, Limitation Act, applies. AIR 1936 Pat 462 (465) (DB).

(4) The suit of a subsequent lessee, who has been dispossessed by a prior lessee, for damages and return of nazarana, is governed by Article 116 of the Limitation Act and time begins to run from the date of his dispossession. AIR 1940 Pat 81 (84) = 18 Pat 654 (DB).

(5) Where a contract becomes impossible of performance and thus a party is deprived of the satisfaction he originally obtained he gets a fresh cause of action for satisfaction of his claim under Section 65 of the Act as from the date on which the impossibility has arisen. (1926) 96 Ind Cas 909 (910) (Mad).

(6) A claim for money paid under a contract, which becomes void, is governed by Article 97 of the Limitation Act; and it must be preferred within three years from the time the contract becomes void. AIR 1928 All 360 (363) (DB).

(7) Limitation starts only from date of failure of consideration — Article 97 applies. AIR 1926 Rang 7 (9) (DB).

(8) No question of limitation arises where the restitution is granted by the same decree which has declared the contract of sale void. (1903) 25 All 618 (627) (DB).

[See however AIR 1927 Oudh 177 (180) (DB). (Decision in a suit that agreement

66. Mode of communicating or revoking rescission of voidable contract.—The rescission of a voidable contract may be communicated or revoked in the same manner, and subject to the same rules, as apply to the communication or revocation of a proposal.*

[*] See Sections 3 and 5.

67. Effect of neglect of promise to afford promisor reasonable facilities for performance.—If any promisee neglects or refuses to afford the promisor reasonable facilities for the performance of his promise, the promisor is excused by such neglect or refusal as to any non-performance caused thereby.

Illustration

A contracts with B to repair B's house.

B neglects or refuses to point out to A the places in which his house requires repair.

A is excused for the non-performance of the contract if it is caused by such neglect or refusal.

CHAPTER V

OF CERTAIN RELATIONS RESEMBLING THOSE CREATED BY CONTRACT

68. Claim for necessities supplied to person incapable of contracting, or on his account.—If a person, incapable* of entering into a contract, or any one whom he is legally bound to support, is supplied by another person with neces-

Section 65 — Note 7 (contd.)

is void may give a cause of action for a fresh suit under Section 65 but it would not be open to the Court to pass a decree under the section in the same suit.)]

(9) Plaintiff having monopoly contract for plying buses — Contract becoming void after coming into force of the Constitution — Plaintiff's suit for refund of money for period of 26-1-1950 to 31-3-51 — Suit brought on 24-1-1956 — Plaintiff silent as to when contract was discovered to be void — **Held**, Article 62 of Limitation Act and not 96 applied and suit was barred. AIR 1967 Raj 14 (16, 18) = 1966 Raj LW 181 (DB).

(10) M purchasing undertaking supplying electricity — Partnership deed executed subsequently — Partners giving their quota to M and M paying it to seller — Another deed of partnership due to change of shares and partners — Revocation of licence by Government and purchase of undertaking by it — Subsequent partnership, illegal — M alone entitled to purchase money payable by Government — Partners' claim to recover money paid by them under Section 65 was covered by Article 62 of Limitation Act (1908). AIR 1967 Pat 191 (215, 216) (DB).

Section 66 — Note 1

(1) Section 66 makes it clear that there should be a communicated rescission. (1965) 4 LR 663 (Mys).

Section 67 — Note 1

(1) Where one party shows clear renunciation or absolute refusal to perform the contract, the other party will be justified in regarding himself as discharged from all continued liability under the contract. AIR 1916 Cal 136 (147) = 43 Cal 790 (DB).

(2) In a contract for delivery of goods, failure by the vendee to procure a certificate of "priority" which was agreed, and which was necessary for transshipment of goods absolves the vendor from performing his part of the contract. (1928) 10 Lah LJ 211 (215) (DB).

(3) Where a legal practitioner is ready and willing to conduct in Court the legal business of his client but is prevented from doing so, by an act or omission of his client (e.g., compromising the case and refusing to pay court-fee required for the power-of-attorney), the latter is not entitled to claim refund of the fee from the former on account of his not appearing in the case. 1907 Pun LR No. 42, p. 156 (157).

(4) Where the defendants had practically repudiated the terms of the contract, it is sufficient for the plaintiffs to show their readiness to pay the money. AIR 1923 Lah 56 (57) (DB).

SECTION 68 — SYNOPSIS

1. Scope and applicability.
2. Necessaries.
3. Interest on value of necessities.
4. Proof of necessity.
5. Alienation by guardian for necessities.

1. Scope and applicability.— (1) Chapter V of the Contract Act deals with certain obligations resembling those created by contract and not obligations arising from contracts. (1910) 34 Bom 583 (588) (DB) ** (1910) 32 All 25 (29) (DB).

(2) A minor falls within the class of persons referred to in Section 68 and so, though he is not liable even for "necessaries" and no demand in respect thereof

series suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property† of such incapable person.‡

Illustrations

(a) A supplies B, a lunatic, with necessities suitable to his condition in life. A is entitled to be reimbursed from B's property.

(b) A supplies the wife and children of B, a lunatic, with necessities suitable to their condition in life. A is entitled to be reimbursed from B's property.

[°] For persons who are competent to enter into contracts, see Section 11 supra.

[†] For personal liability of such incapable person, see S. 70 infra.

[‡] The property of a Government ward in Mahakoshal Region of the State of Madhya Pradesh and in Vidarbha region of the State of Maharashtra is not liable under this section—see S. 31 (1) of the C. P. Court of Wards Act, 1899 (24 of 1899).

Section 68 — Note 1 (contd.)

is enforceable as against him by law, a statutory claim is created thereby against his property, enforceable by the person who has furnished such supplies. (1903) 30 Cal 539 (539, 540, 541) = 30 Ind App 114 (PC).

(3) Section 68 and not Section 70 deals exhaustively with liability for things supplied or delivered to a minor. AIR 1921 Nag 105 (106) = 17 Nag LR 20.

(4) Two things are necessary under Section 68, Contract Act, namely (1) that the person against whom the suit is brought is incapable of entering into a contract, and (2) another person (the plaintiff) has supplied him or any one whom he (the person incapable of entering into a contract) is legally bound to support with necessities suited to his condition in life. AIR 1936 All 819 (820).

(5) Under Section 68, Contract Act, it must not only be shown that moneys advanced were to be expended on goods suitable to the condition in life of the infant but also that they were suitable to infant's actual requirements at the time of sale and delivery. AIR 1938 Rang 359 (360) (DB).

(6) A creditor is entitled to recover monies advanced to a minor for his necessities, by invoking the principle laid down in Section 68, Contract Act, the minor's estate being liable therefor. AIR 1936 All 172 (175) (DB).

(7) The general rule is that a contract by a minor is absolutely void and unenforceable. It cannot even be made valid by confirmation or ratification on his attaining majority. Section 68 of the Contract Act is an exception to the general rule and the minor's estate is liable for the necessities supplied to him. AIR 1922 Nag 247 (248) = 18 Nag LR 119.

(8) In a suit on a pro-note, where the defendant establishes his plea of minority at the date of the execution of the pro-note, the plaintiff cannot be allowed at the revisional stage to invoke S. 68, Contract Act, so as to alter the whole character of the suit. AIR 1941 Mad 569 (571).

(9) Sections 68 and 70 of the Contract Act only apply where the money was ad-

vanced to the minor or to his guardian as such and not to a third party even though the minor was benefited by such advances. AIR 1921 Oudh 14 (21) (DB).

(10) Section 68 will not apply where necessities are supplied to a person or to some one whom that person is bound to support when such person is competent to contract. AIR 1947 Nag 84 (86) = ILR (1947) Nag 154. (Operation on wife — Doctor seeking to recover operation charges from husband — Husband being competent to contract Section 68 held did not apply.)

(11) Where the share of T was attached, while he was separate from his mother and where T had minor sons but T's brother and mother representing themselves to be owners and to be persons in possession of T's share, mortgaged that share and with the mortgage money satisfied the decree against T's estate. Held, that the mortgagors having never purported to act on behalf of minor sons of T and having totally ignored their existence, the mortgage could not be enforced against either T's descendants or T's property and that Section 68 of the Contract Act did not apply to the case. AIR 1925 All 213 (213, 214) (DB).

(12) As Section 68 of Contract Act is not controlled by Section 31 of C. P. Court of Wards Act, 1899, estate of Government ward is not exempt from liability for necessities supplied to ward. (1904) 17 CPLR 57 (58).

(13) Subsequent to coming into force of C. P. Court of Wards (Amendment) Act (1 of 1915) a suit against a minor based on Section 68 of the Contract Act is not maintainable. AIR 1921 Nag 105 (105) = 17 Nag LR 20.

(14) Section 37 of the U. P. Court of Wards Act (1912) has to be read with Sections 11 and 68 of the Contract Act. That section is no bar to a claim under Section 68 of Contract Act. AIR 1943 Oudh 119 (121) = 18 Luck 318 ** AIR 1936 All 819 (820).

(15) Promissory-note executed by a ward of Court for his necessities is not enforceable. He cannot get advantage of Section 68. AIR 1935 Lah 764 (765) = 16 Lah 932. (AIR 1927 Lah 414. Overruled.)

Section 68 (contd.)

2. Necessaries. — (1) Necessaries mean goods suited to the condition in life of the infant and to his actual requirements. So things purchased with which the infant is plentifully supplied are not necessities. (1909) 36 Cal 768 (777).

(2) Word 'necessaries' in Section 68 cannot be restricted to what is necessary for elementary requirements of minor such as food and clothing. It includes money urgently needed for requirement of the minor. AIR 1930 All 128 (129) = 52 All 381 (DB).

(3) The term 'necessaries' is not confined to goods. It can include other things such as good teaching and instructions whereby the minor may profit himself afterwards, and also money to enable him to obtain these necessities. AIR 1938 Nag 65 (68) = ILR (1939) Nag 592.

(4) As 'necessaries' include everything necessary to maintain an infant in the state, station, or degree of life in which he is, "what is necessary" is a relative fact to be determined with reference to the fortune and circumstances of a particular infant. (1909) 36 Cal 768 (777) ** AIR 1950 Mad 274 (275).

[See (1904) 17 CPLR 57 (59). (Sweetmeats may be necessities in particular circumstances.)]

(5) Cloth supplied to a minor and cash lent to him to effect necessary repairs in his house are 'necessaries' within the meaning of Section 68. AIR 1936 Nag 12 (13).

(6) A creditor advancing money to save the property of a minor from being sold for revenue is entitled to be reimbursed from the property of minor. AIR 1930 All 128 (129) = 52 All 381 (DB) ** AIR 1925 Nag 33 (33).

(7) Where the guardian of a minor borrows money for the payment of rent due to lambardar, which the minor was bound to pay, the minor is liable under the transaction, as the guardian can do, what the minor himself would do. AIR 1938 Nag 65 (67) = ILR (1939) Nag 592.

(8) Minor is bound in respect of loans supplied to him for necessities. Agricultural operations and payment of creditors may, in suitable circumstances, be necessary purposes. AIR 1937 Nag 390 (391) = ILR (1937) Nag 458.

(9) Money advanced to a minor required for defence in certain criminal proceedings pending against him, and used for that purpose — Lender suing to get it back — Plea of minority at the time of contracting. Held, that the minor was liable as the money was paid for 'necessaries' the minor's liberty being in jeopardy. (1894) 21 Cal 872 (880) (DB).

[See also (1907) 10 Oudh Cas 38 (39) (DB) ** (1899) 22 Mad 314 (317) (DB).]

(10) An infant's estate is liable for all the costs and expenses, properly incurred by the guardian in proceedings properly taken to preserve the infant from complete ruin and destitution. (1881) 7 Cal 140 (143, 144).

(11) Money spent on the obsequies of the father of the minor cannot be deemed to be necessities supplied to the minor within the meaning of Section 68. AIR 1933 Oudh 132 (133) (DB).

(12) Money borrowed by a guardian of a Hindu minor for Divali expenses is not a loan incurred for 'necessaries' and the minor's estate is not liable. AIR 1938 Nag 65 (68) = ILR (1939) Nag 592.

(13) Moneys paid to a minor for the discharge of his father's decretal debts, for the recovery of which nothing was done, cannot be called necessities but moneys borrowed by him for the necessary costs of a civil or criminal proceeding are held as necessities within S. 68 of the Contract Act. AIR 1922 Nag 247 (248) = 18 Nag LR 119.

(14) During the lifetime of his father, money borrowed by a person incapable of entering into a contract to pay for the Sradh of his mother, is not a necessity under Section 68. AIR 1917 Cal 485 (486) (DB).

(15) The question whether bulls are or are not necessities depends on the evidence let in by the parties in each particular case. AIR 1926 Mad 592 (592).

(16) Although the principle enunciated in Section 68 of the Contract Act would not apply to the expenses of marriage of a minor under English law, the principle has been extended in India to cover the marriage expenses of Hindu minors. AIR 1947 Mad 155 (155) = ILR (1947) Mad 541.

(17) By general principles of Hindu law a minor is under an obligation to provide out of the family property the funds necessary for performing the marriage ceremonies of his sister in a manner suitable to the social position of the family and its pecuniary sources: Such provision is "necessary" and one which the minor is 'legally bound' to make within Section 68. AIR 1921 Oudh 14 (17) (DB). (32 All 325, Foll.) ** AIR 1940 Nag 327 (329, 330) = ILR (1940) Nag 632 ** AIR 1933 Nag 285 (287) ** (1910) 32 All 325 (334) (SB).

(18) A father who has no joint family property in his hands is not bound to defray the marriage expenses of his daughter or sons and a person who spends for the marriage cannot recover the amount personally from the father. To such a case neither Section 68 nor Sections 69 and 70 will apply. AIR 1950 Mad 274 (275).

(19) Advancing of funds to a male Hindu minor for meeting his own marriage expenses is not supplying him with necessities suited to his condition in life

Section 68 — Note 2 (contd.)

within the meaning of Section 68 of the Contract Act, and a person advancing such funds is not entitled to be reimbursed from the property of such a minor. The Hindu law does not enjoin the marriage of a Hindu male before the age of majority. AIR 1940 Nag 327 (329, 330) = ILR (1940) Nag 632.

[See AIR 1941 Mad 387 (389).]

[But see AIR 1917 Pat 332 (333) = 2 Pat LJ 627 (DB).]

(20) In the case of a minor Muslim girl marriage is a "necessity" and the person incurring expenditure for marriage is entitled to relief under Section 68. AIR 1947 Mad 155 (156) = ILR (1947) Mad 541.

(21) The money spent over an object which an infant is legally bound to perform cannot be recovered unless it constitutes a 'debt' and is not a bounteous gift. AIR 1921 Oudh 14 (19) (DB).

(22) Unregistered sale deed — One of the vendors minor — Vendee suing to recover amount alleged to have been paid to some mortgagees in discharge of mortgage on the property in question and some more amount advanced to vendors — Held, that plaintiff acquired no interest in the property, as the mortgage was by a minor and he was not entitled to recover the money paid to discharge the mortgage nor to get the amount advanced to vendors which was not for necessities. (1910) 32 All 25 (27) (DB).

(23) Debt incurred by guardian for improving or developing minor's estate is not binding on such estate. Money borrowed for its upkeep or its preservation binds the estate. AIR 1939 Mad 414 (419, 420) (DB).

(24) Son selling land belonging to lunatic mother to get funds to treat her — Mother getting benefit of funds — Suit for possession by mother — Buyer held entitled to be reimbursed from property of mother to extent of value of necessities supplied. 1947 Rang LR 491 (493, 494).

(25) Where the plaintiff maintains his widowed grandmother with the intention of being repaid and not out of charitable disposition, he is entitled to a decree for the amount as against the defendant who had undertaken the responsibility of maintaining her under a decree but had refused to perform it. 1949 Trav-Co LR 129 (130, 131) (DB).

(26) The house leased to a minor for the purpose of living and continuing his studies is for a necessity, suited to the conditions of minor's life. AIR 1963 Madh Pra 58 (59) = 1961 Jab LJ 1279.

(27) Where the money advanced to the natural guardian against agreement to sell minors' undivided interest in joint family property, was used for the benefit and family expenses of the minors, the minors were liable to refund the amount advanced after the contract was rescinded on

ground of breach of contract by the minors. (1966) 1 Andh LT 233 = (1966) 1 Andh WR 368.

3. Interest on value of necessities.—

(1) No interest on the value of necessities can be allowed by way of damages. AIR 1927 Lah 414 (415).

[See AIR 1940 Mad 106 (110) = ILR (1940) Mad 27 (DB).]

[But see AIR 1936 Nag 12 (13).]

4. Proof of necessity.— (1) In the case of necessities supplied to an infant the onus of proof lies on the creditor. AIR 1938 Nag 65 (67) = ILR (1939) Nag 592.

(2) It is not sufficient to plead that money was advanced and spent for the minor, but it must also be shown that it was necessary. (1907) 10 Oudh Cas 38 (39, 40) (DB).

(3) In a case where a creditor seeks to make the estate of the minor liable for advances made for necessities mere bona fide enquiry by the creditor into the existence of the necessity and advance in good faith thereafter will not suffice, but at the same time the creditor need not prove the actual application of the money. To require this is to ask him to do the impossible. The creditor is required to prove the circumstances of the minor's estate, the absence of any other source from which the necessity could be met at the time of the transaction and the suitability of the necessity having regard to the social status and the condition in life of the minor. If these are established and the creditor has advanced money for meeting such necessities after satisfying himself about the same, the creditor is entitled to a decree against the estate of the minor unless it is proved by the other side that the guardian did not actually apply the money for necessary purposes. The burden will, in such circumstances, shift on the defendants to prove that the guardian instead of using the money for the minor as required, used it for his own purposes. AIR 1938 Nag 68 (71, 72) (DB).

(4) A plaintiff is not debarred from proving that the goods were necessary if no enquiry had been made at the time the goods were supplied as to the necessity. AIR 1927 Lah 414 (415).

(5) A money lender, advancing money to a minor alleging that it was for necessities must draw the bond so as to bind the minor's estate. AIR 1914 Mad 648 (651) = 37 Mad 38 (DB).

(6) Mere statement in a bond executed by a person borrowing money in his personal capacity that the amount was to meet certain necessary expenses of the minor will neither bind the minor nor will afford sufficient proof of the amount having been spent for the necessities of the minor. AIR 1930 Oudh 299 (299).

5. Alienation by guardian for necessities.— (1) Section 68, Contract Act,

69. Reimbursement of person paying money due by another, in payment of which he is interested.—A person who is interested in the payment of money which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other.

Illustration

B holds land in Bengal, on a lease granted by A, the zamindar. The revenue payable by A to the Government being in arrear, his land is advertised for sale by the Government. Under the revenue law, the consequence of such sale will be the annulment of B's lease. B, to prevent the sale and the consequent annulment of his own lease, pays to the Government the sum due from A. A is bound to make good to B the amount so paid.

Section 68 — Note 5 (contd.)

refers to a person who supplies a minor with necessaries suited to his condition in life; Section 68 does not show that a guardian can execute a valid mortgage of the ward's properties. AIR 1933 Rang 83 (84) = 11 Rang 193.

(2) A sale by the administrator of the estate of the deceased of property of his minor heirs is void and cannot be supported under Section 68, nor can the sale be ratified by minor subsequently. AIR 1919 Low Bur 53 (53) = 9 Low Bur Rul 186 (DB).

(3) In a contract of loan made by a mother of a minor, he is liable only for such sums as are spent for procuring necessaries for him. AIR 1927 Nag 196 (196) ** AIR 1933 Nag 285 (287).

(4) A decree can be enforced against the minor's property if the debt was contracted for purposes necessary within the meaning of Section 68. AIR 1926 Pat 399 (399).

SECTION 69 — SYNOPSIS

1. Applicability and scope.
2. Suits for contribution.
3. "Interested".
4. Purchaser of property.
5. Landlord and tenant.
6. Reversioners.
7. Co-sharers.
8. Decree-holder.
9. Payment made to raise wrongful attachment.
10. Joint liability.
11. Money paid to save mortgaged property.
12. Persons in wrongful possession.
13. Other cases.
14. Bona fide payments.
15. Voluntary payments.
16. "Bound by law."
17. "Paying."
18. Limitation.

1. Applicability and scope.—(1) Sections 69 and 70 — The sections are not exhaustive of the principle contained therein. AIR 1926 Cal 657 (658) (DB).

(2) The general purport of the section is to afford to a person who pays money in furtherance of some existing interest

an indemnity in respect of the payment against any other person who, rather than he, could have been made liable at law to make the payment. AIR 1950 PC 99 (104) = 77 Ind App 156.

(3) The doctrine of unjust enrichment which can be equated to Sections 69 and 70 of the Contract Act compels a person who gets unjustifiably enriched at the expense of another to make restitution. A person who officiously confers a benefit upon another is not entitled to restitution therefor. 1958-2 Mad LJ 148 (150) ** 1958-2 Mad LJ 86 (87) ** AIR 1960 Mad 1 (6) = (1959) 2 Mad LJ 225 (FB) ** AIR 1969 Cal 496 (510) (DB). (Purchaser contracting with company for purchase of goods — Company arranging with another firm for supply — Failure of firm to supply goods — Money passed to firm through Company — Firm bound to return money to purchaser.) ** AIR 1960 Mad 410 (419) = (1960) 2 Mad LJ 401 (DB) ** 1958 Mad WN 233 = (1958) 71 Mad LW 50 (2).

[See also AIR 1960 Mys 289 (291, 292) = 38 Mys LJ 480. (Purchaser of property from judgment-debtor prior to auction sale discharging prior usufructuary mortgage out of his own funds — Doctrine of unjust enrichment held was applicable and purchaser was entitled to amount paid.)]

(4) Sections 69 and 70 are distinct — Where one applies the other does not. AIR 1946 Cal 63 (64).

(5) Sections 69 and 70 deal not with contribution but reimbursement. AIR 1946 Cal 63 (64).

(6) The section converts the natural obligation into a legal obligation to pay on the part of the person who has received benefit of the payment by another person of what he was bound to pay. (1881) 3 All 66 (72) (FB).

(7) The section applies where a person pays money which another is bound by law to pay. The obligation to repay money which another has paid and on which a person has benefited does not arise in every case excepting those which fall under this section and Section 70. AIR 1946 Nag 21 (23) = ILR (1945) Nag 820 ** (1921) 19 All LJ 73 (75) (DB) ** AIR 1919 Mad 105 (106) (DB). (Suit by son for recovery of properties bequeathed

Section 69 — Note 1 (contd.)

to him by his brother sold by his mother alleging exclusive title in herself — Out of the purchase money mother alleged to have discharged certain debts binding on property — **Held**, that though purchaser acted bona fide he could not ask to be reimbursed by the true owner.) ** AIR 1918 All 379 (379) (DB). (Sale of properties subject to mortgage — Purchaser retaining money due to mortgagee — Pre-emptor suing obtaining decree with direction to deposit the full purchase money — Defendant's predecessor-in-title withdrawing full amount and failing to discharge mortgage — Pre-emptor compelled to discharge it — **Held** that he could not recover it as the case did not come within the scope of this section.) ** 1949 Bur LR (HC) 509 (524).

(8) Personal liabilities as well as liabilities imposed upon the land are within the section. AIR 1926 Cal 765 (767) (DB) ** AIR 1926 Cal 657 (658) (DB).

[But see AIR 1914 Mad 371 (373) (DB). (The section contemplated only a personal liability.) ** (1903) 6 Oudh Cas 212 (214). (Plaintiff redeeming mortgage suing reversionary heir for reimbursement — Section 69 did not apply as reversioner was not personally liable under the mortgage.)]

(9) No contract or privity of contract between the obligor and obligee is necessary to make a claim for reimbursement under this section. (1910) 6 Nag LR 27 (31).

[But see AIR 1938 Cal 413 (414). (Suit for contribution by co-tenant—Impleading two of the landlords and transferee from one of the co-tenants on the ground that the transferee wrongly paid the rent to the landlord and claiming refund — **Held**, that the claim for reimbursement is not maintainable in the suit for contribution and that the case did not come under this section as there is no mutuality between the landlords on the one hand and the plaintiff and other co-tenants on the other.) ** AIR 1937 Lah 607 (608). (Contract between agent and principal that agent will pay for goods sold where purchaser fails to pay — Agent paying in a transaction where the order was not placed through him but the purchaser led him to believe that he would pay him — **Held**, that the agent to get the benefit of this section must have privity of contract with the purchaser.) ** AIR 1936 Cal 663 (667, 671, 672) = 63 Cal 1172 (DB). (Stranger to contract can sue only if trust is created in his favour.)]

(10) If there is direct contractual relation between the parties, there will be no occasion to rely upon Section 69 at all. AIR 1934 Mad 628 (629).

(11) A obtaining Rs. 1000 from Government as tagai loan and making it charge over land No. 1 and offering

lands Nos. 2, 3 and 4 as collateral security — Lands Nos. 2, 3 subsequently mortgaged to B and Nos. 1 and 4 sold to P — Rs. 1000 out of purchase price left with P for paying tagai loan — Few days before the said sale C attaching land No. 1 in execution of his decree and purchasing it at execution sale — Suit by P claiming charge over lands Nos. 1, 2 and 3 and for recovery of amount paid by him to Government from A, B, and C — Section 69 did not apply. AIR 1941 Bom 153 (155) (DB).

(12) Sections 69 and 70, Contract Act, contemplate persons who not being themselves bound to pay the money or to do the act, do it under circumstances which give them a right to recover from the defendant who is benefited by it. AIR 1920 Nag 119 (121) ** (1912) 16 Cal LJ 148 (153) (DB) ** (1905) 32 Cal 643 (645) (DB).

[See however AIR 1938 Nag 459 (460) = ILR (1939) Nag 246. (Section 69 can be invoked by a person where there was an initial liability to pay by another which he also was interested in making notwithstanding the fact that he was also legally liable to pay.)]

(13) The right that a person has under this section and Section 70 can be kept separate from his right of subrogation under Section 92, T. P. Act. AIR 1934 Nag 84 (86) = 30 Nag LR 148 (DB).

(14) Jurisdiction of civil Court to entertain a suit under this section in respect of cases falling under Sections 183 and 233 of United Provinces Land Revenue Act, 1901, is not ousted by these sections. (1906) 28 All 563 (588) (DB).

(15) Sections 69 and 70 do not apply to remedies against wrong doer. (1913) 40 Cal 598 (613) = 40 Ind App 56 (PC).

(16) Person owning one of two lands forced to pay whole revenue assessed jointly on both can claim contribution — **Semle** — That neither this section nor Section 70 applies to the case. AIR 1916 Mad 668 (669) (DB).

(17) Purchaser of property retaining money to pay off decree against vendor compelled to pay both the decree-holder and vendor — **Semle** — That case falls within this section. (1883) 5 All 400 (404, 405).

(18) Defendants under a rent decree are not bound by law to pay and get the sale under that decree set aside — Mortgagee decree-holder paying and getting sale set aside — He can recover the money under Section 70 though the case is not covered by this section. (1912) 16 Cal LJ 156 (160) (DB).

(19) Purchaser paying arrears of land revenue — Sale deed silent as to who was to pay — **Held**, that no relation existed between purchaser and vendor creating an obligation of the nature contemplated under Section 69 or 70. (1884) 6 All 67 (67, 68) (DB).

Section 69 — Note 1 (contd.)

(20) Cases under Section 69 are cognizable by a Court of Small Causes. (1888) 15 Cal 652 (656) (FB) ** (1882) 4 All 152 (153).

[But see (1896) 23 Cal 189 (191) (DB). (Clause 41 of Schedule II, Small Cause Courts Act, excludes a suit for contribution from its jurisdiction.) ** (1883) 9 Cal 395 (396) (DB). (Joint decree — Money paid under — Suit for contribution — Small Cause Court cannot entertain it.)]

(21) Former unrecorded proprietor paying money on behalf of proprietary body — Right to reimbursement — Outgoing proprietor is entitled to recover any sum due to him before date of vesting by virtue of his proprietary rights. 1958 MPC 421.

2. Suits for contribution.— (1) The right and duty of contribution is founded on doctrines of equity and does not depend upon contract. AIR 1938 PC 169 (174) = 65 Ind App 219 = 13 Luck 494 = 32 Sind LR 772 ** AIR 1939 Mad 531 (538) = ILR (1939) Mad 776 (DB).

(2) This section does not apply to contribution suits. AIR 1939 Cal 645 (646) = ILR (1939) 2 Cal 226 (DB) ** AIR 1957 Raj 267 (274) = ILR (1957) 7 Raj 616 ** AIR 1950 Pat 212 (214) (DB) ** AIR 1961 Pat 103 (104) ** AIR 1960 Mad 457 (462) = (1960) 1 Mad LJ 445.

(3) Section applies to suits for contribution where both plaintiff and defendant were liable for money paid by the plaintiff. AIR 1934 Cal 709 (710) = 61 Cal 864 (DB).

(4) Sections 69 and 70 of the Contract Act do not apply to claims for contribution under Section 82 of the T. P. Act. AIR 1918 Mad 1012 (1013) (DB) ** AIR 1949 Pat 522 (524) = 28 Pat 325 (DB).

(5) Though the creditor's remedy against some of the persons jointly and severally liable to him might have been barred by limitation the right of the person who pays off the debt to claim reimbursement is not affected. AIR 1927 Cal 665 (667) (DB).

3. "Interested."— (1) Interests in Section 69 are restricted to those arising in course of law or through mistake or in virtue of existing relation with person on whose behalf payment is made. AIR 1917 Mad 83 (85) = 39 Mad 965 (DB) ** AIR 1916 Cal 497 (499) (DB) ** AIR 1921 Oudh 14 (19) (DB).

(2) Interest referred to in Section 69 is pecuniary one. (1912) 35 Mad 728 (737) (DB).

(3) The words of Section 69 do not require that a person to be interested in a payment should at the same time have a legal proprietary interest in the property in respect of which the payment is made. AIR 1950 PC 99 (104) = 77 Ind

App 156 ** 1957 Andh LT 475 (481) ** AIR 1960 Mad 1 (6) = (1959) 2 Mad LJ 225 (FB) ** AIR 1966 Mad 426 (427) = 79 Mad LW 14 ** AIR 1961 Pat 103 (104, 105, 106) ** (1960) 40 ITR 708 Andh Pra).

[But see (1907) 10 Oudh Cas 108 (108).]

(4) The interest contemplated by Section 69 is an interest resting on the apprehension of some pecuniary loss, inconvenience or detriment and not an interest based on grounds of mere sentiment or moral or social obligation. AIR 1950 Mad 274 (276).

(5) The interest must be in order to avert some loss or to protect some interest which would otherwise be lost to the person making the payment. AIR 1946 Nag 21 (23) = ILR (1945) Nag 820 ** AIR 1930 Oudh 266 (268) (DB). (Transferee of property subject to charge is person interested in the payment of the debt within Section 69.) ** (1911) 8 All LJ 622 (624). (Property sold under a money decree against plaintiff and defendant — Plaintiff depositing money and getting sale set aside — He is a person interested in paying the amount.) ** 1882 All WN 210 (210). (Mortgage executed pending attachment which was subsequently lifted — Subsequent attachment and sale — Held, mortgagee was not a person interested as his rights were not affected by the sale.) ** (1879-1880) 4 Bom 643 (652) (DB). (Lands belonging to plaintiff situated in defendant's inam village held by him independently rent and cess-free of the defendant — Defendant paying local cess levied by Government in respect of the village claiming proportionate share from plaintiff — Held, that as the plaintiff owed an independent duty to pay to the Government even his lands were assessable to the cess. The defendant was not a person interested in making the payment for he had no interest to protect in respect of plaintiff's holding.) ** AIR 1963 Pat 185 (186, 187, 188) = 1963 BLJR 433 (DB). (Mortgagee obtaining decree for sale — Mortgagor's default in payment of revenue — Payment by mortgagee to avert revenue sale — Mortgagee entitled to be reimbursed by mortgagor.)

(6) Mere apprehension founded upon an impression that one's interest will be adversely affected is sufficient. AIR 1922 Pat 337 (338) ** AIR 1940 All 416 (419) = ILR (1940) All 580 (DB) ** AIR 1937 Rang 350 (350) ** AIR 1928 Cal 389 (391) ** AIR 1926 Cal 385 (391) = 52 Cal 914 (DB). (An interest which may not be enough in common law to found a claim is sufficient.) ** 1950 Ker L Tim 238 (241) (DB).

(7) A person who is bound by law to make a payment is a person who is interested in the payment within the

Section 69 — Note 3 (contd.)

meaning of Section 69, Contract Act. Consequently, a person who is compelled under a decree to pay money which another was ultimately liable to pay is entitled to recover it from such other person under Section 69, Contract Act. AIR 1937 Nag 152 (154) = ILR (1940) Nag 437 ** AIR 1926 Cal 657 (658) (DB). (Though he may be liable for or bound to pay only a part of the money.) ** AIR 1967 Mad 318 (327) = (1966) 2 Mad LJ 226. (Employer compelled by statute paying for tort committed by another on his servant — He can claim reimbursement against the tortfeasor.)

[But see AIR 1922 Nag 50 (51, 52). (The words 'bound by law to pay' include all persons legally bound to pay whether under contract or otherwise.) ** AIR 1916 Mad 980 (983) = 39 Mad 795 (DB).]

(8) Section 69 contemplates only an existing interest which the payment is intended to protect and not interest which is created by the payment itself of forming part of the same transaction as the payment itself or is only a security for the payment. (1913) 25 Mad LJ 312 (314) ** AIR 1945 Bom 187 (197) (DB). (Party making the payment must have a contract to pay or interest present, future or contingent.) ** AIR 1917 Pat 159 (160) = 2 Pat LJ 676 (DB). (Mere expectation to acquire title not an interest.) ** (1913) 19 Ind Cas 614 (615, 616) (Cal). (Plaintiff alleging to be mortgagee paying off rent decree — Subsequent decision that he was not a mortgagee — **Held**, he was not interested in the payment.) ** (1889) 11 All 234 (242) (DB).

(9) Contract for sale of immovable property by A in favour of B — Sub-sale by B to C — Default in payment of outstanding taxes by A — Payment by C — B and C both entitled to reimbursement from A — C was interested in payment. AIR 1950 PC 99 (104) = 77 Ind App 156.

(10) Where a person divests himself of all his interests in the property and has ceased to have any interest in the same by reason of a valid transfer, he cannot be said to be within the relationship contemplated either by Section 69 or Section 70. AIR 1950 Mad 817 (819).

(11) Transferee of a share of a partner who pays off a partnership debt without the consent of the partners cannot be said to be interested in the payment of the amount and he cannot claim contribution under Section 69, Contract Act. AIR 1963 Pat 149 (150, 151) = 1963 BLJR 519 (DB).

4. Purchaser of property. — (1) Purchaser of portion of property made to pay whole amount can sue for contribution. AIR 1987 Oudh 420 (423) = 13 Luck 35 (DB) ** AIR 1925 Mad 1041

(1042). (Vendee to discharge encumbrance — Co-vendee paying to save property can recover.) ** AIR 1914 Mad 26 (28) (DB). (Two properties mortgaged for the same debt subsequently sold to two persons one free of the encumbrance and the other subject to the mortgage — Purchaser of latter property refusing to pay the whole amount paid by the purchaser of former property — He can recover it from the defaulting purchaser.)

(2) Sale deed with covenant for title free of any charge or incumbrance — Purchaser having to pay a mortgage on the property is entitled to be recouped by the vendor. AIR 1928 PC 98 (98) = 55 Ind App 135 = 50 All 371 ** AIR 1946 Mad 244 (245) (DB) ** AIR 1922 All 508 (509) (DB) ** 1957 Andh LT 475 (481).

(3) Vendee entering into possession on the date of contract of sale — Vendor paying the charges on the property since that date to the date of execution of sale deed is entitled to recover it from vendee. AIR 1927 Mad 1060 (1062).

[See AIR 1941 Mad 635 (636) (DB). (Person compelled to make deposit under Order 21, Rule 89, Civil P. C., to save his property by getting the sale set aside can sue to recover consideration for sale under Section 72.)]

(4) Where property sold to plaintiff by defendant is attached before judgment in a suit by the latter's creditor, and the plaintiff paid the amount and got it released, he can recover from the defendant the amount so paid. (1910) 33 Mad 232 (233, 234) (DB) ** AIR 1918 Cal 636 (637) (DB). (Decree against patnidars by landlord — Darpatnidar depositing amount of decree to avoid sale — Patnidar liable under Sections 69 and 70.) ** AIR 1915 Cal 278 (279, 280) (DB). (Plaintiffs purchasing the tenancy of defendant under two of co-sharer landlords compelled to pay off decree for arrears of rent obtained by other landlords — **Held**, they could claim to be reimbursed by the defendants as they paid to protect their interest which in the circumstances of the case was threatened.) ** AIR 1914 Cal 529 (530) (DB). (Purchaser paying off rent decree obtained before the purchase.) ** (1875) 7 NWPHCR 336 (DB). (Encumbrance not disclosed — Purchaser paying off decree obtained on the encumbrance is entitled to be reimbursed.)

(5) Auction sale subject to charge — Purchaser is bound to pay as the principle that the buyer should pay the incumbrances subject to which property is sold is applicable also to court sales. (1907) 30 Mad 461 (463) (DB) ** AIR 1922 Pat 337 (338). (Dues under rent decree.) ** AIR 1921 All 312 (313) = 43 All 268 (DB). (Subsequent mortgage.) ** AIR 1916 Cal 954 (956) (DB). (Rent dues.) ** (1897) 1 Cal WN 458 (462) (DB).

(6) If purchaser of the equity of redemption pays off at the time of

Section 69 — Note 4 (contd.)

redemption the amount of a bond not charged on the property, he cannot recover it from the mortgagor under Section 69. AIR 1915 Mad 870 (871).

(7) Transfer set aside as one made with intent to defraud creditors and the property attached and sold — Transferee who has paid an attaching creditor has got a right to proceed against transferor for the payment made on his behalf. AIR 1914 Low Bur 262 (263) = 8 Low Bur Rul 233.

(8) Registered proprietor transferring tenure — Transferee's name not registered — Person paying arrears of revenue accruing after date of transfer cannot recover same under Section 69. AIR 1932 Cal 205 (205).

(9) Plaintiff was one of the five defendants in the previous suit who was taking a leading part in the interest of all and was contesting the case on behalf of all and the parties were contesting on the basis of their interest in the property which was the subject-matter of the litigation in the previous suit the plaintiff having paid the entire costs jointly decreed against all the defendants in that suit, apportionment of liability for costs ought to be on the basis of the interest that the present defendants would have been entitled to in the event of their success in the previous litigation. AIR 1962 Orissa 1 (2).

5. Landlord and tenant.— (1) Landlord cannot under Section 69 or Section 70 recover from his tenant the cost of sweepers and Bhistis employed under an order of the Municipal Board to keep the premises clean. AIR 1914 All 322 (323).

(2) Sub-tenure-holder paying off decree against the landlord to save his tenure from being sold can recover the amount and accidental expenses. He cannot recover interest on it. AIR 1925 Pat 737 (739) (DB).

(3) Three years summary settlement amount recovered from plaintiff — Defendant who owned lands in the jaghir village of plaintiff found not liable to pay proportionate amount on his land under Bombay Act VII of 1863 either to the Government or to the Jagirdar — Held the plaintiff could not recover either under this Section or Section 70. (1881-82) 6 Bom 244 (250) (DB).

(4) Amounts wrongly collected from landlord instead of the ryot for irregular irrigation of the latter's land — The amount so paid held could be recovered from the ryot under S. 3 (11) of the Madras Estates Land Act (I of 1908) — Doubtful whether the claim is for merely compensation falling under Section 69 or 70 of this Act. AIR 1939 Mad 918 (919, 920).

(5) Landlord collected water cess from plaintiffs at penal rate and paid it to Government. He is not liable to be sued by plaintiffs for recovery of the water cess

so paid by them. Section 69 held not applicable as landlord was not bound to pay water cess. AIR 1916 Mad 157 (159, 161 and 165) (DB).

[But see AIR 1961 All 195 (197).]

(6) Desabandam inamdar is liable to contribute for cost of repairs to bund but not for work done for protection of railway line from possible breach of tank. AIR 1947 Mad 189 (190).

(7) Where the tenant does not deposit the rent his conduct exposes itself to the inference that he is forcing the hands of the sub-tenants to deposit into Court rents, which he is primarily and legally liable to pay and in cases where the tenant does not make the deposit to obtain a stay of the suit for eviction the sub-tenant who does so as provided for by S. 4 (5), Madras Tenants and Ryots Protection Act, can legally recover this deposit from the tenant, who can for the purposes of S. 69, be regarded as a person bound in law to pay the rent in which he is in arrears. AIR 1954 Mad 641 (642).

[See also 1963 Ker LJ 1165 = 1964 Ker LT 315. (Sub-tenant is also entitled to an equitable charge in the nature of salvage lien, even if he cannot claim benefit of the charge for arrears of rent which landlord can claim under S. 41, Malabar Tenancy Act.)]

(8) Occupier who makes payment of tax for which lessor is primarily liable is entitled, in absence of any contract to contrary, to be reimbursed by lessor. AIR 1963 All 568 (569) = 1964 Mun LJ 316 ** (1966) 1 An LT 11.

(9) Where a tenant has committed a breach of contract entered into by him by omitting to pay the revenue, he is liable to give a refund to the landlord of what he has been allowed credit for as per the knaom deed, from the pattom of the properties for the purpose. 1962 Ker LJ 41 = 1961 Ker LT 802 (804).

6. Reversioners.— (1) Hindu reversioner who pays off a mortgage decree against the estate in the hands of the widow is entitled under Section 69 to be reimbursed by the widow in respect of the money which she was bound to pay. (1913) 36 Mad 426 (435, 436) (DB) ** AIR 1925 Mad 95 (105, 106) (DB).

(2) As the next reversioner of a Hindu widow is interested in the payment of revenue in respect of her estate within Section 69, he can recover the amount of revenue paid by him. (1909) 19 Mad LJ 331 (331).

(3) Reversioner depositing the sale amount under Section 310-A of Civil Procedure Code (now Order 21, Rule 89) and getting sale set aside is entitled to recover it from the widow. AIR 1914 Cal 338 (340) (DB).

(4) Widow entitled to maintenance and residence continuing in possession after the death of last male holder but not as

Section 69 — Note 6 (contd.)

heir — Any sums spent by her for purposes binding upon reversioners can be recovered by her. AIR 1928 Mad 820 (822) = 51 Mad 815 (DB).

7. Co-sharers.— (1) He who chooses without the permission of his co-sharer to spend money on the joint property has no right to inflict the payment of any share of such expenses upon such joint owner unless they fall within Sections 69 and 70. 1890 All WN 121 (122) ** AIR 1920 Pat 155 (156). (Co-sharer not bound by law to pay rent decree in favour of landlord — Contribution cannot be levied from him.)

(2) Suit by lambardar co-sharer against other co-sharers to recover land revenue paid by him on their behalf falls under S. 69. AIR 1939 Pat 497 (499) (DB).

(3) Registered holder of village paying water cess leviable under Act VII of 1865 — Defendant entitled to share in village bound to pay either to plaintiff or the Government direct and therefore, his share can be recovered by the plaintiff who paid the whole amount by invoking this section. (1910) 33 Mad 189 (191, 192, 195, 196) (DB).

(4) Co-sharer paying rent due on land is entitled to contribution. AIR 1916 Cal 954 (956) (DB) ** (1912) 13 Ind Cas 457 (458) (Cal) (DB). (Co-sharer paying off entire rent decree.) ** AIR 1914 Cal 672 (673) (DB). (One of the two owners of a non-transferable holding transferring his share — Transfer not recognised by landlord — Decree for rent paid by the other owner — Held he could recover it from the transferee of his co-sharer.)

(5) One of the co-sharers paying off the decretal amount due from all can recover it from the other co-sharers. AIR 1935 Lah 981 (982) ** AIR 1914 Cal 373 (374) (DB). (Patni put up for sale in execution free of encumbrance — Co-sharer in Darosat taluk Patni paying amount to stop sale to protect his interest is entitled to be paid by the Patni-dar under S. 69.)

(6) Co-sharers of patni-tenure — Suit for arrears of rent against common manager representing one of co-sharers only — Decree against such co-sharer — Payment by him to avoid sale — Other co-sharer not being party to suit held not liable to contribution. AIR 1955 Cal 62 (63).

8. Decree-holder.— (1) Decree-holder withheld from possession pending appeal and second appeal paying kist for the land can recover the amount paid under this section. (1904) 27 Mad 338 (339).

(2) A decree-holder who has purchased the zamindari shares of the judgment-debtor in execution paying arrears of revenue is not entitled to be reimbursed by the judgment-debtor. AIR 1934 All 712 (712).

AIR 1926 All 745 (746) (DB).

(3) Holder of money decree with an attachment before judgment paying dues under rent decree to save the property from sale in execution of the latter decree can claim under this section to be reimbursed. AIR 1928 All 353 (353) **

9. Payment made to raise wrongful attachment.— (1) Money paid to avoid attachment of his property in execution of a decree against another can be recovered from the judgment-debtor under Sections 69 and 70. 1911 Punj WR No. 32 p. 82 (93) (DB).

(2) Crops of land possessed by tenants attached by Government for rent for another plot in same patta — Tenant paying off dues is entitled to be reimbursed though attachment illegal. AIR 1916 Mad 1167 (1167) (DB).

10. Joint liability.— (1) One of several joint judgment-debtors paying off the entire decree is entitled to recover contribution from his co-debtors by a suit which will fall under this section. AIR 1942 Pat 204 (208) = 20 Pat 811 (DB) ** AIR 1931 Pat 394 (400) = 10 Pat 528 (DB). (A judgment-debtor along with B under a mortgage depositing money under O. 21, Rule 89, C. P. C., and getting sale set aside — Held, suit brought by him to recover half of the amount paid by him from B was competent under this section.) ** AIR 1927 Mad 98 (99) ** AIR 1926 Cal 951 (952) (DB) ** AIR 1914 Cal 208 (209) (DB). (One of several judgment-debtors buying the decree cannot execute it against the others.) ** (1908) 11 Oudh Cas 279 (282) (DB) ** AIR 1948 Nag 390 (392) = ILR (1948) Nag 80 ** 1965 BLJR 575.

(2) Decree for rent against joint lessees — One of them paying can recover from the other in the absence of funds available with him out of the usufruct to pay it off. AIR 1931 Pat 234 (235) = 10 Pat 168 (DB).

(3) One of co-sureties paying more than his proportionate share can enforce contribution from the others under this section. (1910) 13 Oudh Cas 23 (25) ** AIR 1921 Mad 530 (531). (Ramesam J. (Contra) — Section 140 is applicable.)

(4) Surety given to remove attachment of property before judgment — Subsequent proceedings resulting in the attached properties being declared not attachable under Section 60, C. P. C. — Decree-holder taking coercive measures against the surety and recovering the dues under decree — Held, though it was subsequently found that the surety was not liable to pay, he could sue the debtor for reimbursement under this section. AIR 1944 Nag 282 (283) = ILR (1944) Nag 638.

(5) Co-tenant paying decretal amount to save tenancy is entitled to contribu-

Section 69 — Note 10 (contd.)

tion. AIR 1930 Cal 344 (345) (DB) ** AIR 1926 Cal 1031 (1032) (DB).

(6) Property jointly owned — Plaintiff paying arrears of assessment can recover same from defendant joint owner. (1889) 12 Mad 349 (351) (DB) ** (1888) 11 Mad 452 (459) (DB).

(7) A person who owns one of two lands on both of which the Government revenue was jointly assessed and pays the whole revenue is entitled to claim contribution for the proportionate sum due from other land. AIR 1916 Mad 668 (669) (DB).

(8) Decree for costs — Decretal amount paid by one of the defendants — Person paying is entitled to contribution from other defendants. AIR 1930 Bom 506 (507) = 55 Bom 94 ** 1875 Pun Re No. 90, p. 212 (213) (DB) ** AIR 1962 Orissa 1 (2).

(9) Assignee of decree for rent applying for execution of decree — Assignee though not in a position to apply for execution, Court issuing execution — Plaintiff paying under compulsion of such execution — **Held**, that the case is covered by Section 69 and the money is recoverable from the other judgment-debtor. AIR 1915 Cal 310 (312) (DB).

(10) A person who is himself bound by law to pay a debt (a judgment-debtor) cannot ask for reimbursement under Section 69, especially from a person who is himself not a party to the decree. AIR 1950 Pat 212 (213) (DB).

11. Money paid to save mortgaged property. — (1) Mortgagee of property charged with maintenance by decree impleaded — When he pays off the decree which other defendants are bound to satisfy, he gets the right under this section to be reimbursed. AIR 1934 Nag 84 (85) = 30 Nag LR 148 (DB).

(2) Where before the date fixed in the decree on a prior mortgage for its redemption by payment of the decretal amount the mortgagor had parted with his interest in the property and there was not even a personal liability which could be enforced against him, he is not bound in law to satisfy the decree personally. Therefore, no decree can be passed against him under Section 69 at the instance of the puisne mortgagee who satisfies the decree. 1958 Andh LT 654.

(3) Second mortgagee paying off the amount under the decree obtained by the first mortgagee to save the mortgaged property from sale — He can bring a suit under Section 69, Contract Act, to realize the amount so paid. AIR 1927 Cal 393 (394) = 54 Cal 424 (DB) ** AIR 1922 All 153 (154) = 44 All 67 (DB) ** AIR 1950 Mad 333 (334).

[See however AIR 1940 All 104 (105) = ILR (1940) All 71 (DB). (Puisne mortgagee purchasing property in execution of his own decree and paying

off prior encumbrance cannot recover from the mortgagor.)]

(4) Where a prior mortgagee who has purchased the mortgaged property in execution of his mortgage decree and entered into possession of it pays the decretal amount due to puisne mortgagee in order to avert a sale in execution of puisne mortgagee's decree which directs the sale of the properties subject to the prior charge he is entitled to reimbursement from the mortgagor under Section 69, Contract Act. 1950 Ker L Tim 238 (242) (DB).

(5) Section 69 does not apply to a suit by one of mortgagees for contribution against co-mortgagees who has paid off his share due under a sub-mortgage but the entire right has been sold away due to default of others. AIR 1933 Oudh 478 (480) (DB).

(6) Usufructuary mortgagee paying to have the sale of the property set aside is entitled to reimbursement by the mortgagor. AIR 1923 All 127 (127).

(7) Mortgagor of an under-proprietary plot is not a person who is bound under law to pay arrears of rent as the usufructuary mortgagee thereof is primarily responsible for the rent under Section 76, Transfer of Property Act. AIR 1918 Oudh 286 (287).

(8) Purchaser at a private sale from the mortgagor is bound to pay arrears of rent due under a decree obtained by the landlord prior to his purchase. If the mortgagee paid off the same to save the property from sale he can bring a simple money suit to recover it even though he has given up the mortgage lien. AIR 1926 Cal 765 (767).

(9) Rent of ante-alienation holding paid by mortgagee of the same — Mortgagee can sue original ante-alienation tenant for recovery of amount due which the tenant should have but did not pay. AIR 1947 Nag 43 (45) = ILR (1946) Nag 469 (DB).

(10) Holding brought to sale under Madras Rent Recovery Act (VIII of 1866), for arrears of rent — Mortgagee from tenant paying amount and averting sale — Mortgagee cannot recover under Section 69 but can do so under Sec. 70. (1909) 2 Ind Cas 435 (436) (Mad).

(11) Darpatnidar advancing arrears put in possession of putni — Darpatnidar subsequently defaulting — Property brought to sale and purchased by mortgagee — Darpatnidar suing for recovery of money paid by him in respect of arrears and while he was in possession — **Held**, the section did not apply as mortgagee was not bound to pay the rent. (1911) 15 Cal WN 404 (407) (DB).

(12) Mortgagee auction purchaser paying off rent decrees held by landlord against the mortgagor tenant cannot recover the amount. AIR 1924 Pat 235 (236) = 2 Pat 890 (DB).

Section 69 — Note 11 (contd.)

(13) Purchaser of mortgaged property cannot plead he was only benamidar for the mortgagor in an action brought against him to recover the putni rent paid by the mortgagee to save property. (1907) 34 Cal 92 (96) (DB).

(14) Mortgagee is entitled under this section to be reimbursed by mortgagor for money paid by him in respect of revenue and land taxes to save property from sale. AIR 1936 Rang 47 (48) ** AIR 1946 Nag 226 (227) = ILR (1946) Nag 297. (Mortgagee paying land revenue payable by the purchaser of the property in execution of a money decree against the mortgagor is entitled to recover it from the purchaser.) ** AIR 1941 Mad 800 (802). (Collusive decree against tenants in favour of landlord for cess — Mortgagee decree-holder paying can recover from the tenants.) ** AIR 1940 Nag 285 (286). (Mortgagee obtaining possession of property under compromise decree paying revenue dues defaulted by mortgagor — He can recover it under this section.) ** AIR 1933 Rang 112 (112) ** AIR 1947 Nag 39 (43) = ILR (1946) Nag 630 (DB).

(15) A mortgagee from a co-sharer paying the entire revenue payable by all the co-sharers is entitled to be reimbursed by the other co-sharers. AIR 1930 All 516 (517) (DB).

[See however (1910) 33 Mad 41 (45) (SB). (Mortgagee of shares of certain defendants paying the whole revenue — One of the sharers not bound to pay — He cannot be made to pay under this section.)]

(16) Mortgagee decree-holder who purchased the property in execution paying land revenue could not recover it from the mortgagor on the sale being subsequently set aside. AIR 1928 Pat 552 (554) (DB).

(17) Subsequent mortgagee left with money at the time of mortgage to pay off prior mortgage — Larger amount paid due to his own delay — He cannot recover the excess from the mortgagor. AIR 1921 Oudh 55 (56).

(18) A mortgagor paying rent which ought to be paid by the mortgagee can bring a separate suit based on Sec. 69, Contract Act. AIR 1927 All 713 (713) ** AIR 1955 Mad 265 (266).

(19) Where in default of payment of Government revenue by the mortgagee in possession, the mortgagor pays the same, he can recover the same with interest. AIR 1927 Mad 59 (59).

(20) Co-mortgagor getting sale set aside by consent by paying debt cannot claim contribution from the other mortgagors under this section. But he gets an equitable right to claim. (1910) 14 Cal WN 361 (363) (DB) ** AIR 1924 Nag 238 (239). (No personal liability to contribute and Section 69 does not apply.)

(21) Representatives of mortgagor paying the usufructuary mortgagee of the original mortgagee to get the property can recover the amount from the representatives of the original mortgagee. AIR 1932 Oudh 222 (223) = 8 Luck 79 (DB).

(22) Property subject to three successive mortgages sold under a decree for sale on the first mortgage — Auction-purchaser agreeing to hand over the property back to mortgagor if money was paid before a certain date — Third party advancing money to mortgagor on the understanding that the property will be sold to him — Held, the third party did not get any lien under Section 69 or Section 70. AIR 1929 Mad 890 (896) (DB).

12. Persons in wrongful possession. —

(1) No cause of action arises against the trespassers for reimbursement under Section 69 for dues paid to zamindar on their behalf. AIR 1926 Mad 152 (152).

(2) A person in wrongful possession of property paying rent to Government cannot recover it from the true owner who dispossesses him subsequently. (1885) 7 All 660 (661) (DB).

(3) A kept wrongfully out of possession by B, his co-sharer — B cannot call A to contribute to the rent paid by B during A's dispossession. (1902) 6 Cal WN 903 (904) (DB).

13. Other cases. — (1) Gift of family property to family deity — Plaintiff divesting himself of all rights — Defendant appointed manager — Plaintiff spending over purchases of ghee, matches, cloth and so forth and paying salaries of Pujari and Dhimar — Plaintiff held could not be reimbursed. AIR 1946 Nag 21 (23) = ILR (1945) Nag 820.

(2) Court of Wards paying off creditors of deceased Muhammadan from his pensions and jagirs — Partition suit by some of deceased's heirs not entitled to pensions and jagirs — Heirs bound to reimburse Court of Wards to extent of amount paid. AIR 1941 Lah 88 (89, 90).

(3) A charge-holder is a person interested in the property on which the charge exists and is entitled to recover payments made by him to save it. AIR 1945 Nag 179 (180, 181) = ILR (1945) Nag 247.

(4) Dissolution of partnership — One partner undertaking to pay creditor — Other actually paying is entitled to indemnity. AIR 1936 Mad 865 (867).

(5) Trustee of temple borrowing money for the temple has a right to be indemnified but his claim to such indemnity is not covered by this section. (1911) 12 Ind Cas 335 (336) (DB) (Mad).

(6) A lessee paying off land revenue that had fallen in arrears which the lessor was bound to pay can recover it from the lessor. AIR 1927 Oudh 609 (609) ** AIR 1934 Mad 658 (661).

Section 69 — Note 13 (contd.)

(7) Mortgage decree — Sale in execution — Stranger depositing decree amount on behalf of some reversioner can be reimbursed under Section 69. (1913) 36 Mad 426 (436) (DB).

(8) Co-sharers taking farming lease of estate from another co-sharer specially agreeing to pay the revenue thereon leasing to another in dur-ijara-lease — Dur-ijardar paying revenue to save property could recover it from his lessors. (1876) 25 Suth WR 385 (386) (DB).

(9) Agent of firm ordering goods for the firm — Bill of lading drawn in the name of agent — Agent pawning the goods and handing over the bill to the consignors — Consignors paying the freight and claiming to take delivery — Firm intervening taking delivery of goods — **Held**, they are bound to reimburse the consignors with the amount of freight paid by them. 1882 Pun Re No. 199, p. 577 (581) (DB).

(10) Where money is recovered by Government from shrotriamdar under Sec. 142 (1) of the Madras Estates Land Act which as between himself and the dasabandham inamdar the latter was bound to pay on account of his default to maintain the tank in good repair, the shrotriamdar in whose shrotriam the tank and the inam are situate would be entitled to sue the inamdar for reimbursement. AIR 1951 Mad 650 (653).

(11) A and B, owners of half share each in certain property selling property to C — Suit for possession by C — Consent decree under which C to reconvey property to A and B on payment of certain amount — A selling entire property to D — D depositing full amount in Court and applying for reconveyance in his favour — B selling his half share to E — E depositing half of decree amount in Court — Without prejudice to rights of parties sale-deed executed in joint names of D and E — Amount deposited by E attached by another decree-holder of B — D filing suit against E for his share of decree amount — D, **held** was not entitled to the amount under Section 69 as he was not merely interested in paying the amount under the decree but was himself bound to pay it under his sale-deed. AIR 1950 Mad 343 (346).

(12) In a suit by a creditor against quondam minor to work out the right of subrogation based upon the guardian's claim and right of reimbursement the creditor must satisfy that the claim of the creditor is subsisting and enforceable against the guardian; and that the guardian is entitled to a right of reimbursement. It is of no significance whether action is based on debt or on promissory note. The creditor can obtain relief in the same suit against the minor's estate under the doctrine of indirect recourse and he need not file

two separate suits. (1965) 78 Mad LW 529 = (1965) 2 Mad LJ 292. (AIR 1949 FC 218, Foll.)

(13) Government purchasing property of company in liquidation for liquidator — Draft of sale deed prepared at liquidator's instance approved by Government — Liquidator paying certain sum to his legal advisers for their services in preparing draft — Liquidator **held** could not claim this sum from Government under Section 69 or Section 70. AIR 1961 Andh Pra 57 (59) = (1960) 2 Andh WR 299 (DB).

(14) Amount of private trunk-calls from telephone in Municipal Office, paid by municipality, is recoverable under Section 69 of Contract Act. 1963 Raj LW 40.

(15) Entrustment of money — Loss of amount due to robbery — No proof of defendant's negligence — Defendant **held** not liable to reimburse. (1968) 34 Cut LT 898 = 1968 SLR 694.

(16) Payment of money by agent which purchaser is legally bound to pay — Suit for reimbursement by agent — Section 69 is attracted and purchaser must reimburse agent. 12 Law Rep 423 = (1967) 2 Mys LJ 499.

(17) Motor insurance — Assured assigning all his rights to insurer — Insurer can sue third party in his own name not because he is subrogated to rights of assured but because of express assignment of all rights by assured. AIR 1965 Mad 159 (160) = 77 Mad LW 511.

(18) Loss of goods by Railway in transit — Consignee recovering the money from insurer — Agreement that consignee should join insurer in all legal proceedings — Notice and suit for damages against railway by consignee — Insurer also joined as plaintiff — Consignee does not lose his right to claim damages from railway on the ground that he was paid by the insurer — On consent of consignee decree granted in favour of insurer. AIR 1969 Bom 401 (407) = 71 Bom LR 214.

(19) Bank going into liquidation — Depositor's liability in respect of withdrawals — Effected by another person on his behalf — Question of existence of implied authority or of obligations under Sections 69 and 70 of the Contract Act are questions of law entertained with question of fact — Particulars must be furnished. AIR 1963 Orissa 42 (44) = ILR (1962) Cut 554 (DB).

14. Bona fide payments. — (1) To support a claim for contribution under Section 69, it is an indispensable condition that the claimant must have made the payment in good faith believing in his title to the property. AIR 1932 Mad 71 (73) (DB) ** AIR 1932 All 332 (333) = 54 All 140 (DB) ** AIR 1927 Mad 459 (460) ** AIR 1925 Cal 1097 (1099) (DB) ** AIR 1925 Pat 201 (207) (DB) ** AIR 1925

Section 69 — Note 14 (contd.)

Nag 301 (303, 304) ** AIR 1918 Cal 446 (447) = 45 Cal 691 (DB) ** (1913) 11 All L Jour 179 (183) ** (1904) 7 Oudh Cas 146 (150, 151) ** AIR 1957 Mys 65 (68) = ILR (1957) Mys 1 (DB) ** AIR 1948 Nag 390 (392) = ILR (1948) Nag 80.

(2) Where person putting forward a bona fide claim makes a payment in respect of the disputed property, he is entitled to the benefit and protection afforded by Section 69, Contract Act, even though it ultimately transpires that he had not such an interest. AIR 1950 Mys 6 (7) = 55 Mys HCR 290 (DB).

(3) Where the payment was made by a person not actuated by the motive of protecting his interest it is not bona fide. (1956) 12 Cal 213 (216) (DB).

(4) Proprietor in good faith, pending litigation, paying Government revenue — Estate afterwards adjudged to opponent — Former could recover the money paid minus his receipts from the property. (1894) 21 Cal 142 (148) = 20 Ind App 160 (PC) ** AIR 1941 Mad 847 (850) (DB) ** (1906) 3 All L Jour 665 (667) (DB).

(5) Where the plaintiff fails to establish his bona fides the mere fact that the debt discharged is a mortgage debt or debt secured by a decree does not make any difference. AIR 1931 Mad 207 (210) = 53 Mad 952 (DB).

(6) Contract to supply goods f. o. r. — Goods actually sent with freight "to pay" — Consignee paying freight — No right to recover from consignor. AIR 1928 Mad 198 (198).

(7) Suit for reimbursement by person who obtained probate of a will after its revocation in respect of an amount paid by him in execution under a decree against the assets of the deceased on his admission of the claim — **Held**, in the absence of any movable property with him he ought to have waited till there was actual attachment and therefore, the payment was not genuinely made. AIR 1921 Nag 128 (128).

(8) In determining the question of good faith in a proceeding to be reimbursed for payments the age of the party making the payment is material for inferring knowledge and intention. AIR 1931 Mad 207 (210) = 53 Mad 952 (DB).

(9) Where the mortgagee from a tenant, made the payment of arrears of rent under the bona fide belief that it was necessary to save the property from being sold, he would get the benefit of Section 69 of the Contract Act and so is entitled to recover the amount from the purchaser of the holding though the latter was not a party to the decree for rent for the years that he was in actual occupation. 1946 Nag L Jour 360 (361, 362).

(10) Section 69 only applies to payments made bona fide for the protection of one's own interest. A person who has not acquired any title or interest in property cannot claim back any money paid by him for redeeming a suddharna bond on the property. AIR 1953 Pat 145 (146) = 31 Pat 303 (DB).

15. Voluntary payments. — (1) If plaintiffs, as mere volunteers, choose to pay a sum of money not for defendants, but for themselves, they cannot claim benefit of the section. (1889) 11 All 234 (243) (DB) ** AIR 1916 Oudh 151 (152). (Defendant in a suit for foreclosure paying the full decretal amount pays it in his own interest — He cannot recover it from transferees in possession not parties to suit.) ** (1899) 1 Bom LR 371 (372) (DB).

(2) Payment, by surviving partner in a firm, of super-tax charged on him in respect of the profits of the deceased partner is a voluntary payment which cannot be recovered. AIR 1927 Cal 518 (520).

(3) Vendee of minor's property from a person who he knew was not the guardian spending money for the estate — He has no title to the property and the money, though it benefited the estate, was only a voluntary payment which could not be recovered. AIR 1929 Mad 110 (114) (DB).

(4) Payment of the Government revenue by a lambardar is not a voluntary payment disentitling him to recover it under this section. AIR 1930 All 517 (518) (DB).

(5) Mortgagee paying to prevent sale of certain property for arrears of rent — Such payment is not voluntary payment but constitutes a charge on property. (1879) 4 Cal 539 (542) (DB).

(6) Payment by a charge-holder for dower to the decrec-holder is not a voluntary payment. (1867-1869) 12 Moo Ind App 65 (79) (PC).

(7) Testator bequeathing certain properties to his foster son — Foster son discharging encumbrances on properties not bequeathed to him is not a volunteer and was entitled to be reimbursed. AIR 1925 Mad 1175 (1178).

(8) Person whose claim to a property under a sale has been decided to be fictitious in a suit his payment to save the property from sale is only a voluntary payment which he cannot recover from the vendors. (1908) 30 All 167 (169) (DB).

(9) Purchaser of tenure in execution under rent decree paying the landlords — Defaulting tenants having the sale set aside on the ground of irregularities in the sale — **Held**, purchaser was not a person interested in paying what the tenants were bound to pay but paid the money in his own behalf. (1907) 5 Cal L Jour 59 (61) (DB).

Section 69 — Note 15 (contd.)

(10) Stranger having no interest in mortgaged property or its equity of redemption, voluntarily paying mortgage money having no obligation to do it and going into possession of property — Suit for possession of property by owner of equity of redemption — Decree obtained — Defendant is not entitled to be reimbursed — Moreover claim not having arisen out of mortgage, defendant cannot recover money paid without paying court-fees. AIR 1960 Pat 474 (479, 480) = 1961 BLJR 697.

16. "Bound by law". — (1) The expression "bound by law to pay" in Section 69 means a legal liability. AIR 1918 Mad 1012 (1015) (DB) ** (1910) 33 Mad 15 (19, 20, 21) (DB). (Widow whose property has already been sold without objection is not bound by law to pay the debt. Hence a reversioner who was in possession of the property paying the debt and getting the sale set aside cannot recover it from her.)

[But see AIR 1961 Mad 170 (171, 172) = (1960) 2 Mad LJ 539 (DB). (Words 'bound by law to pay' cover obligations of contract or tort or any other obligation which is an effective bond in law. AIR 1918 Mad 1012, **Held**, to be not good law after the decision in AIR 1950 PC 99.)]

(2) "Bound by law" does not mean "bound by law to the plaintiff" but that the defendant at the suit of any person might be compelled to pay. AIR 1925 Mad 1041 (1042) ** AIR 1938 Cal 413 (414). (Plaintiff along with defendants sued for arrears of rent — Suit not impleading transferee from one of the defendants — Plaintiff compelled to pay off the decree to save his property from sale — **Held**, plaintiff could not claim contribution from transferee whose jama was separately recognised by landlord and that she was not bound by law to pay that which she had already paid.) ** AIR 1927 All 713 (713) ** AIR 1917 Bom 55 (56) = 42 Bom 93 (DB) ** AIR 1965 Ker 55 (57) = 1964 Ker LT 588.

(3) A person "bound by law to pay" includes not only a person who is personally liable for the payment but also a person who is indirectly liable in the sense that his property is liable. AIR 1944 Cal 272 (278) (DB) ** AIR 1920 Mad 890 (892) (DB). (Expenses incurred in respect of the bangle ceremony or seemantham though not recoverable under this section the expenses of nuptials of the daughter are recoverable.) ** (1903) 26 Mad 497 (499) (DB). (Expenses incurred for the marriage of the daughter of the undivided brother by his widow can be recovered from the surviving brother.) ** 1901 All WN 37 (38) (DB). (Revenue-paying property taken under direct management by Collector as revenue was in arrears — While under

such management property bought in execution of a decree of civil Court and sale confirmed — In between confirmation of sale and actual possession auction purchaser compelled to pay arrears of revenue — **Held**, the amount could be recovered from the original owners of the property.)

(4) The obligation to defray the expenses of the marriage of his sons and daughters is cast by the Hindu Law upon a father only if there is any joint family property in his hands and not in other cases. Hence, a wife who expends money on her minor daughter's marriage is not entitled to recover it personally from the husband. AIR 1950 Mad 274 (275, 276).

(5) The liability for which payment may be made under this section need not be statutory but may be contractual also. AIR 1918 Cal 75 (76) (DB) ** AIR 1940 All 214 (216) (DB) ** AIR 1922 Nag 50 (51, 52). (B, under contract with A, to pay C whom he owes money — A paying the money can recover it from B under this section.) ** (1879) 4 Cal 369 (373) (DB). (Intermediate lessee bound under covenant to pay rent to superior landlord — Sub-lessee paying it can recover from them.) ** AIR 1950 PC 99 (104) = 77 Ind App 156 ** AIR 1966 Mad 426 (427) = 79 Mad LW 14 ** AIR 1961 Pat 103 (105) ** (1960) 40 ITR 708 (Andh Pra).

(6) The obligation of the person to pay must have been in existence at the date when payment was made by the other in respect of which the suit is laid. (1913) 17 Cal L Jour 179 (182) (DB) ** AIR 1946 Nag 21 (23) = ILR (1945) Nag 820. (Decree against defendant as recorded tenant — He is bound by law to pay the same though he has parted with his interest under the lease.)

(7) The mere fact that benefit of payment by another is enjoyed by a person is not enough to bring a suit for reimbursement against him but he should also be bound by law to repay it. AIR 1923 Nag 219 (221) (DB).

(8) One person in possession of bulk of the income from the property paying — He pays what he himself is bound to pay and cannot compel the others to contribute. AIR 1935 All 758 (759). (Only one of two mutawallis in possession of bulk of the income — Payment by him to beneficiaries cannot be recovered under Section 69.) ** (1907) 30 Mad 35 (38). (Land in plaintiff's name but in possession of defendant — The defendant was not "bound" to pay revenue.)

(9) Guardian ad litem filing unnecessary and unsuccessful appeal — Estate of the lunatic is not bound by law to pay the costs. (1910) 34 Bom 374 (377) (DB).

(10) Inamdar losing his right of levying assessment on occupancy tenants cannot recover the sum paid as jodi from

Section 69 — Note 16 (contd.)

them, as the tenants are not bound by law to pay jodi. AIR 1921 Bom 175 (176) = 45 Bom 638 (DB).

(11) Rent due for a period when mortgagors and their purchasers were in possession — Plaintiffs as first mortgagees paying rent to superior landlord — Plaintiffs were not bound by law to pay the money within Section 69. (1907) 11 Cal WN 403 (412) (DB).

(12) The money paid by the under-tenant after the sale was not money which the tenant was "bound by law to pay." (1902) 6 Cal WN 336 (337) (DB).

(13) Notwithstanding directive principles in Article 45 of the Constitution, the State Government is under no legal obligation to impart free education and they are not in law bound either to pay the teachers or to meet any of the expenses incurred by private schools. AIR 1958 Ker 290 (297) = ILR (1958) Ker 558 (DB).

(14) If a person is interested in the payment of money which another is bound by law to pay, and he pays it, he will still be entitled to be reimbursed by the other, even if it turns out that he himself was under a legal liability to pay. AIR 1947 Cal 304 (306) (DB).

(15) Deposit under Section 14-A of Regn. VIII of 1819 — Persons entitled under section to make deposit are all persons interested to make deposit — No one is bound by law to pay — Section 69 cannot be invoked to support suit for recovery of money deposited. AIR 1947 Cal 304 (306) (DB).

(16) Patni sale under Regn. 8 of 1819 for arrears of rent — Purchaser takes subject to liability to pay outstanding rent — After proceeding under Regn. 8 of 1819 personal liability of patnidar ceases — Maurasi mukarari tenure-holder depositing money under Section 14-A of Regulation — At date of deposit patnidar is not bound by law to pay money deposited within Section 69, Contract Act. AIR 1947 Cal 304 (306) (DB).

(17) Pro-note — Suit on, by endorsee against endorser and promisor — Decree against both — Realisation of the entire amount from endorser. The principal debtor, is bound to reimburse the surety endorser, if surety has paid the amount. (1967) 2 An WR 349 = (1967) 2 Andh LT 283.

(18) Orders under Essential Supplies (Temporary Powers) Act (1946), S. 3 — Procurement and distribution of paddy and rice — Procurement by Government and its agents and distribution by them to authorised persons — Procuring agents getting only difference between purchase price and sale price — Enhancement of price by Government order resulting in excess profits to procuring agents — Held, procuring agents never stood as agents of Government or in fiduciary

capacity to Government so as to make Government entitled to claim excess profits earned by them. AIR 1965 SC 1773 (1787) = (1965) 2 SCR 577. (AIR 1959 Andh Pra 352, Reversed.)

17. "Paying." — (1) Payment in law means payment to another. So Government which held land under a landholder and paid assessment of the lands to prevent the sale thereof for arrears of revenue is not entitled to recover it from the landholder. (1907) 30 Mad 375 (377) (DB).

(2) Right to contribution does not arise unless the money has been paid in respect of which the right is claimed. (1936) 64 Cal LJ 55 (57).

(3) Mere giving of renewal of security by one of judgment-debtors liable for cost does not amount to payment — The person executing the deed is not actually out of pocket and does nothing more than to convert his former liability into another liability. AIR 1936 Oudh 253 (255, 256) = 12 Luck 45 (DB).

(4) Mere undertaking to pay is not actual payment and does not afford a cause of action for the suits contemplated by this section. 1904 Pun Re No. 31 p. 109 (111) (DB).

18. Limitation. — (1) The right to reimbursement arising under Section 69 is governed by three years' limitation from the date on which the money was paid. AIR 1937 Nag 402 (406) ** AIR 1945 Mad 500 (502). (A person who becomes subrogee of a mortgagee by redeeming the mortgage has a right to be reimbursed by the mortgagor — His claim is governed by Art. 61 of the Limitation Act.) ** AIR 1923 Mad 392 (396) (DB). (Payment of mortgage and claim for reimbursement — Art. 132 of Limitation Act does not apply.) ** AIR 1922 Pat 499 (501) = 1 Pat 780 (DB). (Reimbursement in respect of mortgage paid off.) ** 1904 Pun Re No. 31, p. 109 (111) (DB).

(2) Vendee entering into possession on the date of the contract for sale — Vendee paying charges on the property since that time to the execution of sale deed — Time runs from the date of such payment and Article 61, Limitation Act, governs his suit for recovery of the money from the vendee. AIR 1927 Mad 1060 (1064).

(3) Pronote by R and N in favour of J and M — J alone realizing the whole amount — Subsequent suit by J and M on the pronote — Decree for M only for his half share — Suit by R to recover from J the amount paid to M — Suit is governed by Article 61 or Article 12 but not Article 96, Limitation Act. AIR 1938 Lah 99 (101) = FLR (1937) Lah 623 (DB).

(4) Suit based on registered pronote suit — Combining claim against guardian as well as relief of subrogation against minor's estate — Article 116 of Limitation Act (1908), applies. (1965) 78 Mad LW 529 = (1965) 2 Mad LJ 292.

70. Obligation of person enjoying benefit of non-gratuitous act.—Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.*

Illustrations

(a) A, a tradesman, leaves goods at B's house by mistake. B treats the goods as his own. He is bound to pay A for them.

(b) A saves B's property from fire. A is not entitled to compensation from B, if the circumstances show that he intended to act gratuitously.

[°] As to suits by minors under S. 70 in Presidency Small Cause Courts, see the Presidency Small Cause Courts Act, 1882 (15 of 1882), S. 32. Cf. Transfer of Property Act, 1882, S. 55 (1) (g).

SECTION 70 — SYNOPSIS

1. Scope and applicability.
2. "Lawfully does anything."
3. "For another."
4. "Or delivers anything to him."
5. "Not intending to do so gratuitously."
6. "Enjoys the benefit."
7. Compensation.
8. Quantum meruit — Compensation for services rendered.
9. Pleadings and proof.

1. Scope and applicability. — (1) The section is not exhaustive of the principle contained therein. AIR 1926 Cal 657 (658) (DB).

(2) Section 70 must be interpreted according to its clear and explicit terms and not in reference to the provisions of the English law relating to the matter. AIR 1930 Lah 364 (369) = 11 Lah 375 (DB) ** AIR 1952 Cal 306 (313) ** AIR 1960 Punj 585 (588) = ILR (1960) 2 Punj 676 (DB).

(3) Courts in India ought to be guided more by justice, equity and good conscience than by English precedents and should not cut down the beneficent provisions of Section 70, Contract Act which are intended to apply to all cases of benefit bona fide conferred by one person on another and which benefit is enjoyed by the other person. AIR 1915 Mad 95 (98) = 38 Mad 235 (DB).

(4) The terms of Section 70 are unquestionably wide, but applied with discretion they enable the Courts to do substantial justice in cases where it would be difficult to impute to the persons concerned relations actually created by contract. But it is incumbent on final Court of fact to be guarded and circumspect in their conclusions and not to countenance acts or payments that are really officious. (1911) 88 Cal 1 (7) (DB) ** AIR 1917 Bom 141 (145) = 42 Bom 556 ** AIR 1928 Cal 389 (391).

(5) Where there is an express contract, Section 70, Contract Act, has no application. 62 Cal 612 (623) (DB) ** AIR 1916 Low Bur 56 (56) ** AIR 1947

Nag 84 (86) = ILR (1947) Nag 154 ** AIR 1967 Cal 310 (313) ** AIR 1966 Andh Pra 297 (300) = (1966) 1 Andh WR 275. (However, there are exceptions to this broad rule. Section 70 is not inapplicable merely because plaintiff has another right of action arising out of another cause such as one founded upon contract express or implied or where for some reason the contract is unenforceable.) ** AIR 1964 Pat 555 (559) (DB). (But its principle is extended to cases where services are rendered or things delivered in pursuance of a contract which is void.)

[See also 1965 All LJ 904 (908) = ILR (1965) 2 All 957 (DB).]

[See however AIR 1961 Raj 6 (9) = 1960 Raj LW 345 (DB). (Ordinarily the provisions of Section 70 are not invoked where originally the obligation to restitution arises under any agreement or contract; but there should be no bar to the application of the principle underlying Section 70 also to such class of cases.)]

(6) Section 70 is not founded on contract but embodies the equitable principle of restitution and prevention of unjust enrichment. AIR 1958 Pat 203 (208, 209) = 37 Pat 113 (DB) ** AIR 1968 SC 1218 (1222) = (1968) 3 SCR 214 ** AIR 1962 SC 779 (789) = (1962) Supp (1) SCR 876 ** AIR 1969 Cal 496 (509) (DB). (Purchaser contracting with Company for purchase of goods — Company independently contracting with another firm for supply — Purchaser making payments through Company — Goods not supplied by firm — Firm bound to return money to purchaser for prevention of unjust enrichment.) ** AIR 1969 Mad 437 (439) = (1969) 1 Mad LJ 379 ** AIR 1969 Orissa 171 (175) = 34 Cut LT 1227 ** AIR 1968 All 139 (146) = ILR (1967) 2 All 129 (DB). (Government servant ordered to be compulsorily retired — Writ petition against order — Amount paid to him as result of temporary relief — Dismissal of proceedings — He must refund the amount on basis of quasi contract.) ** 1965 All LJ 904 (908) = ILR (1965) 2 All 957 (DB) ** AIR 1965

Section 70 — Note 1 (contd.)

Ker 55 (56) = 1964 Ker LT 588 ** (1964) 77 Mad LW 297 (298). (A at request of B securing services of C to effect repairs to engine belonging to B and to supply parts — A paying amount due to C — A is liable to pay that amount to B under doctrine of unjustified enrichment.) ** AIR 1960 Mad 410 (419) = (1960) 2 Mad LJ 401 (DB). (In India the principle was developed under Sections 69 and 70 of the Contract Act, and it is generally recognised that these sections are much wider in scope than the doctrine applied in England, and go far beyond it.)

(7) For applicability of Section 70, Contract Act, law will presume a contract, but where there could not have been a contract the law will not presume one. AIR 1937 Nag 330 (333) = ILR (1937) Nag 111.

(8) Section 70 does not apply to persons who are incompetent to contract. AIR 1950 Cal 491 (493) ** AIR 1966 Raj 14 (18) = 1965 Raj LW 173 (DB). (Person entering into the contract having no legal competency.)

(9) Contract Act, Section 70 does not apply to the case of a minor. AIR 1931 Lah 344 (346) (DB) ** AIR 1940 Pat 324 (326) = 19 Pat 739 (FB) ** AIR 1952 Cal 306 (315) ** AIR 1967 Orissa 68 (69) = 32 Cut LT 1149.

(10) Government cannot be considered to be in the position of a minor for the purpose of Section 70. AIR 1962 SC 779 (789) = 1962 Supp (1) SCR 876.

[But see AIR 1928 Mad 317 (320) (DB).]

(11) An obligation to repay money which another has paid and by which a person is benefited does not arise in every case. In India, the matter is regulated by Sections 69 and 70, Contract Act. AIR 1946 Nag 21 (23) = ILR (1945) Nag 820 ** AIR 1945 All 428 (429).

(12) Section 70 can only apply where the law can imply, from the circumstances, a promise to pay. Where the statute prohibits the company from making a binding contract before commencement of business, no implication of a promise to pay can or should be made. AIR 1950 Cal 491 (493).

(13) It is not in every case in which a man has benefited by the money of another that an obligation to repay that money arises. The question is not to be determined by nice considerations of what may be fair or proper according to the highest morality. To support such a suit there must be an obligation express or implied to repay. AIR 1945 PC 23 (30) = 72 Ind App 39 = ILR (1945) Kar (PC) 73 ** AIR 1934 Oudh 307 (311) = 9 Luck 701 (DB) ** AIR 1953 Pat 145 (147) (DB) ** AIR 1950 Mad 274 (276) ** AIR 1969 Mys 350 (354) = (1969) 2 Mys LJ 580.

(14) Section 70 must not be so read as to justify the officious interference of one man with the affairs or property of another or to impose obligation in respect of services which the person sought to be charged did not wish to have rendered. AIR 1946 Nag 21 (23, 24) = ILR (1945) Nag 820 ** AIR 1957 Madh B 183 (183). (Tenant incurring expenditure on repairs against wishes of landlord — Tenant not entitled to benefit of S. 70.) ** ILR (1953) Madh B 53 (56). (Expenditure against wishes of defendant — Plaintiff cannot seek redress under Section 70.) ** 1948 Bur LR (HC) 684 (691, 692).

(15) Under Section 70 plaintiff must prove (1) that he was doing something lawful when he was making the payment; (2) that he did not intend to pay gratuitously; (3) that what he did was done for the defendant and (4) that the defendant did enjoy the benefit. AIR 1915 Mad 95 (97) = 38 Mad 235 (DB) ** AIR 1928 Cal 389 (391) ** AIR 1958 Andh Pra 605 (607) ** AIR 1958 Pat 203 (208, 209) = 37 Pat 113 (DB) ** AIR 1957 Madh B 183 (183) ** AIR 1953 Pat 145 (147) = 31 Pat 303 (DB) ** AIR 1949 Pat 522 (524, 525) = 28 Pat 325 (DB) ** 1949 Bur LR (HC) 509 (521 to 525) ** 1948 Bur LR (HC) 159 (162, 163, 164) (DB) ** AIR 1947 Cal 304 (307) (DB) ** AIR 1968 SC 1218 (1222) = (1968) 3 SCR 214 ** AIR 1969 Ori 171 (175) = 34 Cut LT 1227 ** 1969 Pat LJR 227 (229) = 1969 BLJR 527 (DB) ** 1968 Ker LJ 349 (351) = 1968 Ker LT 108 ** AIR 1966 Andh Pra 297 (299) = (1966) 1 Andh WR 275 ** AIR 1965 Andh Pra 322 (325) = (1965) 1 Andh WR 241 ** AIR 1962 Him Pra 43 (47). (Reversed on facts in AIR 1964 SC 1658.) ** AIR 1960 Punj 585 (588) = ILR (1960) 2 Punj 676.

(16) Section 70, Contract Act, applies to a case when the "person" for whose benefit the payment is made is a large caste. AIR 1917 Bom 141 (147) = 42 Bom 556.

(17) If there is special Act settling the relation of parties the general Act is inoperative. House Accommodation Act ousts the jurisdiction of Civil Court to decide the question of necessity for repairs and its costs. Under Section 70, Contract Act, Civil Courts must take the amount arrived at by the Special Court as it is. (1910) 8 Ind Cas 1158 (1159) = 1910 Pun Re No. 103 (DB).

(18) Section 70, Contract Act, does not contemplate the case of payment of money. AIR 1943 All 220 (232) = ILR (1943) All 610 (FB) ** 1949 Bur LR (HC) 509 (521 to 525) ** 1947 Rang LR 488 (490).

[But see AIR 1925 Cal 1097 (1102, 1103) (DB). ("Does" includes payment of money.) ** 1968 Ker LJ 349 (350, 352) = 1968 Ker LT 108.]

Section 70 — Note 1 (contd.)

(19) An undertaking to pay is not actual payment and does not afford a cause of action for the suit contemplated by Sections 69 and 70 of the Contract Act until the money or its equivalent is actually paid. 1904 Pun Re No. 31, p. 109 (111) (DB).

(20) The provisions of Section 70 can be applied even when one of the parties concerned is a corporation or other public body. AIR 1932 Rang 176 (178) = 10 Rang 522 ** AIR 1952 Cal 306 (315) ** AIR 1962 SC 779 (789) = 1962 Supp (1) SCR 876 ** AIR 1969 Pat 340 (345) (DB). (Provisions apply equally to the citizens, Corporations and Government.) ** AIR 1966 Raj 14 (17) = 1965 Raj LW 173 (DB) (The expression "person" as used in Section 70 includes an association of persons even if not registered.)

(21) Section 70 is not repealed or altered by Sections 48 and 49, Bombay Municipal Boroughs Act. AIR 1937 Bom 417 (419, 420) = ILR (1937) Bom 782 (DB).

(22) Out of the two sections, namely Sections 65 and 70, the latter section covers a wider ground and should not be invoked in the case of a benefit received under a contract. AIR 1926 Oudh 388 (391) = 1 Luck 444 (DB).

(23) Sections 69 and 70 of the Contract Act deal with entirely different conditions and they cannot both apply to the same set of facts. If one applies, the other cannot. And neither of those sections is applicable when a person pays a debt for which he was personally liable. AIR 1946 Cal 63 (64).

(24) Section 70 deals not with contribution but reimbursement. A claim under the section can only be for the recovery of the whole of the money spent and not merely a part of it. AIR 1946 Cal 63 (64).

(25) Section 142 of the Madras Estates Land Act (1 of 1908), does not negative the right of reimbursement contained in Section 70. AIR 1951 Mad 650 (652, 653).

(26) It is not necessary that there should be a request proceeding from one party to the other before the work was undertaken or done to enable a resort to Section 70. AIR 1962 Mad 345 (345, 346) = (1961) 1 Mad LJ 574.

(27) Where property in which the judgment-debtor has no saleable interest is sold under a decree the auction-purchaser is entitled to recover the purchase money from the person to whom it has been paid provided he could bring his case within equitable principles which justify a suit for money had and received on the ground that it is unconscionable that the defendant should retain the money as against the plaintiff. AIR 1956 Trav-Co 216 (217) = ILR (1956) Trav-Co 383 (DB) ** (1947) 37 Trav LJ

1 (31) (FB) ** AIR 1965 Andh Pra 239 (251) = (1965) 1 Andh WR 395 (FB).

(28) It is a matter of some doubt whether a case of payment of money to a third person for another would at all be covered by Section 70, the more appropriate being, perhaps, Section 69. AIR 1961 Andh Pra 57 (59) = (1960) 2 Andh WR 299 (DB).

(29) The fields covered by the two provisions of Section 70 and Section 175 (3) of the Government of India Act are separate and distinct. There is no conflict between the two provisions. AIR 1962 SC 779 (788) = 1962 Supp (1) SCR 876.

(30) Section is wider in scope than doctrine of quantum meruit. AIR 1961 Madh Pra 107 (108) = 1961 MPLJ 156.

2. "Lawfully does anything." — (1) The meaning of the word "lawfully," in Section 70 is merely "bona fide". AIR 1928 Mad 317 (318) (DB) ** AIR 1949 PC 39 (41) = 75 Ind App 213 = ILR (1949) Mad 529 ** AIR 1950 Mad 817 (819) ** AIR 1965 Andh Pra 191 (195) = (1965) 1 Andh WR 176 (DB) ** (1960) 40 ITR 708 (Andh Pra).

(2) Section 70 applies when a person lawfully does something for another; the word "lawful" cannot be ignored. AIR 1946 Nag 21 (23) = ILR (1945) Nag 820.

(3) The word "lawfully" indicates that the man making the payment must have lawful interest in making it. AIR 1953 Pat 145 (146, 151) = 31 Pat 303 (DB) ** AIR 1966 Andh Pra 297 (299, 300) = (1966) 1 Andh WR 275.

(4) Between the person claiming compensation and person against whom it is claimed some lawful relationship must subsist, for that is the implication of the use of the word "lawful" in Section 70, but the said lawful relationship arises not because the party claiming compensation has done something for the party against whom the compensation is claimed but because what has been done by the former has been accepted and enjoyed by the latter. AIR 1962 SC 779 (787, 788) = 1962 Supp (1) SCR 876. (ILR 11 All 234 = 1889 All WN 67, Overruled.) ** AIR 1963 Orissa 220 (222) = ILR (1963) Cut 206 (DB) ** AIR 1959 Bom 519 (520) = 60 Bom LR 459. (AIR 1929 Bom 89, Not foll.) ** AIR 1937 Bom 417 (419, 420) = 39 Bom LR 835 (DB).

[But see AIR 1966 Andh Pra 297 (299) = (1966) 1 Andh WR 275 ** AIR 1958 Andh Pra 605 (607) = 1957 Andh LT 838 ** AIR 1957 Madh B 183 (184) = 1956 Madh BLJ 1019 ** AIR 1953 Pat 145 (147) = ILR 31 Pat 303 (DB) ** 1919 Bur LR (HC) 509 (521 to 525) ** 1948 Bur LR (HC) 159 (163) (DB) ** AIR 1946 Nag 21 (23) = 1945 Nag LJ 563 ** AIR 1929 Bom 89 (91) = 53 Bom 309 (DB).]

(5) Where a person divests himself of all his interests in the property and has

Section 70 — Note 2 (contd.)

ceased to have any interest in the same by reason of a valid transfer, he cannot be said to be within the relationship contemplated either by S. 69 or S. 70. AIR 1950 Mad 817 (819) ** AIR 1946 Nag 21 (23, 24) = ILR (1945) Nag 820.

(6) The word "lawfully" in Section 70, Contract Act is not a surplage and the section is not intended to enable total stranger, without any express or implied request on behalf of a debtor to put himself into the shoes of the creditor by the simple fact of paying the debts due by such debtor. AIR 1953 Pat 145 (147) = 31 Pat 303 (DB) ** AIR 1959 Ker 294 (296) = 1959 Ker LT 120 (DB).

(7) All that the Court has to do in arriving at a decision whether the payment was made lawfully or not is to see whether the person making the payment had any lawful interest in making it at the time when payment was made. AIR 1945 Nag 179 (181) = ILR (1945) Nag 247 ** AIR 1958 Andh Pra 605 (607) ** AIR 1925 Cal 1097 (1102, 1103) (DB) ** AIR 1921 Oudh 14 (21) ** (1910) 14 Cal WN 699 (703) (DB).

(8) Whether an act is lawfully done or not depends on the relative position of the parties so as reasonably to justify liability. AIR 1931 Bom 39 (39, 40).

(9) A bona fide claimant on defeat, is entitled to get back from his opponent what he paid for preserving the estate. AIR 1925 Pat 201 (208) (DB) ** AIR 1925 Cal 1097 (1102, 1103) (DB) ** (1895) 22 Cal 28 (31) (DB) ** 1882 Pun Re No 199, p. 577 (584) (DB) ** (1881) 3 All 36 (72) (FB).

(10) Purchaser on cancellation of his sale is entitled to get back amounts paid in discharge of encumbrances. AIR 1925 Mad 95 (102, 103, 104, 105) (DB) ** AIR 1924 Oudh 302 (303) = 27 Oudh Cas 56 (DB).

(11) Plaintiff holding tenure of defendant — Tenure sold in execution of rent decree against defendant by superior landlord — Deposit by plaintiff to avoid sale — Plaintiff's right of contribution from defendant was enforceable. AIR 1934 Cal 667 (667).

[See also AIR 1917 Bom 141 (145, 147) = 42 Bom 556.]

(12) When a judgment-debtor is lawfully in possession after the sale of property, in execution of a decree, and has paid Government revenue, he is entitled to get back revenue paid. (1909) 6 All LJ 327 (331, 332) (DB).

(13) Where consignee had to pay the freight which was to be paid by the defendant, the payment is lawful and was for the benefit of the latter and is recoverable under Section 70. AIR 1929 Lah 737 (739).

(14) Where on setting aside a decree, the liability to restore sale proceeds has

been discharged by another person, he is entitled to compensation from those so liable. AIR 1929 All 834 (836) (DB).

(15) It is a lawful payment for a purchaser from a mortgagor to redeem the mortgage and recover the amount from the vendor. AIR 1931 Bom 39 (40).

(16) Purchaser of property paying amount of decree against his vendor to save property from execution sale is entitled to recover amount paid under Section 70. (1883) 5 All 400 (405) (DB) ** AIR 1946 Mad 244 (245) (DB) ** (1911) 11 Ind Cas 155 (159) (DB) (Cal).

(17) Plaintiff doing work — Defendant deriving benefit but informing before the work was done that he did not want the work to be done — Work is not done "lawfully." AIR 1928 Mad 320 (325) (DB) ** AIR 1919 Mad 526 (527) ** AIR 1916 Cal 497 (499) (DB) ** (1910) 20 Mad LJ 722 (724) (DB).

(18) Person making payment fraudulently in order to create title must be deemed to be making it voluntarily and not lawfully and so Section 70 would not apply. (1911) 13 Cal LJ 646 (647, 648) (DB) ** (1904) 7 Oudh Cas 146 (147, 151) ** (1880) 4 Bom 643 (653) (DB).

(19) Plaintiff making payment of cess for defendant — It did not appear that any emergency had arisen or was to arise — Section 70 held to have no application for it could not be said that the plaintiff had lawfully made payment. (1902) 26 Bom 504 (514) (DB).

(20) Where the plaintiff pays the revenue of certain lands not knowing that he was making payment for lands which belonged to the defendant nor was the defendant bound to pay the revenue, as he was not the pattadar: **Held**, Section 70 did not apply. (1910) 7 Mad LT 200 (200) (DB).

(21) Where plaintiff alleging himself to be a mortgagee paid the amount of rent decree against his mortgagor and it was afterwards decided that he was not mortgagee, it was held, that deposit was not lawful. (1911) 9 Ind Cas 615 (616) (Cal).

(22) Lawful payment does not include payment of arrears of revenue by a reversioner as his interest is a mere expectancy. AIR 1922 Cal 353 (355) = 49 Cal 470 (DB).

(23) Where a mortgage by a widow is binding on her husband's heirs, the latter are bound to reimburse the mortgagee. 1874 Pun Re No. 69, p. 220 (223) (DB).

(24) A payment of arrears of rent made by a co-sharer in fraud of the other co-sharers is not made lawfully. AIR 1927 Cal 56 (57) (DB).

(25) Plaintiff gaining possession of property under a forged will knowing it to be so — Plaintiff making payments of debts due on estate — Payment is not in

Section 70 — Note 2 (contd.)

good faith and plaintiff is not entitled to reimbursement. AIR 1931 Mad 207 (210) = 53 Mad 952 (DB).

(26) Plaintiffs alleged themselves to be purchasers of the mortgagee's right in certain land — Decree against mortgagee — To save the property from sale in execution of the decree plaintiffs paid the amount of the decree — It was already found in another suit that sale to plaintiff was fictitious and inoperative — Plaintiffs filing suit to recover the money paid towards satisfaction of the decree: **Held**, that Sec. 70 had no application and the suit for recovery of the money was not maintainable. (1908) 30 All 167 (169) (DB).

(27) Person taking wrongful possession of property and paying revenue is not entitled to recover back revenue paid. (1885) 7 All 660 (661) (DB).

(28) In the Madras Presidency the purchaser of mortgaged property subsequent to the Court sale cannot properly apply under Order 21, Rule 89 of the Civil P. C., to have the sale set aside upon payment of the decretal amount; such application is not lawful and the mere fact that the Court entertained it does not make a payment made thereunder a "lawful payment". AIR 1930 Mad 644 (645, 646).

(29) Where vendees discharged encumbrances on property not sold to them they could not recover anything from vendors. AIR 1918 All 319 (320) = 40 All 555 (DB).

(30) Where Village Sanitation Panchayat having control over the conservancy of the local area renders latrine services to a person at his request, the services rendered to him are services lawfully rendered and the Panchayat is entitled to recover under Section 70, Contract Act, the amount charged by it as latrine cess. AIR 1935 Nag 242 (243) = 31 Nag LR (Supp) 108.

(31) The respondents entered into contract with the appellant for the supply of a certain quantity of coal free on rails at Rajahmundry. Two consignments of coal were received under freight system under which the consignee was to pay the freight. The appellant paid the freight and sued respondents for its recovery: **Held**, that it was open for the appellant to have rejected the coal, for his right extended only to rejecting the coal and not to claim any charges that he chose to pay to the railway and that Section 70 did not apply as it could not be said that plaintiff did anything lawfully for the defendant and the defendant had the benefit of it. AIR 1928 Mad 198 (198).

(32) Section 70 cannot be applied when the act done or thing delivered was not lawful. It cannot be said that a person 'lawfully' pays money to the Govern-

ment when the contract with the Government in order to be enforceable is required by Statute to be in a particular form but the person disregards that form. AIR 1955 Cal 626 (628).

(33) Supply to be to permit-holder subject to conditions mentioned in permit — Breach of such conditions — Stock-holder supplying articles on — He cannot recover price of articles from permit-holder — Section 70, Contract Act does not apply. AIR 1963 Pat 326 (329).

3. "For another." — (1) Doing anything "for another" person means in some way taking his place as the doer. That is the first meaning of "for." There is no justification for importing into Section 70 looser sense of "for" and the phrase "does anything for another person not intending to do so gratuitously" in Section 70 means that when a person has proved that he did the thing for another person as explained above, he must then prove that he did not intend to do it gratuitously. Until a person has succeeded in proving that he acted for another, the question whether he acted gratuitously or not does not arise. AIR 1928 Mad 320 (321, 322) (DB).

(2) Where the sole or dominant motive for the payment is not to save another man's property, the payment cannot be said to have been made for such other man. AIR 1930 Mad 644 (645) ** (1903) 6 Oudh Cas 212 (214, 215).

(3) The section would apply to cases where an act is done which is beneficial both to the plaintiff and the defendant. AIR 1947 Mad 117 (117). (Repair of common well by owner of half share after demanding expenses from other co-sharer — Co-sharer not allowed to use water unless he paid share of expenses — Claim for contribution against him — Repairs though for defendant, claim disallowed as he had no benefit out of it — AIR 1943 Mad 85 (FB), followed — AIR 1919 Mad 1145, held no longer good law.) ** AIR 1965 Andh Pra 322 (325) = (1965) 1 Andh WR 241.

[But see AIR 1919 Mad 1145 (1147) (DB).]

(4) If the plaintiff pays to Government certain charges, which the defendant is liable to pay, with the notice and consent of defendant, he can recover the money from defendant under Section 69 or Section 70. (1910) 33 Mad 189 (193) (DB).

(5) If an agent spends money from his own pocket for his principal he can recover them under Section 70. (1911) 34 Mad 167 (172) (DB) ** AIR 1962 Raj 86 (87) = 1961 Raj LW 359 (DB). (Payment by plaintiff to Panchayat at instance of defendant to remove ban imposed upon latter by his castemen.)

(6) A holding power of attorney from B — B giving a contract of some work on behalf of A to C — Power of attorney

Section 70 — Note 3 (contd.)

withdrawn — B making payment afterwards to C without the knowledge of A — B cannot recover the amount from A as he was not a person who had a lawful interest in making the payment. AIR 1969 Mys 350 (354) = (1969) 2 Mys LJ 580.

(7) Where a person is assessed to income-tax and the tax is recovered from him, such person cannot under S. 69 or Section 70 of the Contract Act, recover the amount so paid from another person on the ground that such other person was in actual receipt of the income. Section 70 does not apply as the person paying the tax did so on his own account and not on behalf of another. (1908) 31 Mad 35 (36) (DB).

(8) Mere benefit to another without an express or implied liability to repay does not confer any right. AIR 1931 Bom 39 (39) ** 1969 Pat LJR 227 (229) = 1969 BLJR 527 (DB).

(9) Where a railway, in pursuance of the Government orders under Section 11 (3) (b), Railways Act, widens a culvert to take out the overflowing water of a tank situated in a municipal area, at its own cost, a suit by the Railway against the Municipality for the recovery of the cost is not maintainable. Section 70 of the Contract Act does not apply because the work was done under the Government orders for the benefit of private owners of property in the neighbourhood and not for the benefit of the Municipality. AIR 1945 Mad 427 (429, 430) = ILR (1946) Mad 333 (DB) ** AIR 1949 PC 39 (41) = 75 Ind App 213 = ILR (1949) Mad 529.

(10) It is a question of fact whether what has been done is or is not for another person. AIR 1931 Mad 51 (52) ** AIR 1958 Andh Pra 605 (607) ** 1969 Pat LJR 227 (230) = 1969 BLJR 527 (DB).

(11) Where a person making payment for another is interested in making the payment, he cannot be presumed, in the absence of evidence, to show that he intended to act for the other party also, to have acted for such other party. (1910) 33 Mad 15 (21) (DB).

(12) Person, primarily liable, but absolutely ignorant of the expenditure being incurred on his behalf, need not repay. AIR 1917 Mad 83 (85) = 39 Mad 965 (DB).

(13) A mortgagee-purchaser who pays assessment of the land after the pattadar-mortgagor has relinquished the patta cannot recover the amount from subsequent pattadar. (1912) 12 Mad LT 261 (262) (DB).

(14) Plaintiff paying amount for which he was personally liable — Defendant benefiting by the payment — Plaintiff cannot be said to have paid on behalf

of defendant. AIR 1939 Cal 645 (647) = ILR (1939) 2 Cal 226 (DB).

(15) Where a co-owner defends a suit brought against him and other co-owners, if incidentally and without any special effort on his part, the other co-owners derive an advantage from the defence, he cannot be said to have done something for the other co-owners for which the latter would be bound in law or equity to recompense him. AIR 1933 Lah 95 (96) (DB).

(16) Where money is deposited under Section 14-A of Regn. 8 of 1819, by the holder of a mourasi mokarari tenure under the patni, it cannot be said that the deposit is made for or in the interest of, or for the benefit of the former Patnidar. AIR 1947 Cal 304 (307) (DB).

(17) Where a company never became entitled to commence business, the expenses incurred in its pre and post incorporation period cannot be said to be for its benefit. AIR 1950 Cal 491 (493).

(18) A claim for reimbursement under Section 70 of the Contract Act cannot be sustained if, at the time when the payment was made by the claimant, it was in assertion of his exclusive title to the property. AIR 1950 Mad 343 (346, 347) ** AIR 1965 Ker 55 (56) = 1964 Ker LT 588. (Dispute regarding title to property — Payment of land-tax during period of dispute — Claim for reimbursement of land-tax — Claim could not fall under Section 70 as land tax was paid more in support of title than with intention to benefit other party.)

(19) Compromise decree — Defendant to build wall according to certain specification — Wall built but not according to specification — Plaintiff completing wall and filing suit for recovery of expenses — Plaintiff is entitled to expenses. AIR 1961 Madh Pra 107 (107, 108) = 1961 MPLJ 156.

4. "Or delivers anything to him." —

(1) The elements of Section 70 as regards the delivery of a thing are: (1) delivery (2) delivery without an intention to deliver gratuitously and (3) enjoyment of the benefit of the thing delivered. The section thus contemplates according to its own language a case where only those three elements are present and nothing more. They do not comprise a further element, viz., a request in response to which the thing was delivered. Indeed, if there is a request and a thing is delivered in compliance therewith, there would be an agreement and the person delivering the thing would be entitled to recover his dues under the agreement itself, without being required to fall back on the doctrine of compensation. (1952) 89 Cal LJ 342 (361, 362) (DB) ** AIR 1963 Pat 153 (157) (DB) ** AIR 1959 Cal 247 (252) = 1958 Cal LJ 341.

(2) Relief under Section 70 of the Contract Act can be granted against Govern-

Section 70 — Note 4 (contd.)

ment if the plaintiff proves delivery not intending to do so gratuitously and that the benefit of the delivery was enjoyed by the Government. AIR 1952 Cal 306 (313).

(3) Government paying money to agent for procuring foodgrains — Money cannot be said to be delivered to agent within meaning of Section 70. AIR 1964 Pat 555 (560) (DB).

(4) Mere delivery of a thing irrespective of its context cannot bring in the aid of Section 70 for deliverer. AIR 1964 Pat 555 (560) (DB).

5. "Not intending to do so gratuitously." — (1) It is well settled that there is no obligation to repay in the case of a voluntary payment. AIR 1945 PC 23 (30) = 72 Ind App 39 = ILR (1945) Kar (PC) 73.

(2) A payment by volunteer of mortgage amount or money debt does not render debtor liable. AIR 1928 Mad 541 (542).

(3) Section 70 does not require that a person who claims compensation must have acted from purely disinterested motive; the expression "not intending to do so gratuitously" suggests that there must be an element of self-interest also in the act performed by him. AIR 1949 Pat 522 (524, 525) = 28 Pat 325 (DB) ** (1960) 40 ITR 708 (Andh Pra).

(4) Devisee discharging encumbrances on properties other than those bequeathed to him, but which he expects to inherit, is entitled to be reimbursed, as he is not a volunteer. AIR 1925 Mad 1175 (1178).

(5) The value of payment under protest is to safeguard the position of the person who makes the payment and to ensure that it cannot be said that the payment he made was a voluntary one. AIR 1929 Mad 409 (410) = 52 Mad 207 (DB).

(6) Co-sharer who has incurred expenditure on repair or improvements of common property can claim a rateable contribution if he did not intend to benefit them gratuitously and if they are really benefited. (1911) 7 Nag LR 11 (13) ** AIR 1943 Mad 85 (86) = ILR (1943) Mad 158 (FB) ** AIR 1937 Pat 103 (103) ** AIR 1934 Pat 346 (349) ** AIR 1927 Mad 122 (122) ** AIR 1921 Cal 93 (94) (DB) ** (1905) 32 Cal 374 (376) (DB).

(7) Government repaired certain tank from which were irrigated lands in the zamindari of defendant. Defendant knew that the repairs were necessary for the preservation of the tank. The Government had carried out the repairs not intending to do them gratuitously for defendant and the defendant enjoyed the benefit of the work done. There was no request either express or implied on the part of the zamindar to the Government to execute the repairs: **Held**, in the suit by Government against defendant,

that the plaintiff was entitled under Contract Act, Section 70, to recover from defendant part of the costs incurred, estimated with reference to the irrigable area of the villages owned by the plaintiff and defendant respectively. (1895) 18 Mad 88 (93, 94) (DB).

(8) When several persons hold a tenancy jointly and where one of these persons pays the whole rent, he can sue the others for contribution under Section 70 and is entitled to a decree. AIR 1915 Cal 157 (158) ** AIR 1931 Pat 234 (235) = 10 Pat 168 (DB) ** AIR 1930 Cal 344 (345) (DB). (Transferee from one co-tenant of a holding not transferable is entitled to contribution.) ** AIR 1920 Cal 657 (658) (DB) ** (11) 37 Cal 1 (6, 7) (DB) ** (1910) 14 Cal WN 699 (703). (Joint Decree.)

[See also AIR 1935 Lah 981 (981, 982).]

(9) Part owner of an estate paying revenue due on the whole estate to save his own interests: **Held** that under Sections 69 and 70 of the Contract Act he was entitled for contribution. (1888) 11 Mad 452 (459) (DB) ** AIR 1936 Mad 752 (759, 760) ** AIR 1925 Oudh 625 (626) ** 1883 Pun Re No. 42, p. 127 (129) (DB).

(10) Mortgagor is entitled to contribution from his co-mortgagors of amount paid by him in Court to set aside sale in execution of mortgage decree but cannot claim statutory compensation. AIR 1931 Pat 394 (400) = 10 Pat 528 (DB) ** AIR 1945 Mad 500 (502).

(11) A co-plaintiff is entitled to be reimbursed his expenses in full. AIR 1916 Pat 273 (274) = 1 Pat LJ 201 (DB).

(12) Litigation against A and B — A incurring costs unauthorised by B to prosecute it up to the highest Court cannot recover a share of it from B, even though the litigation has ended successfully. (1894) 21 Cal 496 (504) = 21 Ind App 26 (PC) ** AIR 1914 Lah 384 (385) = 1914 Pun Re No. 461 (DB).

(13) Inamdar within a zamindari taking for his benefit Government water and the zamindar made to pay the water cess: **Held**, that the zamindar is entitled to recover the amount of cess so paid under Section 70 of the Contract Act. (1907) 30 Mad 277 (278) (DB).

(14) Mortgagee paying rent or revenue is entitled to recover from mortgagor. AIR 1933 Rang 112 (112) ** (1912) 16 Cal LJ 156 (161) (DB) ** (1909) 2 Ind Cas 435 (436) (Mad) ** (1903) 30 Cal 794 (800).

(15) Income-tax due from mortgagor — Mortgagee paying same — Payment is gratuitous — Mortgagee not entitled to reimbursement. AIR 1959 Ker 294 (296) = (1959) Ker LT 120 (DB).

(16) Electric charges and water tax payable by defendant to appropriate departments — Plaintiff paying them on

Section 70 — Note 5 (contd.)

defendant's behalf on latter's failure — Payment is gratuitous and plaintiff cannot recover same from defendant. AIR 1963 Pat 131 (139).

(17) Mortgagee of a tenure becoming also its purchaser is not entitled to be reimbursed for the amounts of arrears he had paid prior to his purchase for he was himself liable. AIR 1924 Pat 235 (236) = 2 Pat 890 (DB).

(18) The payment made by sadar lambaradar of land revenue allotted to the pattidar after the imperfect partition under Section 188 (1), C. P. Land Revenue Act, is a payment lawfully made and not one intended to be made gratuitously of which the benefit is enjoyed by the defaulting pattidar, and the sadar lambaradar is entitled to be reimbursed under Section 70, Contract Act. AIR 1946 Nag 134 (134, 135) = ILR (1946) Nag 226 (DB).

(19) Person continuing to be recorded as lambaradar even after he sold his holdings is entitled to recover from his vendee the rent paid by him. AIR 1930 All 302 (303) = 51 All 897.

(20) Principal and agent — Principal benefiting by money received through unauthorised act of agent — He is liable jointly and severally with agent to restore it. AIR 1937 Lah 570 (571) ** AIR 1927 All 161 (162) = 49 All 520 (DB).

(21) Execution against members of joint Hindu family — Property in the possession of one member attached — That member depositing decree amount to avoid sale — He is entitled to refund of deposit on proof that his self-acquisitions were attached and not family property. AIR 1920 Mad 241 (242).

(22) Lease of bazar legally defective — Lessee entering into possession and constructing tin-shed and chabutra — No notice given to lessor nor his consent obtained under Section 108 (f) and (p), T. P. Act — Section 70 held inapplicable — Lessee held not entitled to costs of construction. AIR 1942 Oudh 231 (237) = 17 Luck 530 (DB).

(23) A borrowed money from B, for the use of C and paid to C. B sued A, and recovered the amount. Then A sued C. Held that payment by A to B was not gratuitous and he could recover it from C. (1907) 29 All 627 (632) (DB).

(24) Purchaser from a widow is not entitled, as against purchasers from heir of the last owner, to claim the amount paid by such purchaser to a decree-holder who had sought to execute against such property. He did not intend to confer any benefit on the plaintiffs. AIR 1923 All 404 (405).

(25) Mortgage debt paid with the money of the plaintiff — Defendants are bound to compensate the plaintiff by repayment of the principal and reasonable interest. AIR 1934 All 390 (392).

(26) The heir on re-marriage of the widow is bound to pay the amount advanced at her request for the discharge of an encumbrance out of the estate. AIR 1925 Nag 19 (20).

(27) A standing surety for B's liquor shop and depositing cash security with Government — B taking C as partner — Default in payment of licence fees — Recovery by Government from cash deposited by A without his consent — Suit by A for recovery of that amount against B and C — B and C held liable. AIR 1938 All 206 (207).

(28) R and N borrowed certain amount on a promissory note from J and M. J alone realised the amount. Subsequently J and M brought a suit against R and N on the basis of the promissory note. As J had no authority to receive payment on behalf of M, the suit was dismissed to the extent of half the claim but was decreed in favour of M to the extent of half the claim. Thereupon, R brought a suit against J to recover the amount paid to M on the ground that he had been compelled to pay it twice: Held that the suit fell under Section 70, Contract Act. AIR 1938 Lah 99 (101) = ILR (1937) Lah 623 (DB).

(29) One of the several judgment-debtors paying off decree is entitled to recover compensation under Section 70 because his payment is not gratuitous. AIR 1919 Pat 10 (12).

(30) When the payment of the municipal tax is the obligation of the defendant and the plaintiff has not paid the tax as a volunteer, the right of the plaintiff to reimbursement under Sections 69 and 70 cannot be negated. AIR 1955 Mad 555 (557).

(31) Plaintiff purchasing leasehold interest in Court auction and proceeding with agricultural operation on obtaining delivery of possession — Auction sale set aside at instance of defendant — Plaintiff held was entitled to recover amount spent by him for agricultural operations till sale was set aside as all requisites of Section 70 were satisfied. 1955 Andh WR 560 (561).

(32) A in execution of his money decree against B purchased certain land and obtained an order for delivery of possession. By a subsequent sale, B sold the land to C. Prior to his purchase C had redeemed a sudbharna bond in respect of the property and subsequent to his purchase he also redeemed another sudbharna bond in respect of the property — Held, that the payments made by C could not be considered to have been made 'lawfully' but were gratuitous payments and therefore he was not entitled to any relief under Section 70. AIR 1953 Pat 145 (146 to 149) = 31 Pat 303 (DB).

(33) A entering into wagering contract with pucca adatia — A from time

Section 70 — Note 5 (contd.)

to time depositing with pucca adatia cover or margin money — Transactions resulting in loss — Section 70 held had no bearing on the facts as there was no question of pucca adatia enjoying benefits of non-gratuitous act. AIR 1947 All 14 (15, 16).

(34) Railway expressing its inability to carry goods and asking consignor to take it back, but afterwards forwarding same after seven months — Act of railway is purely gratuitous. (1955) 8 Sau LR 163 (163) (DB).

(35) Where a person executes a mortgage deed and receives consideration but the deed is not registered and possession not given to the mortgagee, latter can recover the amount of consideration under Section 70, the amount not being paid gratuitously. AIR 1956 Sau 27 (29).

(36) Property mortgaged — Prior mortgagee seeking execution of mortgage decree by sale — Purchaser of property paying up decretal amount and averting sale — Property including share of property purchased by puisne mortgagee in execution of his mortgage decree — Suit by purchaser against puisne mortgagee for reimbursement — Section 70 held applied and plaintiff was entitled to decree for reimbursement. AIR 1949 Pat 522 (525) = 28 Pat 325.

(37) Plaintiff, purchaser of property, allowed the defendants to continue their residence in building until other occupation is secured by them — No indication in evidence that plaintiff had done so gratuitously — Claim based on agreement to pay rent or other remuneration — Agreement even if not proved plaintiff was entitled to remuneration for use and occupation. AIR 1969 Ker 263 (264) = 1969 Ker LJ 80.

(38) Suit to recover arrears of salary from Gram Panchayat constituted under Madras Village Panchayats Act (10 of 1950) — Contention that as appointment by President was not approved by higher authority, contract of service was not binding on panchayat — Even if contention is accepted, Panchayat, being a legal person is bound to pay as services rendered were not intended to be gratuitous. (1965) 78 Mad LW 621 (621, 622) = 1965 Mad WN 354.

(39) Where the manager and the teacher have agreed that the manager makes the appointment subject to the condition that the teacher shall look to Government alone for salary and that such salary would be payable only in the event of the appointment being approved, the teacher, on disapproval of his appointment cannot claim salary from manager, for, services rendered by him were gratuitous. ILR (1967) 2 Ker 208 (214) = 1967 Ker LT 653 (DB).

(40) Electricity cut off for non-payment of dues before tenant's entry into

house — Tenant paying arrears cannot ask for compensation in absence of proof that he did not intend to pay arrears gratuitously. AIR 1964 All 348 (349).

(41) Plaintiff supplying bricks to canal department of Government under oral contract which was found not enforceable—Canal department utilising bricks — Supply of bricks not gratuitous — Government liable for their price. 1964 All LJ 1092.

(42) An implied promise to repay will arise if it can be established that the moneys which the defendant received belonged to the plaintiff and the plaintiff did not want the property in the money to go to the defendant without the consideration therefor. AIR 1969 Cal 496 (508, 509).

6. "Enjoys the benefit". — (1) Section 70, Contract Act, contemplates a case in which a certain benefit is done to another and is not intended to be done gratuitously, and the man to whom benefit is done enjoys the benefit voluntarily, that is to say, he should have an option of refusing to enjoy the benefit. It does not mean that the benefit should be thrust upon him without his having the option of refusing it. Nobody has a right to force a benefit upon another. AIR 1936 Pat 194 (197, 198) (DB) ** AIR 1950 Mad 817 (818) ** AIR 1932 Mad 151 (152) ** AIR 1931 Mad 51 (54) ** AIR 1922 Pat 337 (338, 339) ** AIR 1915 Mad 870 (871) ** AIR 1915 Mad 428 (430, 432, 433) (DB) ** (1910) 33 Mad 15 (20) ** AIR 1962 SC 779 (786, 787) = 1962 Supp (1) SCR 876 ** AIR 1969 Mys 350 (353) = (1969) 2 Mys LJ 580 ** AIR 1964 Orissa 69 (70) ** AIR 1962 Him Pra 43 (47). (Reversed on facts in AIR 1964 SC 1658.) ** AIR 1961 Madh Pra 107 (108) = 1961 MPLJ 156.

[But see AIR 1949 Pat 522 (524, 525) = 28 Pat 325 (DB) ** AIR 1927 Mad 459 (460) ** AIR 1923 Mad 64 (66) (DB) ** AIR 1915 Mad 1081 (1082) (DB) ** AIR 1915 Mad 85 (98, 99) = 38 Mad 235 (DB) ** (1912) 16 Cal L Jour 156 (161) (DB).]

(2) There should be direct benefit to the person for whom the work is done. AIR 1949 PC 39 (41) = 75 Ind App 213 = ILR (1949) Mad 529 ** AIR 1950 Mad 817 (818, 819) ** AIR 1947 Nag 84 (86) = ILR (1947) Nag 154 ** AIR 1945 Mad 427 (430) = ILR (1946) Mad 333 (DB) ** AIR 1936 Mad 930 (934, 936) (DB) ** AIR 1969 Mys 350 (354) = (1969) 2 Mys LJ 580. (A holding power of attorney from B — B giving a contract for improvements to his house to C — Powers of attorney revoked by B — B making payment subsequently to 'C' for the work done — The benefit derived by B is not direct and hence he cannot be made to repay

Section 70 — Note 6 (contd.)

A.) ** AIR 1969 Tripura 26 (28, 29). (Even if the contract is discovered to be void.) ** AIR 1963 Pat 153 (157) (DB).

(3) A person who pays money due to certain person, not on behalf of or for the benefit of another, cannot recover the money from the other person who has not been benefited by the payment. AIR 1931 Oudh 242 (243) (DB) ** (1899) 22 Mad 314 (316) (DB).

(4) Even illegal payments to which defendant consented for his own benefit must be repaid. AIR 1928 Mad 476 (476).

(5) Even in the absence of a contract the party deriving benefit or advantage must pay compensation for the equivalent value of the benefit derived. (1966) 32 Cut LT 383 (386) = ILR (1966) Cut 102.

(6) Payment neither beneficial nor known or consented to confers no right. AIR 1916 Bom 302 (304) = 40 Bom 646 (DB).

(7) Where a tenant used Government water without permission and the landlord paid water rate and sued for the recovery of the same, it was held that the only consequence of non-payment of water rate would be sale of proprietary estate of landlord and that as tenant was not benefited by such payment, he would not be liable. AIR 1914 Mad 20 (21).

[See also AIR 1918 Cal 56 (57) (DB).]

(8) Where a company through unauthorised action of the directors, comes into possession of money advanced by the plaintiff, the receipt of the money itself is a benefit to the company and the creditor is not concerned with what is done with the money by the company subsequently. AIR 1957 All 311 (315) (DB).

(9) Money deposited under Section 14-A of Regulation 8 of 1819 by holder of mourasi mokarari tenure under patni — Patnidar having lost his interest in patni sale does not enjoy benefit of such deposit. AIR 1947 Cal 304 (307) (DB).

(10) Where A and B were co-sharers of Patni-tenures, and a decree was obtained for recovery of rent against A alone without making B a party, and A paid the amount to avert the sale of the defaulting patni, and thereafter instituted a suit for contribution against B, it was held that since B was not a party to the decree, his interest in the property could not have been affected by the execution sale, and B was not benefited by the payment made by A, and the conditions of Sections 69 and 70 not having been present, A was not entitled to any relief either under Section 69 or under Section 70 of the Contract Act. AIR 1955 Cal 62 (63).

(11) Loan of money in Japanese notes during Japanese occupation of Burma — Suit by creditor — Loan of Japanese notes was not loan of money — However under Section 70 lender having got benefit of Japanese notes was bound to make compensation. 1947 Rang LR 149 (151, 152, 153) (FB).

(12) A paid cash money by B, his employer, to purchase goods — A purchasing goods from C on credit though not authorised — Suit by C against B and A — B cannot be held liable, though he received goods. 1959 Raj LW 98 (99).

(13) Agreement between defendant and plaintiffs — Latter to deliver rice to defendant or his nominees — Rice delivered to nominees — Nominees cannot be said to have received any advantage under agreement. AIR 1960 Pat 19 (26) = 1959 BLJR 527 (DB).

(14) Supply of water to hotel owned by A and B jointly — Water Works Committee refusing to record B as tenant in respect of water-tax payable by hotel — Suit for recovery of water rates as against B is not maintainable. AIR 1964 Orissa 69 (70).

(15) Where plaintiff supplied pipes which were utilized by Government for improvement of water supply it was held that Government enjoyed benefit of supply and was bound, therefore, to make compensation. AIR 1965 J & K 43 (44) = 1964 Kash LJ 319 (DB).

(16) Admission of receipt of money by A from B — Payment not gratuitous — No proof of its being made towards A's remuneration — Money used for A's benefit — A must repay it. 1968 Ker LJ 349 (350, 352) = 1968 Ker LT 108. (AIR 1939 Lah 386, Dissented from.)

(17) Officer having no authority entering into works contract — Work done to property of which Government is not owner — Government sanctioning work for certain limited purpose — Government cannot be held to have received benefit. AIR 1959 Bom 56 (60) = 1958 Nag LJ 142. (Reversed on another point in AIR 1963 SC 1516.)

(18) Contract for supply of vehicles to Military Authorities — Contractor by a separate contract using vehicles of State Transport undertaking — Fact that Military authorities did not pay the bills would not affect the position that the Contractor derived benefit by use of State Transport vehicles — State Transport undertaking entitled to recover agreed hire charges from the contractor for use of their vehicles. AIR 1966 All 507 (508).

(19) Partition between father and son — Father agreeing to transfer 50 shares in certain company to son — Shares continued to stand in name of father — Company went into liquidation — Father making payment towards balance

Section 70 — Note 6 (contd.)

of share amount — Suit for recovery of that amount — **Held**, that neither payment was for son nor he enjoyed any benefit, and hence Section 70 was inapplicable. AIR 1960 Andh Pra 146 (146).

(20) Plaintiff agreeing to adjustment of amount due to him from defendant — Defendant to convey title in lands to him after conversion into raiyati — Contract is not void ab initio — Plaintiff is entitled for refund under Section 65 as well as under Section 70. AIR 1969 Orissa 171 (175, 176) = 34 Cut LT 1227.

(21) Money spent by plaintiff at the request of the defendant resulting in benefit to both — Plaintiff can claim contribution in proportion to benefit obtained by defendant. (1969) 2 MLJ 538 (539) = 82 Mad LW 435.

7. Compensation. — (1) Section 70 contemplates a case where, initially, at the time of the doing of the act, or the delivery of thing, there is no "proposal" or "promise" as defined in Section 2, and, therefore, no agreement; but an obligation to make compensation to the person doing the act or, delivering the thing nevertheless arises out of the fact that the person for whom the act was done or to whom the thing was delivered, accepted and enjoyed its benefit, although there was no request for the act or the thing on his part. The section clearly contemplates a case where an act has been done or a thing delivered without a request, but not gratuitously. It may be that cases where a request was made but it was by a person having no authority to make it are also intended because in such cases there is really no request by the person who receives and takes the benefit. (1952) 89 Cal L Jour 342 (363) (DB).

(2) The right to claim compensation under Section 70 is an equitable right which arises out of an implied contract of indemnity between persons whose interest in the property is liable for a common debt. (1956) 60 Cal WN 988 (993). (Suit by Corporation to enforce charge under Section 205, Calcutta Municipal Act (3 of 1923) — One co-sharer paying all the dues of Corporation — He can sue other co-sharers for compensation.)

(3) The basis of the compensation under Section 70 would be in proportion to the benefit enjoyed. AIR 1937 Bom 417 (421) = ILR (1937) Bom 782 (DB).

(4) Where motor vehicles of plaintiff are taken by Government for emergent work of refugee evacuation without settling rate of hire or period for which they are to be used plaintiff held to be entitled to compensation under Sec. 70. 1965 All LJ 904 (908) = ILR (1965) 2 All 957 (DB).

(5) Plaintiff entitled to contribution can claim interest. AIR 1936 Mad 910 (912) = ILR (1937) Mad 35 ** AIR 1931 Lah 457 (463) (DB).

[But see AIR 1930 Lah 364 (371) = 11 Lah 375 (DB).]

(6) Part owner of darpatni depositing decretal amount and statutory compensation and getting sale set aside — He has against co-sharers, under Sec. 70, right to contribution for decretal amount and compensation. AIR 1920 Cal 1002 (1003) (DB).

(7) In imparting education without the collection of any tuition fees, the schools under private management cannot be said to be discharging an obligation of the State Government and the grant paid by the State Government to the schools cannot be said to be compensation lawfully due to them. AIR 1958 Ker 290 (297) = ILR (1958) Ker 558 (DB).

(8) The words of the section are wide enough to cover a case where a landlord delivers possession of the accommodation to the tenant under an understanding that the latter shall pay rent. In such a case if the tenant refuses to pay rent or offers rent which is reasonably low, the Court can award reasonable compensation. 1966 All LJ 688 (695) = 1966 All WR (HC) 69.

(9) Defendant being highest bidder at auction of right to collect fees in markets — Defendant however failing to execute registered lease deed representing terms of auction — Defendant exercising his right under auction — **Held**, Sections 65 and 70 applied and defendant was bound to pay compensation to plaintiff. AIR 1965 Andh Pra 191 (193) = (1965) 1 Andh WR 176 (DB).

(10) Compensation under Section 70 is ordered not in any affirmation of agreement or contract but in disaffirmation thereof. AIR 1961 Raj 6 (9) = 1960 Raj LW 345 (DB).

8. Quantum meruit — Compensation for services rendered. — (1) The principle of quantum meruit is often applied where for some technical reason a contract is held to be invalid. Under such circumstances an implied contract is assumed by which the person for whom the work is to be done contracts to pay the person who does work reasonably for the work done. AIR 1941 Mad 887 (887, 888) ** AIR 1965 Andh Pra 191 (195) = (1965) 1 Andh WR 176 (DB).

(2) The principle of quantum meruit has no application to cases where there are specific contracts in operation, and has only application to cases where there is no contract in operation. AIR 1957 Mad 169 (177) (DB).

(3) In cases arising out of obligation prior to the contract and in order to effectuate contract and also cases arising subsequent to the breach of contract, re-

Section 70 — Note 8 (contd.)

Ref of quantum meruit can be granted.
AIR 1966 Andh Pra 297 (300) = (1966)
1 Andh WR 275.

(4) Where the claim on a promissory note fails on the ground of undue influence, it does not involve the dismissal of the alternative claim set up by the plaintiff, as for instance, to recover remuneration of services rendered by him. Where it appears that he undertook various duties for the defendants and performed them with assiduity and care and they proved beneficial to the defendants and he did this under the impression that he would receive remuneration for the services, his claim to a reasonable compensation must be held to be established. AIR 1937 PC 50 (52, 53) ** AIR 1927 Nag 241 (242).

(5) Where a contract is invalid so far as one party is concerned, it cannot bind the other party also. Decree can be passed on "quantum meruit" basis against a party enjoying benefit under this contract. AIR 1933 Pesh 16 (18) ** AIR 1937 Bom 417 (419, 422) = ILR (1937) Bom 782 (DB) ** (1936) 38 Pun LR 618 (619) ** AIR 1933 Lah 15 (17) = 13 Lah 561 (DB) ** AIR 1932 Rang 176 (178) = 10 Rang 522 ** AIR 1930 Lah 364 (369) = 11 Lah 395 (DB) ** AIR 1927 Cal 465 (472) = 54 Cal 189 (DB).

(6) No claim in the nature of a quantum meruit can be founded upon a contract which has not been performed, unless the person who has a right to insist on its performance has elected to accept some benefit resulting from its partial or defective performance, or the circumstances are such as to show, in some other way, that a new contract has arisen between the parties. In order to raise an inference of a new contract the circumstances must be such as to give an option to the defendant to take or not to take the benefit. Where a contract has been only partly performed, the mere fact that the part performance has been beneficial is not enough to render the party benefited liable to pay for it; it must be shown that he has taken the benefit of the part performance under circumstances sufficient to raise an implied promise to pay for the work done notwithstanding the non-performance of the special contract. AIR 1963 Ker 181 (184) = 1963 Ker LT 335.

(7) If a party to a contract has rendered service to the other not intending to do so gratuitously and the other person has obtained some benefit, the former is entitled to compensation for the value of the services rendered by him, even if he failed to prove an express agreement in that behalf. AIR

1966 SC 1034 (1035, 1036) = (1961) 3 SCR 663.

(8) Where one has expressly or impliedly requested another to render him a service without specifying any remuneration but the circumstances of the request imply that the service is to be paid for, the law will imply a promise to pay, i. e., so much as the party doing the service has deserved or as is normally said a reasonable sum. AIR 1935 Cal 347 (353) = 62 Cal 175 (DB).

(9) If there is an agreement which is invalid under Section 28 of the Legal Practitioners' Act or no agreement at all, the pleader can sue under Section 70, of the Contract Act, and he can get whatever is a fair and just remuneration for the services he has actually rendered. AIR 1921 Nag 122 (125) = 17 Nag LR 8 ** AIR 1914 Cal 166 (166) (DB) ** (1886) 9 Mad 375 (376) (DB).

[But see AIR 1927 Pat 178 (181) = 6 Pat 614 (DB).]

(10) Section 28 of Legal Practitioners Act prohibits the recovery of any money under an agreement not recorded in a particular manner. It no doubt supersedes those provisions of the Contract Act under which agreement can be enforced generally. But it does not touch Section 70 which has no relation to express agreement at all, but which is intended specially to deal with cases where remuneration can be claimed in the absence of an agreement. 1888 Pun Re No. 160 p. 426 (426) (DB) ** 1893 Pun Re No. 136 p. 528 (533) (DB).

(11) Where the supply of hard coke made by the plaintiff to a jute mill belonging to the Military Department of the Government of India is rejected as it was not up to the specification upon which the Deputy Coal Commissioner gave direction for its disposal by sale and for payment of the price realised by the sale to the plaintiff, a suit in the meanwhile brought by the plaintiff against the Union of India to recover the price of the Coke supplied is governed not by Section 70 of the Contract Act but by the statutory provisions contained in Rule 8 and Rule 10-A (1) of the Colliery Control Order, 1945. AIR 1959 Pat 347 (348) = 1959 BLJR 259 (DB).

(12) In absence of an express agreement medical man is entitled to reasonable remuneration to be fixed by Court. AIR 1914 Upp Bur 12 (14) = 2 Upp Bur Rul 19.

(13) J agreed to repair an organ belonging to S for Rs. 100 but he did not do the full repairs to the organ according to agreement. J claimed to be entitled to retain the organ until he is paid for the work done: Held, that as there was an express contract it must be performed in its entirety or nothing

Section 70 — Note 8 (contd.)

can be claimed under it. (1884) 6 All 139 (142) (DB) ** (1913) 19 Ind Cas 48 (51) (Low Bur).

(14) Void lease — Compensation for use and occupation can be recovered under Section 70. AIR 1940 Sind 129 (130) = ILR (1940) Kar 200 (DB).

(15) Where the plaintiffs had supplied sugarcane to a sugarcane factory in pursuance of an oral agreement on the basis of which a suit for recovery of the price of the sugarcane was not maintainable under U. P. Sugar Factories Control Rules 1938, it was held that the plaintiffs were entitled to a decree under Section 70. 1950 All L Jour 659 (660).

(16) Where a statutory body like a Municipality has entered into a contract which is invalid for non-compliance with the statutory requirements, the other party to the contract who has performed his part of the contract is entitled to claim restitution by way of compensation for damages from the defendant Municipality by virtue of Sections 65 and 70 of the Contract Act. AIR 1956 Cal 203 (203, 204) (DB) ** 1968 MPLJ 425 (435, 436, 437) = 1969 Jab LJ 304 ** AIR 1961 Raj 6 (9) = 1960 Raj LW 345 (DB).

(17) License to telephone company expiring — Under terms of license Government exercising right to purchase company by letter — War with Japan breaking out and part of property destroyed under denial scheme — Remaining properties taken over after war — Suit by company against Government claiming value under contract or as damages — Government accepting liability for what was actually taken over by them. Held, that principle of quantum meruit embodied in Section 70, applied. 1948 Bur LR (HC) 527 (537, 538).

(18) Works contract — Defective execution — Breach going to root of contract — Enjoyment of benefit of defective work without protest — Liability to pay for same on quantum meruit arises. AIR 1963 Ker 181 (186) = 1963 Ker LT 335.

(19) Appointment of unqualified teacher by management — Government disapproving appointment — Management is liable to pay for services rendered by teacher. AIR 1960 Ker 133 (134) = 1959 Ker LT 1008.

(20) Plaintiff found entitled only to reasonable compensation for services rendered after expiry of service contract — Plaintiff is not entitled to three months' notice or salary for three months under Section 70. (1962) 3 Guj LR 149 (152) (DB).

(21) A person who does work or supplies goods under a contract, express or implied, if no price is fixed, is entitled to be paid a reasonable sum for

his labour and materials supplied. AIR 1960 Punj 585 (589) = ILR (1960) 2 Punj 676 (DB).

(22) Contract to supply glazed windows of particular design — After part performance design changed into panelled windows without fixing new rate — Defendant accepting goods supplied by plaintiff — Plaintiff is entitled to claim fair and reasonable price on basis of quantum meruit. AIR 1960 Punj 585 (589) = ILR (1960) 2 Punj 676 (DB).

(23) Allotment of maize by undivided Punjab to plaintiff — Maize lying at place which fell within territory of East Punjab — Price paid by plaintiff but maize not removed — Government of East Punjab cancelling permit — Money (price) deposited in Bank falling within territory of West Punjab in Pakistan — East Punjab held liable to refund amount. ILR (1961) 2 Punj 71 (146, 147) (FB).

(24) Government purchasing property of company in liquidation from liquidator — Draft of sale deed prepared at instance of liquidator approved by Government — Liquidator paying certain sum to his legal advisers for their services in preparing draft — Liquidator could not claim this sum from Government. AIR 1961 Andh Pra 57 (59) = (1960) 2 Andh WR 299 (DB).

(25) When the drawer makes a remittance in the bank with a direction that it should be utilised for making payment of a cheque issued in favour of the payee and the banker accepts it as such but the payee is not informed about its acceptance, the payee cannot on the dishonour of the cheque, bring an action for the recovery of the amount as money had and received for his use. AIR 1963 Ker 306 (308).

(26) Where the lessee of a rice mill in violation of express contract carried out repairs exceeding Rs. 150 without the prior approval of all the co-owners of the mill, no relief could be granted to the lessee on the foot of quantum meruit merely because the co-owners also would be enjoying benefits of repairs carried out by lessee. AIR 1966 Andh Pra 297 (300) = (1966) 1 Andh WR 275.

(27) Section 175 (3) of the Government of India Act, did not in any way prevent a contract with the Government being implied or a Government from incurring an obligation under a quasi-contract. 1965 All LJ 904 (908) = ILR (1965) 2 All 957 (DB) ** AIR 1968 SC 1218 (1223) = (1968) 3 SCR 214 ** AIR 1964 SC 152 (155) = (1964) 2 SCR 850. (65 Cal WN 441, Reversed.) ** AIR 1969 Pat 340 (345) (DB) ** AIR 1963 Mad 154 (154) = 75 Mad LW 223 ** AIR 1963 Pat 254 (257) (DB) ** AIR 1963 Pat 153 (DB) ** AIR 1962 Pat 338 (338) = ILR 41 Pat 292 (FB). (Even if a contract with Government is made

Section 70 — Note 8 (contd.)

without complying with formalities of Section 175 (3) of Government of India Act, 1935 or Article 299 (1) of Constitution if goods are delivered or services are rendered in pursuance of such void contract an obligation is imposed on Government under Section 70 to make compensation to person delivering goods or rendering services.) ** AIR 1962 Pat 485 (488) (DB) ** AIR 1961 Cal 663 (666) = 63 Cal WN 907 (DB). (Sufficient compensation for the benefit or advantage received by plaintiff — Plaintiff not entitled to compensation under Sec. 70.)

(28) The principles of Section 70 could not be availed of by plaintiff where what he claimed from Government is not the value of thing done or given but future profit which he would have derived if collection of toll was left to him for entire lease period. AIR 1962 Pat 485 (488) (DB).

(29) It would not be reasonable to suggest that in recognising the claim for compensation under Section 70 the Court is either directly or indirectly nullifying the effect of Section 175 (3), Government of India Act, or treating as valid a contract which is invalid. AIR 1962 SC 779 (788) = 1962 Supp (1) SCR 876.

9. Pleadings and proof. — (1) Under Section 70, Contract Act, the plaintiff has to prove (1) that he was acting lawfully when he was either making payment or delivering anything to the other party; (2) that he does not intend to do that gratuitously; and (3) that the defendant did enjoy the benefit. There must be an element of self-interest also. AIR 1963 Pat 153 (157) (DB).

(2) Plaintiff claiming compensation must prove that defendant actually derived benefit from the act. It is not sufficient that he would derive a benefit if he (defendant) would do some more acts. 1912 Mad WN 956 (957) (DB) ** AIR 1916 Mad 157 (159, 161, 165) = 29 Mad LJ 597 (DB). (Plaintiff must prove the extent of benefit derived by defendant.)

(3) The pleas of ratifications, of express or implied authority or of obligations under Sections 69 and 70 are questions of law intertwined with questions of facts. All the necessary facts in support of such pleas must, therefore, be pleaded. AIR 1963 Orissa 42 (44) = ILR (1962) Cut 554 (DB).

(4) Strict and technical view of pleadings not to be taken. AIR 1969 Pat 340 (345) (DB).

(5) The Court cannot deny relief under Section 70 for the reason only that there was no express pleading. AIR 1965 Andh Pra 191 (196) = (1965) 1 Andh WR 176 (DB) ** 1968 MPLJ 425 (437) = 1969 MPLJ 304 (DB). (Relief can be granted without any formal

amendment in plaint.) ** AIR 1963 Pat 153 (156, 157) (DB) ** AIR 1958 Pat 203 (209) = 1957 Pat LR 419 (DB). (If from the materials on record it can be gathered that the ingredients of the section were present, the Court would not be justified in refusing relief to the plaintiff.)

[But see ILR (1966) 1 Punj 49 (60) (DB). (Plea under Section 70 cannot be allowed to be raised in absence of pleading in that behalf.) ** AIR 1960 Pat 139 (141, 142) ** AIR 1959 Cal 247 (252) = 1958 Cal LJ 341 ** AIR 1951 Nag 431 (432). (When a suit by a legal practitioner against his client for recovery of his fees is based only on an express agreement, he is not entitled to any relief on the basis of "quantum meruit" if he fails to make out an express agreement, specially when there is no alternative relief claimed on the basis of an implied agreement.) ** AIR 1938 Lah 71 (71) = ILR (1938) Lah 511 ** AIR 1933 Mad 344 (344).]

(6) When the plaintiff has really done some work under contract but failed to prove the alleged contract, reasonable compensation should be given to the plaintiff for the work done. AIR 1915 Oudh 12 (13) = 2 Oudh LJ 332.

(7) Suit, on a hundi which is inadmissible can still proceed on basis of recovery of money had and received or for compensation. AIR 1929 All 254 (257) = 51 All 530 (DB).

(8) Where a suit was brought on promissory note which was inadmissible due to its being insufficiently stamped, the plaintiff can have his money back though document is inadmissible in evidence. AIR 1964 Andh Pra 188 (190).

(9) As soon as it is held that there is a valid contract containing an arbitration clause covering the subject matter of the dispute in suit the claim in the alternative under Sections 65 and 70 becomes nugatory and is of no consequence. AIR 1967 Cal 372 (375).

(10) To a claim for compensation against Government under Section 70 fact of legal competency of Government officer entering into contract is not material. AIR 1965 J and K 43 (45) = 1964 Kash LJ 319 (DB).

(11) Under Section 70 compensation or reasonable value of the goods is a question of fact. There must be proof as to what the reasonable value of the goods would be. AIR 1959 Cal 247 (252).

(12) Where the defendant-lessor had agreed to put up the constructions, though later he was unable to spare the time or the money necessary for the purpose and the plaintiff put up the constructions, it was held that as the benefit of the constructions would subsequently accrue to the defendant the owner of the premises, the plaintiff was

71. Responsibility of finder of goods.—A person who finds goods belonging to another and takes them into his custody, is subject to the same responsibility as a bailee.*

[*] See Sections 151 and 152; as to finding of a treasure-trove, see the Treasure Trove Act, 1878 (VI of 1878).

72. Liability of person to whom money is paid or thing delivered by mistake or under coercion.—A person to whom money has been paid, or anything delivered, by mistake* or under coercion,† must repay or return it.‡

Illustrations

(a) A and B jointly owe 100 rupees to C. A alone pays the amount to C, and B, not knowing this fact, pays 100 rupees over again to C. C is bound to repay the amount to B.

(b) A railway company refuses to deliver up certain goods to the consignee, except upon the payment of an illegal charge for carriage. The consignee pays the sum charged in order to obtain the goods. He is entitled to recover so much of the charge as was illegally excessive.

[*] See Section 22, *supra*.

[†] See Section 15 *supra*.

[‡] Cf. Section 86, Trusts Act, 1882 (II of 1882).

Section 70 — Note 9 (contd.)

entitled to be reimbursed under S. 70 the constructions not having been put up gratuitously by him. In such a case even if the claim for compensation was based on a contract for reimbursement which was not proved the claim could be decreed under Section 70. AIR 1962 Mad 345 (345, 346) = (1961) 2 Mad LJ 574. (AIR 1951 Nag 431, held to be no longer good law.)

Section 71 — Note 1

(1) Section 71, Contract Act permits the recognition of a contract of bailment implied by law. AIR 1960 SC 233 (238) = (1960) 2 SCR 75. (Goods consigned from Quetta in Pakistan to New Delhi in India — Goods carried by Pakistan Railway and Indian Railway — No treaty between two countries regarding liability for loss of goods in case of through traffic — Suit by consignee for compensation for non-delivery at New Delhi against Dominion of India — Liability of Forwarding Railway is that of a bailee under implied contract of bailment.)

(2) Torts — Plaintiff's timber lying on lands leased to defendant by railway — Notice by defendant to remove it within 15 days — Plaintiff's failure to remove it — Defendant clearing it himself — Suit for damages for conversion or detinue — On the expiry of the notice period the position of the timber becomes as that of abandoned goods — Section 71 does not apply — Defendant not liable. — (Penal Code (1860), S. 403, Expln. 2.) AIR 1959 Orissa 103 = ILR (1959) Cut 32 (41).

SECTION 72 — SYNOPSIS

1. Scope and applicability.
2. Mistake of fact.
3. Mistake of law.
4. Coercion.

1. Scope and applicability.— (1) Payment "by mistake" in Section 72 must refer to a payment which was not legally due and which could not have been enforced. The "mistake" is in thinking that the money paid was due when in fact it was not due. AIR 1949 PC 297 (302) = 76 Ind App 244 = 28 Pat 913. (AIR 1946 Cal 245, Approved; AIR 1920 Bom 192 and AIR 1929 Mad 177, Overruled.) ** AIR 1957 Ker 3 (5) = ILR (1957) Ker 13.

[See AIR 1921 All 81 (84) = 43 All 272 (DB).]

(2) The remedy provided under Section 72 is only an equitable one and is not available where it will not be equitable to make a refund to the plaintiff of the money paid by him. 1964 Raj LW 50.

(3) It cannot be said that every sum paid under a mistake is recoverable no matter what the circumstances may be. There may in a particular case be circumstances which disentitle a plaintiff by estoppel or otherwise. AIR 1949 PC 297 (302) = 76 Ind App 244 = 28 Pat 913 ** (1969) 17 Law Rep 890 (Mys). (Even if a payment is made under a mistake it is a question to be decided by the Court whether the mistake falls within the ambit of this section.)

(4) Section 72 is not applicable to a payment rightly made under a contract

Section 72 — Note 1 (contd.)

which is entered into under a mistake of law. AIR 1958 Andh Pra 427 (437) ** (1966) 70 Cal WN 892 (924).

(5) Where money is voluntarily paid under an illegal agreement which has been carried into effect, the money so paid cannot be recovered back, if parties are in pari delicto and they had knowledge of the illegality of the agreement before payment. AIR 1951 Pat 463 (466) = 30 Pat 137 (DB). (Per Reuben J.) — The principle applies whether money was paid under a contract or not.)

(6) Section 72 which specifically deals with the question as to whom money must be repaid or a thing returned, must be regarded as exhaustive, apart from other specific provisions of the law. 1911 Pun WR No. 32 p. 82 (90) (DB).

(7) Section has no application where property is neither delivered by mistake nor under coercion. (1905) 27 All 592 (602) (DB) ** AIR 1959 SC 135 (138, 139, 141) = 1959 SCR 1350.

(8) Section 72 makes no distinction between mistakes of fact and mistakes of law. AIR 1949 PC 297 (301) = 76 Ind App 244 = 28 Pat 913 ** AIR 1951 Nag 372 (374) = ILR (1951) Nag 457 ** AIR 1946 Cal 245 (249) = ILR (1945) 2 Cal 41 ** AIR 1963 Raj 51 (54) = 1961 Raj LW 420 (DB). (AIR 1959 SC 135, Foll.)

(9) A person is not entitled to recover money paid by him under a mistake where both he and the receiver were victims of fraud perpetrated on them by a third person and the receiver was misled by the payer's conduct and on the faith of that conduct altered his own position by paying the money to such third person before the discovery of the mistake. The loss in such circumstances must lie where it fell. AIR 1951 Nag 372 (374, 375) = ILR (1951) Nag 457.

(10) Payment made in circumstances which show that both the parties to the transaction had full knowledge of the material facts, is not recoverable. 1950 Trav-Co LR 40 (43, 44) (DB).

(11) Collection of property tax by Municipality on basis of actual rent paid by tenant — Subsequent fixation of fair rent by Rent Controller with retrospective effect — Owner cannot claim refund of tax — Section 72 not applicable because neither party was under mistake and the tax was paid voluntarily. AIR 1956 Mad 49 (50) = ILR (1956) Mad 530 (DB).

(12) Occupation for exhibiting Cinema shows — Payment made in excess of fair rent—Recovery of, cannot be claimed as payment is voluntary under a contract and there was no mistake about it. AIR 1956 Mys 57 (59) = ILR (1956) Mys 71 (FB).

(13) Sale of car for price subsequently discovered to be higher than control price — Contract entered into on mistaken assumption by both parties as to price — Difference between contract price and control price cannot be recovered by purchaser — Section 72 cannot apply as there was no mistake in payment. AIR 1955 Mad 662 (663, 664) = ILR (1956) Mad 712 (DB). (AIR 1952 Mad 779, Reversed.)

(14) Party entitled to relief by way of refund under Section 72 is not precluded from enforcing the claim under Article 226 of Constitution. 1963 Ker LJ 356 (359).

(15) Arbitration agreement — Party making application to Court under Section 14 of Arbitration Act, 1940 and depositing amount in favour of other party — Before filing of award by arbitrators application and money deposited withdrawn under order of Court — Held, Section 72 was not attracted. ('64) 66 Pun LR 483 (498).

(16) After the issue of the amended notification on 27th May, 1954 which clearly shows that after the date of its issue, the operators can collect the amount that they were paying as tax from the passengers and the consignors of the goods. Any payment made by the operators subsequent to the notification on 27-5-1954 cannot be said to be made under a mistake of fact or law or made involuntary for the purpose of avoiding any penal consequences. Payments made after this notification will be strictly gratuitous payments which are not recoverable. AIR 1963 Andh Pra 140 (144, 145) = (1962) 2 Andh WR 424.

2. Mistake of fact.— (1) A payment under a mistake of fact cannot be regarded as a voluntary payment and is recoverable under Section 72. AIR 1940 Mad 660 (662) ** AIR 1963 Raj 198 (200) = 1963 Raj LW 304. (Postal employee making over-payment by bona fide mistake while discharging postal cash certificate — Employee is entitled to recover excess payment.)

[See (1812) 15 Ind Cas 361 (362) (Low Bur). (Voluntary payment made with full knowledge of facts cannot be recovered under Section 72.) ** (1871) 8 Bom HCR (AC) 102 (105, 106). (Money paid under mistake induced by fraud — Payment is not voluntary — Money can be recovered.)]

(2) The rule governing the recovery of money paid under a mistake of fact is that the person paying under a mistake of fact, however ignorant he may be and however forgetful he may have been is entitled to recover such money unless he has at any time waived his claim or has been estopped by reason of conduct by which the payee has altered his position by parting with the money.

Section 72 — Note 2 (contd.)

AIR 1934 Rang 66 (70) = 12 Rang 25 **
AIR 1940 Mad 660 (662).

[But see AIR 1930 Lah 852 (854) = 11 Lah 667 (DB). (Bank making payment in respect of cheque forgetting that it was countermanded by drawer is not entitled to refund of amount from payee.) ** AIR 1926 Bom 66 (68) = 50 Bom 49 (DB). (Where drawee paid to wrong person, and kept quiet for a long time he is not entitled to recover it though he had paid by mistake.)]

(3) Where money is paid or goods delivered to a man by mistake, it can be recovered so long as his status quo is maintained, i.e., so long as he can be equitably regarded as still having the benefit of that which was paid or delivered to him. The doctrine involved in the cases is the doctrine of equitable restitution. AIR 1923 Mad 17 (18, 19) (DB). (A making excess delivery to B by mistake — B transferring to others under same mistake — A cannot thereafter claim from B for excess delivery.)

[But see AIR 1925 Mad 1255 (1257) = 48 Mad 925 (DB). (Party who received money by mistake should refund though he himself had also paid by mistake to his vendor who had become insolvent.)]

(4) To establish a cause of action to recover money as money paid by mistake, the mistake should be as to some fact causing a liability to pay. AIR 1933 PC 78 (82). (Cash handed over under voluntary contract hardly comes within that description.)

(5) It is not necessary that the mistaken payment must be of such a nature that if such payment were not rectified the liability would be created against the person paying. AIR 1940 Mad 660 (662, 663).

[But see AIR 1934 Rang 66 (70) = 12 Rang 25.)]

(6) The payment need not arise out of contractual relation between the parties. AIR 1940 Mad 660 (661) ** AIR 1942 Mad 590 (592) = ILR (1942) Mad 669 (DB) ** AIR 1946 Cal 245 (249) = ILR (1945) 2 Cal 41.

[See AIR 1928 All 500 (504) = 50 All 818 (DB). (Money paid under a forged document may be recovered with interest.)]

(7) Where money is paid to another under the influence of a mistake, that is upon the supposition that a specific fact is true, which would entitle the other to the money, but which fact is untrue, and the money would not have been paid if it had been known to the payer that the fact was untrue, an action will lie to recover it back. AIR 1942 Mad 590 (591) = ILR (1942) Mad 669 (DB). (G falsely representing that he was M and mortgaging M's property

to A — Subsequent mortgage by G of same property to R — R paying amount to A as first mortgagee as agreed under influence of mistake that G was M — R held entitled to return of amount paid to A.) ** AIR 1946 Mad 150 (151) = ILR (1946) Mad 531 (DB). (Purchaser in execution paying off mortgage on property under bona fide mistake that it was valid mortgage — Recovery of amount so paid can be made.)

[See also AIR 1960 Mad 335 (336). (Excess payment made under belief induced by vendor that price paid was controlled price — Vendee can recover excess paid.)]

(8) Where a person seeks to recover a payment under a mistake of fact, he must prove not only that he was mistaken as to the facts but is also bound to show that it was such a mistake which caused him to pay. AIR 1943 Pat 327 (327) = 22 Pat 220 (DB).

[See also (1912) 15 Ind Cas 361 (361, 362) (Low Bur).]

(9) Money paid under mistake of both parties can be recovered as money had and received. AIR 1928 PC 261 (262) ** AIR 1922 Cal 1 (2) (DB) ** AIR 1921 Bom 93 (102).

(10) Money paid under a mistake of fact with which payee had nothing to do cannot be recovered. AIR 1926 Rang 14 (16) = 3 Rang 477 (DB).

[See however AIR 1961 Mad 438 (442) = 74 Mad LW 145 (DB).]

(11) Money paid under a mistake induced by fraud of third party may be recovered. (77) 1 All 79 (81, 82) (DB) ** AIR 1963 All 459 (464) = 1963 All LJ 152 (FB).

(12) Payment made cannot be split up and a part only treated as having been paid under mistake. AIR 1946 Cal 245 (249) = ILR (1945) 2 Cal 41.

(13) Tenant holding over under A induced after latter's death to take the lease of same property from A's widow — Tenant to pay rent regularly to widow — A's executors obtaining decree for rent due since A's death — Tenant claiming refund of sums paid to widow — Suit dismissed on ground of there having been no express agreement to make such refund — Held, that in face of Section 72 it was not necessary that there should be such agreement and that tenant was entitled to claim refund. 1906 Pun Re No. 131, p. 491 (492) ** AIR 1962 Raj 127 (132) = 1962 Raj LW 77. (One of plaintiffs kept under wrongful confinement by police at the instance of defendants — Other plaintiff paying sum of money to defendants for getting his release — He is entitled to recover sum paid.)

(14) Person paying tax to Panchayat Board under mistaken notion that property for which tax was paid lay within

Section 72 — Note 2 (contd.)

jurisdiction of Board — Payment is under mistake of fact and can be recovered under Section 72 as money had and received for payer's use. AIR 1940 Mad 660 (661).

(15) Money paid to wrong person by plaintiff's broker contrary to plaintiff's instructions can be recovered from the person under Section 72 as money paid by mistake. AIR 1925 Sind 93 (94) = 18 Sind LR 65 (DB).

(16) Official Assignee declaring dividend and paying it to creditors who had proved their debts — Applicant decree-holder submitting his claim in time but through oversight his name not included in lists of creditors and notice of dividend not issued to him — Applicant held entitled to be admitted as creditor and to have refund of any excess dividend that had been paid in error to the other creditors. (1927) 29 Bom LR 1167 (1177).

(17) Suit for recovery of money overpaid to creditor by mistake falls within Section 72. ('80) 2 All 671 (675) (DB).

(18) Plaintiff bona fide believing to be owner of estate paying revenue of that share — Share, decided not to belong to him — Defendant entitled to entire estate paying revenue of remainder of estate — Plaintiff held was entitled to recover money paid by him. (1881) 7 Cal 573 (576, 577) (DB).

(19) Debt paid to insolvent's nominee, but again paid to Official Referee can be recovered from the former. AIR 1922 Lah 103 (104) (DB).

(20) When a consumer of electricity gives an amount of money to an electricity company claiming it under the rules framed by it, under the mistake that the company had made the rules after necessary legal preliminaries had been gone through, the case is one of mistake of fact and is covered by Sec. 72. AIR 1939 Pesh 8 (9).

(21) Plaintiff can recover the money which has not been credited towards payment of his real debt by his mistake in referring to a wrong date of the pronote though no suit has been filed by endorsee of the genuine pronote executed by him. AIR 1925 Mad 762 (763).

(22) Defendants, as plaintiff's landing agents receiving money when goods were landed, and later on sending plaintiff bill for amount of their charges — Defendants are accountable for money and plaintiff can sue to recover overcharges. AIR 1921 Mad 609 (609) (DB).

(23) Money paid under decree which is afterwards found not to be due cannot be recovered as money had and received, in fresh suit, unless decree is set aside or superseded by some ulterior

proceeding. AIR 1918 Pat 494 (495) ** AIR 1940 Pat 1 (3) (DB) ** AIR 1937 Rang 234 (236, 237). (Money paid under order of Court — Order not set aside — Subsequent discovery that money is not due — Money cannot be recovered back.) ** AIR 1932 Bom 386 (388, 389) = 53 Bom 501 ((DB) ** AIR 1915 Cal 579 (582) (DB). (Moneys paid by compulsion of legal proceedings cannot be recovered even if paid within limitation period.) ** (1912) 16 Cal L Jour 437 (439) (DB).

[See however AIR 1928 Cal 865 (867) (DB). (Relief on the ground of mistake in execution sale can be granted.)]

(24) Money paid under compulsion of legal process cannot be recovered unless fraud, mistake or unconscionable dealing is alleged. AIR 1918 Pat 185 (189) = 3 Pat L Jour 465 (DB) ** AIR 1958 Pat 310 (311) (DB).

(25) Rule that no suit lies for recovery of money recovered under legal process of Court though subsequently found to be not due does not apply to case where money is ordered to be deposited pending adjudication but paid out without decision. AIR 1916 Cal 241 (242, 243) = 43 Cal 269 (DB).

(26) A sold a house to B reserving a certain sum of money to be paid to C and B paid a portion of it to C. A was adjudged insolvent and the sale was declared fraudulent and was set aside. B sued A and C for recovery of moneys paid to C: Held, that B was not entitled to obtain a decree against C as the amount cannot be regarded as having been paid under a mistake of fact, and there was no privity between B and C. AIR 1933 Lah 658 (658).

(27) P firm contracting to purchase goods from D at Rs. 77 per cent. on 16th September 1943 — Goods delivered to railway on 27th December 1943, D being consignee — Government order fixing price at Rs. 48 per cent. as from 1st January 1944 — P company taking delivery and making payment at contract rate on 3rd January 1944 — Suit by P to recover difference between two prices — P held could not recover under S. 72 as difference between two prices could not be regarded as payment made by P under mistake. AIR 1946 Cal 245 (249) = ILR (1945) 2 Cal 41.

(28) Plaintiff purchased property and discharged a debt for which the property was hypothecated believing that certain persons were liable to contribute, of whom one was subsequently declared not to be liable to contribute — Held, that this was not such a payment by mistake as to give him a right of suit. (1871) 3 NWPHCR 136 (136, 137) (DB).

(29) Money paid, not to principal, but to agent cannot be recovered if the latter has changed his position as by

Section 72 — Note 2 (contd.)

settling accounts with principal. AIR 1917 Bom 119 (121, 122, 123) = 42 Bom 16 (DB).

(30) Surplus sale proceeds of revenue sale paid to defendant who was recorded proprietor under Section 31, Bengal Land Revenue Sales Act, 1859 — Plaintiff purchasing property before date of sale — Suit by plaintiff for recovery of surplus proceeds — Section 72 held did not apply to facts of this case. AIR 1936 Pat 370 (371) = 15 Pat 433 (DB).

(31) Purchaser of tenure under decree for rent paying off rent to landlords — Sale subsequently set aside at the instance of defaulting tenants — Held, the payment was made under mistake and could be recovered from the landlords. (1907) 5 Cal LJ 59 (62) (DB).

(32) Payment of whole mortgage debt to one of his joint mortgagees in spite of notice to the contrary from other — Mortgagor compelled to pay to other mortgagee — He cannot claim refund from the former whom he has already paid. AIR 1914 All 450 (451) (DB).

(33) Under mutual mistake of fact each party must return benefit derived through other's mistake. This principle is not limited to Section 64 and Sec. 65 only. AIR 1922 Oudh 152 (156).

(34) Consignment booked from C to P — Railway freight, pre-paid by consignor — Consignee taking delivery on indemnity bond by paying freight again as railway receipt was not received — Case is one of double payment through mistake and consignee is entitled to recover the amount paid by him. (1947) 13 Cut L Tim 60 (DB).

(35) Where by mistake the entire amount fixed in a decree for redemption was paid by the mortgagor without taking into account the amounts recovered by the mortgagee subsequent to the decree, the amount paid in excess of the decree can be recovered from the mortgagee by the mortgagor. AIR 1958 Andh Pra 593 (595) = ILR (1957) Andh Pra 477.

(36) A suit for refund of salary received by a Government servant whose service had stood terminated by virtue of a circular is maintainable if the disbursing officer had paid the salary under a mistake as to fact as to his continuance in service. AIR 1957 Ker 3 (5) = ILR (1957) Ker 13.

(37) Suit for refund of purchase money by auction purchaser who finds after the confirmation of sale that the judgment-debtor has no interest in the property is not maintainable in view of Order 21, Rule 93, Civil P. C. The only right available to him is to bring an action for money had and received. AIR 1950 Bom 313 (318, 319) = ILR (1951) Bom 248 (DB).

(38) Payment made under mistake as to rates — Mistake is one of fact and not of law. AIR 1953 Hyd 274 (274) = ILR (1953) Hyd 451. (AIR 1949 PC 297, Foll.)

(39) Section has no application to a case where money is paid by a person to a bank with instructions, that it should be deposited in account of third person who is constituent of the bank, and the bank, without the constituent's consent, cannot reverse the entry of credit made in the account or pay it back to person who paid it on his representation that it was paid by mistake. AIR 1967 SC 540 (542, 543) = (1967) 1 SCR 792. (F. A. Nos. 1 of 1957 and 15 of 1961, D/- 7-6-1962 (J. and K.) Affirmed.)

(40) If under a mutual mistake one party suffered a detriment and other derived a benefit which would not have happened but for the mistake the latter cannot subsequently claim to dispel the mistake and claim a benefit thereby, unless he is prepared to surrender the benefit he already obtained under the mistake. AIR 1967 Ker 190 (192) = 1966 Ker LT 1151.

3. Mistake of law.— (1) If a mistake of law has led to the formation of a contract, Section 21 enacts that that contract is not for that reason voidable. If money is paid under that contract, it cannot be said that money was paid under a mistake of law. AIR 1949 PC 297 (302) = 76 Ind App 244 = 28 Pat 913. (AIR 1920 Bom 192 and AIR 1929 Mad 177, Overruled; AIR 1943 Pat 327. Reversed.) ** AIR 1967 Cal 310 (313). (Contract by printers with Government of India — Sales tax claim paid after the contract — Mistake of law is origin of contract — Payment is not refundable under Section 72.) ** AIR 1963 Mad 231 (234, 235) = (1963) 1 Mad LJ 183 (DB) ** AIR 1961 Orissa 75 (79) = (1960) 2 Orissa JD 481 (DB) ** AIR 1958 Andh Pra 427 (437) = 1957 Andh LT 516 (DB).

(2) If a payment made under a mistake of law is not the origin of a contract, such payment would be refundable under S. 72. The English common law rule that a payment made under a mistake of law is not recoverable can have no application in India. AIR 1946 Cal 245 (249) = ILR (1945) 2 Cal 41. (39 Cal WN 174, Dissent.) ** AIR 1966 Goa 1 (16) (FB) (Plaintiff required by trial Court to pay excess Court-fee — Order not legal — Held, excess should be refunded) ** (1965) Ker LJ 520 (521) ** AIR 1963 Mad 231 (235) = (1963) 1 Mad LJ 183 (DB) ** AIR 1963 Raj 51 (54) = 1961 Raj LW 420 (DB) (Mistake may be of law or fact.) ** (1960) 11 STC 460 (Andh Pra).

(3) It cannot be the intention of S. 72 that wherever and whenever and however a mistake of law occurs, a claim

Section 72 — Note 3 (contd.)

may be made under S. 72. Ignorance of law is not mistake of law. Deliberate disregard of law is not mistake of law. AIR 1955 Cal 626 (630). (It is not open to the plaintiff to say that he did not know the effect of S. 175 (3). Government of India Act, 1935.) ** (1968) 1 Andh WR 81 = (1968) 1 Andh LT 82.

(4) Money paid voluntarily with full knowledge of all facts cannot be recovered on ground of mistake of law. AIR 1955 Cal 626 (630).

(5) Debtor making extra payments voluntarily under mistake of law cannot claim refund. AIR 1933 Lah 523 (524).

(6) A person who makes a payment of tax under a misapprehension as to his liability to do so cannot recover it in a Court of law although one would expect a corporate body to refund voluntarily any amount which had been paid to it in error. AIR 1940 Mad 956 (957) ** 1958-1 Mad L Jour 217 (223, 224) ** (1958) 1 Mad LJ 217 (224). (If the Municipality refuses to give effect to a declaration the Government will exercise its overriding authority to enforce obedience on being moved by the aggrieved party.)

(7) Payment of excess interest under mistake of law in the interpretation of Section 13 of the Madras Agriculturists Relief Act (IV of 1938) is recoverable under S. 72. AIR 1957 Andh Pra 546 (553) (FB) ** (1965) 1 Andh WR 296 = ILR (1966) Andh Pra 1274.

[See however AIR 1963 Andh Pra 24 (25) = (1962) 2 Andh LT 206 (DB).]

[But see AIR 1963 Mad 249 (252) = (1963) 1 Mad LJ 171 (FB) ** AIR 1962 Mad 1 (6) = (1961) 2 Mad LJ 222 (FB). (Debt after commencement of Madras Agriculturists Relief Act — Agreed rate of interest more than rate in Act — Payments appropriated towards interest with consent of debtor — No mistake of law in such appropriation — Section 72, Contract Act, not applicable — AIR 1956 Mad 618 and (1961) 1 Mad LJ 172 = 1961 Mad WN 215, Overruled.)]

(8) Where the plaintiff paid tax at higher rate than that provided by the statute and sues for refund of the excess tax, illegally recovered on the allegation that he made the excess payment by mistake as he thought that the money paid was due when in fact it was not due, the suit is maintainable under Section 72. AIR 1956 Vindh Pra 26 (27).

(9) A claim for refund of sales tax illegally levied is maintainable under Section 72 on the ground that it was paid under a mistake of law. AIR 1957 Pat 112 (115) = 35 Pat 1055 ** AIR 1957 Pat 1 (3) = 35 Pat 757 (DB) ** AIR 1956

All 383 (384) (DB) ** AIR 1964 SC 1006 (1011) = (1964) 6 SCR 261 ** AIR 1959 SC 135 (142) = 1959 SCR 1350. (State, utilising tax levied illegally — Responsibility to repay, nevertheless exists.) ** AIR 1969 Mys 23 (39) = (1968) 2 Mys LJ 78. (Illegal levy of education cess on Toddy shop rent, Beer shop rent and Arrack shop rent.) ** AIR 1969 Orissa 182 (183) (DB). (Illegal levy of excise duty.) ** 1968 Ker LR 467 = 1968 Ker LJ 792 ** AIR 1966 All 204 (206) = 1966 Cri LJ 390 ** ILR (1963) 2 All 431 ** AIR 1963 Madh Pra 173 (174) = 1963 Jab LJ 79 (DB). (Claim for refund time-barred — Relief will not be granted under Article 226.) ** AIR 1963 Raj 51 (53) = 1961 Raj LW 420 (DB). (Tax levied without legal authority—Remedy under Art. 226 open — Existence of alternative remedy is no bar.) ** AIR 1962 Orissa 136 (139) = ILR (1961) Cut 159 (DB) ** AIR 1961 Mad 322 (322, 323) = (1961) 1 Mad LJ 163 (DB) ** (1960) 2 Andh WR 276 ** 1960 MPLJ 601 (608) = 1960 Jab LJ 656 ** (1959) 10 STC 57 (67) (All).

[See however AIR 1960 Ker 287 (288) = 1960 Ker LT 174. (Suit for refund of amount paid as tax on ground that the tax was paid under mistake — Order of assessment not quashed — Section 72 has no application.)]

(10) Where the plaintiff, misrepresenting that he was a bachelor took the defendant as a second wife and after she had been taken away by her parents, sued for the recovery of the jewels and a certain sum presented by him to the bride at the time of marriage and it was not his case that he was under a mistaken belief that in law he was bound to make any presents to the bride at the time of marriage, but that he was ignorant of the provisions of Madras Act 6 of 1949 which prohibited a second marriage there is no scope to resort to Section 72. AIR 1959 Andh Pra 277 (278) = (1959) 1 Andh WR 63 (DB).

(11) Tax collected illegally under Madras General Sales Tax Act — Civil suit for refund is barred — Assessee must seek remedy under the Act itself. AIR 1961 Andh Pra 512 (518) = 1961 Andh LT 39 (FB). ((1960) 1 Andh WR 279 = 1960 Andh LT 739, Overruled.)

4. Coercion.— (1) The word "coercion" used in Section 72 is used in its general and ordinary sense and its meaning is not controlled by definition in Section 15. (13) 40 Cal 598 (612) = 40 Ind App 56 (PC) ** AIR 1941 Mad 635 (636) (DB) ** AIR 1928 Rang 55 (57) = 5 Rang 653 ** 65 Ind Cas 517 (518) (DB) (Cal) ** AIR 1954 Mad 213 (213) ** AIR 1949 Nag 215 (217) = ILR (1948) Nag 971 (DB) ** AIR 1969 Mys 230 (235) = 11 Law Rep 237 (DB) ** AIR 1962 Raj 127 (133) = 1962 Raj LW 77.

Section 72 — Note 4 (contd.)

(2) 'Coercion' in Section 72 merely means payment under compulsion which the defendant has no right to claim. AIR 1970 Guj 59 (64).

(3) 'Coercion' within meaning of Section 72 is a wrongful act, producing liability to restitution — Liability to make restitution is absolute — It does not come to end even if person compelling payment parts with amount received by him. AIR 1969 Mys 230 (236) = 11 Law Rep 237 (DB).

(4) Where property of one person is wrongfully attached in execution of a decree against another and the real owner pays off the decree amount under protest to save the property from seizure, the owner is entitled to demand repayment of that sum from the decree-holder as being an involuntary payment made under coercion. (1913) 40 Cal 598 (609, 613) = 40 Ind App 56 (PC) ** AIR 1939 All 373 (374, 375) ** AIR 1938 Nag 225 (230) = ILR (1938) Nag 382 (DB) ** AIR 1928 All 668 (670) (DB) ** AIR 1928 Rang 55 (57) = 5 Rang 653 ** AIR 1923 PC 114 (116, 117) = 50 Ind App 162 = 4 Lah 284.

[But see 1911 Pun WR No. 32, p. 82 (92, 93, 94) (DB).]

(5) Properties brought to sale in execution of decree though decree had been satisfied — Money paid to prevent such sale is involuntary payment — Suit will lie to recover same. ('81) 7 Cal 648 (653) = 8 Ind App 93 (PC) ** AIR 1934 Pat 605 (607, 608) ** AIR 1933 All 953 (953, 954) ** AIR 1933 Bom 239 (241) = 57 Bom 601 (DB) ** (1888) 15 Cal 656 (662, 663) (DB).

(6) A person who is compelled to make a payment under Order 21, Rule 89, Civil P. C., in order to save his property being sold, does not make the payment voluntarily but is subject to coercion within the meaning of Section 72, Contract Act and consequently is entitled to recover the consideration for the sale. AIR 1941 Mad 635 (636) (DB) ** AIR 1943 All 267 (269, 270) = ILR (1943) All 510. (Payment made by judgment-debtor under a time-barred decree to set aside sale under Order 21, Rule 89.) ** AIR 1940 Mad 725 (726, 727, 730) ** AIR 1938 Mad 493 (494, 495) (DB). (AIR 1935 Mad 961, Reversed.) ** AIR 1931 Mad 753 (755) (DB) ** AIR 1951 Pat 602 (604, 606) = 30 Pat 784.

[But see AIR 1933 Bom 239 (241) = 57 Bom 601 (DB) ** (1908) 12 Cal WN 151 (152, 153) (DB).]

(7) The payment by a third person of a decree amount on attachment of property found to be not wrongful, is not payment under coercion within the meaning of Section 72 of the Contract Act. Such payment can only be regarded as voluntary, and the person paying

the money is not entitled to its return. AIR 1949 Cal 457 (462) = ILR (1950) 2 Cal 171.

(8) The right to recover money paid to raise an attachment or set aside a sale does not depend upon any conditions annexed to such payments when made but arises out of the compulsion of law involved in such cases. It is a statutory right under Section 72, Contract Act. AIR 1940 Mad 725 (726, 727, 728, 730) ** AIR 1938 Mad 493 (494, 495) (DB).

(9) Payment of Municipal tax in pursuance of usual demand notice without objection — Party discovering subsequently that he was entitled to resist claim of tax under law — Simply because that notice contains warning that legal process will be put into force for realization does not make payments made involuntary and as such they cannot be recovered back. AIR 1934 Mad 420 (422) ** AIR 1954 Mad 213 (214) ** (1960) 2 Andh WR 45 (52) = 1960 Andh LT 1073.

(10) Where a consumer of electricity pays money to the electric company under protest on being threatened with disconnection in case of default, the case is one of coercion within Section 72. AIR 1939 Pesh 8 (9).

(11) Excess payment to electric company made by consumer claiming commercial rate during period during which consumer's claim was under consideration is payment made under protest and not voluntary payment. AIR 1941 Mad 439 (440) ** 1968 Raj LW 562 (568) = ILR (1969) 19 Raj 575.

(12) The tax-payer, though not legally bound to pay the enhanced tax, had to pay it under the compulsion of a warrant. The payment was therefore one made under coercion, within the meaning of Section 72 of the Contract Act. AIR 1957 Andh Pra 896 (897).

(13) Payment of tax on demand without protest — Payment is not voluntary but under coercion — Tax if illegal can be recovered under Section 72. AIR 1949 Nag 215 (217) = ILR (1948) Nag 971 (DB) ** AIR 1957 Pat 112 (114) = 35 Pat 1055 ** AIR 1952 Vindh Pra 32 (34).

(14) A payment of water cess made under fear of coercive process is not voluntary payment. AIR 1914 Mad 534 (536) = 37 Mad 322 (DB) ** AIR 1958 Pat 310 (311). (AIR 1932 Bom 386 and 20 All 237 and AIR 1940 Pat 1, Rel. on.)

(15) Money paid by person under arrest can be recovered if parties stand in pari delicto even if it was really due to defendant. AIR 1917 Mad 607 (608, 610) = 40 Mad 285 (DB).

(16) If seller refuses to deliver unless a certain amount to which buyer demurs is paid then there is duress. AIR 1924 Mad 236 (239) = 47 Mad 222 (DB).

CHAPTER VI

OF THE CONSEQUENCES OF BREACH OF CONTRACT

73. Compensation for loss or damage caused by breach of contract.—When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.*

Compensation for failure to discharge obligation resembling those created by contract.

When an obligation resembling those created by contract† has been incurred and has not been discharged, any person injured by the failure to discharge it is

Section 72 — Note 4 (contd.)

(17) A talukdar who deposits full amount claimed to stop a sale under Section 14, Bengal Patni Regulation 1819, can sue for its recovery in ordinary suit. AIR 1918 PC 41 (43) = 46 Cal 1 = 45 Ind App 103.

(18) Property exempt from assesment included in income-tax return — Assesment thereon — Payment of such assesment is not under 'duress'. AIR 1929 Mad 179 (181) = 52 Mad 12 (DB).

(19) A voluntary payment by an agent towards interest due under a mortgage bond could not be recovered from the party receiving it. AIR 1930 Bom 430 (430) (DB).

(20) Where co-tenant deposits entire rent he cannot sue for its recovery as he has not paid under mistake or coercion. AIR 1919 Cal 13 (14) (DB).

(21) Application for reference under Section 8 (5), Taxation of Income (Investigation Commission) Act (1947), rejected as having become infructuous — Fees paid by assessee for reference being a voluntary payment and not under coercion cannot be claimed back under the general law. AIR 1958 Mad 479 (481) = ILR (1958) Mad 737.

(22) Money paid voluntarily for the compounding of a non-compoundable offence is not paid under coercion. AIR 1928 Rang 173 (175) = 6 Rang 238.

(23) A person who had paid certain amount under a threat of criminal prosecution by a Magistrate is entitled to recover it back under Section 72 as having been made under coercion even though it was made to stifle prosecution and is for an illegal purpose. To such a case the maxim *pari delicto* etc., does not apply. AIR 1956 All 205 (206).

(24) A person travelled by a tram-car without obtaining a ticket. He paid a penalty of Rs. 5 to avoid proceedings in a Court of law. It was held that the sum of Rs. 5, must be taken to have been paid under coercion and as such was recoverable under Section 72. AIR

1954 Bom 427 (430) = ILR (1954) Bom 727.

SECTION 73 — SYNOPSIS

- 1-2. Breach of contract.
3. Anticipatory breach of contract.
4. Compensation and damages
5. Measure of damages.
6. Sale of goods — Measure of damages.
7. Sale of immovable property — Defect in vendor's title.
8. Breach of warranty.
9. Nominal damages.
10. Special damages
11. Interest as damages — Illustration (n).
12. Interest on damages.
13. Earnest money — Recovery of — See Section 74.
14. Breach of promise of marriage.
15. Contract of service.
16. Compromise decree
17. Contract of lease.
18. Contingent contract.
19. Breach of covenant.
20. Transfer of property — Covenant by transferee to pay off transferor's creditors
21. Contracts of affreightment and carriage.
22. Other cases.
23. Quantum meruit.
24. "Which naturally arose likely to result from the breach of it."
25. Default of plaintiff.
26. Proof of damages.
27. Date when damages become due.
28. Suit for damages.
29. Limitation
30. Suit for specific performance.
31. Defences to suit for damages.
32. "Obligation resembling those created by contract."

entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract.

Explanation.—In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account.

Illustrations

(a) A contracts to sell and deliver 50 maunds of saltpetre to B, at a certain price to be paid on delivery. A breaks his promise. B is entitled to receive from A, by way of compensation, the sum, if any, by which the contract price falls short of the price for which B might have obtained 50 maunds of saltpetre of like quality at the time when the saltpetre ought to have been delivered.

(b) A hires B's ship to go to Bombay, and there takes on board, on the first of January, a cargo which A is to provide and to bring it to Calcutta, the freight to be paid when earned. B's ship does not go to Bombay, but A has opportunities of procuring suitable conveyance for the cargo upon terms as advantageous as those on which he had chartered the ship. A avails himself of those opportunities, but is put to trouble and expense in doing so. A is entitled to receive compensation from B in respect of such trouble and expense.

(c) A contracts to buy of B, at a stated price, 50 maunds of rice, no time being fixed for delivery. A afterwards informs B that he will not accept the rice if tendered to him. B is entitled to receive from A, by way of compensation, the amount, if any, by which the contract price exceeds that which B can obtain for the rice at the time when A informs B that he will not accept it.

(d) A contracts to buy B's ship for 60,000 rupees, but breaks his promise. A must pay to B, by way of compensation, the excess, if any, of the contract price over the price which B can obtain for the ship at the time of the breach of promise.

Section 73 — Synopsis (contd.)

33. Plaintiff's duty to mitigate loss — Explanation.

1-2. Breach of contract.— (1) In a suit to enforce a contract it is necessary to ascertain its exact terms, so as to determine the breach thereof. AIR 1932 Lah 148 (149) (DB).

(2) Section 73 relates to breaches of contract and not to torts. (1913) 11 All L Jour 335 (338, 339) ** AIR 1927 Nag 75 (75). (Claim on breach of contract comes under Section 73 and not tort.)

(3) Illustrations to Section 73, Contract Act, are not more than general rules. AIR 1941 Sind 146 (150).

(4) The general principle which is embodied in Section 73 is that when there is a breach of contract, the party who suffers by the breach is entitled to recover compensation from the other party for the loss caused to him by the said breach. AIR 1955 Andhra 148 (151) (DB) ** 1965 All LJ 969 (970). (None of Sections 73 and 74 applies to a suit instituted by the party who has broken the contract.) ** AIR 1964 Madh Pra 126 (127) = 1963 MPLJ 184 (DB).

(5) Section 73 applies to all contracts, including those in respect of lands. AIR 1927 Sind 120 (122) = 19 Sind LR 337. (Hence Indian Courts not to apply foreign rules of law or equity.) ** AIR 1925 Rang 261 (262) (DB) ** AIR 1919 Oudh 396 (396) ** AIR 1918 Mad 1315 (1318) = 40 Mad 338 (FB).

(6) Damages cannot be granted for breach of an incomplete agreement. AIR 1927 All 837 (838) (DB).

(7) Where the buyer uses ambiguous terms in his order, and such terms are misinterpreted by seller and such misinterpretation is acted upon by the buyers, it is not open to the buyer to contend that he did not make the offer as understood by the seller, and if the buyer refuses to make payment for the goods supplied as per terms as understood by the seller, the buyer commits a breach of the contract. AIR 1928 Mad 873 (878) (DB).

(8) Where out of three contracts for supply of flour, plaintiff fulfilled only one, and on refusal of the same, sued for damages for the breach of that contract, he cannot succeed unless the parties intended to treat each contract separately. 1937 All LJ 1250 (1251).

(9) Notice of repudiation by vendor — Buyer may treat the notice as inoperative — Then contract continues for the benefit of vendor as well — Vendor may elect to complete contract in spite of previous repudiation. AIR 1923 Bom 113 (116).

(10) Under Section 55 of the Act, a promisee has the option of enforcing the contract or not as may suit him. If he chooses to enforce it, he can only claim damages as provided for in Section 73. ILR (1949) 2 Cal 530 (535).

(e) A, the owner of a boat, contracts with B to take a cargo of jute to Mirzapur, for sale at that place, starting on a specified day. The boat, owing to some avoidable cause, does not start at the time appointed, whereby the arrival of the cargo at Mirzapur is delayed beyond the time when it would have arrived if the boat had sailed according to the contract. After that date, and before the arrival of the cargo, the price of jute falls. The measure of the compensation payable to B by A is the difference between the price which B could have obtained for the cargo at Mirzapur at the time when it would have arrived if forwarded in due course, and its market price at the time when it actually arrived.

(f) A contracts to repair B's house in a certain manner, and receives payment in advance. A repairs the house, but not according to contract. B is entitled to recover from A the cost of making the repairs conform to the contract.

(g) A contracts to let his ship to B for a year, from the first of January, for a certain price. Freights rise, and, on the first of January, the hire obtainable for the ship is higher than the contract price. A breaks his promise. He must pay to B, by way of compensation, a sum equal to the difference between the contract price and the price for which B could hire a similar ship for a year on and from the first of January.

(h) A contracts to supply B with a certain quantity of iron at a fixed price, being a higher price than that for which A could procure and deliver the iron. B wrongfully refuses to receive the iron. B must pay to A, by way of compensation, the difference between the contract price of the iron and the sum for which A could have obtained and delivered it.

Section 73 — Note 2 (contd.)

(11) Where a party has not qualified obligation under a contract he is liable to make compensation in damages for non-performance, although the performance has been rendered impracticable by some unforeseen cause beyond his control. AIR 1941 Pat 429 (429, 430).

(12) Person to be responsible for loss of money not due to act of God or King's enemies — Loss due to robbery — Person held responsible. AIR 1942 Pesh 33 (35) (DB).

(13) Injunction issued prohibiting vendee to import certain goods — Vendee cancelling his contract to purchase, though vendor willing to keep contract open — Injunction shortly dissolved — Vendee not cancelling cancellation — Cancellation, held, to be voluntary — Person, obtaining injunction held, not liable. AIR 1929 PC 222 (224).

(14) Purchase by N of license for pawnshop auctioned by municipality — Terms of sale reduced to document, which recited that N was licensed for three years, subject to certain conditions but contained no guarantee as to validity of license — Grant, subsequently, set aside by Commissioner under powers given him by Burma Municipal Act — License again auctioned and again bought by N for much higher sum — N suing committee in damages for breach of contract basing his claim on difference between two bids. The municipality were not in a position to guarantee what the action of the Commissioner would be, nor could it be presumed that they ever intended to give any guarantee in the matter and that there was no breach of contract on their part

and so they were not liable in damages. AIR 1930 Rang 16 (17) = 7 Rang 441 (DB).

(15) Consignment of 200 bundles of steel rods through Railway — Nine bundles found to have been changed — Refusal to take delivery — Offer of Railway Company for delivery of 191 bundles — Refusal to accept — Suit for damages — Railway liable only for nine bundles. AIR 1933 All 595 (596) (DB).

(16) Employer entitled to close work for definite and indefinite period for causes stated in contract — Power of closing for definite period exceeded but acquiesced in by employee — Subsequent indefinite closing legal — Employee cannot get damages. AIR 1934 Bom 126 (129) = 58 Bom 262 (DB).

(17) Goods of inferior quality delivered — Contract is broken on due date, and not when inferiority of quality is discovered, in the absence of a contract, that the due date shall be postponed until it is ascertained whether the goods are of the contract quality or not. AIR 1921 Bom 203 (203, 205) = 45 Bom 129 (DB).

(18) Contract for supply of sugar, of particular mill, at Rs. 29/6/- per maund, which was ex mill rate when contract took place — Under contract delivery to be made at place C — Breach of contract — Held, fact that contract was for particular quality of sugar which was to be supplied by defendant after he got delivery from mill and rate under contract was ex mill rate, would show that measure of damages would be difference between ex mill rate on date of breach

(i) A delivers to B, a common carrier, a machine, to be conveyed, without delay, to A's mill informing B that his mill is stopped for want of the machine. B unreasonably delays the delivery of the machine, and A, in consequence, loses a profitable contract with the Government. A is entitled to receive from B, by way of compensation, the average amount of profit which would have been made by the working of the mill during the time that delivery of it was delayed, but not the loss sustained through the loss of the Government contract.

(j) A, having contracted with B to supply B with 1,000 tons of iron at 100 rupees a ton, to be delivered at a stated time, contracts with C for the purchase of 1,000 tons of iron at 80 rupees a ton, telling C that he does so for the purpose of performing his contract with B. C fails to perform his contract with A, who cannot procure other iron, and B, in consequence, rescinds the contract. C must pay to A 20,000 rupees, being the profit which A would have made by the performance of his contract with B.

(k) A contracts with B to make and deliver to B, by a fixed day, for a specified price, a certain piece of machinery. A does not deliver the piece of machinery at the time specified, and in consequence of this, B is obliged to procure another at a higher price than that which he was to have paid to A, and is prevented from performing a contract which B had made with a third person at the time of his contract with A (but which had not been then communicated to A), and is compelled to make compensation for breach of that contract. A must pay to B, by way of compensation, the difference between the contract price of the piece of machinery and the sum paid by B for another, but not the sum paid by B to the third person by way of compensation.

Section 73 — Note 2 (contd.)

and date of contract — Fact that delivery was to be made at place C was immaterial on question of measure of damages. 1969 All LJ 127 (128).

(19) Where there was a duty on the part of the vendor to give notice to the vendee of the arrival of the goods and it was not done, it amounts to a breach of contract. (1924) 19 Mad LW 654 (658) (DB).

(20) Defendant contracting to supply 1,000 maunds of husks to plaintiff — 589½ maunds supplied — The balance mixed with sand — Plaintiff refusing delivery — Defendant liable for breach. AIR 1931 Cal 163 (164).

(21) Agreement to lend money on mortgage delayed — New agreement stipulating payment of interest from a given date — Defendant finally refusing to execute deed with added clause to which he had agreed — Plaintiff, held, was entitled to compensation. (1893) 17 Bom 457 (465) (DB).

(22) Mortgagee agreeing to pay creditors of mortgagor — Failure to pay — Mortgagor cannot recover the sum as a debt — Remedy of mortgagor is by way of damages only. AIR 1935 Nag 135 (136) = 31 Nag LR 235.

(23) A executed a bond in favour of B for Rs. 1300, on B's assurance on oath that he would pay the debt of A, amounting to Rs. 1100, and pay cash of 200. B failed to perform his contract within a reasonable time — Held, that the contract became voidable, entitling A to sue B for cancellation or for damages under Section 73. 1882 Pun Re No. 186, p. 542 (548) (DB).

(24) Defendants contracted to transfer their business including stock in trade

and outstandings to the plaintiffs and to pay them Rs. 1650 in consideration of the plaintiffs discharging the debts of the firm. Defendants resiled from their contract. Held, that plaintiff's could sue them for damages in terms of Section 73. Damage arose as plaintiffs were prevented from making profit out of the concern. 1889 Pun Re No. 20, p. 64 (68) (DB).

(25) The true basis of the claim for damages by anybody injured by an improper execution proceeding after receiving satisfaction by decree-holder can only be that it is a breach of an implied agreement not to execute the decrees any further. AIR 1935 Mad 961 (964).

(26) A paper was signed by the defendant to the effect that he and plaintiff had entered into a partnership for 2½ years and that amount of brokerage, earned by each partner separately, was to be divided equally among all. No counter agreement was given by plaintiffs and nothing further was done. Defendants, having refused to settle account, denied partnership. The plaintiffs sued for their share of profits. Held, on the facts, that the transaction amounted to an agreement to enter into partnership and that plaintiffs were entitled to damages for breach, on the basis of the profit that would have been made during the 2½ years. 1867 Pun Re No. 68, p. 130 (132) (DB).

(27) Surety representing principal to be major, and agreeing to compensate plaintiff, if representation proved false — Principal found to be minor — Surety must compensate the plaintiff. AIR 1940 Nag 327 (331) = ILR (1940) Nag 632.

(l) A, a builder, contracts to erect and finish a house by the first of January, in order that B may give possession of it at that time to C, to whom B has contracted to let it. A is informed of the contract between B and C. A builds the house so badly that, before the first of January, it falls down and has to be re-built by B, who, in consequence, loses the rent which he was to have received from C, and is obliged to make compensation to C for the breach of his contract. A must make compensation to B for the cost of rebuilding the house, for the rent lost, and for the compensation made to C.

(m) A sells certain merchandise to B, warranting it to be of a particular quality, and B, in reliance upon this warranty, sells it to C with a similar warranty. The goods prove to be not according to the warranty, and B becomes liable to pay C a sum of money by way of compensation. B is entitled to be reimbursed this sum by A.

(n) A contracts to pay a sum of money to B on a day specified. A does not pay the money on that day; B, in consequence of not receiving the money on that day, is unable to pay his debts, and is totally ruined. A is not liable to make good to B anything except the principal sum he contracted to pay, together with interest up to the day of payment.

(o) A contracts to deliver 50 maunds of saltpetre to B on the first of January, at a certain price. B afterwards, before the first of January, contracts to sell the saltpetre to C at a price higher than the market price of the first of January. A breaks his promise. In estimating the compensation payable by A to B, the market price of the first of January, and not the profit which would have arisen to B from the sale to C, is to be taken into account.

Section 73 — Note 2 (contd.)

(28) Where defendant sold goods to plaintiff, receiving part of the consideration and agreed to receive the balance by instalments, and deliver the goods on demand and the plaintiff brought a suit for damages as the defendant had failed to deliver: held, that the defendant was liable. 1911 Pun LR No. 207, p. 801 (802).

(29) Sale — Direction to vendee to pay off creditor — Creditor who was not paid obtaining decree against vendor -- Suit by vendor against vendee could lie. AIR 1931 All 754 (755, 756) = 53 All 946 (DB).

(30) A Municipal Board accepted plaintiff's tender subject to certain conditions one of which provided that the contract was subject to the approval of the Engineer. The contract further provided that the contractor was bound to carry out changes made in the work, design, plan, etc., by the Engineer and that such alterations would not invalidate the contract. The Engineer asked the work to be stopped until further orders. After some correspondence between the parties, a new specification was resolved upon but the Council invited fresh tenders and gave the work to a new tenderer. Held that the Board had committed a breach of contract. 1929 All L Jour 735 (740).

(31) Contract with Government for execution of public works — Execution of work stopped under orders of Government — Contractor is entitled to claim damages. (1966) 1 Mys LJ 33 (33) = (1966) 5 Law Rep 773.

(32) Where a defendant failed to perform his part of the contract by deliver-

ing the goods by a certain date but kept on saying after expiry of the date that he would deliver them as soon as he received them from his vendor, without requesting the plaintiff to extend the time for delivery, and ultimately the plaintiff repudiated the contract, the breach occurred on the date by which the defendant was bound to perform his part of the contract. AIR 1946 Bom 1 (7) = ILR (1946) Bom 218 (DB).

(33) Sale of goods bilty cut — Time for performance of agreement — Difficulty in getting wagons — Term that goods would be loaded on wagon being available — Delay apprehended by seller -- Alternative suggested by seller but not accepted by buyer — Buyer held responsible for breach of contract — Seller held entitled to get damages. AIR 1963 All 110 (112, 113) = 1962 All LJ 853 (DB).

(34) Sale of goods — Portion ready for delivery — Balance to be delivered on particular date — Failure to deliver — Date of breach for ready goods, the date of contract; for other goods, the date, fixed for delivery. AIR 1922 Bom 203 (204, 205).

(35) Contract of agency — Undertaking by agent not to work for other mills — The mere fact that he was buying and selling cloths from other mills and merchants, was not a violation of the contract. AIR 1921 Mad 664 (665) (DB).

(36) Where price is to be paid on receipt of railway receipt, failure to take delivery, on mere intimation of arrival of a portion of the goods, does not amount to breach of contract. AIR 1930 Lah 193 (195) (DB).

(p) A contracts to sell and deliver 500 bales of cotton to B on a fixed day. A knows nothing of B's mode of conducting his business. A breaks his promise, and B, having no cotton, is obliged to close his mill. A is not responsible to B for the loss caused to B by the closing of the mill.

(q) A contracts to sell and deliver to B, on the first of January certain cloth which B intends to manufacture into caps of a particular kind, for which there is no demand, except at that season. The cloth is not delivered till after the appointed time, and too late to be used that year in making caps. B is entitled to receive from A by way of compensation, the difference between the contract price of the cloth and its market price at the time of delivery, but not the profits which he expected to obtain by making caps, nor the expenses which he has been put to in making preparation for the manufacture.

(r) A, a ship-owner, contracts with B to convey him from Calcutta to Sydney in A's ship, sailing on the first of January, and B pays to A, by way of deposit, one half of his passage-money. The ship does not sail on the first of January, and B, after being in consequence detained in Calcutta for some time and thereby put to some expense, proceeds to Sydney in another vessel, and, in consequence, arriving too late in Sydney, loses a sum of money. A is liable to repay to B his deposit with interest, and the expense to which he is put by his detention in Calcutta, and the excess, if any, of the passage-money paid for the second ship over that agreed upon for the first, but not the sum of money which B lost by arriving in Sydney too late.

[°] See Negotiable Instruments Act, 1881 (26 of 1881), S. 117, for compensation in case of dishonour of negotiable instruments: Civil Procedure Code (1908), O. 37.

[†] See Chapter V supra.

Section 73 — Note 2 (contd.)

(37) Loss in revenue of toll-collector by discontinuance of traffic owing to Plague Regulations—Toll-collector cannot get damages from Government for breach of contract. (1902) 4 Bom LR 874 (876) (DB).

(38) The defendant purchased from the plaintiff a cargo of Watson's Harry Steam coal per Grecian, at Rs. 21 per ton. On the arrival of the coal in Calcutta, the defendant was called on to take delivery, which, after inspection, he refused to do on the ground that, the coal had not the usual certificate from Watson. On the same day the plaintiffs themselves, and three days after, their attorneys, wrote to the defendant that, unless he took delivery, the coal would be sold on his account and risk. The defendant refused to take delivery and the very next day without any proper advertisement, the plaintiffs sold the coal to M. and Co., for Rs. 13 per ton. But it was found that the real purchasers were the plaintiffs themselves. **Held**, that the sale was not a valid sale and that the plaintiffs were not entitled to recover any damages under the circumstances of the case. (1875) 15 Beng LR 276 (289, 290, 291, 292).

(39) Appellant approached by H. Q. for opening Service Club. — Club opened in premises taken on lease by appellant — Club managed by Committee of officers — Appellant appointed Commercial Manager — Committee undertaking to pay rent of premises — Club to endure during continuance of hosti-

lities — H. Q. taking no part in management — Club closed down before period agreed upon by order of H. Q. in interest of military discipline — Crown held could not bind itself not to close Club — Order closing Club held was justified — H. Q. held were under no contractual obligation to appellant so to organise and conduct Club that it would not be necessary to close it during war and, therefore, the appellant could not claim damages for breach of this obligation. **AIR 1947 PC 29 (31).**

(40) To make decree for damages for the breach of a contract which is not the subject-matter of the litigation would be to assume that there has been a breach of the contract which has never been attempted to be specifically enforced. **AIR 1916 Cal 774 (775) (DB).**

(41) If the documents relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of a further contract is a condition of term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to, will in fact go through. In the former case, there is no enforceable contract either because the condition is unfulfilled or because the law does not recognise a contract to enter into a contract. In the latter case there is a binding contract and reference to the more formal document may be ignored. In such cases refusal to execute a formal contract cannot give rise in

Section 73 — Note 2 (contd.)

any case to an action for breach of contract. AIR 1933 PC 29 (31) = 60 Ind App 297 = 60 Cal 980.

(42) In a suit for breach of an executory contract, it is open for the defendant to show that it is not binding upon him inasmuch as it is not binding on the plaintiff. (1933) 27 Bom 618 (621) (DB).

(43) The plaintiff, a tailor, sued a Railway company for damages because of an undue delay in transit due to the fault of their servants. He had entrusted to the company his sewing machine to be carried to a place where car festival was to be held, with the object of making special profit. He had not intimated this object to the company, nor did he inform them that the machine was wanted within a fixed time — **Held**, that he was precluded from maintaining the suit by one of the conditions on the back of the forwarding note signed by him to the effect that defendants are not responsible for any loss of or damage to goods by reason of accident of unavoidable delay in transit or otherwise. (1898) 21 Mad 172 (174, 175, 178) (DB).

(44) A agreed to transfer to H the mortgage rights under a mortgage executed in her favour and also in favour of her son B. The consideration was fixed at Rs. 26,000 out of which Rs. 3000 were paid to A in advance. Subsequently A and B informed H that they were willing to execute a transfer deed in H's favour provided a further sum of Rs. 26,000 was paid. H refused and brought a suit for specific performance of the contract for sale and in the alternative for refund of money with interest. It was held H was entitled to refuse the offer made by A and B which was not bona fide and therefore A and B, and not H, were in breach of the contract. AIR 1947 PC 173 (175) = 74 Ind App 213 = ILR (1947) All 615.

(45) The plaintiff placed an order with the defendant for supplying six wagons of dust coal required for the manufacture of bricks at K railway station as per priority class 'N' issued in his favour. The defendants accepted the order subject to the sanction of the authorities concerned and confirmed the rate offered F. O. R. Colliery. The defendants placed indents for wagons regularly but no wagons were supplied. The plaintiff brought a suit for damages for breach of the contract and for refund of money paid towards the price — **Held**, that the contract did not imply that the goods were to be delivered at K. The defendant merely undertook to indent the wagons on account of the plaintiff which had been sanctioned by the Controller, Coal Distribution. The defendant having regularly indented the

wagons there was no breach on his part and therefore was not liable in damages. (1950) 86 Cal L Jour 220 (228) (DB).

(46) Where contract had not become impossible of performance, the plaintiff was entitled to damages for breach of contract. AIR 1965 Mad 400 (403) = (1965) 1 Mad LJ 227 (DB).

(47) Where there is a positive contract to do a thing without any reservation or exception to excuse the performance, the party must perform it or pay damages for not doing it, although in consequence of unforeseen accidents the performance of the contract has become unexpectedly burdensome or even impossible. AIR 1949 Cal 472 (477).

(48) Agreement to re-sell zamindari land to the seller — Refusal on demand to re-sell — Breach of contract is complete — Subsequent passing of U. P. Zamindari Abolition and Land Reforms Act, 1950 (1 of 1951) does not affect the breach of contract and liability to pay compensation by way of damages for failure to resell Zamindari land, on account of passing of U. P. Zamindari Abolition and Land Reforms Act, 1950 (1 of 1951). AIR 1963 All 201 (202).

(49) Purchaser of right to levy octroi from Government — No undertaking given by Government that control on cloth would not be reimposed — **Held**, that there was no breach of contract due to reimposition of control. AIR 1960 Him Pra 1 (10).

(50) Conveyance by letter of distribution rights by defendant in certain films for a consideration, part of it being payable as advance and balance in instalments — Defendant to distribute and exploit and exhibit pictures on behalf of plaintiff on separate terms and conditions — Advance to be forfeited on breach — Letter by plaintiff on same day asking defendant to distribute pictures on his behalf till he opened his own office — Plaintiff paying only a part of advance agreed upon and claiming refund of same on ground that defendant had committed breach by not handing over films on his opening his own office — **Held** plaintiff's letter did not modify earlier agreement and that he had committed breach of agreement and hence could not recover. (1947) 52 Mys HCR 56 (64) (DB).

(51) Where the defendant had agreed to deliver jaggery to the plaintiff at a particular station by railway, but due to Government order controlling the movement by railway of jaggery, the goods could not be delivered by railway and the plaintiff refused to bear the additional expenses which the change in the mode of transport would have entailed, it cannot be said that defendant com-

Section 73 — Note 2 (contd.)

mitted the breach of contract. AIR 1952 Mad 670 (670).

(52) Express stipulation in contract to despatch goods by train — Goods actually sent by sea — Amounts to breach of material term of contract. AIR 1961 Mad 281 (283) = (1961) 1 Mad LJ 244.

(53) Breach of contract has to be proved before any enquiry can be conducted into the quantum of damages. When the Court without coming to any definite conclusion as to who had committed the breach awards damages against the defendant on the fragile consideration that the defendant had been profited by the contract not having been carried out overlooking the fact that the plaintiff had not himself observed a material term in the contract, the decree cannot be sustained in law. 1950-2 Mad L Jour 505 (506).

(54) If one party to a contract for the supply of electrical energy fails to fulfil without adequate excuse, its part of the contract, it is liable to pay damages to the other. AIR 1953 Punj 166 (168) (DB).

(55) A agreeing to sell certain property to B for a particular price — B paying part of the consideration money but subsequently refusing to pay the remaining amount on ground that the contract had not been settled for the price as alleged by A — B held was responsible for breach of contract. AIR 1955 Raj 70 (74, 75) = ILR (1954) 4 Raj 705 (DB).

(56) The defendants who were fishermen by profession were parishioners of St. Bortholomeo Roman Catholic Church. They secured certain sums from the plaintiff which they paid as voluntary contribution to the Church and entered into an agreement in writing with the plaintiff to pay him a specified share of their daily catch and to pay him damages in case of default. On 20-1-1125 the defendants sent a notice to the plaintiff stating that they had seceded from the Roman Catholic Church and ceased to be parishioners of the St. Bortholomeo Church and that therefore they were not willing to give the plaintiff the quota of fish they used to give. On the defendants thus ceasing to give their quota of fish, the plaintiff brought a suit for damages: **Held:** (1) that the agreement was not executed by the defendants for and on behalf of the Church as its representatives as they had undertaken personal liability for damages in case of breach of the contract; and (2) that the plaintiff had got a legal right to enforce the contract against the defendants which right could not be taken away from the plaintiff by the mere fact that some of the executants changed their religion and ceased to be

members of the Church. AIR 1953 Trav-Co 302 (303) (DB).

(57) Section 73 relates to compensation for loss or damage caused by breach of contract. The claim for refund of money does not arise out of the breach of contract, but out of the right of the plaintiff to recover money paid to the defendant for consideration which has failed. AIR 1956 Raj 137 (139) = ILR (1956) 6 Raj 522 (DB).

(58) Where the plaintiff fails to accept delivery of more than half the stipulated quantity of goods, he is clearly guilty of a breach of the entire contract and the defendant is justified in refusing to abide by the terms of the contract. In such circumstances, the plaintiff is not entitled to any compensation on the ground of breach by the defendant. AIR 1957 Orissa 8 (9) (DB).

(59) A purchaser of goods who commits default in his obligation to pay for the goods within 15 days of the delivery thereof cannot be heard to complain that the seller committed breach in withholding supply. AIR 1964 Mad 508 (510) = (1964) 2 Mad LJ 263.

(60) Contract for sale of goods—Goods to be given delivery of when they arrive — Contract held was not a contingent contract but an absolute contract — Failure to deliver goods due to non-arrival of goods amounts to breach. AIR 1949 Bom 356 (359) = ILR (1950) Bom 144 (DB).

(61) Where a party to a validly concluded contract refuses to carry out the work he has agreed to do unless the opposite party agreed to certain other new conditions, he commits a breach of contract. AIR 1958 Andh Pra 533 (540) (DB).

(62) A transferee with notice of a contract for sale of shares cannot avoid liability for damages for the breach of contract by transferring the shares to others. AIR 1950 PC 90 (98) = 77 Ind App 76 = ILR (1950) Bom 606.

(63) Partnership between plaintiff and defendant in textiles dissolved — Deed of dissolution provided that in respect of licences for textile goods plaintiffs should be entitled to $\frac{1}{4}$ quota and defendant $\frac{3}{4}$ — Plaintiff applying to Export Trade Controller for his quota — Defendant objecting and defendant allotted full quota — Plaintiff suing defendant for declaration and damages — Defendant held could not be made liable as trustee for plaintiff in respect of plaintiff's quota after dissolution of partnership—Defendant, however, was liable for breach of contract. AIR 1950 Mad 289 (292) = ILR (1950) Mad 697 (DB).

(64) Where the conditions of auction sale of liquor shop expressly provide that the acceptance of the bid shall be

Section 73 —Note 2 (contd.)

subject to the confirmation of the Chief Commissioner, there will be no completed contract till such confirmation. Where, therefore, a bid is withdrawn before the assent of the Chief Commissioner the bidder will not be liable on account of any breach of contract. AIR 1953 Punj 274 (278).

(65) Agreement to sell goods — Buyer alleging local usage demanding quantity in excess of standard weight — Seller expressing willingness to supply only according to standard weight and refusing buyer's demand for excess — Evidence adduced by buyer not establishing usage claimed by him — Such usage also declared to be void under statute — Seller has committed no breach of contract and hence buyer's suit against him for recovery of damages must be dismissed. ILR (1964) 14 Raj 799 = 1964 Raj LW 200 (200).

3. Anticipatory breach of contract.—

(1) If one party to a contract repudiates it, the other party may either treat the repudiation as inoperative, or he may treat the repudiation as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it, but he cannot both sue upon the breach and also keep the contract open. AIR 1926 Mad 118 (119).

(2) A repudiation of contract, before the time for performance arrives, which is not accepted by the other party, the contract being kept alive, cannot be treated as an anticipatory breach of the contract. AIR 1928 Sind 103 (103) = 23 Sind LR 370 ** AIR 1937 Nag 289 (293) = ILR (1938) Nag 31.

(3) When a party to a contract is entitled to cancel the contract by reason of the breach by the other, notice of cancellation should be given to the other party — If no notice is given then the breach is condoned and the contract is allowed to continue. AIR 1928 Mad 211.

(4) A breach of contract may take place before the time fixed for performance of the contract has arrived where the promisor had repudiated the contract — In such an event, the promisee may elect to sue him for breach of the contract without waiting for the time fixed for performance. The exact measure of damages upon anticipatory breach is in the ordinary case precisely the same as it would be if the repudiation were not accepted as a breach and the injured party brought suit, after the time of performance, for non-performance at the time set, i.e., though the plaintiff sues at once for an anticipatory breach of the contract his damages are to be assessed according to the cost of performance, not at the time and place of the breach but at the time and place set for performance. AIR 1921 Cal 185 (187, 189) = 48 Cal 427 (DB) ** AIR

1921 Low Bur 78 (80, 81) = 11 Low Bur Rul 182 (DB). (Breach — Repudiation — Other party may sue at once or wait till the due date — Measure of damages is the same in both cases, the difference between the contract rate and the market rate on the due date.) ** AIR 1917 PC 255 (257). (Jury will take into account what the plaintiff has or could have or ought to have done in mitigation of his loss.) ** (1911) 21 Mad L Jour 182 (193, 194) (DB) ** 1906 Pun Re No. 137, p. 502 (504) ** ILR (1960) 1 Cal 821 (832).

[See however AIR 1959 Raj 264 (266) = 1959 Raj LW 620 (DB). (But where the contracts of sale and purchase are done on an exchange from day to day with respect to commodities like bullion the market value of such contract on the date of repudiation is the best basis of damages rather than the actual value of performance as proved by the event.)]

(5) Lease of dry dock — Dry dock lost through lessee's negligence before end of term — Covenant enabling lessor to sue for re-delivery on breach of certain obligations — Such breach having taken place, lessor can sue before end of term, for damages for loss of the dock and for breach of the covenants — But rent cannot be claimed for period subsequent to commencement of action. AIR 1919 PC 85 (89).

(6) A seller is not to be defeated merely by its being shown that after repudiation by the buyer he had not the goods to implement the contract actually in his physical possession — He can show that he could supply the goods contracted for either from the open market or from any other source and he would be entitled to maintain a suit for damages for wrongful repudiation. AIR 1926 Mad 410 (410) (DB).

(7) Contract to place a part of a ginning factory at plaintiff's disposal for a certain period at a fixed rate — Anticipatory breach committed—Estimate of profits is the measure of plaintiff's loss — Plaintiff need not cut down the loss by actually getting his cotton ginned in another factory. AIR 1928 PC 200 (202) = 55 Ind App 299 = 55 Cal 1048 = 24 Nag LR 154.

(8) Contract for manufacture of goods according to specifications for sale in particular market — Such market lost — Order cancelled — Manufacturer ceasing to manufacture goods and claiming damages for breach of contract at 15 per cent of contract price, which he could have earned as profits — Such method of calculation, held proper — Damages awarded at 7½ per cent. on net value of goods. AIR 1945 Mad 291 (293, 294) = ILR (1946) Mad 192 (DB).

(9) If defendant commits breach before articles to be supplied to him are

Section 73 — Note 3 (contd.)

not finished, damages have to be assessed on estimate of profits which plaintiff would have made had the contract been performed. (1968) 2 Andh LT 326 (344) (DB).

4. Compensation and damages.— (1) The expression compensation is not ordinarily used as an equivalent to damages, although compensation may, often, have to be measured by the same rule as damages in an action for a breach. The term compensation signifies that which is given in recompense, an equivalent rendered. Damages, on the other hand, constitute the sum of money claimed or adjudged to be paid in compensation for loss or injury sustained, the value estimated in money, of something lost or withheld. The term compensation etymologically suggests the image of balancing one thing against another. Its primary signification is equivalence, and the secondary, and more common meaning is, something given or obtained as an equivalent. AIR 1923 Cal 507 (511, 512) (DB) ** AIR 1956 Hyd 12 (13) = ILR (1955) Hyd 718.

(2) The jurisprudential meaning of the word "damages" is that it is nothing more than the compensation which the Court determines in the circumstances of each case for the injury or loss which has been sustained by the other party. AIR 1956 Punj 174 (176) (DB) ** AIR 1956 Nag 221 (224) = ILR (1956) Nag 411 (DB).

(3) The word "compensation" is used in Article 115 of the Limitation Act in the same sense as in Section 73, Contract Act. AIR 1956 Hyd 12 (13) = ILR (1955) Hyd 718.

(3-A) Word "compensation" includes money due under contract for its breach. AIR 1970 All 206 (210) = 1969 All LJ 718 (FB).

(4) The word "compensation" in Section 19, Specific Relief Act, 1877, should be understood in the sense of damages contemplated in Section 73, Contract Act. AIR 1955 Nag 38 (40) = ILR (1955) Nag 538 (DB).

(5) A right to indemnity is given by the original contract whereas a right to damages arises in consequence of the breach of that contract. AIR 1928 Mad 43 (44).

(6) Inasmuch as a breach of contract does not result in any existing obligation on the part of the person who commits the breach, the right to recover damages is not an actionable claim and cannot be assigned. AIR 1954 Bom 423 (425) = ILR (1954) Bom 739.

(7) A party does not get damages or compensation by reason of any existing obligation on the part of the person who has committed the breach. He gets compensation as a result of the fiat of

the Court. Therefore, no liability arises till the Court has determined that the party complaining of the breach is entitled to damages. AIR 1954 Bom 423 (425, 426) = ILR (1954) Bom 739.

5. Measure of damages.— (1) It is not general intention of the law, that in giving damages for breach of contract, the party complaining should, so far as it can be done by money, be placed in the same position as he would have been in, if the contract had been performed. The rule, which prescribes as a measure of damage the difference in market prices at the respective times, is merely designed to apply this principle and it generally secures a complete indemnity to the purchaser. AIR 1947 Sind 22 (24) = ILR (1946) Kar 296 (DB) ** AIR 1941 Sind 146 (150) ** AIR 1922 Pat 79 (82) (DB) ** AIR 1956 Trav-Co 49 (50). (But this principle is only theoretically true for in practice it is almost certain that it is impossible to restore the party who has suffered by the breach of contract to status quo ante.) ** AIR 1956 Nag 221 (224) = ILR (1956) Nag 411 (DB) ** AIR 1962 SC 366 (369) = (1962) 1 SCR 653 ** AIR 1965 Pat 179 (183) = 1965 BLJR 679 (DB) ** AIR 1960 Cal 270 (278) (DB).

(2) Section 73 is merely declaratory of the common law as to damages. AIR 1957 Ker 3 (6) = ILR (1957) Ker 13 (DB).

(3) It is well settled that Courts will give damages for breach of contract only by way of compensation for loss suffered and not by way of punishment. AIR 1958 Andh Pra 533 (541) (DB) ** AIR 1963 Madh Pra 242 (245) = 1963 MPLJ 307 (DB).

(4) Amount of Rs. 1000/-, in the shape of Post Office Saving Bank Pass Book, given as security for faithful performance of contract — Amount available to satisfy any damages suffered by the other party (Madras State) in default of faithful performance of contract — State not entitled to forfeit amount even if no damage is suffered. (1968) 2 Mad LJ 359 (361, 362) = 81 Mad LW 407.

(5) Minimum charge payable under an agreement for supply of electricity is not a penalty for breach of contract to consume a stated amount of electricity — The charge is for keeping the energy available to the consumer — The levy is legal. (1969) 1 Mad LJ 69 (73, 76) = ILR (1968) 2 Mad 553.

(6) Under the terms of Sec. 73 the compensation is only for the loss actually suffered and such compensation is not to be given for any remote or indirect loss or damage sustained by reason of the breach of the contract — The section does not give any cause of action unless and until the damage is actually suffered. AIR 1946 Pat 263 (267) (DB).

Section 73 — Note 5 (contd.)

** AIR 1936 Pat 393 (394, 395) = 15 Pat 394 (DB) ** AIR 1965 SC 1981 (1984, 1985) = (1966) 1 SCWR 7 ** AIR 1965 Pat 179 (181) = 1965 BLJR 679 (DB) ** AIR 1959 Andh Pra 551 (556) (DB) ** 1958 Andh LT 930 (931).

(7) The amount of damages to be awarded can never exceed the loss actually suffered by the claimant or, which he is likely to suffer, provided that his acts are lawful and not contrary to the law, rules or bye-laws duly enacted. Thus, where the plaintiff gave on hire his Ghumti, a temporary wooden structure, after placing it on a public road or land in contravention of the municipal law and the bye-laws and the municipal Board removed the Ghumti and misappropriated it and the plaintiff did not possess any land on which the Ghumti, if placed, could fetch any income: **Held** that the income derived by the plaintiff by giving the Ghumti on hire was unlawful and he could not claim the amount by way of damages. AIR 1956 Bhopal 65 (65).

(8) The quantum of damages is not a part of the cause of action. It is a matter to be ascertained by the Court according to well laid down principles of law. AIR 1951 SC 144 (151) = 1950 SCR 979.

(9) Damages for breach of contract are intended to recompense the plaintiff for the pecuniary loss that he has sustained and do not depend upon the gain that the other party might have made. AIR 1950 Mad 289 (293) = ILR (1950) Mad 697 (DB).

(10) Contractor prevented from executing work — Damages payable to the contractor, may be fixed at estimated profits after making allowance on account of release from responsibility to execute the work. (1966) 1 Mys LJ 33 (36) = (1966) 5 Law Rep 773.

(11) Under this section damages are to be awarded as compensation for any loss or damage arising naturally in the usual course of things from the breach of contract. AIR 1937 Nag 243 (245) = ILR (1938) Nag 283 (DB) ** AIR 1956 Cal 41 (44) (DB) ** AIR 1965 SC 1981 (1984, 1985) = (1966) 1 SCWR 7.

(12) On breach of contract the party guilty of the breach must pay the injured person such damages as may accrue within a reasonable time. AIR 1917 Pat 178 (181) (DB) ** AIR 1956 Pat 441 (444).

(13) The rules applicable for determining the amount of damages for the breach of a contract to perform a specified work is that the damages are to be assessed at the pecuniary amount of the difference between the state of the plaintiff upon the breach of the contract and what it would have been if

the contract had been performed and not the sum which it would cost to perform the contract though in particular cases the result of either mode of calculation may be the same. AIR 1958 Andh Pra 533 (540).

(14) In awarding damages it is an ordinary rule that change of circumstances may be taken into consideration. AIR 1928 Bom 427 (430) = 52 Bom 883 (DB).

(15) The measure of damages varies according to, not only the time at which breach is brought, but the special circumstances of the particular case. AIR 1956 Cal 41 (44) (DB).

(16) Where the parties have themselves fixed the value of their right, that amount is a proper measure of damages sustained by a party. AIR 1915 All 40 (41).

(17) The mortgagee is entitled to damages on account of failure of the debtor to pay the debt at the stipulated time and that the measure of damages prima facie should be the same as the rate of interest agreed upon, though the Court has discretion to reduce this rate if it is found to be unusual. AIR 1922 Lah 254 (257) = 3 Lah 200 (FB) ** (1929) 115 Ind Cas 26 (29) (DB) (Lah).

(18) The amount due on a debt or for damages for breach of contract or in tort is to be determined according to the rate, prevailing at the date when the cause of action arises. Where, therefore, no time for repayment of a grain loan is fixed in the bond the debt is payable on demand and the grain must be valued at the rate prevailing on date of bond. AIR 1928 Lah 949 (951) (DB).

(19) The rate of exchange prevailing on the date of judgment is not the rate applicable in a suit for damages. AIR 1921 Cal 239 (240) = 48 Cal 886.

(20) On the breach of a contract by defendants to transfer their business, including stock and outstandings, plaintiffs would be entitled to recover compensation under this section for loss or damage which resulted to them from their having been prevented from making profit which would have accrued to them if defendants had fulfilled their promise and plaintiffs had fulfilled theirs. 1889 Pun Re No. 20, p. 64 (67) (DB).

(21) Promise of a share in partnership — Breach — Measure of damages is the difference between value of plaintiff's estate after breach of promise and its value if there had been no breach. AIR 1915 Lah 243 (244) = 1915 Pun Re No. 64 (DB).

(22) Where the suit is one for damages for breach of a partnership contract the death of one partner subse-

Section 73 — Note 5 (contd.)

quent to suit does not affect the measure of damages. AIR 1916 Mad 926 (927) (DB).

(23) Building contract — Contractor contracting to build up building according to plan and of particular kind — Building owner appointing supervising engineer — Collusion between contractor and engineer — Building, when nearly complete found very defective as to necessitate its pulling down — Passing of running bills by engineer does not preclude owner from challenging work done — Measure of damages is amount that would be required for constructing the building agreed for. AIR 1941 Nag 111 (112, 113, 114, 116) (DB).

(24) Wrongful termination of contract for manufacture of steel bins — Measure of damages in respect of finished bins would be difference between contract price and market price of such goods at time when contract is broken and in respect of unfinished bins would be difference between contract price on one hand and cost of labour and material required for manufacture of component parts of unfinished bins on the other — In absence of market at place of delivery, market price of nearest place or price prevailing in controlling market is to be considered. (Per Ramaswami, J.) AIR 1967 SC 378 = (1967) 1 SCR 633.

(25) Where a person purchases shares on a fraudulent representation of another person, in the absence of any special circumstances the measure of damages cannot be the amount of the loss ultimately sustained by the representee. It can only be for the difference between the price, which he paid and the price which he would have received if he had resold the shares in the market forthwith after the purchase provided of course that there was a fair market then. Ordinarily, the market rate of the shares on the date when fraud was practised would represent their real price in the absence of any other circumstances. If, however, the market was vitiated or was in a state of flux or panic in consequence of the very fact that was fraudulently concealed, then the real value of the shares has to be determined on a consideration of a variety of circumstances disclosed by the evidence led by the parties. AIR 1953 SC 235 (238) = 1953 SCR 789.

(26) Contract providing measure of liquidated damages consisting of (1) difference between contract price and market price on date of default, (2) certain additional amount above that — Breach of contract — Award of maximum amount named in contract as damages is not inconsistent with S. 73.

AIR 1959 SC 1357 (1362) = (1960) 1 SCR 569.

(27) Contract for sale of shares — Breach — Seller holding on to the shares after breach cannot recover difference below market price from purchaser. AIR 1915 SC 48 (49) = 43 Ind App 6 = 43 Cal 493 = 8 Low Bur Rul 343.

(28) In cases, where the elements of fraud, oppression, malice or the like are found, the law does not confine its remedy to the payment of compensation merely proportionate to any pecuniary loss actually suffered by the injured person — It can grant vindictive or exemplary damages by way of punishment to the wrong-doer. AIR 1942 Cal 493 (495) (DB) ** AIR 1933 Cal 706 (708) = 60 Cal 918. (Charge of fraud against businessman — Exemplary damages may be allowed.)

(29) A contract of hiring of machinery gave the right to the owners of the machinery even after the hiring has been terminated to claim damages in addition to the arrears of rent due on the date of the termination of the hiring for breach of the agreement. The plaintiff, the owner, claimed rent up to the date of the plaint and thereafter up to date of decree: Held that, the agreement between the parties was a hiring agreement with an option to purchase and that the proper basis for the assessment of damages for use of the machinery not delivered up to the owner in pursuance of a demand was the amount of the hire agreed upon in the agreement. AIR 1935 Mad 603 (605) (DB).

(30) Where the plaintiff gets the work done by another the measure of compensation is the increased cost of work on account of the work so done. AIR 1958 Andh Pra 533 (540).

(31) Where there has been a breach of contract which was to run for several years, and as a result of the breach the plaintiff claims damages, the right to claim damages accrues on the date of the breach though, in determining the amount, the Courts have to make an estimate of likely damage suffered by the plaintiff for the early termination of the contract and anticipate as best as they can what damages are likely to be. ILR (1954) 2 All 531 (553, 554) (DB).

(32) A plaintiff cannot be allowed to accumulate damages by his own inaction. AIR 1956 Raj 137 (139) = ILR (1956) 6 Raj 522 (DB).

(33) According to Illustration (n) to Section 73, the law in India in consonance with the rule of English law does not regard collateral or consequential damage arising from delay in the receipt of money. This principle has be-

Section 73 — Note 5 (contd.)

come settled though it is anomalous. AIR 1956 Trav-Co 49 (50).

(34) An appellate Court should as a rule be reluctant to interfere with the finding of the trial Court on the amount of damages to be awarded in a particular case. AIR 1955 Pat 215 (222) = 32 Pat 662 (DB).

6. Sale of goods — Measure of damages.— (1) The law as to damages on forward contracts may be summed up as follows: (1) Damages to be assessed with reference to the date fixed for delivery. (2) If that date is in future, the Court must estimate rate as best it can and it matters not that the estimate is to the great extent speculative. (3) If the plaintiff has rescinded the contract and the defendant proves that after rescission plaintiff has made fresh contract at better rates or that acting reasonably and as prudent man he might have made such contract this will be considered ground for abatement of damages. (4) If plaintiff after rescission makes fresh contract, he does so at his own risk and if he gets worse rate, he cannot make use of that for purpose of enhancing his damages. (1912) 6 Sind LR 187 (191).

(2) Section 56 of the Sale of Goods Act 1930 does not provide as to how damages are to be measured. Therefore, the damages are to be measured in accordance with the principles laid down in Section 73 Contract Act. ILR (1954) 4 Raj 778 (786, 787) (DB) ** AIR 1960 Pat 87 (98).

(3) In an action for non-delivery or non-acceptance of goods under a contract of sale, the law does not take into account in estimating damages anything that is accidental as between the plaintiff and the defendant; as for instance an intermediate contract entered into with a third party for the purchase or sale of goods. AIR 1922 PC 178 (180) = 48 Ind App 175 = 43 All 257 ** AIR 1921 Sind 98 (98, 99) = 15 Sind LR 214. (Loss sustained by either party through his breach of contract with a third party cannot be recovered unless the other party is aware of it.) ** AIR 1917 Low Bur 161 (162). (Profits which the plaintiff would have made out of another contract if the defendant had fulfilled his contract, can be recovered only if the defendant knew about it at the time of making the contract.)

(4) Where in the case of a c. i. f. contract, the buyer fails to accept the drafts and cannot be made to pay the price the sellers are only entitled to the difference between the contract price and the price of the goods on the date of the breach. AIR 1932 Sind 9 (15) = 26 Sind LR 167 ** AIR 1921 Low Bur 75 (78) = 11 Low Bur Rul 141 (DB).

(5) Goods sold under a C. I. F. contract pass to buyer on shipment by seller and the latter is not liable for subsequent damage. AIR 1917 Sind 36 (37) = 10 Sind LR 118.

(6) In the case of breach of contract of sale of goods on c. i. f. terms the amount of damage would be the difference between the contract price and the market price on the date of the breach. Where the sellers failed to tender the c. i. f. documents to the buyer and themselves cleared the goods, the breach occurred on the date on which the sellers cleared the goods as there could have been no tender of those documents after that date and not on the date on which the sellers, after clearing the goods, had shipped them to Calcutta in implementation of a different contract.

Unless there was evidence placed before the Court by the plaintiff as regards the market price at the relevant dates, there cannot be a decree for damages against the defendants. AIR 1958 Mad 43 (52) = ILR (1957) Mad 1108 (DB).

(7) The principle, by which Courts are guided in awarding damages in restitutio in integrum, and exact cost of effecting a complete restitutio in integrum, is difference between original contract rate and that at which vendor can sell to fresh purchaser goods of same quantity and quality and of same shipment. Election to take advantage of repudiation of a contract goes only to question of breach. Damages must be estimated by difference between contract price and market price at day or days appointed for performance, and not at time of breach. AIR 1914 Sind 53 (58) = 8 Sind LR 95 (DB).

(8) The market rate prevailing on the date of delivery fixed in the contract should afford the basis of ascertaining the damages. AIR 1958 Andh Pra 427 (435) (DB) ** AIR 1966 SC 395 (400) = (1966) 1 SCR 580 ** AIR 1964 Bom 76 (81) = 65 Bom LR 516 (DB). (Where damages are awarded on any other footing, it is necessary to explain the circumstances why the criteria of market rate was not applicable to the facts of that case.) ** AIR 1960 Cal 590 (592) (DB).

(9) It may be that in ascertaining the damages with reference to the market price on the date of delivery the Court may be ascertaining them without reference to the fall or rise in the market since the date of the contract. But this consideration can have no relevance to the principle on which damages are awarded. AIR 1956 Nag 221 (224) = ILR (1956) Nag 411 (DB).

(10) Where the property has not passed in the goods, the seller's only remedy for a breach of contract to accept and

Section 73 — Note 6 (contd.)

pay for the goods is as a general rule, a suit for damages, and the measure of damages for such breach is the difference between the contract price and the market price when the contract is broken, that is, on the due date which is the last day on which the delivery can be made. (1924) 6 Lah L Jour 415 (416, 417) (DB) ** AIR 1944 Nag 279 (279) = ILR (1944) Nag 749 ** AIR 1943 Nag 210 (210) = ILR (1943) Nag 772 ** AIR 1936 All 514 (516) ** AIR 1928 Lah 834 (837) (DB) ** AIR 1927 Sind 49 (52) = 19 Sind LR 41 ** AIR 1926 Mad 1021 (1023) (DB) ** AIR 1924 Bom 390 (391) (DB) ** AIR 1923 Bom 75 (76, 77) ** AIR 1917 Low Bur 103 (104) ** AIR 1915 Sind 17 (20) ** AIR 1914 Mad 573 (574, 576) = 37 Mad 412 (DB) ** 1910 Pun LR No. 2, p. 4 (6) ** (1876) 1 Cal 264 (273) (DB) ** AIR 1958 Bom 291 (295) = ILR (1958) Bom 775 (DB) ** AIR 1957 Punj 90 (91) (DB) ** AIR 1956 Pat 441 (444) ** AIR 1955 Andhra 148 (152) (DB) ** AIR 1955 Raj 70 (75) = ILR (1954) 4 Raj 705 (DB). (In such cases, the dictates of law are reasonably met by proving the loss with reasonable approximation to the date of breach.) ** ILR (1954) 4 Raj 778 (785) (DB) ** AIR 1952 Cal 440 (442) (DB). (Unless the parties have agreed upon an extension of the due date, damages cannot be awarded on the basis of the rate prevailing on a later date.) ** AIR 1952 Nag 32 (34) = ILR (1952) Nag 125 ** AIR 1952 Punj 234 (236) ** AIR 1951 Madh B 103 (104) ** **AIR 1968 SC 741 (744) = (1968) 2 SCR 239** ** ILR (1965) 2 All 343 (354) ** AIR 1963 Ker 13 (15) = ILR (1962) 2 Ker 319 (DB).

(11) Where the buyer obtained delivery of goods by fraud from Railway administration without complying with condition under contract as to payment of part of the price, the seller was entitled to the full contract price irrespective of market price on the date of conversion. AIR 1964 Ker 135 (138) = 1963 Ker LT 741 (DB).

(12) In assessing damages for breach of contract for sale of goods, price ruling on the date on which contract was finally cancelled is the criterion and not that prevailing on any previous date. AIR 1916 Mad 830 (832) (DB) ** AIR 1939 Rang 139 (141) = 1939 Rang LR 622 ** AIR 1935 Nag 111 (112) = 31 Nag LR 250 ** AIR 1963 Cal 510 (513).

(13) Damages for breach of contract to sell, calculated at market rate prevailing on date of breach — No date for delivery is fixed — Notice of non-acceptance is given after certain date — Difference between market rate prevailing on that date and contract rate is the amount of damages. AIR 1917 All 433 (433, 434).

(14) It is open to the parties to exclude any of the terms or conditions which the law attaches to the contracts of sale and create for themselves any special rights and obligations that they please, such as providing their own measure of damages in case of breach of contract. AIR 1958 Bom 291 (295) = ILR (1958) Bom 775 (DB).

(15) Goods refused by buyer — Resale after notice — Seller is entitled to contract price minus resale price. AIR 1927 Mad 380 (882) ** AIR 1917 Bom 234 (235) (DB) ** AIR 1956 All 721 (723) (DB) ** AIR 1968 Delhi 233 (237) = (1967) 69 Pun LR (D) 419 (DB).

[But see AIR 1949 Nag 199 (201) = ILR (1948) Nag 867 (DB). (Plaintiff held entitled to difference between contract price and rate prevailing on date of delivery.)]

(16) Breach of F. O. R. contract — Goods resold — Seller could not be allowed demurrage charges and commission and brokerage paid on resale. AIR 1959 AP 30 (36).

(17) Where it is the duty of the seller to give notice of re-sale and he does not give such notice, he is not entitled to recover any damages whatever. AIR 1957 Mad 228 (234) (DB).

(18) On information sent by B at S, A from C wired to B to purchase certain quantity of mahua seeds and despatch it to C at the "bilty cut" rate quoted by B which was higher than the normal market rate and meant "with the way bill made out". B made the purchase at S and sent 2 wagons charging the "bilty cut" rate. B, however could not secure third wagon for 14 months during which the seeds were lying with B in his godown and deteriorated. After notice to A, B auctioned the stock and sued A for the difference as damages. Held, that the property in the goods not having passed to A, he was not liable for any damages. AIR 1952 Vindh Pra 62 (64).

(19) Where the buyer takes the delivery not on the day fixed for delivery but on a subsequent day and there is shortage in delivery, the seller is liable in damages for the difference between contract rate and market rate on the day, fixed for delivery and not on the market rate on a day other than the day fixed for delivery. AIR 1922 Low Bur 1 (1).

(20) Breach of contract to purchase property — Damages though fixed by parties may be awarded according to difference between contract price and value of property. AIR 1919 Mad 411 (412) (DB).

(21) The measure of damages for breach of contract to sell goods is the sum by which the contract price falls short of the price at which the pur-

Section 73.— Note 6 (contd.)

chasers might have obtained goods of like quality at the time and place where they should have been delivered. AIR 1927 Lah 909 (911) ** AIR 1923 Lah 117 (119) (DB) ** AIR 1919 Mad 1053 (1055) = 41 Mad 709 (DB) ** (1909) 5 Mad L Tim 215 (216) ** AIR 1957 Madh B 190 (192) ** AIR 1951 Madh B 103 (104) ** AIR 1964 Pat 250 (253) = 1963 BLJR 426 (DB).

(22) In absence of evidence that some other market rate prevailed, the price at which vendee actually purchased the goods during the period at the place where goods, by a previous agreement were agreed to be supplied should be taken as market price. AIR 1964 Pat 250 (253) = 1963 BLJR 426 (DB).

(23) In a suit for damages for breach of a contract for sale of goods it is not necessary for the plaintiff to prove that he purchased the goods from other sources at a price exceeding the contract price and sustained a loss. AIR 1957 Madh B 190 (192).

(24) When goods delivered under contract of sale of goods by sample were all not equal to sample, measure of damages recoverable by purchaser is difference between market rates of goods delivered and those contracted to be delivered on date of delivery. 1913 Mad WN 772 (773, 774) ** (1908) 2 Sind LR 7 (10) (DB).

[See also ILR (1958) 2 Cal 441 (449).]

(25) A asked for rates of goods of firm B. B. supplied A with rates, whereupon A orders for despatch of goods. B again sent to A list of same rates but on next day B sent telegram quoting different rates. A sued B for damages. **Held**, that contract was complete when A accepted rates and gave orders for goods, measure of damages being price prevailing in A's city on the day of delivery and the contract rate plus cost of freight. AIR 1920 Cal 426 (428) (DB).

(26) Agent selling his own goods to principal — Profit made by such act of the agent — Measure of damages is difference between contract rate and market rate at time of delivery. AIR 1934 Bom 86 (87, 88) (DB).

(27) Vendor informs the purchaser before hand of his inability to give delivery at the time fixed by contract — The purchaser does not rescind the contract — The measure of damages is the difference between the contract price and the higher price the goods bear on the last day appointed for fulfilment of the contract. (1903) 30 Cal 477 (480) ** AIR 1933 Rang 25 (26).

(28) Where the contract does not provide what damages should be paid in the event of a breach it is not open to read a term into the contract that the

plaintiff agreed to receive only the damages representing the profits that he might have secured in accordance with certain scheme. What has to be determined under the terms of Section 73 is the market rate of the goods prevailing on the date of the breach. ILR (1956) Andhra 502 (512) (DB).

(29) Contract — Damages — Plaintiff, asking defendant, their agent to reship goods delivered for sale in foreign country — Defendant not carrying out his instructions — Plaintiff's remedy is relief by way of damages according to market rate in that country on date of refusal. AIR 1933 Sind 247 (250) (DB).

(30) Where in a contract for sale of goods, the goods are delivered late, the measure of damages is the difference between the market price on the due date of delivery and on the day of actual delivery, as given by illustration (e) to Section 73. But this test is subject to the main section that the purchaser must prove loss or damage caused to him. Where, however the purchaser sells the goods after the late delivery, the mere difference in price on the relevant dates is not sufficient to establish the loss. The measure of loss in such a case is the difference between the market price on the due date and the price actually obtained by sale of the goods. Where the fact of sale is established but the sale price is not proved, the purchaser is not entitled to any damages. AIR 1951 Pat 219 (221) (DB).

(31) Where custom duty is payable by the buyer it should be added to the contract price in assessing damages even when goods are not delivered. AIR 1924 Sind 38 (40) = 17 Sind LR 236 (DB).

(32) Method of assessing damages in case of a breach of contract to supply future goods is to ascertain the quantity, to ascertain the price at which, the same might have been fairly sold in the market during the season to which the contract relates, deducting from such price the ordinary charges of producing and selling the goods in question and in no case the amount awarded should exceed the amount of liquidated damages fixed by the parties. AIR 1923 All 199 (201).

(33) A contracts to sell goods to M — M contracts to sell them to C — Subsequent agreement that A shall deliver to C direct — Failure to take delivery — Measure of damages is the difference between the price to be paid to M and that to be paid to A. AIR 1920 Bom 346 (347) (DB).

(34) The usual practice in produce markets is that where there is a chain of sellers and buyers, the damages as ascertained between the last buyer and seller would probably without further litigation form the measure of the dam-

Section 73 — Note 6 (contd.)

ages to be recovered all along the chain
AIR 1925 PC 161 (163) = ILR 49 Mad 1.

(35) In ascertaining market value on a particular day for assessing damages value created for special purposes is irrelevant and it is for this reason that prices created by Bulls and Bears are of no use. (1902) 26 Bom 235 (239) (DB).

(36) When a contract of sale does not provide a penalty, the right of the seller to damages, on the failure of the buyer to complete payment, will arise under Section 73 or Section 75. Contract Act, and is something quite independent of the amount of any part payment made. AIR 1942 Sind 37 (39) = ILR (1941) Kar 495 (DB).

(37) Where a purchaser delays to take delivery of goods resulting in the deterioration of goods even though the property in the goods did not pass to him, he has to compensate the seller under Section 73 for any loss occasioned by the delay. AIR 1916 Sind 86 (91) = 10 Sind LR 14.

(38) On breach by purchaser, resale must be held within reasonable time. Measure of damages is difference between contract price and realization on resale with costs and expenses. This criterion is not applicable when resale is unduly delayed, in which case basis is difference between contract price and price on day of breach. AIR 1935 Lah 593 (595) = 16 Lah 358 (DB) ** AIR 1945 Lah 35 (42) = ILR (1944) Lah 578 (DB). (But if purchaser agrees to harsh terms Court cannot relieve him on equitable grounds.)

(39) Goods not appropriated — Resale, power of, in contract — Measure of damages — **Held**, that, as the goods had not been ascertained or even appropriated for purposes of agreement they did not come within the power of resale as framed and the resale was inoperative as a method of measuring damages. (1912) 39 Cal 568 (579, 580, 581) (DB) ** **AIR 1968 SC 741 (744) = (1968) 2 SCR 239.**

(40) Goods sold — Time for delivery not fixed — Buyer notifying seller that he would not accept delivery after a certain date — **Held**, contract must be deemed to have subsisted till that date and the damages are to be calculated at the difference in the market rates of that date and the date of contract. AIR 1917 All 433 (433, 434).

(41) Contract providing penalty for failure to accept draft or making payment at maturity and not for failure to take delivery of goods — Failure to take delivery of goods on intimation of arrival — Seller can claim difference between contract price and that on date of default. AIR 1928 Lah 817 (818) (DB) ** AIR 1930 Lah 389 (391) (DB).

(42) Sale of goods—Price paid at time of purchase — Failure by vendor to deliver goods entitles purchaser to recover purchase money with interest from the date it was paid and also to usual damages. AIR 1944 Bom 21 (23) ** AIR 1962 Pat 155 (158) = 1962 BLJR 225 (DB).

(43) Time extended for delivery but not fixed — Vendors must deliver only within reasonable time — In that case vendees cannot refuse to take delivery — Vendors cannot sue for price but can claim damages represented by market rates. AIR 1924 Bom 325 (326, 329) = 48 Bom 374 (DB).

(44) Merchant buying goods in Japan, and desirous of paying in rupees, entering into contract with Bank — Purchases of yen to be during specified periods at fixed rate — Bank covering itself by yen purchased against yen sold — Importer failing to pay bills by purchase of yen commits breach — Measure of damages is difference between contract rate and buying rate of yen to be purchased against yen sold. AIR 1936 Rang 269 (271) (DB).

(45) Contract to deliver goods by instalments — Seller repudiating before due date — Damages are the difference between contract price and market price at dates of delivery though last date has not elapsed at the time of action but the seller can show in mitigation that in the interval the buyer could have obtained a new contract on better terms. AIR 1917 Cal 721 (724) = 43 Cal 305 (FB) ** ILR (1960) 1 Cal 821 (832).

(46) Contract for sale of goods — Goods to be delivered on arrival — Damages for non-delivery will be with regard to dates of actual arrival of goods and not the date when the goods were expected. AIR 1927 Lah 648 (649) (DB).

(47) Where the goods are specially made to order but are not marketable the measure of damages is the price of the goods. AIR 1931 Lah 742 (744) = 13 Lah 386 (DB).

(48) In the case of breach of contract of sale of goods if there was an available market for the goods at the date of breach, the damages must be based on the difference between that market price and the contract price; a contract of re-sale becomes immaterial, because if there was a market, the law presumes that the buyer can minimise his damages by procuring substituted goods in the market so that he is thus in the same position, apart from the difference in price, as if the seller had not made default. AIR 1932 PC 196 (197) = 59 Ind App 398 = 11 Pat 600 ** (1964) 1 Ker LR 94 (95). (Market value as at closing transaction of the day is to be taken.) ** AIR 1961 Pat 107 (110) ** ILR (1960) Mys 1079 (1088) (DB).

Section 73 — Note 6 (contd.)

(49) Where there is no available market and there are difficulties in assessing the damages on the ordinary footing the Court must do its best to award such damages as will put the seller in the same position in which he would have been if the contract had been performed. (1950) 85 Cal L Jour 164 (174) ** AIR 1952 Punj 234 (236) ** AIR 1964 Pat 107 (111) ** AIR 1960 Cal 590 (592) (DB).

(50) Where for calculating damages for breach of contract to supply goods the market price on the date of the breach is not available as no transaction took place on that date the rate that was prevalent just before and just after that date can be taken into consideration. AIR 1954 Orissa 254 (254) (DB) ** AIR 1961 Pat 107 (110). (AIR 1952 Cal 441, Diss. from.)

(51) Contract to purchase Pakistan Jute — Breach of — Award of damages according to rates prevailing in Calcutta Market held proper — Export price fixed by Pakistan Government need not be taken into consideration in adjudicating damages. AIR 1968 SC 522 (528) = (1968) 1 SCR 821.

(52) Defendant contracting to deliver goods at a particular place and not aware that goods were delivered by defendant's agent to railway for transit — Contract cannot be avoided for common mistake — Defendant refusing to hand over railway receipt but selling the goods — Damages should be calculated as on the date of refusal to hand over railway receipt. AIR 1927 Bom 514 (515, 516) (DB).

(53) Goods sent by railway in pursuance of contract for sale of black-gingelly — Repudiation of contract before delivery — For assessing damages for non-acceptance of goods the time was the date when the buyer finally refused to take delivery. AIR 1959 Andh Pra 30 (35).

(54) Where the term of the plaintiff's contract, with defendants, regarding delivery, was subsequently varied and there was to be no delivery to defendants, there could not be a breach of contract on part of defendants by reason of their not taking delivery. Correct measure of damages would be such as would put plaintiffs in same position as if their contract with defendants as varied had been carried out. AIR 1920 Bom 346 (347) (DB).

(55) Plaintiff ordering goods through defendants but failing to pay the draft on due date — Defendants doing so and taking delivery of goods — Plaintiff on tendering value entitled to goods — Refusal by defendants — The plaintiff was entitled to damages, namely the difference between the market value of the

goods on the day on which he sent the cheque and the amount due by him on the draft. (1921) 23 Bom LR 1108.

(56) Where property contracted to be sold to plaintiff is sold by owner to another, the measure of damages in a suit for damages on breach of contract is the difference between actual price and contracted price. AIR 1927 Lah 252 (255) (DB).

(57) Credit and debit entries in buyer's accounts, as goods were left with seller — Subsequent pledge by buyer — Buyer's suit for account — The contract being unenforceable both entries cancel each other — If debit entry represents damages for conversion, value of goods is value at time of conversion. AIR 1927 Mad 340 (342) (DB).

(58) In cases where conversion has occurred, the profit obtained by conversion is usually held to be the best evidence of the measure of damages; but the measure of damages will still be the loss sustained, by not having the property delivered at the price agreed on. A man cannot by merely changing the form of action entitle himself to recover damages greater than the amounts to which he is in law entitled according to the true facts of the case and the real nature of the transaction. The usual rule in damages is that damages should be calculated from the date of the breach. AIR 1943 Nag 141 (143) = ILR (1943) Nag 272.

(59) Where the parties knew that the agreement to purchase goods was entered into to supply to a third party under a sub-sale it is a clear case where under the terms of Section 73 itself, the party committing the breach would be liable to pay the difference between the contract rate and the sub-sale rate if the parties knew at the time of the contract that a breach thereof would result in damage. But where there was no such knowledge, the only measure is the damage which naturally arose in the usual course of things from such breach. AIR 1955 Andhra 148 (152) (DB) ** 1963 Mys LJ (Supp) 361 (364, 365). (AIR 1946 Nag 392, Disting.)

(60) Where according to the terms of the contract the buyer is given, on breach of the contract, a right to purchase in the market and to claim the difference, it cannot be contended that since the buyer has not proved any purchase on his part, he is not entitled to claim any damages. The buyer can claim damages on the basis of market rate. It is a right which law gives and it is not taken away by the operation of the maxim 'Expressio unius est exclusio alterius' as the maxim does not apply to the case. ILR (1951) 1 Cal 420 (431).

(61) The plaintiff, a firm of Madras, booked orders for goods of the defend-

Section 73 — Note 6 (contd.)

ants who were the manufacturers of those goods and were carrying on their business at Mirzapur. The contract was for despatch of goods f. o. r. Mirzapur, at earliest booking day, the railway receipt to be negotiated through the Bharat Bank, Ltd. It was shown that the defendants failed to despatch goods, even after many reminders of the plaintiffs on the excuse that Railway booking was not open. It was in evidence that other merchants of Mirzapur had booked their goods. The plaintiffs cancelled the contract, covered up the contract by purchasing goods in the market and sued in Madras for the difference in price as damages — **Held**, that damages had to be assessed according to the market rate in Madras, as the performance of the contract and the payment for the goods were at Madras and not at Mirzapur. AIR 1949 Mad 858 (859).

(62) In cases of manufacture of articles, where part of articles to be manufactured in agreement, have been manufactured, amount of damages sustained by breach of contract would be ascertained by deducting value of articles manufactured from agreed price of those articles. (1968) 2 Andh LT 326 (343) (DB).

(63) Where in respect of a contract entered into between the plaintiff and the first defendant under which the goods to be supplied by the first defendant were agreed to be delivered by a third party, the second defendant, and a sum of money was received by the second defendant in pursuance of the contract, and on failure to receive the goods the plaintiff sued for damages for breach of contract, it was held that both the defendants were liable to pay damages. 1954 Mad WN 692 (693) (DB).

(64) In a suit for damages on non-delivery of goods it is the duty of the plaintiff to satisfy the Court that he was ready and willing with the money, that he had capacity to pay, or at any rate, he had made proper and reasonable preparations and arrangements for securing the purchase money and that he demanded the goods on the due date from the defendants. AIR 1958 Punj 289 (294) = ILR (1958) Punj 1670 (DB).

(65) On the breach of an agreement for sale of shares on the part of the seller, the purchaser can sue for the money deposited for the purchase of shares and damages or for shares and damages or for interest of the money or damages. AIR 1951 Hyd 47 (49) = ILR (1951) Hyd 440.

(66) Contract for sale of shares — Breach — Suit for specific performance or in alternative for damages — Defence that relation of parties was not that of vendor and vendee but that

of agent and principal held not established — Measure of damages held was difference between market rate on date of agreement and on date of filing plaintiff and not date when plaintiff abandoned relief for specific performance. AIR 1948 Mad 391 (393) (DB).

(67) Where the commission agent sells the principal's bales of cotton without any justification or cause the principal, in a suit for damages for breach of contract, cannot select the rates of cotton prevailing on any date before the suit and after the breach had occurred or after the delivery of the bales has been refused to him. The measure of damages is the amount indicated by the difference in the rate at which the bales were purchased and the rate at which they could be sold when the principal demanded their delivery and the agent failed to comply. AIR 1953 Pepsu 113 (116) (DB).

(68) The principle that for a breach of contract a party is entitled by way of damages to the difference between the contract price and the market price is not an absolute and inviolable principle. It is only a presumptive test. AIR 1955 Cal 465 (469) (DB) ** ILR (1955) 1 Cal 29 (36) (DB).

(69) Where the defendant sells his property to a third person for the same price contracted with plaintiff, there is no difference in prices and hence the plaintiff is not entitled to any damages on account of the alleged breach. AIR 1955 Nag 38 (41) = ILR (1955) Nag 538 (DB).

(70) Though there might be some broad equity in calculating quantum of damages at 50 per cent of that which would be strictly due, it would not suffice as a basis for finding at law. AIR 1960 Mad 388 (390) = 1960 Mad WN 627 (DB).

(71) 11-3-1950 agreed between parties as date for ready delivery — Defendant not accepting delivery on that date — Breach of contract takes place on that date — Rate of contracted goods on 11-3-1950 being same as originally agreed between parties, plaintiff suffers no damage. AIR 1953 Ajmer 8 (1) ((8 (1))).

(72) Where the Court below reduced the damages on the ground that the plaintiff (buyer) was always asking for the goods and never for the documents and that he never tendered the price of the goods under the contract on arrival of the ship and that the plaintiff alone should have got the import license and cleared the goods, held that each one of those three grounds might in a proper case be held to negative any breach on the part of the defendants but if the defendants did break the contract, they furnished no relevant basis for reducing the quantum of

R. 99. Resistance or obstruction by bona fide claimant.—Where the Court is satisfied that the resistance or obstruction was occasioned by any person (other than the judgment-debtor) claiming in good faith to be in possession of the property on his own account or on account of some person other than the judgment-debtor, the Court shall make an order dismissing the application.

[1882 and 1877, Ss. 331, 335; 1859, Ss. 229, 269.]

HIGH COURT AMENDMENTS

Allahabad

For the words in brackets, "(other than the judgment-debtor)" read the words in brackets "(other than the persons mentioned in Rules 95 and 98 hereof.)"

Andhra Pradesh

Same as that of Madras.

Assam and Nagaland

Same as that of Calcutta—See Assam High Court Order, 1948, Cl. 6 and Act 27 of 1962, Ss. 13 and 15 (w. e. f. 1-12-1963).

Bombay: Dadra and Nagar Haveli^a

For the existing Rule 99 and its marginal note, substitute the following:—

"99. Resistance or obstruction by bona fide claimant. — Where the Court is satisfied that the resistance or obstruction was occasioned by any person (other than the persons mentioned in Rule 95 or 98) claiming in good faith to be in possession of the property on his own account or on account of some person other than the judgment-debtor, the Court shall make an order dismissing the application." (1-11-1966.)

[a] See Act 35 of 1961, S. 11 and Reg. 6 of 1963 S. 3 (1-7-1965).

ORDER 21, RULE 99 — SYNOPSIS

1. Scope.

2. "Claiming in good faith to be in possession."

3. "On his own account."

4. "Symbolical possession".

1. Scope. — (1) Unless there is an investigation and unless the Court is satisfied an order under this rule cannot be made. 1956 Madh B LJ 129 (129, 130) (DB) °° AIR 1969 Andh Pra 192 (193, 194): (1968) 2 Andh WR 580.

(2) When an application by the decree-holder under O. 21, R. 97 is dismissed for default the dismissal is not one under this rule and hence R. 103 can have no application. AIR 1951 Punj 431 (1) (431).

[See also AIR 1963 Guj 153 (156): (1963) 4 Guj LR 172.]

(3) Dismissal of petition not on merit — Order is final and conclusive unless suit is filed as per O. 21, R. 103. AIR 1959 Mys 169 (170): 36 Mys LJ 415.

(4) A suit under Order 21, Rule 103 can be filed only by a person against whom an order has been made under R. 98 or 99 or 101. (1966) 2 Mys LJ 54: (1966) 8 Law Rep 4.

(5) Under R. 99 only the right to possession of the property has to be determined. Rule of 'lis pendens' does not apply with all its implications. AIR 1952 Trav-Co 102 (104): 1950 Ker LT 409 (DB).

(6) 'Possession' means khas possession — Application by stranger before dispossession

is not maintainable — Inherent power cannot be resorted to. AIR 1955 Trav-Co 225 (225): 1955 Ker LT 413 (FB) °° AIR 1953 Trav-Co 123 (125): 1952 Ker LT 660 (DB).

(7) Order granting police help passed without service of notice to opposite party — Order is illegal. AIR 1965 Cal 51: 68 Cal WN 806.

(8) Application by landlord for possession of premises with police help — Objection by sub-tenant — Discretion of Court to order police help where Court decides sub-tenancy to be illegal and orders police help, the order will not be interfered with. AIR 1953 Cal 218 (218): 57 Cal WN 65 (DB).

(9) A third party and/or a bona fide claimant has got no locus standi to maintain an application under R. 99. AIR 1965 Cal 51 (53): 68 Cal WN 806.

(10) An order by Insolvency Court declining to grant appellant redelivery of possession cannot be said to negative his title. The suit by the appellant for partition and separate possession of his half share was held maintainable. AIR 1965 Mad 331 (334): (1965) 1 Mad LJ 242 (DB).

2. "Claiming in good faith to be in possession". — (1) The party resisting delivery of possession should satisfy the Court that he is, in good faith, in possession of the property on his own account or on account of a person not the judgment-debtor. AIR 1928 Mad 909 (909) °° AIR 1926 Mad 78 (80, 81): 48 Mad 767 °° AIR 1967 Kerala 145 (145, 146): 1966 Ker LT 798 °° AIR 1959 Cal 621 (623): 63 Cal WN 361.

Calcutta: Andaman and Nicobar Islands

Insert the words "to have a right" after the words "in good faith" [3-2-1933].

Kerala: Laccadive, Minicoy and Amindivi Islands

Same as that of Madras [9-6-1959]; see Act 37 of 1956, S. 60 and Reg. 8 of 1965, S. 3 (2).

Madhya Pradesh

Same as that of Allahabad [16-9-1960].

Madras and Pondicherry

For the words in brackets "(other than the judgment-debtor)" read the words in brackets "(other than those mentioned in Rule 98)" [13-10-1936]; See Act 26 of 1968, S. 3 and Sch., Pt. II (w.e.f. 5-9-1968).

Mysore

Delete Rule 99 and substitute the following:—

99. Where the Court is satisfied that the resistance or obstruction was occasioned by any person (other than those mentioned in Rule 98) claiming in good faith to be in possession of the property on his own account or on account of some person other than the judgment-debtor, the Court shall make an order dismissing the application (30-3-1967).

Orissa

Same as that of Allahabad.

Patna

Same as that of Allahabad.

R. 100. Dispossession by decree-holder or purchaser.—(1) Where any person other than the judgment-debtor is dispossessed of immovable property by the holder of a decree for the possession of such property or, where such property

Order 21, Rule 99 — Note 2 (contd.)

(2) If the obstructor has a good and legal right to obstruct, the fact that he acts at the instigation of the judgment-debtor will not prevent an order being made under this rule in his favour. (1881) 3 Mad 81 (85) (DB) ** AIR 1933 Pat 604 (605).

3. "On his own account". — (1) In execution of a decree against a tenant, a sub-tenant, cannot resist delivery of possession to the landlord. ILR (1954) 4 Raj 1059 (1059) ** AIR 1922 Bom 449 (451): 46 Bom 887 ** (1968) 1 Mad LJ 386: 81 Mad LW 8.

(2) Where on redemption of a mortgage, a tenancy created by the mortgagee is required to be terminated under the provisions of Sec. 106, T. P. Act, the tenant in possession is entitled to obstruct delivery of possession in execution of the decree. AIR 1955 Kutch 11 (12).

(3) A decree against executors does not bind the beneficiaries under the will and their possession of the testator's estate is not on behalf of the executors. AIR 1937 Cal 301 (301, 303).

(4) Where a sub-tenant, in reply to a notice under R. 97, puts in an application claiming her right to remain in occupation by virtue of a right independent of the judgment-debtor, the Small Cause Court Judge should have heard the sub-tenant and passed orders under R. 99. (1956) 60 Cal WN 147.

(5) A tenant, brought in by the vendee long before the pre-emptor got title on depositing pre-emption money in Court, cannot be ejected in execution of the pre-emption decree. Pre-emptor is entitled to only symbolic possession. (1966) 68 Punj LR 693.

(6) Execution of partition decree — Land leased by one of co-sharers — Decree can be executed — Separate suit to evict lessee not necessary. AIR 1964 Punj 525 (526, 527): 66 Pun LR 832.

4. "Symbolical possession." — (1) Rule 97 does not contemplate delivery of symbolical possession in cases where a person is actually occupying immovable property and resisting delivery of possession. AIR 1964 All 302 (307) ** (1959) 61 Pun LR 82.

ORDER 21, RULE 100 — SYNOPSIS**1. Scope.**

2. "Any person other than the judgment-debtor".

3. "Is dispossessed."

4. Limitation.

1. Scope. — (1) Where in obtaining possession of property the holder of a decree for possession or the auction-purchaser, dispossesses any person other than the judgment-debtor, such person may apply to the Court for a summary investigation of the matter under this rule. AIR 1953 Cal 598 (599) (DB) ** AIR 1953 Trav-Co 340 (342): 1953 Cri L Jour 1394 (DB) ** AIR 1954

has been sold in execution of a decree, by the purchaser thereof, he may make an application to the Court complaining of such dispossession.

(2) The Court shall fix a day for investigating the matter and shall summon the party against whom the application is made to appear and answer the same.

[1882 and 1877, S. 332; 1859, S. 230.]

Order 21, Rule 100 — Note 1 (contd.)
Mad 516 (518) ** AIR 1960 All 626 (629): 1960 All LJ 492 (DB).

(2) Where an application is made under this rule, the Court shall register the application, make an investigation therein and should either dismiss the application or pass an order under R. 101. AIR 1924 Pat 698 (700) ** AIR 1926 Cal 377 (377) (DB).

(3) When an ejectment decree is sought to be executed before the Small Cause Court Judge, he has power to start a proceeding under O. 21, R. 97 or to decide objections under that provision, read with the three subsequent rules. (1956) 60 Cal WN 147 (148).

[But see ILR (1951) 2 Cal 474 (479).]

(4) This rule applies to cases of exclusive as well as of joint possession. AIR 1954 Mad 516 (518) ** AIR 1933 Pat 132 (133).

(5) The rule does not apply to a case of excessive execution, i. e., delivery to the decree-holder of property in excess of that to which he was entitled under the decree for possession. AIR 1947 Mad 458 (461): ILR (1948) Mad 415.

(6) Where an applicant under O. 21, R. 100, has been claiming that he is in possession in proceedings under S. 145, Criminal P. C., it cannot be said that the delay in filing his claim is bona fide, especially when he has been keeping one Court ignorant of his attitude in the other Court. 1958-1 Mad L Jour 402 (405, 406).

(7) Even though the provisions of O. 9 do not apply to execution proceedings, the executing Court in exercise of its inherent powers under S. 151 can restore applications under O. 21, R. 100 dismissed for default. AIR 1958 Orissa 200 (201, 202): ILR (1958) Cut 351.

(8) An anticipatory objection to delivery by a person who was a stranger to the decree does not lie. 1959 Ker LT 458: 1959 Ker LJ 343.

(9) Insolvency Court can invoke, in appropriate cases, provisions of O. 21, Rr. 95 to 102. AIR 1965 Mad 331 (333): (1965) 1 Mad LJ 242 (DB). (If an order is made under any of these rules, aggrieved party can file suit under R. 103.)

(10) Procedure under Rr. 100 and 101 is optional — Party dispossessed can resort to remedy of suit under general law — Application under O. 21, R. 100 can be withdrawn at any time without affecting his remedy under general law of filing independent suit. AIR 1962 Mad 181 (186): (1962) 1 Mad LJ 40 (FB).

(11) Applicant, under O. 21, R. 100 claiming joint possession with judgment-debtors — Claim not raised when land attached before judgment — Application is not

barred by constructive res judicata. AIR 1965 Pat 509 (510).

(12) Judgment-debtor is not a necessary party to a proceeding under O. 21, R. 100. AIR 1968 Pat 232 (235): ILR 46 Pat 1183 (DB).

(13) Transferee of suit property which was transferred after dismissal of suit but before the suit was decreed in appeal cannot apply against dispossession under R. 100. Application is governed by R. 102. 1964 Raj LW 487.

(14) Dispossession of tenant in execution of decree against landlord — Tenant enjoying protection against eviction under S. 13 (2), East Punjab Rent Restriction Act — Occupation of tenant is in his own right — Tenant can seek summary remedy under O. 21, R. 100. AIR 1963 Punj 229 (230): 1961 Cur LJ (Part 1 Cri) 15.

(15) Court has to determine whether the applicant was in possession of the property on his own account, or on account of some person other than the judgment-debtor. AIR 1963 Pat 62 (67): ILR 42 Pat 763 (DB).

(16) Mortgagee under S. 17 (1) of U. P. Act, 13 of 1940 is not a holder of decree for possession — Person dispossessed by such mortgagee cannot apply under this rule for restoration of possession. 1959 All LJ 742.

(17) Question of J. D's title beyond the ken of enquiry. AIR 1968 Pat 232 (235): ILR 46 Pat 1183 (DB).

(18) An order cannot be said to have been made against any party within the meaning of O. 21, R. 100 unless it had been made after investigation into the matter. 1950 Trav-Co LR 692 (700): 1950 Ker LT 502 (DB).

(19) Cochin Civil P. C., O. 21, R. 97 — Applicant must satisfy Court that he was in possession of the property on his own account and not on account of any of the judgment-debtors and that his claim for possession of property is supported by good faith — Failure to prove either — He is not entitled to recover possession under O. 21, R. 97. AIR 1952 Trav-Co 102 (103): 1950 Ker LT 409 (DB).

(20) R. 100 does not preclude a Court from entertaining objection to dispossession filed by a claimant, whose objection under R. 58 has failed and whose suit under R. 63 is pending. AIR 1951 Nag 183 (184): 1950 Nag LJ 535.

(21) Order of Court under R. 96 ordering delivery of possession to purchaser — Doubtful whether plaintiff, who had notice of execution proceedings, can bring a suit without invoking court's jurisdiction under R. 100. AIR 1960 Andh Pra 397 (404): 1959 Andh LT 554. (Reversed on facts in AIR 1963 SC 1633.)

R. 101. Bona fide claimant to be restored to possession.—Where the Court is satisfied that the applicant was in possession of the property on his own account or on account of some person other than the judgment-debtor, it shall direct that the applicant be put into possession of the property.

[1882, Ss. 332, 335.]

Order 21, Rule 100 — Note 1 (contd.)

(22) Insolvency Court would be competent to entertain applications under R. 100. AIR 1965 Mad 331 (333): (1965) 1 Mad LJ 242 (DB).

2. "Any person other than the judgment-debtor." — (1) A judgment-debtor or his representative cannot apply under this rule. AIR 1942 Pat 279 (281) (DB) ** AIR 1923 Pat 76 (82) ** AIR 1964 Andh Pra 222 (223): ILR (1965) Andh Pra 1319.

(2) A person who is a party to the suit, but against whom no decree has been passed can apply under this rule. (1895) 17 All 222 (225) (FB) ** AIR 1954 Trav-Co 223 (224): ILR (1953) Trav-Co 1214 ** AIR 1918 Mad 911 (912): 40 Mad 964 (966, 967) (DB).

[See however AIR 1956 Nag 93 (94): ILR (1955) Nag 72 (DB).]

(3) "Any person other than the judgment-debtor"—Expression means a third party—Pro forma defendant in a partition suit, held, a judgment-debtor — Dispute between him and the decree-holder falls to be decided under S. 47 and not under R. 100 of O. 21. AIR 1968 Cal 547 (548): 73 Cal WN 4.

(4) Decree in a previous suit against plaintiff and another person — No execution against plaintiff — In execution of decree against other person property alleged to belong to plaintiff was sold — For purpose of O. 21, R. 100 plaintiff was a judgment-debtor and could not file application under that Rule. ILR (1967) 3 Mad 408.

(5) Rules 100 and 101 contemplate an investigation and satisfaction of Court that a party was in possession of the property on his own account. AIR 1962 Mad 181 (186): (1962) 1 Mad LJ 40 (FB) ** AIR 1951 Nag 183 (184): 1950 Nag LJ 535.

3. "Is dispossessed." — (1) Unless the applicant is dispossessed of the property, he has no cause of action to apply under this rule. AIR 1952 Orissa 120 (124, 125): ILR (1951) Cut 543 (FB) ** AIR 1953 Hyd 4 (4, 5): ILR (1952) Hyd 473 ** 1960 Raj LW 618 ** 1959 Ker LR 313: 1959 Ker LT 458.

(2) The dispossession should be in the course of the delivery of possession and should be proved as a fact. AIR 1929 Pat 553 (554, 555) ** AIR 1942 Pat 279 (281) (DB).

(3) Mere delivery of symbolical possession to the decree-holder or auction-purchaser will not amount to dispossession of the party in possession. AIR 1955 Trav-Co 225 (225): ILR (1955) Trav-Co 363 (FB).

(4) Where dispossession does not take place in the course of the delivery of possession in execution but subsequent there-

to, this rule has no application. AIR 1952 Cal 9 (9, 10) (DB). (AIR 1938 Cal 192, Overruled.)

(5) A person who was deprived of his possession under order of a Civil Court cannot be asked to seek assistance of revenue Court for vacation of that order. AIR 1964 Andh Pra 222 (223): ILR (1965) Andh Pra 1319 (DB).

(6) The words 'such property' in O. 21, R. 100 (1) would mean the property covered by the decree. The rule has no application where a third person is dispossessed of some other property not covered by the decree. AIR 1961 Assam 79 (80): ILR (1962) 14 Assam 166.

(7) The Court can decide a question under O. 21, R. 100 only on the basis of possession. AIR 1968 Cal 547 (548): 73 Cal WN 4.

(8) Objection raised after sale of property in execution of money-decree — It cannot be contended that parties claiming portion of the property have no right to resist delivery of possession or institute a suit under R. 58 and that their remedy is to apply under R. 100 after dispossession. AIR 1968 Pat 46 (46).

(9) Applicability — Decree against a pat-tadar of land executed by Civil Court by delivering possession of land — Claim petition by protected tenants for restoration of possession in Civil Court, maintainable. AIR 1964 Andh Pra 222 (223): ILR (1965) Andh Pra 1319 (DB).

4. Limitation. — (1) When an adverse order is passed on an application under R. 100 and a revision against that order is summarily dismissed the date of the adverse order is material for counting period of limitation for a suit under R. 103. AIR 1963 Pat 62 (69): ILR 42 Pat 763 (DB).

(2) Suit for possession on ground that plaintiffs were dispossessed in execution and they filed objection under O. 21, R. 100 — Suit is under O. 21, R. 103 C. P. Code — Art. 11-A of Limitation Act (1908) applies. AIR 1963 Pat 62 (67): ILR 42 Pat 763 (DB).

ORDER 21, RULE 101 — SYNOPSIS

1. "On his own account".
2. Nature of the investigation under this rule.
3. Appeal.
4. Revision.

1. "On his own account".— (1) Rules 100 and 101 are not confined, in their application, to cases of exclusive possession but are applicable also to cases where the person dispossessed was in joint possession. AIR 1954 Trav-Co 223 (224): ILR (1953) Trav-Co 1214 ** AIR 1931 Cal 385 (387): 58 Cal 55.

HIGH COURT AMENDMENT

Kerala: Laccadive, Minicoy and Amindivi Islands

In Rule 101, for the 'full stop' at the end of the rule, a comma shall be substituted and the following shall be added to the rule, namely:—

"and may order the decree-holder or auction-purchaser, as the case may be, to pay in addition to costs reasonable compensation to the applicant for dispossession." (9-6-1959); see Act 37 of 1956, S. 60 and Reg. 8 of 1965, S. 3 (2).

Order 21, Rule 101 — Note 1 (contd.)

(2) If a co-owner or a member of an undivided family is dispossessed in execution of a decree against another co-owner or coparcener, he may apply under R. 100 to be put in joint possession with the decree-holder or the auction-purchaser, but he cannot claim to be put in possession of specific portions of the property. AIR 1923 Nag 52 (53); 18 Nag LR 206 ** AIR 1938 Nag 442 (443, 444) ** (1910) 5 Ind Cas 298 (301) (DB) (Cal).

[But see (1893) 17 Bom 718 (721).]

(3) A mortgagee in possession of the property or an occupancy tenant, if dispossessed can get back the possession under this rule but not a mortgagee or transferee pendente lite. (1878) 2 All 94 (95) (FB) ** (1895) 17 All 222 (224, 225) (FB).

(4) If a usufructuary mortgagee objects under O. 21, R. 58 to the attachment of the property of his mortgagor, and if such an objection is disallowed, R. 63 will not operate to debar him from making an application under Rule 100 when he is dispossessed by the purchaser in execution of a decree. AIR 1922 Pat 408 (408): 1 Pat 159 (DB) ** AIR 1937 Pat 63 (64): 16 Pat 54 (FB).

(5) Mortgagee holding a self liquidating mortgage under S. 17 (1), Provisos and S. 3 of U. P. Debt Redemption Act, 1940, is not a holder of a decree for possession or a purchaser in execution of a decree. He holds possession on his own account and not as representative of the mortgagor. 1959 All LJ 742.

(6) An order under R. 101 cannot be conclusive as against the judgment-debtor — It does not by itself set aside the sale. AIR 1968 Pat 232 (235): ILR 46 Pat 1183 (DB).

(7) Dispossession of tenant in execution of decree against landlord — Tenant enjoying protection against eviction under S. 13 (2), East Punjab Rent Restriction Act — Tenant can seek summary remedy under O. 21, R. 100. AIR 1963 Punj 229 (230): 1961 Cur LJ (Part 1 Cri) 15.

(8) Landlord not accepting evicted person as a sub-tenant, or the evicted person claiming that he is a direct tenant — In either case evicted person is claiming on his own account and not through judgment-debtor within meaning of O. 21, Rule 101 and is entitled to restoration. (1965) 2 Mad LJ 102 (103): 78 Mad LW 192.

(9) Court giving delivery to decree-holder or auction-purchaser in execution — Not only judgment-debtor but others in possession are dispossessed — Their remedy

is to ask for redelivery under O. 21 or to file suit for possession. AIR 1953 Trav-Co 340 (342): 1953 Cri LJ 1394: 1953 Ker LT 31 (DB).

(10) An order under this rule has to be made when Court is satisfied in regard to the matters enumerated in the rule. This involves investigation of the question involved. AIR 1969 Andh Pra 192 (193): (1968) 2 Andh WR 580.

(11) If an order is passed by the Insolvency Court under this Rule, the aggrieved party was competent to file a suit under R. 103. AIR 1965 Mad 331 (333): (1965) 1 Mad LJ 242 (DB).

2. Nature of the investigation under this rule. — (1) Where a third party applies for re-delivery of property under this rule, the question which the Court has to decide is whether the applicant was in possession on his own account or on account of some person other than the judgment-debtor. AIR 1954 Mad 516 (519) ** AIR 1952 Trav-Co 102 (103): 1950 Trav-Co LR 665 (DB) ** AIR 1962 Mad 181 (186): (1962) 1 Mad LJ 40 (FB).

(2) The Court should confine itself to the question of possession and should not decide questions of title or questions regarding the construction of the decree or the equities of the parties. AIR 1947 Cal 434 (436) ** AIR 1918 Mad 911 (912): 40 Mad 964 (966) (DB) ** AIR 1930 Pat 416 (417) ** AIR 1968 Pat 232 (235): ILR 46 Pat 1183 (DB).

(3) Any question of juridical possession would be foreign to the nature and purpose of the inquiry. AIR 1954 Mad 516 (519).

(4) An unsuccessful applicant under O. 21, R. 58 is not competent to apply under O. 21, R. 100. AIR 1933 Cal 233 (234) (DB) ** AIR 1935 Pat 122 (123).

(5) Application under R. 100 dismissed on ground that applicant did not want to prosecute it and intended to file a separate suit — Order does not come under O. 21, R. 101. AIR 1962 Mad 181 (186): (1962) 1 Mad LJ 40 (FB).

3. Appeal. — (1) Order under Rule 98 against a stranger will not fall under S. 47 and no appeal will, therefore, lie in such a case. AIR 1931 Cal 574 (576): 58 Cal 808 (DB).

(2) If the proceedings under this rule are between parties to the suit, and an order is passed the aggrieved party will have only a right of appeal under S. 47. AIR 1920 Mad 979 (980, 981) (DB) ** AIR 1920 Mad 126 (127): 43 Mad 696 (DB).

4. Revision. — (1) If the lower Court re-

R. 102. Rules not applicable to transferee lite pendente.—Nothing in Rules 99 and 101 shall apply to resistance or obstruction in execution of a decree for the possession of immoveable property by a person to whom the judgment-debtor has transferred the property after the institution of the suit in which the decree was passed or to the dispossession of any such person.

[1882 and 1877, S. 333; 1859, S. 231.]

R. 103. Orders conclusive subject to regular suit.—Any party not being a judgment-debtor against whom an order is made under Rule 98, Rule 99 or Rule 101 may institute a suit to establish the right which he claims to the present possession of the property; but, subject to the result of such suit (if any), the order shall be conclusive.

HIGH COURT AMENDMENTS

Allahabad

Between the word "property" and the semi-colon, insert "and for cancellation or modification of the order for payment of costs and compensation made under Rule 98" [5-9-1959].

Kerala: Laccadive, Minicoy and Amindivi Islands

After the words "possession of the property," insert "or to cancel the order, if any, for compensation" [9-6-1959]; see Act 37 of 1956, S. 60 and Reg. 8 of 1965, S. 3 (2).

Order 21, Rule 101 — Note 4 (contd.)

fuses to order investigation, or rejects the application on a misconstruction of the law, or the lower Appellate Court erroneously entertains appeals from orders under Rr. 98, 99 or 101 or if there are illegalities or material errors in the proceedings in the lower Court, the High Court may interfere in revision. AIR 1930 Bom 375 (378): 54 Bom 479 (DB) ** AIR 1937 Pat 136 (137) (DB) ** AIR 1931 Cal 385 (386): 58 Cal 55 ** AIR 1931 Mad 534 (538).

(2) Decision of lower Court on the application under O. 21, R. 100 that applicant was actually dispossessed supported by evidence — No interference warranted under Section 115 — Proper remedy was by way of regular suit. AIR 1965 Pat 509 (510).

Order 21, Rule 102

1. Scope. — (1) It is not permissible to go beyond the rule and rely upon the analogy of S. 52 of the Transfer of Property Act. AIR 1954 Madh B 46 (47): ILR (1954) Madh B 310 ** AIR 1947 Mad 458 (460): ILR (1948) Mad 415.

(2) A transferee pendente lite cannot get the benefit of the procedure under Rr. 99 and 101. But such a person can raise all the objections that the judgment-debtor could have raised in execution. AIR 1957 Madh B 99 (100) (DB) ** Madh B LJ 1955 HCR 1352 (1353) ** 1964 Raj LW 487.

(3) The rule is wide enough to include a transfer of title as well as a transfer of possession. AIR 1954 Madh B 46 (47): ILR (1954) Madh B 310 ** AIR 1947 Mad 458 (461): ILR (1948) Mad 415 ** ILR (1952) Trav-Co 103.

(4) This rule applies to involuntary sales of the judgment-debtor's property. AIR 1939 Cal 709 (710): ILR (1939) 2 Cal 63 ** AIR 1952 Trav-Co 102 (104): 1950 Trav-Co LR 665 (DB) ** AIR 1960 Cal 299 (302, 303): 64 Cal WN 356 (DB).

[But see AIR 1946 Pat 134 (135, 136): 24 Pat 695 (DB).]

(5) Defendant against whom suit is dismissed transferring suit property — Suit decreed in appeal — Defendant is judgment-debtor within meaning of O. 21, R. 102 and Sec. 2 (10). 1964 Raj LW 487: ILR (1964) 14 Raj 1120.

(6) Held that the effect of compromise decree was to make plea of lis pendens not available to transferee and could not be pleaded for purpose of O. 21, R. 102. AIR 1967 Andh Pra 277 (279) (DB).

(7) Transferee pendente lite is not entitled to notice under Trav-Co Civil Courts Guide (1120) R. 289 as he is not entitled to resist delivery—Case comes under R. 102. AIR 1955 Trav-Co 234 (235): 1955 Ker LT 807.

(8) If by virtue of the nature of the suit filed, properties were not involved, then the decree which followed could not bring into play R. 102 of O. 21. AIR 1963 Pat 319 (320).

(9) The expression 'in execution of a decree for the possession of immovable property' must mean 'to an execution of a decree for possession of immovable property by virtue of a suit involving those properties. AIR 1963 Pat 319 (320).

(10) Recovery of possession of land from tenant of mortgagee, who effected the tenancy pendente lite, by mortgagor in execution of decree for redemption of mortgage — Tenant's claim is not lawful under R. 102. 1967 Ker LT 1060: 1968 Ker LR 82.

ORDER 21, RULE 103 — SYNOPSIS

1. Scope.

1A. Applicability of S. 42A, Specific Relief Act to suit under this rule.

2. Suit by decree-holder or auction-purchaser under a different right.

Order 21, Rule 103 — Synopsis (contd.)

3. "Any party against whom an order is made."

4. Order dismissing application under Rule 95.

5. Parties to suit.

6. Limitation. See Notes on Article 98, Limitation Act (1963).

1. Scope. — (1) The failure to file a suit under this rule by a party against whom an order is made under the previous rules will render the order under those rules conclusive against him and his representatives. AIR 1932 All 703 (704) (DB) °° AIR 1920 Lah 517 (520): 1 Lah 57 (DB) °° AIR 1950 Mad 41 (43) °° AIR 1969 Mad 166 (170, 171): (1968) 2 Mad LJ 284 °° AIR 1968 Bom 44 (48): 69 Bom LR 111 °° 1968 Pat LJR 283 (DB) °° AIR 1959 Mys 169 (169, 170): 36 Mys LJ 415. (18 Mys LJ 166 and AIR 1952 Mys 25, Rel. on.)

(2) Where subsequent to the adverse order against a person his right to the possession of the property is established in another suit between the parties, it is not necessary to sue again under this rule to establish the right. AIR 1950 Mad 19 (20, 21) °° AIR 1937 Mad 582 (583, 584) °° AIR 1968 Ker 242 (243): 1967 Ker LT 549 (DB) °° 1968 MPLJ 293: 1968 Jab LJ 394 °° AIR 1960 Cal 580 (582): 65 Cal WN 483 (DB)

(3) Right to possession may be based on title even without showing that the plaintiff was in actual possession at the date of the order against him. AIR 1921 Mad 317 (318): 44 Mad 227 (DB) °° AIR 1929 Bom 379 (380): 53 Bom 668 (DB).

[See however AIR 1939 Bom 508 (510) °° 1962 Raj LW 554: ILR (1959) 12 Raj 957.]

(4) An order without investigation will not be conclusive under this rule. AIR 1950 Pat 25 (29): 28 Pat 828 (DB) °° AIR 1965 Ker 110 (112): 1964 Ker LJ 385 °° AIR 1963 Guj 153 (156): (1963) 4 Guj LR 172 °° AIR 1959 Orissa 65 (68) (DB).

(5) An order under Rr. 98, 99 or 101 can only be made "where the Court is satisfied," etc., which can only be on an investigation of the question. 1956 Madh B LJ 129 (130) (DB) °° AIR 1922 Cal 229 (233) (DB) °° AIR 1969 Andh Pra 192 (193): (1968) 2 Andh WR 580 °° AIR 1963 Tripura 54 (55) °° AIR 1959 Orissa 65 (68) (DB).

(6) The scope of a suit filed under this rule is not the mere determination of the question of possession of the parties concerned, but the establishment of the right or title by which the plaintiff claims the present possession of the property. AIR 1958 Ker 22 (25): ILR (1957) Ker 724 (FB) °° AIR 1967 Assam 101 (102) °° AIR 1967 Bom 34 (37): 67 Bom LR 767 °° ILR (1963) 2 Ker 154 °° AIR 1960 Mad 298 (301): (1960) 2 Mad LJ 318 (DB) °° AIR 1959 Bom 269 (271): 60 Bom LR 829.

(7) Where an order becomes conclusive

under this rule, it will bar a suit as well as a defence by the party against whom the order is passed or by his representative. AIR 1957 Pat 133 (134) °° AIR 1948 Oudh 22 (23): 22 Luck 192 °° AIR 1946 Mad 76 (77, 78): ILR (1946) Mad 536 (DB). [See however ILR (1963) 2 Ker 154 °° AIR 1933 Cal 246 (250): 60 Cal 8 (DB) °° AIR 1934 Lah 457 (458) (DB).]

(8) Where the order also falls under Section 47 of the Code, this rule does not operate as a bar to an appeal under that section. AIR 1933 All 57 (59): 54 All 1031 (DB) °° AIR 1968 Cal 547 (548): 73 Cal WN 4.

[See however AIR 1957 Cal 111 (113) (DB).]

(9) The provisions of Rules 97 to 103 are of a restrictive nature and strict compliance with them is necessary. AIR 1960 Cal 580 (582): 65 Cal WN 483 (DB).

(10) A suit instituted under this rule is not a continuation of the summary application, but an independent proceeding. AIR 1940 Mad 627 (628) °° AIR 1967 Bom 389 (392): 69 Bom LR 172 °° AIR 1960 Punj 141 (DB).

[But see (1950) 28 Mys LJ 14 (18, 19) (DB).]

(11) The onus of proving subsisting title is prima facie on the party who was out of possession; the mere fact that the other party has been driven to institute a suit under this rule cannot shift that burden on to that party. AIR 1955 Tripura 17 (18) °° (1898) 22 Bom 967 (968) (DB) °° AIR 1925 Sind 201 (202) (DB) °° AIR 1960 Punj 141 (DB).

[See however AIR 1939 Bom 508 (513).]

(12) Where the plaintiff in a suit under this rule succeeds, the order complained of must be set aside and the parties must be restored to the status quo ante and where the plaintiff has been removed from possession of the property, he must be back in possession. AIR 1939 Bom 508 (510).

(13) The rule does not apply to cases where the order in question is being challenged by the judgment-debtor or his representative. ILR (1949) 2 Cal 372 (373) (DB) °° AIR 1945 Bom 386 (388) (DB) °° AIR 1943 Mad 381 (383) (DB) °° AIR 1968 Pat 232 (235): ILR 46 Pat 1183 (DB).

(14) If a decree or order is obtained by collusion it cannot, by utilising the machinery provided by Rules 97 to 99, be made the basis of a suit under this rule. AIR 1960 Mad 298 (301): (1960) 2 Mad LJ 318 (DB).

(15) A suit is maintainable under this rule to set aside an order of the District Judge made under Section 12-B of the Madras Buildings (Lease and Rent Control) Act, 1949, reversing an order under Order 21, Rule 98 passed by the Court executing an eviction order made under that Act. AIR 1960 Mad 298 (300, 301): (1960) 2 Mad LJ 318 (DB). (AIR 1953 Mad 924, Overruled.)

Order 21, Rule 103 — Note 1 (contd.)

(16) The procedure prescribed by O. 21, Rules 95 to 102 Civil P. C. can be invoked in appropriate cases, by the insolvency Court. Consequently, if an order is made under any one of these provisions, it is competent to the aggrieved party to file a suit under Order 21, Rule 103. AIR 1965 Mad 331 (333); (1965) 1 Mad LJ 242 (DB).

(17) Subject matter of a suit under R. 103 is the summary order that preceded it and not what formed subject matter of the earlier suit. The suit under Rule 103 cannot be held to be connected with the earlier suit itself. (1965) 2 Mad LJ 449: 78 Mad LW 497.

(18) Order of dismissal of claim under Order 21, Rule 98 — Unsuccessful party should file a suit within one year to establish his right claimed — Order 21, Rule 103 does not require him to establish his right within one year. AIR 1969 Mad 166 (170); (1968) 2 Mad LJ 284 (DB). (AIR 1937 Mad 582 and (1949) 1 Mad LJ 286, AIR 1950 Mad 19 held overruled by AIR 1949 Mad 586 (FB); AIR 1960 Cal 580, Dissented from.)

(19) Initial views in a suit under R. 103 to prove his title is on the plaintiff. Where evidence of both parties is equally unsatisfactory the party on whom the onus lies must fail. 1968 Pat LJR 283 (DB).

(20) Section 142 of the Limitation Act applies to a suit for possession filed by an auction purchaser who was obstructed by third party in taking delivery of possession in execution. AIR 1960 Mad 312 (313); (1960) 1 Mad LJ 488 (DB).

(21) Fact that remedy by way of suit was available was no bar against maintainability of an application under Section 115 for revision. AIR 1959 Cal 621 (623): 63 Cal WN 361.

(22) Opposite party put in joint possession by order under Rule 101 — To obtain permanent relief against this order petitioner has to file a suit. AIR 1965 Pat 509 (510).

(23) An order under Rule 63 would be final even if it was not passed after investigation, but for being conclusive under Rule 103. The order must have been passed after investigation. AIR 1965 Ker 110 (112): 1964 Ker LJ 385 ** AIR 1969 Andh Pra 192 (193): (1968) 2 Andh WR 580.

1A. Applicability of Section 42, Specific Relief Act to suit under this rule.—

(1) Proviso to Section 42 of the Specific Relief Act does not bar the suit filed under this rule if the plaintiff does not ask for recovery of possession or any other consequential relief. 1963 All LJ 725 ** (1966) 2 Mys LJ 54: (1966) 8 Law Rep 4 ** AIR 1934 Nag 169 (169): 17 Nag LJ 24.

[See also AIR 1960 Mad 298 (301): (1960) 2 Mad LJ 318 (DB).]

(2) Plaintiff is not precluded from claiming consequential relief in a suit filed under this rule. AIR 1935 Sind 129 (130).

2. Suit by decree-holder or auction-purchaser under a different right. — (1) This rule does not apply where the auction-purchaser or the claimant institutes a suit relating to the property in any other capacity or based on a cause of action different from the adverse order under Rule 98, 99 or 101. AIR 1952 Madh B 159 (161): ILR (1953) Madh B 171 ** AIR 1946 Mad 324 (326).

(2) This rule will not operate so as to bar a party against whom an order has been passed under those rules, from maintaining a suit for redemption of property or for enforcing a mortgage lien over the property. AIR 1921 Nag 69 (70): 17 Nag LR 33 ** AIR 1928 Nag 97 (98): 23 Nag LR 164 ** (1901) 29 Cal 25 (29) (DB).

[But see AIR 1939 Pat 7 (13): 18 Pat 155 (DB).]

3. "Any party against whom an order is made." — (1) An order cannot be said to have been made against any party within the meaning of this rule, unless it was made after investigation into the matter. AIR 1950 Cal 555 (558): ILR (1952) 2 Cal 617 ** 1950 Ker L Tim 502 (508) (DB) ** AIR 1959 Orissa 65 (68) (DB).

(2) The Court should have come to a definite conclusion on the matter under enquiry. (1899) 9 Mad L Jour 175 (176, 177) (DB) ** (1903) 27 Mad 25 (26) (DB).

(3) An order dismissing an application under Rule 100 to be put in possession is an order against the applicant under R. 101 for the purposes of this rule. AIR 1917 Bom 133 (134): 42 Bom 10 (DB).

(4) An order under Rule 98, 99 or 101 passed against a person in a representative capacity will become conclusive under this rule against such person as well as those whom he represents. AIR 1940 Mad 636 (639) ** AIR 1965 Andh Pra 8 (12): (1964) 2 Andh WR 337.

(5) There is no order 'against a party' within the meaning of this rule where the applicant withdraws his application and the Court makes an endorsement that no investigation was made by reason of the withdrawal. AIR 1962 Mad 181 (186): (1962) 1 Mad LJ 40 (FB).

4. Order dismissing application under Rule 95.— (1) This rule will not apply to an order on an application under Order 21, Rule 95 dismissing it on the ground that the person in possession was so on his own account and not on account of the judgment-debtor. AIR 1924 All 495 (499, 500): 46 All 693 (FB).

(2) This rule will not apply where the decree-holder applying under Rule 95 gets possession without any resistance on the part of any one. AIR 1924 Rang 261 (262) (DB).

5. Parties to suit.— (1) A suit under this rule can be filed only by a person against whom an order had been made under R. 98 or R. 99 or R. 101 of Order 21. (1966) 2 Mys LJ 54: (1966) 8 Law Rep 4.

HIGH COURT AMENDMENTS

Rules 104 to 140 (Allahabad)

The following rules shall be added to Order XXI:—

R. 104. When the certificate prescribed by S. 41 is received by the Court which sent the decree for execution, it shall cause the necessary details as to the result of execution to be entered in its register of civil suits before the papers are transmitted to the record-room.

R. 105. Every attachment of moveable property under R. 43, of negotiable instruments under Rule 51, and of immoveable property under Rule 54, shall be made through a Civil Court Amin, or bailiff, unless special reasons render it necessary that any other agency should be employed, in which case those reasons shall be stated in the handwriting of the presiding Judge himself in the order of attachment.

R. 106. When the property which it is sought to bring to sale is immovable property within the definition of the same contained in the law for the time being in force relating to the registration of documents, the decree-holder shall file with his application for an order for sale a certificate from the Sub-Registrar within whose sub-district such property is situated, showing that the Sub-Registrar has searched his book Nos. I and II and their indices for the twelve years preceding the mortgage or attachment, as the case may be, and stating the encumbrances, if any, which he has found on the property.

R. 107. Where an application is made for the sale of land or of any interest in land, the Court shall, before ordering sale thereof, call upon the parties to state whether such land is or is not ancestral land within the meaning of Notification No. 1887-I-238-10, dated 7th October 1911, of the Local Government, and shall fix a date for determining the said question.

On the day so fixed, or on any date to which the enquiry may have been adjourned, the Court may take such evidence, by affidavit or otherwise, as it may deem necessary; and may also call for a report from the Collector of the district as to whether such land or any portion thereof is ancestral land.

After considering the evidence and the report, if any, the Court shall determine whether such land, or any, and what part of it, is ancestral land.

The result of the enquiry shall be noted in an order made for the purpose by the presiding Judge in his own handwriting.

R. 108. When the property which it is sought to bring to sale is revenue-paying or revenue-free land or any interest in such land, and the decree is not sent to the Collector for execution under Section 68, the Court, before ordering sale, shall also call upon the Collector in whose district such property is situate to report whether the property is subject to any (and, if so, to what) outstanding claims on the part of Government.

R. 109. The certificate of the Sub-Registrar and the report of the Collector shall be open to the inspection of the parties or their pleaders, free of charge, between the time of the receipt by the Court and the declaration of the result of the enquiry.

No fees are payable in respect of the report by Collector.

Order 21, Rule 103 — Note 5 (contd.)

(2) Persons other than the obstructor who are likely to dispute the title of the purchaser are not necessary parties to the suit under this rule. AIR 1968 Bom 44 (50): 69 Bom LR 111.

[But see AIR 1948 Sind 95 (96): 1LR (1947) Kar 86 (DB).]

(3) Suit under Order 21, Rule 103 — Judgment-debtor is a proper if not a necessary party. AIR 1938 Nag 300 (302): 1938 Nag LJ 107.

(4) Plaintiff content with getting merely symbolical possession — Lessee in actual

possession not a necessary party. (1947) 51 Cal WN 857 (858) (DB).

(5) Suit against obstructor — Judgment-debtor is not necessary party. AIR 1935 Sind 129 (131).

(6) A person wrongly impleaded but subsequently removed is not a party to the suit under S. 47 — Purchaser in execution of a decree under that suit can file a suit against him under Rule 103. (1965) 78 Mad LW 606.

6. Limitation.— See Notes on Art. 98, Limitation Act (1963).

R. 110. The result of the enquiry under R. 66 shall be noted in an order made for the purpose by the presiding Judge in his own handwriting. The Court may in its discretion adjourn the enquiry, provided that the reasons for the adjournment are stated in writing and that no more adjournments are made than are necessary for the purposes of the inquiry.

R. 111. If after proclamation of the intended sale has been made any matter is brought to the notice of the Court which it considers material for purchasers to know, the Court shall cause the same to be notified to intending purchasers when the property is put up for sale.

R. 112. The costs of the proceedings under Rr. 66, 106 and 108 shall be paid in the first instance by the decree-holder; but they shall be charged as part of the costs of the execution, unless the Court, for reasons to be specified in writing, shall consider that they shall either wholly or in part be omitted therefrom.

R. 113. Whenever any Civil Court has sold, in execution of a decree or other order, any house or other building situated within the limits of a military cantonment or station, it shall, as soon as the sale has been confirmed, forward to the Commanding Officer of such cantonment or station for his information and for record in the Brigade or other proper office, a written notice that such sale has taken place; and such notice shall contain full particulars of the property sold and of the name and address of the purchaser.

R. 114. Whenever guns or other arms in respect of which licences have to be taken by purchasers under the Indian Arms Act (Act No. XI of 1878) are sold by public auction in execution of decrees by order of a Civil Court, the Court directing the sale shall give due notice to the Magistrate of the district of the names and addresses of the purchasers and of the time and place of the intended delivery to the purchasers of such arms, so that proper steps may be taken by the police to enforce the requirements of the Indian Arms Act.^a

[a] Now Arms Act, 1959 (54 of 1959).

R. 115. When an application is made for the attachment of livestock or other moveable property, the decree-holder shall pay into Court in cash such sum as will cover the costs of the maintenance and custody of the property for fifteen days. If within three clear days before the expiry of any such period of fifteen days the amount of such costs for such further period as the Court may direct be not paid into Court, the Court, on receiving a report thereof from the proper officer, may issue an order for the withdrawal of the attachment and direct by whom the costs of the attachment are to be paid.

R. 116. Livestock which has been attached in execution of a decree shall ordinarily be left at the place where the attachment is made either in custody of the judgment-debtor on his furnishing security, or in that of some landholder or other respectable person willing to undertake the responsibility of its custody and to produce it when required by the Court.

R. 117. If the custody of livestock cannot be provided for in the manner described in the last preceding rule, the animals attached shall be removed to the nearest pound established under the Cattle Trespass Act, 1871, and committed to the custody of the pound keeper, who shall enter in a register—

(a) the number and description of the animals;

(b) the day and hour on and at which they were committed to his custody;

Order 21, Rule 116 (All) — Note 1

(1) Buffaloes attached by Court Amin under warrant of attachment in execution of decree-holder were kept in custody of the sapurdar who for want of accommodation kept them for the night in the enclosure

of the decree-holder. Held the buffaloes were in the legal possession of the sapurdar on behalf of the Court. AIR 1961 SC 803 (804, 807); 1961 (1) Cri LJ 859; (1962) 1 SCR 75.

(c) the name of the attaching officer or his subordinate by whom they were committed to his custody; and shall give such attaching officer or subordinate a copy of the entry.

R. 118. For every animal committed to the custody of the pound-keeper as aforesaid a charge shall be levied as rent for the use of the pound for each fifteen or part of fifteen days during which such custody continues, according to the scale prescribed under S. 12 of Act No. I of 1871.

And the sums so levied shall be sent to the Municipal or District Board, or the Notified Area, as the case may be, under whose jurisdiction the pound is. (21-11-1942.)

R. 119. The pound-keeper shall take charge of, feed and water, animals attached and committed as aforesaid until they are withdrawn from his custody as hereinafter provided and he shall be entitled to be paid for their maintenance at such rates as may be, from time to time, prescribed under proper authority. Such rates shall, for animals specified in the section mentioned in the last preceding rule, not exceed the rates for the time being fixed under S. 5 of the same Act. In any case, for special reasons to be recorded in writing, the Court may require payment to be made for maintenance at higher rates than those prescribed.

R. 120. The charges herein authorized for the maintenance of livestock shall be paid to the pound-keeper by the attaching officer for the first fifteen days at the time the animals are committed to his custody, and thereafter for such further period as the Court may direct, at the commencement of such period. Payments for such maintenance so made in excess of the sum due for the number of days during which the animals may be in the custody of the pound-keeper shall be refunded by him to the attaching officer.

R. 121. Animals attached and committed as aforesaid shall not be released from custody by the pound-keeper except on the written order of the Court or of the attaching officer, or of the officer appointed to conduct the sale; the person receiving the animals, on their being so released, shall sign a receipt for them in the register mentioned in Rule 118.

Note.—The reference to Rule 118 seems to be a mistake for Rule 117.

R. 122. For the safe custody of moveable property other than livestock while under attachment the attaching officer shall, subject to approval by the Court, make such arrangements as may be most convenient and economical.

R. 123. With the permission of the Court the attaching officer may place one or more persons in special charge of such property.

R. 124. The fee for the services of each such person shall be payable in the manner prescribed in R. 116. It shall not be less than four annas and shall ordinarily not be more than six annas per diem. The Court may at its discretion allow a higher fee: but if it do so, it shall state in writing its reasons for allowing an exceptional rate.

R. 125. When the services of such person are no longer required, the attaching officer shall give him a certificate on a counterfoil form of the number of days he has served and of the amount due to him; and on the presentation of such certificate to the Court which ordered the attachment, the amount shall be paid to him in the presence of the presiding Judge:

Provided that where the amount does not exceed Rs. 5 it may be paid to the sahna^o by money order on requisition by the amin, and the presentation of the certificate may be dispensed with.

[^o] Sahnas are persons employed to watch crops.

R. 126. When in consequence of an order of attachment being withdrawn or for some other reason, the person has not been employed or has remained in charge of the property for a shorter time than that for which payment has been made in respect of his services, the fee paid shall be refunded in whole or in part, as the case may be,

R. 127. Fees paid into Court under the foregoing rules shall be entered in the Register of Petty Receipts and Repayments.

R. 128. When any sum levied under R. 119 is remitted to the treasury, it shall be accompanied by an order in triplicate (in the form given as Form 9 of the Municipal Account Code), of which one part will be forwarded by the Treasury Officials to the District or Municipal Board, as the case may be. A note that the same has been paid into the treasury as rent for the use of the pound, will be recorded on the extract from the pass-book.

R. 129. The cost of preparing attached property for sale, or of conveying it to the place where it is to be kept or sold shall be payable by the decree-holder to the attaching officer. In the event of the decree-holder failing to provide the necessary funds, the attaching officer shall report his default to the Court, and the Court may thereupon issue an order for the withdrawal of the attachment and direct by whom the costs of the attachment are to be paid.

R. 130. Nothing in these rules shall be deemed to prevent the Court from issuing and serving on the judgment-debtor simultaneously the notices required by O. 21, Rr. 22, 66 and 107.

GARNISHEE ORDERS

R. 131. The Court may, in the case of any debt due to the judgment-debtor (other than a debt secured by a mortgage or a charge or a negotiable instrument, or a debt recoverable only in a Revenue Court), or any moveable property not in the possession of the judgment-debtor, which has been attached under Rule 46 of this Order, issue a notice to any person (hereinafter called the garnishee) liable to pay such debt or to deliver or account for such moveable property, calling upon him to appear before the Court and show cause why he should not pay or deliver into Court the debt due from or the property deliverable by him to such judgment-debtor, or so much thereof as may be sufficient to satisfy the decree and the cost of execution. (As amended on 29-3-1949.)

R. 132. If the garnishee does not forthwith or within such time as the Court may allow, pay or deliver into Court the amount due from or the property deliverable by him to the judgment-debtor, or so much as may be sufficient to satisfy the decree and the cost of execution, and does not dispute his liability to pay such debt or deliver such moveable property, or if he does not appear in answer to the notice, then the Court may order the garnishee to comply with the terms of such notice, and on such order execution may issue as though such order were a decree against him.

R. 133. If the garnishee disputes his liability the Court, instead of making such order, may order that any issue or question necessary for determining his liability be tried as though it were an issue in a suit; and upon the determination of such issue shall pass such order as shall be just. [As amended on 29-3-1949.]

Order 21, Rule 131 (All) — Note 1

(1) It is open to a prospective garnishee to make a payment of his debt to his creditor even if he knew that by making that payment he was likely in a way to affect the interest of the creditor of his creditor. AIR 1962 All 107 (108) (DB).

(2) Notice under Order 21, Rule 131 — Ex parte order dismissing objections for non-compliance with certain directions — Ex parte order subsequently recalled and objections decided on merits — Order held, could not be challenged as it did not affect merits of the matter. AIR 1962 All 107 (108) (DB).

(3) Custodian of evacuee property cannot be ordered by Civil Court under Order 21, Rule 131, to deposit the sale proceeds of

evacuee property against which a claim is registered. AIR 1965 All 70 (71, 72): 1964 All LJ 132.

Order 21, Rule 133 (All) — Note 1

(1) Rule 133 does not empower the Court to direct the decree-holder or the garnishee to file a separate suit so that the issue raised may be decided in that suit. The issues have to be tried in the execution proceedings themselves. AIR 1960 All 547 (547): 1960 All LJ 123.

(2) Garnishee disputing liability — It is for him to indicate on what grounds the dispute is being raised so that specific issues could be framed with respect to questions necessary for determining the liability. AIR 1963 All 313 (318, 319): 1963 All LJ 443 (DB).

R. 134. Whenever in any proceedings under these rules it is alleged, or appears to the Court to be probable that the debt or property attached belongs to some third person, or that any third person has a lien or charge upon, or an interest in it, the Court may order such third person to appear and state the nature of his claim, if any, upon such debt or property and prove the same, if necessary. [As amended on 29-3-1949.]

R. 135. After hearing such third person, and any other person who may subsequently be ordered to appear, or in the case of such third or other person not appearing when ordered, the Court may pass such order as is hereinbefore provided or make such other order as it shall think fit, upon such terms in all cases with respect to the lien, charge or interest, if any, of such third or other person as to such Court shall seem just and reasonable.

R. 136. Payment or delivery made by the garnishee whether in execution of an order under these rules or otherwise shall be a valid discharge to him as against the judgment-debtor, or any other person ordered to appear as aforesaid, for the amount paid, delivered or realised although such order or the judgment may be set aside or reversed.

R. 137. Debts owing from a firm carrying on business within the jurisdiction of the Court may be attached under these rules, although one or more members of such firm may be resident out of the jurisdiction: Provided that any person having the control or management of the partnership business or any member of the firm within the jurisdiction is served with the garnishee order. An appearance by any member pursuant to an order shall be a sufficient appearance by the firm.

R. 138. The costs of any application under these rules and of any proceedings arising therefrom or incidental thereto, or any order made thereon, shall be in the discretion of the Court.

R. 139. (1) Where the liability of any garnishee has been tried and determined under these rules, the order shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree.

(2) Orders not covered by clause (1) shall be appealable as orders made in execution.

Illustration.—An application for a garnishee order is dismissed either on the ground that the debt is secured by a charge or that there is no prima facie evidence of debt due. This order is appealable as an order in execution.

R. 140. All the rules in this Court relating to service upon either plaintiffs or defendants at the address filed or subsequently altered under O. 7, or O. 8 shall apply to all proceedings taken under O. 21 or Section 47.

The following form shall be used under the provisions of Rule 131 of Order 21:—

Suit No. 19 .

Plaintiff,

versus

Defendant.

To

Whereas it is alleged that a debt of Rs.....is due from you to the judgment-debtor:

Or that you are liable to deliver to the abovenamed judgment-debtor the property set forth in the schedule hereto attached;

Take notice that you are hereby required on or before the....day of.....19.. to pay into this Court the said sum of Rs. orto deliver, or account to the Amin of this Court for the moveable property detailed in the attached schedule or otherwise to appear in person or by advocate, vakil or authorised agent in this Court at 10-30 in the forenoon of the day aforesaid and show cause to the contrary, in default whereof an order for the payment of the said sum, or for the delivery of the said property may be passed against you.

Dated this.....day of.....19...

Munsif/Sub-Judge.....

at.....

Rules 104 to 106 (Andhra Pradesh)

- (i) Rules 104 and 105—Same as those of Madras.
- (ii) After Rule 105, add as Rule 106, the following:—

“106. Where and in so far as a decree or order is varied or reversed and the case does not fall within the scope of Section 47 or Section 144, the Court of first instance shall, on the application of any party affected by the decree or order, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or order or such part thereof as has been varied or reversed. For this purpose, the Court may make any order including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation or reversal.” (19-4-1956.)

Rule 104 (Delhi and Himachal Pradesh)

Same as that of Punjab. See Act 26 of 1966, Ss. 7 and 17 (31-10-1966 and 1-5-1967).

Rules 104 and 105 (Kerala: Laccadive, Minicoy and Amindivi Islands)

Same as Rules 104 and 105 of Madras (9-6-1959): See Act 37 of 1956, S. 60 and Reg. 8 of 1965, S. 3 (2).

Rules 104 to 106 (Madras and Pondicherry)

Add the following after Rule 103:—

“R. 104 (1) The Court before which an application under any of the foregoing rules of this Order is pending may fix a day for the hearing of the application.

(2) Where on the day fixed or on any other day to which the hearing may be adjourned the applicant does not appear, when the case is called on for hearing, the Court may make an order that the application be dismissed.

(3) Where the applicant appears and the respondent to whom the notice has been issued by the Court does not appear, the Court may hear the application *ex parte* and pass such order as it thinks fit.

Explanation.—An application referred to in sub-rule (1) includes a claim or objection made under Rule 58 of this Order.”

“R. 105. (1) The applicant, against whom an order is made under sub-rule (2) of the preceding rule or the respondent against whom an order is passed *ex parte* under sub-rule (3) of the preceding rule or under sub-rule (1) of Rule 23 of this Order, may apply to the Court to set aside the order and if he satisfies the Court that there was sufficient cause for his non-appearance, when the application was called on for hearing, the Court shall set aside the order on such terms as to costs or otherwise as it thinks fit, and shall appoint a day for the further hearing of the application.

(2) No order shall be made on an application under sub-rule (1) unless notice of the application has been served on the opposite party.

**Order 21, Rules 104, 105 (Andh Pra) —
Note 1**

(1) Execution petition dismissed for default — Restoration — Position in Andhra after insertion of Rules 104 and 105 in Order 21 — No inherent powers. AIR 1963 Andh Pra 127 (129, 130): (1962) 2 Andh WR 21.

(2) (Mad and Andh Pra) Execution petition — Decree-holder represented by counsel — Counsel not present before Court — Dismissal is for default — Presence of

decree-holder not material — Restoration governed by Rules 104 and 105. AIR 1962 Mad 386 (387): (1962) 1 Mad LJ 319.

(3) Application under Order 21, Rule 2 for recording full satisfaction of decree — Dismissal for default — Application for restoration under Order 21, Rule 105 (2) — Court imposing terms or restoration after hearing petitioner — Order neither final nor appealable — Order cannot be interfered with in revision under Section 115. (1968) 1 Andh LT 321.

(3) An application under sub-rule (1) shall be made within thirty days of the date of the order or where in the case of an ex parte order the notice was not duly served, the date when the applicant had knowledge of the order.

(4) The provisions of Section 5 of the Indian Limitation Act, 1908, shall apply to applications under sub-rule (1)." [P. Dis. No. 397 of 1945 dated 4-9-1945.]

"R. 106. Where and in so far as a decree or order is varied or reversed and the case does not fall within the scope of Section 47 or Section 144, the Court of first instance shall, on the application of any party affected by the decree or order, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or order on such part thereof as has been varied or reversed." (19-5-1954): See Act 26 of 1968, S. 9 and Schedule Pt. II (w.e.f. 5-9-1968).

Mysore

At the end of Order XXI, after Rule 103, add the following rules:—

104. (1) The Court before which an application under any of the foregoing rules of this Order is pending may fix a day for the hearing of the application.

(2) Where on the day fixed or on any other day to which the hearing may be adjourned the applicant does not appear when the case is called on for hearing the Court may make an order that the application be dismissed.

(3) Where the applicant appears and the respondent to whom notice has been issued by the Court does not appear, the Court may hear the application ex parte and pass such order as it thinks fit.

Explanation—An application referred to in sub-rule (1) of this rule includes a claim or an objection made under Rule 58 of this Order.

105. (1) The applicant against whom an order is made under sub-rule (2) of Rule 104 or a respondent against whom an order is passed ex parte under sub-rule (3) of the same rule or under sub-rule (1) of Rule 23 of this Order, may apply to the Court to set aside the order and if he satisfies the Court that there was sufficient cause for his non-appearance when the application was called on for hearing, the Court shall set aside the order on such terms as to costs or otherwise as it thinks fit and shall appoint a day for the hearing of the application.

(2) No order shall be made on an application under sub-rule (1) unless notice of the application has been served on the opposite party.

(3) An application under sub-rule (1) of this Rule shall be made within 30 days of the date of the order or where in the case of an ex parte order the notice was not duly served, the date when the applicant had knowledge of the order.

(4) The provisions of Section 5 of the Limitation Act, 1963 shall apply to applications under sub-rule (1) [30-3-1967].

Rule 104 (Orissa)

Same as that of Patna.

Rule 104 (Patna)

Add the following rule:—

"R. 104. For the purpose of all proceedings under this Order service on any party shall be deemed to be sufficient if effected at the address for service referred to in O. 8, R. 11, subject to the provisions of O. 7, R. 24, provided that this rule shall not apply to the notice prescribed by Rule 22 of this Order."

Order 21, Rule 106 (Madras and Andh Pra) — Note 1

(1) Order for eviction of cultivating tenant by Tahsildar — Confirmation in appeal by Revenue Divisional Officer — Writ petition by tenant to quash order — Tenant evicted

in spite of stay — Revenue authorities have power to order restoration of possession if order of eviction is quashed. AIR 1966 Andh Pra 4 (7): (1965) 2 Andh WR 197 (DB).

Rule 104 (Punjab, Haryana and Chandigarh)

Add the following rule:—

“R. 104. For the purpose of all proceedings under this Order service on any party shall be deemed to be sufficient if effected at the address for service referred to in O. 8, R. 11, subject to the provisions of O. 7, R. 24, provided that this rule shall not apply to the notice prescribed by Rule 22 of this Order.” (24-11-1927): See Act 31 of 1966, Ss. 29 and 32 (1-11-1966).

ORDER XXI-A**Assam and Nagaland**

Same as that of Calcutta — See Assam High Court Order, 1948, Cl. 6 and Act 27 of 1962 Ss. 13 and 15 (w.e.f. 1-12-1963).

Calcutta: Andaman and Nicobar Islands

Insert the following as Order XXI-A:—

“ORDER XXI-A

R. 1. Every person applying to a Civil Court to attach moveable property shall, in addition to the process-fee, deposit such reasonable sum as the Court may direct, if it thinks necessary for the cost of its removal to the Court-house, for its custody, and if such property is livestock, for its maintenance according to the rates prescribed in Rule 2 of this Order. If the deposit, when ordered be not made, the attachment shall not issue. The Court may, from time to time, order the deposit of such further fees as may be necessary. In default of due payment the property shall be released from attachment.

R. 2. The following daily rates shall be chargeable for the custody and maintenance of livestock under attachment:—

Goat and pig—Annas 2 to annas 4.

Sheep—Annas 2 to annas 3.

Cow and bullock—Annas 6 to annas 10.

Calf—Annas 3 to annas 6.

Buffalo—Annas 8 to annas 12.

Horse—Annas 8 to annas 12.

Ass—Annas 3 to annas 5.

Poultry—Annas 2 to annas 3 pies 6.

Explanation.—Although the rates indicated above are regarded as reasonable, the Courts should consider individual circumstances and the local conditions and permit deposit at reduced rates where the actual expenses are likely to fall short of the minima or maxima. If any specimen or special value in any of the above classes is seized a special rate may be fixed by the Court. If any animal not specified is attached, the Court may fix the cost as a special case.

R. 3. When the property attached consists of agricultural implements or other articles which cannot conveniently be removed and the attaching officer does not act under the proviso to R. 43, O. 21, he may, unless the Court has otherwise directed, leave it in the village or place where it has been attached—

- (a) in the charge of the decree-holder or his agent or of the judgment-debtor or some other person, provided that the decree-holder or his agent or the judgment-debtor or other person enters into a bond in Form No. 15A of appendix E to this Schedule, with one or more sureties, to produce the attached

Order 21-A, Rule 3 (Calcutta and Assam) — Note 1

(1) Attachment of movable property before judgment — Property attached kept in custody of third party on his executing bond to return goods and to pay price of goods

if he failed to do so — Goods destroyed by fire — Surety can plead in defence that he was not liable as goods were destroyed by act of God. AIR 1962 Assam 23 (27): (1960) 1 Assam LR 243.

Section 73 — Note 24 (contd.)

tune indirectly occasioned to him. AIR 1948 Mad 442 (446) = ILR (1948) Mad 851 (DB).

(22) The person injured by breach of contract is to be placed in the position he would have been in had the contract been performed. Of course, he is not to be put in a better position by recovery of damages for the breach of contract than he would have been in if there had been performance. The fundamental principle of law of damages within the meaning of Section 73 is, that the person injured by breach of contract shall have fair and just compensation commensurate with loss sustained in consequence of the defendant's breach of contract which gives rise to the action. This amount is to be established with reasonable certainty. AIR 1957 Madh B 53 (56) = ILR (1956) Madh B 182 (DB) ** AIR 1962 SC 366 (370) = (1962) 1 SCR 653. (AIR 1957 Madh B 53, Reversed.)

(23) In a suit against the Railway for compensation on account of the loss in transit of a consignment of 3 volumes of books, which formed part of a set, the plaintiff claimed the price of the whole set on the ground that the loss of 3 volumes rendered the whole set useless. It was not proved that the Railway had knowledge that the volumes were out of a single set and that the books if lost would render the whole set entirely useless — Held, that damage which can be said to naturally arise in the usual course of things is the price of the 3 volumes. Consequently, the loss of the entire set cannot be regarded as a loss naturally arising in the usual course of things. It was not the case of the plaintiff that the Railway had knowledge that the volumes were out of a single set. Hence it cannot be said that the Railway undertook any liability for the price of the entire set in case of loss of consignment. The Railway cannot, therefore, be liable for anything more than the value of the consignment. AIR 1952 Nag 32 (33) = ILR (1952) Nag 125.

25. Default of plaintiff.— (1) Sections 73 and 74 are meant for benefit of party willing to perform contract and not for defaulting party. (1910) 33 Mad 375 (379) (DB) ** AIR 1964 Mad 508 (510) = (1964) 2 Mad LJ 263.

(2) A plaintiff, who has failed to perform his part of contract and proved no damages, cannot succeed in a suit for damages for breach of the contract. AIR 1919 Cal 1000 (1000) (DB).

(3) Party to be entitled to compensation must have done something to his own prejudice in performance of his part of the contract. AIR 1934 Nag 129 (132).

(4) A party to a contract cannot be in a better position by reason of his own default than if he had fulfilled his obligations. AIR 1942 Cal 382 (384).

(5) Plaintiff's plea to benefit by his own breach of contract and enforce it against defendants cannot be allowed. AIR 1934 Lah 84 (84) ** AIR 1934 Lah 845 (846) = 36 Cri L Jour 737.

(6) Breach of contract — Breach waived by lapse of time — Remedy for breach is lost. AIR 1969 Mys 310 (311) = (1969) 1 Mys LJ 237 (DB).

(7) Vendor having no goods to deliver is not entitled to compensation for vendee's refusal to take delivery. AIR 1934 Nag 129 (132).

(8) To maintain a suit for damages for alleged breach of contract, the plaintiff should have performed his part of the contract, taken possession of the land, put forward any accounts of the alleged loss and claim damages on that basis alone. It is the duty of plaintiff in such circumstances to mitigate the damages. AIR 1939 Lah 118 (122) (DB).

(9) Mere fact that party has committed breach of term of contract with reference to first instalment, in which goods are to be delivered, does not in itself entitle the other to treat the contract as at an end. But where breach has been such as goes to the root of the contract, the party in default cannot insist on remainder being carried out. AIR 1930 Cal 382 (384) (DB).

(10) A agreed to give B reasonable time to fulfil order placed with him, having regard to exigencies of B's business. The order was however given too late. B not liable to pay damages for not carrying out terms of contract. (1911) 12 Ind Cas 339 (340, 345) (Oudh).

(11) Where the plaintiff was guilty of unjustifiable conduct in not co-operating with the railway in tracing out the lost bale by helping them to identify the same etc., when requested by the railway so to do — Held, that the last day of which the market value should be taken into calculation ought to be the day on which the plaintiff would in ordinary course have received the goods if he had complied with the request of the railway and co-operated with them in tracing out the lost bale. AIR 1925 Cal 737 (739) (DB).

(12) Plaintiff agreeing to construct house for defendant according to estimated cost less certain rebate — Defendant stopping work and settling dues at certain amount — Suit by plaintiff for work actually done — Defendant cannot claim rebate proportionate to rebate upon original estimate. AIR 1938 Cal 538 (538) = ILR (1938) 2 Cal 320 (DB).

Section 73 — Note 25 (contd.)

(13) The doctrine of frustration only applies if the disturbing cause goes to the extent of substantially preventing the performance of the whole contract: "interference leaving a considerable part capable of performance, will not be an excuse. AIR 1940 Pat 204 (238) = 19 Pat 1.

(14) Plaintiffs acting as commission agents of defendants in respect of purchase of textile goods — Such goods required to be kept in godown of plaintiffs before despatch to defendants — Plaintiffs agreeing to insure goods and defendants to pay for it — Goods not insured by plaintiffs destroyed by fire caused by explosion in Bombay Docks — Suit by plaintiffs to recover damages in respect of price of goods destroyed — Counter claim by defendant on ground of plaintiffs' breach of duty in not insuring goods — Measure of plaintiff's liability to defendants — Difference between compensation received under Bombay Explosion (Compensation) Ordinance, 1944, and what would have been received if insurance had been effected is to be compensation or damages. AIR 1948 Bom 133 (137) (DB).

26. Proof of damages.— (1) Section 73 makes it compulsory for the plaintiff to prove that he has suffered damage and the extent to which he has suffered before a Court can award him damages for breach of contract, and if he does not give the best evidence, every presumption should be made against him, but this does not relieve the Court altogether of the duty of assessing the damages, as best it can, on evidence and materials actually before it. AIR 1927 Sind 49 (52) = 19 Sind LR 41 ** AIR 1918 PC 149 (150) ** AIR 1915 All 295 (297) ** AIR 1965 Pat 179 (183) = 1965 BLJR 679 (DB) ** (1968) 2 Andh LT 326 (348) (DB) ** AIR 1964 Madh Pra 101 (109) = 1964 MPLJ 579 (DB) ** AIR 1964 Pat 250 (253) = 1963 BLJR 426 (DB). (Failure to supply goods — Market price not stated in plaint — Allegation as to price at which vendee was forced to purchase goods would indicate market price and vendee would be entitled to damages on its basis.) ** AIR 1963 Cal 163 (174, 175) = 1963 Cal LJ 43 ** AIR 1960 Pat 87 (97).

(2) Compensation cannot be granted on grounds of equity for loss of profit in the absence of proof that any damages had been sustained. AIR 1960 Punj 478 (480) = 62 Pun LR 710.

(3) In a suit for damages for a breach of contract, the defendant is entitled to know exactly what case he has to meet and he must be afforded an opportunity to investigate the details

of the claim so that he can call evidence about it if he can, and so he can attack the plaintiff's estimate of damages, as well as the basis on which it is grounded. The plaintiff must consequently furnish the necessary particulars. AIR 1938 Nag 530 (531).

(4) The rule, that in a suit for work done by a contractor against his employer, it is for the plaintiff to prove his claim and if the evidence he has produced is not reliable, he can get nothing beyond what the defendant has admitted, can hardly be applied to a case where the defendant is a railway company and the defendant's measurements were not properly made and the defendant has not been able to produce all relevant materials in connection with the measurements that the defendant made. AIR 1933 Cal 165 (167) (DB).

(5) The amount of damages must be established with reasonable certainty. But this does not mean that absolute certainty is required nor, in all cases, is there a necessity for direct evidence as to the amount. Where the defendant has, by his wrong, put it out of the plaintiff's power to prove the quantum of damage exactly, the presumption is against the defendant and the burden is upon him to reduce the amount from the highest possible estimate. Only such approximation to certainty is required as would satisfy the mind of a prudent and impartial person. Where there has undoubtedly been an infringement of a right, nominal damages are recoverable even though no actual damage can be proved. AIR 1923 Cal 49 (50, 51, 52) (DB) ** AIR 1963 Cal 163 (174) = 1963 Cal LJ 43 ** ILR (1960) 1 Cal 821 (832) ** AIR 1959 Andh Pra 551 (560, 561) (DB).

(6) Where the only evidence available as regards damages is the plaintiff's own estimate about it and the defendant does not produce best evidence though within his power, adverse inference against him can be drawn. AIR 1963 Madh Pra 197 (200) = 1964 MPLJ 848 (DB).

(7) Even without amendment of plaint Court can award proper measure of damages if there is sufficient evidence on record. AIR 1959 Andh Pra 30 (35). (AIR 1924 Bom 390, Foll. ILR 39 Cal 568 Not foll.)

(8) In a breach of contract to sell immovable property, the market value of the land is what it will fetch in the open market. In such a case earlier sales of the same property or comparison with other similar plots in the locality will also help in ascertaining the value. AIR 1921 Sind 197 (199) = 15 Sind LR 21.

Section 73 — Note 26 (contd.)

(9) It is open to the Judge of the Small Cause Court to assess the damages for bailee's negligence, even in the absence of more definite evidence as to the extent of the negligence which he has found to be proved. AIR 1924 Rang 356 (358).

(10) Contract for delivery at a place — Plaintiff producing no evidence to show market rate at the place — Plaintiff is not entitled to damages. AIR 1934 Lah 59 (60) ** ILR (1960) Mys 990 (998) (DB).

(11) Proof of damage is necessary to enable recoverability. AIR 1948 Mad 442 (444) = ILR (1948) Mad 851 (DB) ** (1969) 1 SCWR 1064.

(12) Where the plaintiff who was in possession of a temple under an agreement complained of dispossession by the defendant and claimed damages and loss suffered by him in respect of the offerings of the temple which to some extent were personal offerings and the amount whereof was uncertain and voluntary in character: **Held**, that whether the damages were claimed for breach of contract or in tort on the ground of wrongful deprivation of possession no decree for damages could be allowed, where there was no definite proof of loss suffered by the plaintiff. AIR 1955 Ajmer 14 (16).

(13) In a suit for damages it is for the plaintiff to adduce reliable evidence to show what damages he has suffered. AIR 1957 Pat 350 (355) = 35 Pat 967 (DB) ** AIR 1966 MP 95 (102) = 1965 MPLJ 809 (DB). (Plaintiff relying on hypothetical and misleading data to prove part of damages, though in position to give better and satisfactory data — Claim for that part not allowed.) ** ILR (1961) 1 Cal 389 = (1960) 64 Cal WN 992 (1006). (Market-rate which is based on a large series of transactions put through or carried on by a firm of brokers is more reliable and more truly the best evidence on the point of market-rate.)

(14) In a suit for damages for loss of goods which had been consigned under railway risk, the onus is entirely on the Railway to establish that the loss was not due to any negligence on its part. AIR 1957 Pat 328 (331) = 36 Pat 495 (DB).

27. Date when damages become due. — (1) Damages for breach of contract become due on the date when the contract is broken. AIR 1921 Lah 39 (41) ** AIR 1969 Cal 496 (510) (DB). (Allegation of date of breach of contract is material and relevant in awarding damages.) ** AIR 1963 Madh Pra 197 (200) = 1964 MPLJ 848 (DB) ** AIR 1960 Cal 729 (733) = 64 Cal WN 475 (DB).

(2) If contract was to do work for lump sum, price could not be recovered until work was completed. (1913) 19 Ind Cas 48 (51) (Low Bur.) ** AIR 1963 Ker 181 (186) = 1963 Ker LT 335.

(3) Where, even after the date originally fixed for delivery, the seller continued to supply and the purchaser to receive the contracted goods: **Held**, that on evidence that there was an extension of time granted, and as delivery was going on, it was not open to the seller to fall back upon the date originally fixed for delivery as the date for assessing damages. AIR 1930 Mad 624 (625) (DB) ** AIR 1960 Pat 87 (97).

(4) Contract by defendant to despatch the goods purchased for the plaintiff immediately after purchase — Defendants did not do so disputing that the goods contracted for were with reference to sample but not of pure quality as claimed by plaintiff — Goods not despatched after several demands — **Held** the breach must be held to have occurred when the defendant disputed the quality of goods agreed to be dispatched — Damages would be the price on the date of breach of contract. AIR 1970 Pat 91 (94) (DB).

(5) Where a term in a contract provided that the delivery of the goods should be given as and when they arrived at A and the goods arrived at A on December 2, 1942 and the buyers demanded delivery on December 9, 1942 and the demand was not complied with: **Held**, that the contract was broken on December 2, 1942, when the delivery should have been made, and that it was the date to be taken for the assessment of damages. AIR 1944 Mad 418 (418, 419) = ILR (1945) Mad 180 (DB).

(6) Where a contract is made by defendant that certain goods shall be delivered at a certain place to the plaintiff, but the time of delivery is not given in the contract, the plaintiff cannot extend the time for delivery beyond a reasonable period so as to suit his own convenience while calculating the amount of damages for breach. But if goods are delivered and accepted after long delay, it is open to the plaintiff to say that he would put an end to the contract on a particular date so as to calculate damages from that date. AIR 1928 Mad 1232 (1234).

(7) If the buyer and the seller agrees to extend the time for performance of contract, the buyer is entitled to damages if the contract is not performed at the extended time. It does not matter that the agreement takes place after the original date of delivery has expired and when the seller has already committed breach of the contract. AIR 1959 Cal 472 (474) (DB).

Section 73 — Note 27 (contd.)

(8) Where a contract is made in English currency the date for calculation of damages is the date of the breach and the date on which the rate of exchange is to be taken for conversion is the date on which the money was to be paid and that the rate of interest is that fixed in the contract. AIR 1923 Rang 265 (267, 268) = 1 Rang 339 (DB).

(9) There can be no action for breach of contract unless damage has actually been suffered. Action by the judgment-debtor therefore commenced before the judgment-debtor has paid the amount due by him to the decree-holder twice over is not maintainable. AIR 1933 All 511 (512).

(10) The section does not give any cause of action unless and until the damage is actually suffered. AIR 1946 Pat 263 (267) (DB) ** (1908) 10 Bom LR 1113 (1123, 1124, 1125).

(11) Held that though the date of breach of the contract was the date of delivery, the defendants having the right to give delivery within any time till the last moment of that date until the day had elapsed, it could not be said that the defendants had committed breach of the contract. It was therefore physically impossible for the plaintiff firm to make the purchase in the market on that very day. It could not therefore be said that the plaintiff firm was under an obligation to purchase the shares on the very same day on which delivery was to be given. AIR 1954 Cal 179 (186).

(12) Goods validly seized by Forest Ranger and entrusted to a third party for safe custody — Goods tampered with while in such custody — Plaintiff-owner refusing to take delivery of goods on release, as being tampered with — For calculating damages, price on date of refusal to take delivery was taken as basis and not the price on date of seizure. (1961) 3 OJD 227 (235) = 27 Cut LT 340 (DB).

28. Suit for damages.— (1) The remedy of a suit for damages for breach of a contract need not be one of the terms of the contract but becomes available under the law in case of a breach of a contract. The ordinary remedy of a suit for damages in case of breach is not excluded merely because certain other remedies in case of breach are mentioned in the contract. AIR 1942 Pat 269 (270).

(2) The whole basis of a suit for damages is that at the date of the suit there is no pecuniary liability upon the defendant and the plaintiff has come to the court in order to establish a pecuniary liability. AIR 1954 Bom 423 (426) = ILR (1954) Bom 739.

(3) After breach of contract cause of action is no longer based on contract itself but on its breach. (1968) 70 ITR 347 (352) (Cal) (DB).

(4) Though there was no provision for payment of damages in the Essential Supplies (Temporary Powers) Act or in the Scheme of the Commissioner, the plaintiff is entitled to sue for damages under the general law of contracts. Though the contract is brought about through the medium of the Commissioner, the parties are governed by the provisions of Sale of Goods Act. ILR (1956) Andhra 502 (510) (DB).

(5) There can be no cause of action under a breach of contract unless the damage has been suffered. Merely because the decree-holder files an execution without giving credit for uncertified payments does not give cause of action to the judgment-debtor. It is only when the judgment-debtor is made to pay twice over that he suffers damages. AIR 1950 Madh B 15 (16) = 1 Madh BLR 419 (DB).

(6) The plaintiff was one of the importers appointed by Government for controlled cotton cloth and the defendant was a licensed semi-wholesale dealer. The distribution of cloth was controlled by the Textile Commissioner under the powers conferred by Section 30 Cotton Textiles (Control) Order 1948. Three bales of controlled cotton cloth were allotted by the Textile Commissioner to the defendant by means of an order. The defendant did not acquiesce in the order of allotment and refused to accept the bales, whereupon under the permission of the Textile Commissioner the plaintiff sold the bales at a loss and instituted a suit for recovery of damages which he had sustained. Held, that there was neither any condition in the licence nor was there any provision in the Control Order from which it might be inferred that the defendant entered into an obligation to pay damages to any third party. There being no contract between the plaintiff and the defendant the plaintiff had no cause of action against the defendant. AIR 1955 Vind Pra 33 (36).

(7) A part of the cause of action to sustain a suit for damages for breach of contract would certainly arise at the place where performance of the contract is provided. AIR 1949 Mad 145 (146) (DB).

(8) Suit for damages — Consignment of goods under C. I. F. or F. O. R. contract — Goods according to sample — Suit lies at place of consignment — Where goods are not according to sample, suit lies also at place of discovery. AIR 1950 Mad 768 (768, 769).

(9) Where the specific articles purchased have been shown to the pur-

Section 73 — Note 28 (contd.)

chaser at the place of contract the jurisdiction to entertain a suit for damages for supplying articles of inferior quality will only be in the courts of that place and not in courts in the place to which the articles may be subsequently consigned at the instance of the buyer. AIR 1953 Mad 389 (390).

(10) A party cannot maintain an action claiming damages for the breach of an alleged contract unless he can aver and prove that he has performed or has at all time been ready to perform his part of the contract. AIR 1947 Nag 193 (200) = ILR (1947) Nag 60 (DB) ** AIR 1923 All 220 (224) (DB).

(11) The right to compensation arises coincidentally with the right to specific performance and out of the breach or non-performance of the contract of sale. Where, therefore, the purchaser sues for and obtains a decree only for the specific performance of the contract, his subsequent suit for compensation for the breach would be barred under Order 2, Rule 2, Civil P. C. AIR 1957 Andh Pra 960 (961).

(12) Valid cancellation of contract — Bad motive behind cancellation furnishes no cause of action to other party for claiming damages. AIR 1959 Andh Pra 551 (554) (DB).

(13) A suit for damages is not within the jurisdiction of the Tribunal appointed under the Displaced Person (Debts Adjustment) Act, 1951, because the word 'debt' in Section 2 (6) of that Act does not include damages for breach of contract. AIR 1956 Punj 174 (177) (DB). ** AIR 1961 Punj 340 (349) = 63 Punj LR 275 (FB). (AIR 1960 Punj 291, Disapproved; AIR 1956 Punj 174 and F. A. F. O. No. 87 of 1953 (Punj), Approved.)

29. Limitation.— (1) A suit for damages for breach of contract of marriage is governed by Article 115, Limitation Act. AIR 1953 Madh B 91 (93) = ILR (1952) Madh B 322 (DB).

(2) To a suit for damages for breach of express covenant of indemnity in a sale deed the article applicable is Article 116 read with Article 83 of the Limitation Act and the limitation will run from the date of disturbance. AIR 1958 Ker 322 (324) = ILR (1958) Ker 27 (DB).

(3) A suit for recovery of money in respect of realisation by the decree-holder of the decretal dues paid twice over is a suit for damages for breach of an implied contract by the decree-holder to get the payments certified and not to execute the decree and the article applicable is Article 115 or

possibly Article 97. AIR 1951 Pat 348 (349) = 28 Pat 974 (DB).

(4) Suit for loss sustained after resale of goods — Suit is governed by Article 115 of Limitation Act and is to be instituted within 3 years of date of breach of contract. AIR 1960 Mad 480 (482) = 1960 Mad WN 489 (DB).

(5) Article 65 of Limitation Act (1908) is applicable to cases of breach of contracts under Section 73 also. 1959 Raj LW 46 (49) = ILR (1959) 9 Raj 17.

(6) Where the contract itself is void, cause of action cannot be breach of any contract; consequently limitation in such case is governed by Article 120 and not Article 115. AIR 1964 Pat 225 (DB).

30. Suit for specific performance.—

(1) Where a plaintiff claiming specific performance prays in the alternative for the return of moneys expended by him and for other proper relief, the prayer is wide enough to include a claim for compensation for breach of contract in substitution for its performance. 1891 Punj Re No. 83, p. 408 (413) (DB). (Sale-deed not registered — Suit for specific performance — Although proof of contract is excluded, compensation for breach may be given.)

(2) Specific performance not granted for special reasons to party entitled, party is entitled to damages in lieu thereof. AIR 1924 Lah 163 (165).

(3) Where there is a breach of contract to sell, the plaintiff can sue for specific performance or alternatively for damages. The plaintiff is entitled even at the trial to elect whichever of the two remedies would be advantageous to him and if he abandons the relief for specific performance, the suit must be treated as a suit for damages. AIR 1948 Mad 216 (217) ** AIR 1965 Mad 85 (86, 87) = (1965) 1 Mad LJ 362 (DB). (Contract for sale — Claim for damages by purchaser — No suit for specific performance can be maintained by him, thereafter.)

(4) There is a distinction between damages for breach of a contract which can only be claimed under the Contract Act and damages in substitution for specific performance the claim for which Section 19 of the Specific Relief Act permits. The two claims are based on entirely different considerations. Compensation in substitution for specific performance is granted where the Court could have granted specific performance but declines in its discretion to do so. ILR (1952) 1 Cal 27 (32) (DB).

(5) While awarding the amount of compensation under Section 19 of the

Section 73 — Note 30 (contd.)

Specific Relief Act. the Court has ordinarily no alternative but to act on the principles contained in Section 73 of the Contract Act. AIR 1963 Pat 298 (302) (DB).

(6) Whether the claim is for specific performance or for damages, the cause of action is breach of contract. The reliefs follow as a consequence of the breach of contract. If the party aggrieved is ready and willing to carry out his part and the party complained against commits the breach then the party aggrieved may either sue for specific performance or for damages. Moreover a claim for specific performance under the Specific Relief Act can co-exist with a claim for damages under the Contract Act and claim under one Act cannot preclude claim under the other so long as the requirements of the respective statutes are satisfied. In a proper case, therefore, a plaint for specific performance can be converted by amendment into a claim for damages for breach of contract. AIR 1952 Cal 78 (81) = ILR (1951) 2 Cal 376.

(7) Contract of sale of house on plot granted by Government — Term that vendor shall obtain necessary permission from Government before sale — Vendor making application but withdrawing the same — Specific performance held was enforceable — Permission for sale if refused, damages could be granted. AIR 1964 SC 978 (980) = (1964) 2 SCR 495.

31. Defences to suit for damages.— (1) Where the buyer wrongfully cancels the contract without justification, he cannot set up any defence which he might otherwise have done to any action for damages. AIR 1920 Bom 181 (182).

(2) A party, who by his conduct makes a performance of the contract impossible, is deprived of his rights to recover anything by way of damages from the other party. AIR 1925 Nag 119 (120).

(3) Where there is a contract subject to condition that the plaintiff may, upon a breach of it, treat it as cancelled and not ask for damages, the defendants are bound to justify their refusal to perform the contract since they cannot themselves bring about the state of affairs which would avoid the contract. AIR 1926 Nag 435 (442) ** AIR 1922 Bom 44 (44, 45) = 46 Bom 806 (DB).

(4) Claim for damages for breach of contract entered into against provisions of law is not maintainable for no party can claim any rights in respect of such contract. AIR 1969 SC 504 (513) =

(1969) 2 SCJ 313. (AIR 1962 Ker 92, Reversed.)

(5) A plea under Explanation to Section 73 does involve questions of fact. Therefore, the defendant cannot be allowed to raise such plea for the first time at appellate stage. AIR 1960 Ker 139 (140) = 1959 Ker LT 941 (DB).

32. "Obligation resembling those created by contract."— (1) I, under-proprietor of entire village, selling some land to defendants — Subsequently J mortgaging all his interest in village to plaintiff — Mortgagor to pay revenue then payable and any amount by which it might be enhanced at any future settlement — Settlement officer, subsequently, enhancing amount of rent payable to superior proprietor by defendants — Plaintiff being required to pay whole of under-proprietary rent to superior proprietor, claiming against defendants amount of enhanced rent — Defendants, held, were under "obligation resembling those created by contract" within Section 73, and were, therefore, liable as in an action for damages for breach of express contract. (1903) 6 Oudh Cas 346 (350).

(2) It is clear from the expression "as if in para. 3 of Section 73 that a party who is ultimately injured on account of failure to discharge a liability under Section 72 has a right to enforce that liability against a person who is guilty of default in performance of an obligation. AIR 1963 Raj 198 (201) = 1963 Raj LW 304. (Postal employee making over payment under bona fide mistake of fact while discharging postal cash certificate — Amount recovered from his salary by postal department — He is entitled to sue payee for recovery of excess payment.)

(3) When a payment is made by the judgment-debtor to the decree-holder, there is an implied understanding between the parties that the decree-holder shall credit that amount towards the decree and in case of his not giving a credit of that amount towards the decree, he shall refund the amount to the judgment-debtor. A decree-holder by not giving credit of the amount received by him out of Court and by filing an execution petition for the recovery of such amount contravenes the implied understanding of the parties and he should be made to refund the amount. The judgment-debtor need not wait till the decree-holder recovers the amount twice over in order to entitle him to file a suit for the refund of the amount already paid by him. The amount already paid may be regarded as loss sustained by the judgment-debtor in such a case and it may, therefore, form part of the

Section 73 — Note 32 (contd.)

damages which may be awarded to the judgment-debtor. ILR (1952) 2 Raj 731 (740) (DB).

33. Plaintiff's duty to mitigate loss — Explanation.— (1) Implementing of contract is a part of the general law and is also recognised by the explanation to Section 73 of the Act. AIR 1923 Rang 84 (85) = 11 Low Bur Rul 326 (DB).

(2) The explanation to Section 73 casts a burden upon the person complaining of the breach of contract to show that he did not possess means of remedying the inconvenience caused by the non-performance of the contract. AIR 1943 Oudh 17 (22) = 18 Luck 327 (DB) ** AIR 1963 Madh Pra 242 (245, 246) = 1963 MPLJ 307 (DB). (Contract with Government to collect lac, rescinded by contractor — Government must hold re-auction — Contractor entitled to benefit from failure to hold re-auction.)

(3) Though in case of a breach of contract, the plaintiff is entitled as far as possible, to be put in the same position as he would have been in case the contract had been carried out and get all such damages as naturally flow from the defendant's failure to perform his part of the contract and are not too remote, the plaintiff is under an obligation to mitigate the damages as far as possible. ILR (1954) 2 All 531 (534) (DB) ** AIR 1962 SC 366 (369) = (1962) 1 SCR 653 ** (1966) 7 Guj LR 512 (529) = ILR (1966) Guj 426 ** AIR 1966 Madh Pra 95 (101, 102) = 1965 MPLJ 809 (DB).

(4) There is a duty cast upon the plaintiff to minimise the damage, if he could, but the burden of proving that the plaintiff had the means available, and did not take steps to avail himself of the means would lie heavily on the defendant. AIR 1925 Rang 261 (262, 263) (DB).

(5) Tenant agreeing to pay Government revenue and cess failing to pay it — Landlord having notice of intended sale but taking no steps to avoid it by paying necessary dues — Sale taking place — Landlord is entitled to damages for breach of contract. AIR 1940 Pat 88 (89) (DB) ** AIR 1928 All 481 (490) = 50 All 695 (DB) ** AIR 1915 PC 48 (49) = 8 Low Bur Rul 343 = 45 Cal 493 = 43 Ind App 6 ** (1911) 9 Ind Cas 470 (471, 472) (Low Bur).

(6) Party is not entitled to damages for breach of contract if he might have avoided loss by the use of reasonable precautions. AIR 1915 Cal 601 (605) (DB) ** (1966) 7 Guj LR 512 (530) = ILR (1966) Guj 426.

(7) A plaintiff who sues for damages owes the duty of taking all reasonable steps to mitigate the loss consequent upon the breach and cannot claim as damages any sum which is due to his own neglect. AIR 1925 Bom 28 (30, 31) = 49 Bom 25 (DB) ** AIR 1956 Bhopal 65 (65) ** AIR 1969 Bom 373 (381) = 1969 Lab IC 1324 ** (1969) 71 Pun LR 566 = 1969 Cur LJ 494 (499) (DB) ** (1966) 7 Guj LR 512 (530) = ILR (1966) Guj 426 ** AIR 1963 Madh Pra 242 (245) = 1963 MPLJ 307 (DB).

(8) The duty to minimise damages arises where breach has occurred. AIR 1924 Cal 427 (432) (DB).

(9) It is the duty of a Court to consider the question of mitigation of damages while assessing the quantum of damages in a suit based on breach of a contract, 1969 Cur LJ 494 (498) = 71 Punj LR 566 (DB).

(10) Where plaintiffs could have taken delivery earlier and avoided deterioration of goods, it was held that they had failed to do what they might have done to "remedy the inconvenience." (1911) 9 Ind Cas 470 (471) (Low Bur) ** ILR (1954) 4 Raj 778 (793) (DB).

(11) If at the date of breach plaintiff could do something to mitigate damage, defendant is entitled to benefit of it. But the fact that by reason of loss of contract which defendant has failed to perform plaintiff obtains the benefit of another contract which is of value to him does not entitle the defendant to the benefit of the latter contract. AIR 1915 PC 48 (49, 50) = 43 Cal 493 = 8 Low Bur Rul 343 = 43 Ind App 6.

(12) Principle on which damages for breach of contract are assessed is laid down in Section 73, and explanation to that section shows that means which existed for remedying the inconvenience caused should be taken into consideration. (1902) 1 Low Bur 21 (22) ** (1928) 109 Ind Cas 335 (335, 336) (Lah) ** AIR 1969 Bom 373 (377) = 1969 Lab IC 1324.

(13) It is undoubtedly the duty of a plaintiff to mitigate the damages caused by the defendant's breach. The plaintiff cannot claim to be compensated for loss which was due to his own failure to behave reasonably after the breach. The test to determine whether his behaviour was reasonable is to see whether he did what a prudent man might have reasonably done if the whole expense was to fall on himself. The plaintiff must not have acted in a way legitimately open to blame. The rule must be applied with discretion because the party who is already in the wrong by breaking the contract is not entitled to impose new and extraordi-

74. Compensation for breach of contract where penalty stipulated for.—
 *[When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not

Section 73 — Note 33 (contd.)

nary duties on the aggrieved party. AIR 1958 Andh Pra 533 (540) (DB) ** AIR 1962 SC 366 (369) = (1962) 1 SCR 653 ** AIR 1962 Andh Pra 192 (195) = 1961 Andh LT 421 (DB).

(14) Contract with Government for supply of crores of pucca bricks according to schedule — Delivery at kiln site — Default of Government in removing burnt bricks resulting in lacs of katcha bricks being destroyed by rains — Claim for price of katcha bricks against Government — Contract containing express stipulation that Government, will not entertain any claim for damage to unburnt bricks due to any cause whatsoever — Contractor cannot go back on this agreement — But Government is not absolved from liability for breach of contract by not removing burnt bricks — But it was the duty of contractor under Section 73 to remove the bricks himself and stock them elsewhere and thus minimise loss and then claim compensation — Or he could have sold bricks in market and claimed difference in price — Ordinarily he could not have claimed damages for loss of katcha bricks unless he could show that damage was in contemplation of parties absolved from liability. AIR 1955 SC 468 (472) = 1955-2 SCR 48 = 34 Pat 359.

(15) It is the duty of the judgment-debtor to have the adjustment of payment certified. If he does so, he would suffer no damage. If he fails to do so when it is in his power, he puts himself out of Court as regards his claim for damages. AIR 1950 Madh B 15 (16) = 1 Madh BLR 419 (DB).

(16) A servant's duty is to minimise the damages and for this purpose to seek and accept suitable employment but he is not expected to accept an engagement in a lower status, and this will be taken into consideration in the calculation of the damages.

The question what is reasonable for a plaintiff to do in mitigation of damages is not question of law, but one of fact in the circumstances of each particular case the burden of proof being upon the defendant. AIR 1960 Cal 214 (219).

(17) Servant wrongfully dismissed must diligently seek another employment — Offer of suitable post to him may be taken into account while assessing damages. 1968 MPLJ 846 (851)

= 1969 Jab LJ 37 (DB). (AIR 1959 SC 12, Foll.)

SECTION 74 — SYNOPSIS

1. Penalty and liquidated damages — General.

1-A. "Stipulation by way of penalty" — General.

1-B. Unconscionable agreement — Test.

2. Enhanced rate of interest.

3. Explanation.

4. Compound interest.

5. Interest payable, if principal not duly repaid.

6. Reduced rate of interest on punctual payment.

7. Where the rate of interest is exorbitant.

8. "Reasonable compensation."

9. Exception.

10. Instalments — Illustrations (f) and (g).

11. Hire-purchase agreements.

12. Deposit — Forfeiture of.

13. Contract of service.

14. Breach of promise of marriage.

15. Pledge.

16. Compromise decrees.

17. Chit fund.

18. Landlord and tenant.

19. Penal stipulations — Illustrative cases.

1. Penalty and liquidated damages — General. — (1) A penal stipulation cannot be enforced. Liquidated damages must be the result of a "genuine pre-estimate of damages." They do not include a sum fixed in terrorem. AIR 1941 PC 101 (103) ** AIR 1955 Pat 215 (221) = 32 Pat 662 (DB) ** AIR 1954 Madh B 84 (86) = ILR (1953) Madh B 198 ** AIR 1965 Andh Pra 33 (35, 36) = (1964) 1 Andh WR 69 (DB).

(2) Penalty differs from stipulated damages within the meaning of S. 74. The essence of liquidated damages is a genuine pre-estimate of damage which is agreed upon while the essence of a penalty is a stipulation in terrorem of the offending party. 1961 Jab LJ 141 = 1960 MPLJ 1379.

(3) The distinction between penalty and liquidated damages has been abolished by the Indian Contract Act and now in every case (except bail bonds or where the bond is given for the performance of any public duty or act in which the public are interested, in which a sum

exceeding the amount so named or, as the case may be, the penalty stipulated for.

Explanation.—A stipulation for increased interest from the date of default may be a stipulation by way of penalty.]

Exception.—When any person enters into any bail-bond, recognizance or other instrument of the same nature, or under the provisions of any law, or under the orders of the †[Central Government] or of any §[State] Government, gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein.*†

Explanation.—A person who enters into a contract with Government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested.

Illustrations

(a) A contracts with B to pay B Rs. 1,000, if he fails to pay B Rs. 500 on a given day. A fails to pay B Rs. 500 on that day. B is entitled to recover from A such compensation, not exceeding Rs. 1,000, as the Court considers reasonable.

(b) A contracts with B that, if A practises as a surgeon within Calcutta, he will pay B Rs. 5,000. A practises as a surgeon in Calcutta. B is entitled to such compensation, not exceeding Rs. 5,000, as the Court considers reasonable.

Section 74 — Note 1 (contd.)

is named as damages to be paid in case of breach of contract), the Court, which tries the suit, is not bound to award more than 'reasonable compensation' not exceeding the amount so named. 1883 Pun Re No. 150, p. 452 (453) (FB) ** AIR 1934 Cal 285 (287) = 60 Cal 1379 ** AIR 1929 PC 179 (180). (The effect of Section 74 is to disentitle the plaintiffs to recover simpliciter the sum named in the contract as due and payable as on breach, whether by way of penalty or liquidated damages.) ** AIR 1918 Cal 557 (568) (DB) ** AIR 1915 Mad 896 (906) = 38 Mad 178 (FB) ** 1894 Pun Re No. 99, p. 364 (369) (DB) ** (1883) 5 All 238 (241, 242) (DB) ** (1883) 9 Cal 689 (692) (DB) ** (1881) 3 Mad 224 (228) (DB) ** AIR 1963 SC 1405 (1410, 1411) = (1964) 1 SCR 515 ** 1968 Ker LT 713 (715) = 1968 Ker LJ 757 ** AIR 1964 J and K 26 (29) = 1964 Kash LJ 49 ** AIR 1960 Pat 87 (92) ** AIR 1960 Punj 637 (638, 639) = 62 Pun LR 650 (DB).

(4) The word penal implies that there is a main contract and a subsidiary contract, providing for some more drastic consequences (e.g., liability to pay something more than the debtor would be liable to pay under the primary contract) in the event of the breach of the original and main contract. AIR 1919 Mad 200 (201) ** AIR 1934 Mad 31 (36) (DB) ** AIR 1933 Oudh 291 (295) = 8 Luck 707 (DB). (Case of condition subsequent — To constitute the existence of penalty, it is only necessary to establish the element of punishment, however well deserved or temperate such punishment might be.) ** AIR 1930 Bom 306 (315) = 54 Bom 381. (The Court may, however, carry out the terms of the second-

dary contract, if such a contract is just and reasonable but is not bound to.) ** AIR 1921 Mad 378 (379, 380) (DB) ** AIR 1915 Oudh 31 (42) (DB) ** AIR 1960 Pat 87 (92).

[See also AIR 1937 Mad 234 (235).]

(5) Where a contract is for payment of a larger sum with a concession enabling a smaller sum to be paid in a particular way in full satisfaction, the law relating to penalties and Section 74 do not apply. AIR 1934 Bom 370 (372) = 58 Bom 610 ** AIR 1943 Pat 403 (405) (DB) ** AIR 1937 Mad 234 (235) ** (1909) 2 Ind Cas 850 (851) (DB) (Mad).

[See also AIR 1929 All 558 (559) (DB). (The term penalty cannot be properly applied where all that is agreed between the parties is that they shall revert to situation existing immediately prior to the new agreement, even though that may involve liability on the part of one of them for a sum greater than if he had carried out the agreement.)]

(6) In deciding the question whether the sum mentioned in a clause is a penalty or liquidated damages in a given case the Court must take into consideration the intention of the parties, as evidenced by their language and the circumstances of the case. AIR 1960 Pat 87 (91) ** AIR 1958 Andh Pra 598 (604) = (1958) 1 Andh WR 255.

(7) If the sum is imposed as security for the due performance of the contract it is a penalty. The essence of a penalty is a payment of money stipulated as in terrorem of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage. AIR 1960 Pat 87 (91).

(8) Contracts for supply of commodities to railway — Agreements containing

(c) A gives a recognizance binding him in a penalty of Rs. 500 to appear in Court on a certain day. He forfeits his recognizance. He is liable to pay the whole penalty.

†[(d) A gives B a bond for the repayment of Rs. 1,000 with interest at 12 per cent, at the end of six months, with a stipulation that, in case of default, interest shall be payable at the rate of 75 per cent. from the date of default. This is a stipulation by way of penalty, and B is only entitled to recover from A such compensation as the Court considers reasonable.]

†[(e) A, who owes money to B, a money-lender, undertakes to repay him by delivering to him 10 maunds of grain on a certain date, and stipulates that, in the event of his not delivering the stipulated amount by the stipulated date, he shall be liable to deliver 20 maunds. This is a stipulation by way of penalty, and B is only entitled to reasonable compensation in case of breach.]

†[(f) A undertakes to repay B a loan of Rs. 1,000 by five equal monthly instalments with a stipulation that, in default of payment of any instalment, the whole shall become due. This stipulation is not by way of penalty, and the contract may be enforced according to its terms.]

†[(g) A borrows Rs. 100 from B and gives him a bond for Rs. 200 payable by five yearly instalments of Rs. 40, with a stipulation that, in default of payment of any instalment, the whole shall become due. This is a stipulation by way of penalty.]

[°] Substituted for the first paragraph of S. 74, by the Indian Contract Act Amendment Act, 1899 (6 of 1899), S. 4.

[†] Inserted, *ibid*, S. 4 (2).

[‡] Substituted for 'Government of India' by A. O., 1937.

[§] Substituted for 'Provincial' by A. L. O., 1950.

[°†] See the Opium Act, 1878 (I of 1878), S. 25.

Section 74 — Note 1 (contd.)

penalty clause — Neither party having any intention of enforcing it at all — Defendant railway seeking to show that it is liquidated damages — Onus is on Railway to prove that such is the intention. AIR 1960 Pat 87 (94).

1-A. "Stipulation by way of penalty" — General. — (1) The addition of the words "or if the contract contains any other stipulation by way of penalty" to S. 74, by Amendment Act in 1899 has considerably enlarged the scope of the section and has the effect of getting rid of all subtle technicalities on the application of the equitable principle regulating the duty of the Court to relieve against penalties. AIR 1917 Mad 5 (6) (DB).

(2) There cannot be a stipulation by way of penalty unless there is another antecedent promise. For a sum to be treated as a penalty it must be an amount to be paid in case of a breach of an antecedent promise. AIR 1918 Mad 574 (576) (DB). (Contract to pay heavy rate of interest is not by itself a stipulation by way of penalty and cannot be relieved against under S. 74.)

(3) Penalty in Section 74 means only a separate payment — Re-taking of chattel and retention of moneys already paid under seizure clause in hire-purchase agreement is not separate and extraneous payment and does not amount to a penalty within the meaning of Section 74. AIR 1930 Rang 193 (196) = 8 Rang 236 (DB).

"Penalty".

(4) Where the rights and liabilities of the parties are regulated by contract, the terms of which could not be said to have been unfair at the date when the contract was entered into, the principle of natural justice cannot be invoked to relieve one of the parties of some hardship which might have been provided against in the contract, but which the parties have omitted to provide for. AIR 1936 Pat 341 (343, 344) = 15 Pat 594 (SB).

(5) Penalty clause does not deprive creditor of right to reasonable compensation. AIR 1923 Nag 98 (99).

(6) An agreement which carries a penal clause, such as may be covered by Section 74 of Contract Act, is not in any sense of the term 'unlawful.' AIR 1926 All 278 (280) (DB).

(7) Section 74 does not only speak of all agreements that are unreasonable but speaks of all agreements in which the damages to be paid for breach of contract are stated as a certain sum of money or are otherwise specified. AIR 1926 Nag 473 (474).

[See also AIR 1920 Oudh 180 (182) = 23 Oudh Cas 118 (DB). (S. 74 is not restricted to money, increased interest or the like. It can include any other stipulation by way of penalty, for instance, a stipulation to convey certain property, on default of payment of a debt on a fixed date.) ** AIR 1917 Mad 405 (406) (DB).]

[But see (1903) 6 Oudh Cas 167 (170). (Section 74 was applicable only to cases

Section 74 — Note 1A (contd.)

in which pecuniary compensation was sought for breach of contract.)

(7-A) The expression "the contract contains any other stipulation by way of penalty" comprehensively applies to every covenant involving a penalty whether it is for payment on breach of contract of money or delivery of property in future or for forfeiture of right to money or other property already delivered. AIR 1963 SC 1405 (1410, 1411) = (1964) 1 SCR 515. (AIR 1952 Bom 310 and AIR 1915 Mad 896 (FB), Overruled.)

(8) If a clause was in the nature of a penalty, it can be relieved against even if it was contained in a family settlement. AIR 1953 All 559 (563) = ILR (1954) 2 All 495 (DB).

(8-A) Where under an agreement an option to a vendor is reserved for repurchasing the property sold by him the option is in the nature of a concession or privilege and may be exercised on strict fulfilment of the condition on the fulfilment of which it is made exercisable. Refusal to enforce the term specifically for failure to abide by the condition does not amount to enforcement of a penalty and the Court has no power to afford relief against the forfeiture arising as a result of breach of such condition. AIR 1963 SC 1182 (1184) = (1962) Supp 3 SCR 476.

(9) In suit by legal practitioner for recovery of any fees due to him from his client as per agreement between them, Section 4 of the Legal Practitioners (Fees) Act (1926) excludes the operation of Section 74 of the Contract Act. AIR 1956 Raj 25 (27) = ILR (1955) 5 Raj 753.

(10) Section 74 dealing with promises to pay specified sums upon the breach of a contract, does not apply to cases of forfeiture of the deposits for breaches of stipulations even when some of them be trifling and some are not. 1960 Jab LJ 536 (538).

(11) The Contract Act is meant to cover contracts between the parties and not statutory provisions enacted by competent legislature e.g. Rule 90 of the Displaced Persons (Compensation and Rehabilitation) Rules which is a statutory provision. 1965 Pun LR (Supp) 170 (172).

1-B. Unconscionable agreement — Test. — (1) Whatever may be the expression used in a contract in describing the payment to be made in case of a breach, the question must always be whether the construction contended for renders the agreement unconscionable and extravagant, and one which no Court ought to allow to be enforced. (1912) 16 Cal WN 697 (700) (PC). (Case from Ceylon.) ** AIR 1925 Mad 177 (179). (Where reasonable compensation for breach is provided, there is no penalty; but where it

is in terrorem, it is penalty.) ** AIR 1915 Cal 796 (799) = 42 Cal 652 (DB) ** (1901) 14 CPLR 49 (52). (One of the best tests, in practice being to see whether the stipulation would be wholly unreasonable, if regarded as an integral part of the contract.)

(2) Questions as to unconscionable bargains must be decided on the provisions of the Contract Act, as amended in 1899 and on these alone. Principles of the English Courts of Equity are entirely inapplicable. AIR 1918 PC 249 (250, 251) = 1918 Pun Re No. 124.

(3) It is impossible to lay down any abstract rule as to what may or may not be extravagant, or unconscionable. It must be decided with reference to the particular facts and circumstances, which are established in each individual case. (1912) 23 Mad LJ 177 (179) (PC) ** AIR 1917 Cal 502 (507) = 44 Cal 162 (DB).

(4) Whether particular bargain is unconscionable or not and whether particular stipulation constitutes penalty or not are questions of fact rather than of law. AIR 1918 Nag 82 (83) = 14 Nag LR 21 ** AIR 1924 Rang 46 (46) = 1 Rang 460 (DB) ** (1905) 1 Nag LR 9 (13, 14).

[But see AIR 1921 Lah 212 (213) ** 1879 Pun Re No. 51, p. 135 (136) (DB)]

2. Enhanced rate of interest. — (1) The stipulation for enhanced interest, on default from the date of contract, is always by way of penalty against which relief can be granted. AIR 1929 Lah 515 (516) (DB). (Stipulation for increased interest from date of bond is penal — Whether a stipulation is penal or not depends on the intention of parties.) ** AIR 1955 Pepsu 110 (112) = ILR (1955) Patiala 76 (DB) ** AIR 1926 Nag 173 (174) ** AIR 1926 Nag 31 (31) = 24 Nag LR 54 ** AIR 1922 Oudh 123 (124). (Usufructuary mortgage for less than Rs. 100 — Rents and profits in lieu of interest — Stipulation to pay additional interest in case mortgagor failed to have mortgage deed registered, held, penal.) ** AIR 1916 All 160 (160) ** (1911) 10 Ind Cas 572 (573) (DB) (All). (Such interest would not be wholly disallowed — Reasonable portion may be allowed by way of compensation.) ** (1909) 4 Ind Cas 820 (820, 821) = 1909 Upp Bur Rul 17 ** (1908) 4 Nag LR 187 (188) ** (1903) 25 All 169 (173) (DB) ** (1895) 8 CPLR 77 (78) ** (1893) 17 Bom 106 (113) (FB) ** (1892) 19 Cal 392 (397) (FB) ** 1884 All WN 280 (281) (DB) ** 1883 Pun Re No. 150, p. 452 (456) (FB) (1887 Pun Re No. 5 and 1879 Pun Re No. 25, Overruled.) ** (1881) 3 Mad 224 (228) (DB).

[But see (1894) 17 Mad 62 (65, 66) (DB).]

(2) Before the introduction of the Explanation in 1899, it was held, in the

Section 74 — Note 2 (contd.)

following cases, that when the higher rate of interest was payable as from the date of default (and not as from date of contract) the contract rate was enforceable — Section 74 did not apply, since no sum was named. AIR 1923 Pat 231 (236) = 2 Pat 296 (DB). (Stipulation for higher rate of interest from date of default contained in mortgage bond executed in 1897 — Default — Suit on mortgage brought in 1918 — Law as it stood in 1897 applied, and contract rate of interest, held enforceable.) ** (1900) 27 Cal 421 (424) (DB) ** (1883) 9 Cal 689 (692, 693, 694) (DB).

[But see (1900) 3 Oudh Cas 168 (169, 170). (Agreement to pay interest, at the enhanced rate, in case of default, was in the nature of a penalty, and that the plaintiff-respondent was entitled only to reasonable compensation.) ** (1895) 8 CPLR 54 (57).]

(3) In the undermentioned case to which the Amendment Act of 1899 did not apply, it was held that the Courts were competent to grant equitable relief against a stipulation for enhanced interest from the date of default if it amounted to a penalty. (1903) 30 Cal 15 (19) (DB) ** (1899) 26 Cal 300 (310) (DB) ** (1893) 17 Bom 106 (113, 114) (DB).

(4) After the addition of Explanation in 1899 a stipulation for enhanced interest from the date of default may or may not be a stipulation by way of penalty. AIR 1929 Lah 515 (516) (DB) ** AIR 1940 Sind 68 (73) (DB). (Provision in mortgage bond for enhanced interest at 18 per cent. per annum, in case of default is not necessarily penal.) ** (1908) 4 Nag LR 187 (188).

(5) Stipulation for enhanced interest from default cannot be considered as a penalty unless the enhanced rate be such as to lead to the conclusion that it could not have been intended to be part of the primary contract between the parties. (1893) 17 Bom 106 (113) (FB).

(6) Whether a stipulation for enhanced interest from the date of default is penal or not, depends upon the facts and circumstances of each case. AIR 1933 Oudh 81 (82) (DB) ** (1911) 9 Ind Cas 406 (410) (DB) (Oudh).

(7) Question whether an agreement to pay enhanced interest, from date of default, is penalty or not is one of fact. (1912) 13 Ind Cas 624 (625) (Oudh).

(8) In the following cases, it was held that the stipulation for higher interest from the date of default was penal and therefore could be relieved against. AIR 1943 Mad 109 (110) ** AIR 1957 Pat 542 (545) (DB) ** AIR 1939 Pat 457 (459) (DB) ** AIR 1937 Cal 654 (655) = ILR (1937) 1 Cal 300 ** AIR 1935 Lah 456 (458) (DB). (Mortgage, for Rs. 400 — Interest at As. 12 per cent. per mensem payable — In case of default, in-

terest to be paid at R. 1-9-0 per cent. per mensem with compound interest — Clause held penal — Compensation at original rate, held, not unreasonable.) ** AIR 1931 Mad 137 (138) (DB) ** AIR 1931 Oudh 33 (34) = 6 Luck 321 (DB). (Stipulation for increased interest from date of default is penal only if it be introduced in terrorem.) ** AIR 1923 Rang 61 (64) = 11 Low Bur Rul 356 (DB). (An increase of the rate of interest from 24 per cent. to 36 per cent. from the date of default is penal.) ** AIR 1922 Lah 268 (268). (Enhanced interest at double the original rate.)

[But see (1912) 13 Ind Cas 624 (Oudh) ** (1912) 13 Ind Cas 473 (Oudh) ** AIR 1918 Lah 129 (130) (DB) ** (1912) 36 Bom 164 (166, 167, 168) (DB).]

(9) In the following cases, enhanced rate of interest from date of default was held not penal. (1935) 18 Nag L Jour 267 (272). (Debt repayable in four instalments with simple interest at 1 per cent. per mensem—Defaulted instalments were to carry interest at 2 p. c. p. m. — On default of two instalments whole amount was recoverable with interest at 2½ p. m.—Held that the rate was not per se in the nature of a penalty.) ** AIR 1953 Ajmer 6 (7). (Where in a mortgage deed interest at 4½ per cent simple per annum was stipulated and the penal rate was to 7½ per cent. simple, either of them could not be regarded as inequitable.) ** AIR 1931 Lah 120 (121) = 11 Lah 635 (DB). (Enhancement from 12 per cent. to 15 per cent. held not penal.) ** AIR 1929 Lah 515 (516) (DB) ** AIR 1926 Mad 785 (787). (Person, on ceasing to be a share-holder of fund, to repay the whole debt and pay interest at 12½ per cent. instead of at 6½ per cent. The fund being for the benefit of only its members, the above stipulations are not penal.) ** AIR 1926 Oudh 502 (503). (Provision for payment of Deorha is not penal.) ** AIR 1924 Oudh 103 (103) ** AIR 1924 Rang 46 (46) = 1 Rang 460 (DB). (Where, on default, interest was raised from Re. 1-12-0 to Rs. 2 per cent. per mensem.) ** AIR 1923 Oudh 158 (158) = 26 Oudh Cas 352. (Interest at 8 annas per cent. per mensem payable half yearly, and in case of default, at 12 annas per mensem from the date of default.) ** AIR 1919 Mad 231 (231) = 42 Mad 465 (DB). (12 per cent. from date of default, where original rate was only 9 per cent.) ** (1913) 20 Ind Cas 949 (950) (DB) (All). (Stipulation that on default of due payment of interest at 9 per cent. per annum on a bond, every half-year, interest at 24 per cent. per annum was payable on the unpaid balance of interest, is not unconscionable and can be enforced.) ** (1912) 13 Ind Cas 624 (625) (Oudh). (Interest at 10 annas per cent. per mensem to be paid annually. On default, interest or compound interest recoverable at Re. 1-4-0 per cent. per men-

Section 74 — Note 2 (contd.)

sem, held not penal.) ** (1912) 13 Ind Gas 473 (474) (Oudh). (Interest at 12 per cent. per annum to be paid half-yearly — Stipulation that if interest of any year was not punctually paid, interest charged would be double for that year. Held it is not penal.)

[But see AIR 1922 Lah 268 ** (1911) 9 Ind Cas 406 (410) (DB) (Oudh). (Original rate $5\frac{1}{4}$ per cent. per annum — Enhanced rate 12 per cent. per annum.)]

(10) In a contract under the Punjab State Aid to Industries Act between the Government and a citizen granting a loan to him at a fairly low rate of interest, a stipulation as to payment of increased rate of 10 per cent. per annum in case of breach is not unreasonable. The increased rate of interest fixed in pursuance of a statutory power is not affected or controlled by Section 74. ILR (1966) 2 Punj 714 (724) (DB).

3. Explanation. — (1) The Explanation appears to have been introduced to meet the decisions to the effect that when a higher rate of interest is payable as from the date of default and not as from the date of contract the contract rate is enforceable. (1906) 29 Mad 491 (496) (DB). (25 Mad 348, Followed.)

(2) Although the explanation was introduced only by the amending Act of 1899, yet inasmuch as it only explains and illustrates the section as it had already been, so as to remove the doubt entertained in certain quarters, it is applicable to contracts entered into before 1899. AIR 1925 Pat 64 (65) (DB) ** AIR 1918 Cal 557 (568) (DB) ** (1906) 29 Mad 491 (495, 496) (DB) ** (1903) 25 All 169 (173) (DB) ** (1902) 25 Mad 343 (347, 348) (DB).

[But see AIR 1923 Pat 231 (236) = 2 Pat 296 (DB) ** (1903) 26 Mad 445 (447) (DB).]

4. Compound interest. — (1) Stipulation of enhanced rate of compound interest from the date of contract — Held, always penal. AIR 1918 PC 249 (250, 251) = 1918 Pun Re No. 124 ** (1907) 34 Cal 150 (157) = 34 Ind App 9 (PC). [See AIR 1959 Madh Pra 172 (177) = 1959 MPLJ 301 (DB).]

(2) The Courts do not lean towards compound interest, they do not avoid it in the absence of stipulation; but, where there is clear agreement for its payment, it is in the absence of disentitling circumstances allowed. AIR 1924 Bom 264 (268).

(3) Compound interest, at the same rate as the original rate of simple interest, from the date of default, is not penal. AIR 1939 Pat 360 (361) (DB) ** AIR 1935 Lah 38 (39) (DB) ** AIR 1934 All 152 (154) = 56 All 496 (DB) ** AIR 1934 Lah 321 (322) ** AIR 1934 Mad 31 (36) (FB) ** 1933 Mad WN 408 (409)

(DB) ** AIR 1931 Nag 91 (92) ** AIR 1928 Lah 601 (603) (DB) ** (1928) 10 Lah LJ 48 (51) ** AIR 1927 Mad 1143 (1143) (DB) ** AIR 1927 Nag 338 (338, 339) ** (1922) 64 Ind Cas 247 (248) (DB) (Pat) ** AIR 1921 Mad 378 (379) ** AIR 1920 Lah 238 (239) (DB) ** AIR 1919 Oudh 326 (328) = 22 Oudh Cas 194 (DB) ** AIR 1918 PC 48 (49) = 1918 Pun Re No. 101. (No relief can be given on the ground that the transaction is hard.) ** AIR 1918 Oudh 10 (12) = 20 Oudh Cas 318 ** AIR 1917 Pat 594 (594) = 2 Pat LJ 283 (DB) ** AIR 1915 Mad 1054 (1054) (DB) ** AIR 1915 Oudh 31 (43) (DB) ** AIR 1914 Lah 363 (365) = 1914 Pun Re No. 82 (DB) ** (1913) 9 Nag LR 78 (81) ** (1908) 4 Nag LR 187 (188) ** (1907) 34 Cal 150 (158) = 34 Ind App 9 (PC) ** 1904 Pun Re No. 58, p. 170 (171) (DB) ** (1903) 25 All 26 (26) (DB) ** (1903) 26 Mad 111 (112) (DB) ** 1963 BLJR 887 (890) (DB).

[See also AIR 1927 Lah 445 (446, 447) = 8 Lah 721 (DB). (Agreement to pay compound interest at same rate of simple interest is not penal, though in the deed there is to be found a further unenforceable condition that on default of payment of interest for 2 successive half years' interest, compound interest would be chargeable at an enhanced rate.)]

(4) Compound interest at enhanced rate from the date of default is generally held to be penal. AIR 1936 PC 283 (285) ** AIR 1953 SC 370 (373) = 1953 SCR 894 ** AIR 1958 Andh Pra 598 (604) = ILR (1957) Andh Pra 790 (DB) ** (1935) 18 Nag L Jour 220 (226). (Mortgage-deed — Provision for payment of simple interest at 1 per cent. annually — On default interest enhanced to $1\frac{1}{4}$ per cent. compound interest.) ** AIR 1934 Mad 31 (36) (FB) ** AIR 1932 Nag 169 (170) = 28 Nag LR 149 (DB). (Creditor is sufficiently compensated if he is allowed compound interest at original rate or simple interest at enhanced rate.) ** AIR 1931 All 203 (205) (DB) ** AIR 1928 Nag 120 (122) ** AIR 1928 Nag 74 (74, 75) ** AIR 1927 All 315 (315) (DB) ** AIR 1927 Nag 284 (286) ** AIR 1925 All 78 (78). (Stipulation to pay compound interest at Re. 1-8-0 p. c. p. m. in case of default to pay simple interest at Re. 1 p. c. p. m. is a penalty — It was reduced to Re. 1 p. c. p. m. compound interest.) ** AIR 1921 Mad 183 (185) = 44 Mad 301 (DB) ** AIR 1920 Nag 99 (102) (DB) ** AIR 1919 Mad 1117 (1122) (DB) ** AIR 1915 Mad 1054 (1054) (DB) ** AIR 1915 Oudh 31 (43) (DB) ** (1913) 20 Ind Cas 667 (669) (Oudh) ** (1910) 6 Nag LR 109 (113). (Either it should be reduced to simple interest at enhanced rate, or compound interest at the original rate.) ** (1909) 2 Ind Cas 111 (113) (Cal) ** (1909) 6 Mad L Tim 156 (156) (DB) ** (1907) 34 Cal 150 (157) = 34 Ind App 9 (PC) ** AIR 1963 Andh Pra 117 (119) = (1962)

Section 74 — Note 4 (contd.)

2 Andh WR 100 (DB). (Mortgage-deed imposing double penalty on mortgagor — Court while relieving mortgagor of double penalty competent to award reasonable compensation to mortgagee.)

[See also AIR 1923 Oudh 162 (163).]

(5) In the following cases, compound interest at enhanced rate from the date of default was held not penal. AIR 1936 Mad 871 (876) (DB) ** AIR 1925 Mad 302 (303) ** AIR 1924 Bom 264 (269) ** 1912 Pun LR No. 192, p. 608 (611) (DB).

[See also 1912 Mad WN 512 (513). (Rate same but half yearly rests instead of yearly.)]

(6) In awarding compensation, no rule of law can be laid down that in particular cases compound interest, at the original rate, should be allowed. (What the Court should give depends upon the circumstances of each case). The matter is in the discretion of the Court and the discretion ought to be judicially exercised. AIR 1934 Mad 31 (36) (FB).

(7) The Court sometimes may award to the plaintiff the rate of compound interest, which is higher than the original rate in case of default according to the secondary stipulation as a reasonable compensation. But it is not so bound to give. AIR 1934 Mad 31 (36) (FB).

(8) Stipulation for capitalization of interest and adding to principal and for payment of a higher rate of interest than the contract rate, held, penal. AIR 1939 Mad 481 (481, 482) (DB) ** AIR 1933 Oudh 190 (190) (DB) ** AIR 1918 PC 249 (250, 251) = 1918 Pun Re No. 124 ** AIR 1917 All 315 (315) (DB) ** AIR 1914 Mad 210 (210) (DB) ** 1879 Pun Re No. 51, p. 135 (136) (DB) ** AIR 1963 Andh Pra 117 (119) = (1962) 2 Andh WR 100 (DB) ** AIR 1958 Andh Pra 598 (604) = (1958) 1 Andh WR 255.

[See however AIR 1927 Mad 894 (897).]

(9) Interest at 24 per cent. per annum and after due date capitalization of interest on arrears is not necessarily penal. AIR 1919 Cal 467 (468) (DB).

5. Interest payable, if principal not duly repaid. — (1) Mortgage deed — No interest till redemption, which was to be within four years — Stipulation for payment of simple interest, in case of default — Section 74, Explanation, does not apply. AIR 1921 Lah 212 (212). (The interest is payable, not on the breach of any agreement, but in pursuance of the original contract.) ** 1911 Mad WN 134 (134) ** (1909) 19 Mad L Jour 630 (631) ** (1903) 26 Mad 445 (447) (DB).

(2) Where no interest is payable originally, and some interest becomes pay-

able only on default, agreement is penal. AIR 1928 All 255 (257) (DB).

(3) Payment by instalments without interest — Upon default of any instalment, stipulation for payment of interest on the whole amount from the date of the bond — Held, penal. AIR 1914 Mad 157 (158) ** AIR 1955 Pepsu 122 (126) (DB) ** AIR 1935 Lah 873 (874) (DB) ** (1906) 10 Cal WN 1020 (1023) (DB) ** (1903) 27 Bom 21 (22) (DB).

[See also AIR 1946 Pat 404 (405) (DB). (Instalment mortgage bond — Interest payable only if instalments are in arrears — Bond is interest-bearing bond though stipulation to pay interest may amount to penalty.)]

(4) Exorbitant interest from date of default may be a penalty within Section 74 even though no interest is payable until default. Act XXVIII of 1855 does not apply to secondary contracts providing for breaches of original contracts and does not intend to cut down equitable powers of Courts. (1913) 36 Mad 229 (238, 249, 251, 273) (FB). (25 Mad 343, 26 Mad 445 and 14 Mad L Jour 136, Overruled.) ** AIR 1932 Cal 53 (57, 59) = 59 Cal 613 (DB) ** AIR 1915 Cal 796 (800) = 42 Cal 652 (DB).

(5) Rs. 10,000 to be payable in 10 annual instalments — In the case of default interest at 1 per cent. p. a. on the entire amount from the date of default until realization — Held, not appeal. AIR 1928 Lah 857 (858) (DB).

(6) Debt — Payment on a fixed date — Upon default to carry interest at exorbitant rate on the entire sum from date of contract — Held, penal. AIR 1927 Lah 113 (114) ** AIR 1957 Madh B 185 (186) ** AIR 1925 Oudh 231 (233) = 28 Oudh Cas 51 (DB) ** AIR 1925 Oudh 72 (72) ** AIR 1919 Oudh 69 (70) ** (1912) 22 Mad L Jour 354 (354) (DB) ** (1896) 2 Upp Bur Rul 300 ** 1885 Pun Re No. 55, p. 116 (117) (DB).

(7) Payment of a debt at a fixed date — On default stipulation for payment of interest on the entire amount from the date of default at a low rate is not penal. 1910 Mad WN 616 (616) (DB). (Rate at 1½ p. c. p. m.) ** AIR 1927 Madh B 185 (187) ** 1891 Pun Re No. 99, p. 471 (472, 473) (DB). (Interest at rate of 2½ per cent.)

6. Reduced rate of interest on punctual payment. — (1) Covenant to accept interest at a reduced rate if interest is paid punctually does not make the original rate of interest a penalty. On default, creditor can recover at original rate. AIR 1921 Cal 109 (110) = 48 Cal 1036 (DB) ** AIR 1955 Pepsu 122 (126) (DB) ** ILR (1954) Madh B 464 (467) ** 1950 Bur LR (SC) 98 (108). (If the contract is for payment of the larger sum with a concession enabling a smaller sum to be paid in a particular

Section 74 — Note 6 (contd.)

way in full satisfaction, then Section 74 of the Contract Act would not apply.) ** AIR 1934 Bom 370 (372) = 58 Bom 610 ** AIR 1933 Lah 523 (524) ** AIR 1928 Rang 19 (20) = 5 Rang 573 (DB) ** AIR 1923 Lah 548 (551) = 4 Lah 258 (DB) ** AIR 1922 Nag 263 (264) ** AIR 1921 PC 118 (121) = 47 Ind App 265 ** AIR 1918 Cal 557 (568) (DB) ** AIR 1914 Mad 145 (148) (DB) ** (1910) 32 All 448 (449) (DB) ** (1908) 4 Nag LR 187 (188, 190) ** (1906) 10 Cal WN 640 (642).

7. Where the rate of interest is exorbitant. — (1) There cannot be stipulation by way of penalty unless there is another antecedent promise. What Section 74 means is that for a sum to be treated as a penalty it must be payable in case of a breach of an antecedent promise. A heavy rate of interest is not itself penal and cannot be relieved against. AIR 1918 Mad 574 (577) (DB).

[See also AIR 1936 All 712 (714) (DB).]

(2) Where the transaction was, undoubtedly, improvident, but there is no evidence to show that the money-lender had unduly taken advantage of his position it is difficult for Court of Justice to give relief on grounds of hardship. AIR 1918 PC 48 (49) = 1918 Pun Re No. 101 ** AIR 1935 Lah 38 (39) (DB) ** AIR 1934 Cal 511 (512) (DB) ** AIR 1927 Mad 620 (620, 621) = 50 Mad 614 (DB) ** AIR 1926 Cal 690 (690) (DB) ** AIR 1926 Oudh 408 (409) = 1 Luck 354 = 29 Oudh Cas 253 ** AIR 1926 Oudh 273 (275) = 1 Luck 160 (DB) ** AIR 1925 Cal 1193 (1194) (DB) ** AIR 1925 Lah 580 (580) ** AIR 1924 Lah 21 (24) = 4 Lah 76 (DB) ** AIR 1923 Cal 268 (268) (DB) ** AIR 1923 Cal 166 (166) = 49 Cal 1040 (DB) ** (1922) 35 Cal L Jour 209 (211) (DB) ** AIR 1922 Pat 491 (492) = 1 Pat 263 (DB) ** AIR 1921 Lah 53 (53) (DB) ** AIR 1920 Cal 829 (829) (DB) ** AIR 1920 Pat 678 (681) = 5 Pat L Jour 147 (DB) ** AIR 1919 Cal 413 (414) (DB) ** AIR 1919 Cal 278 (281) (DB) ** AIR 1919 Cal 258 (258) (DB) ** AIR 1919 Oudh 254 (255) (DB) ** AIR 1919 Pat 293 (297) = 4 Pat L Jour 565 (DB) ** AIR 1918 Cal 552 (553) (DB) ** AIR 1918 Cal 473 (474) (DB) ** AIR 1917 Pat 689 (690) (DB) ** AIR 1914 Mad 157 (158) ** (1913) 11 All L Jour 155 (156) ** 1913 Pun LR No. 235 p. 784 (788) (DB).

[See also AIR 1922 PC 347 (349) ** (1874) 21 Suth WR 352 (355) (DB). (Loan with interest at 18 per cent — Ijara for ten years to be given as security for the loan — On failure to give the security and pay the interest principal with interest at 75 per cent. to become payable. Held, that in the absence of undue influence etc., the

contract could not be deemed unreasonable or oppressive.)]

(3) The circumstance that the interest was at compound rate would by itself not be sufficient to show that the contract rate of interest was extortionate or unreasonable. AIR 1959 Madh Pra 172 (177) = 1959 MPLJ 301 (DB).

(4) That interest is compound or excessive or amounts to a large sum is no reason for interference. Debtor should show why his contract should not be enforced. AIR 1930 Cal 207 (208) = 56 Cal 960 (DB) ** AIR 1927 All 538 (538) ** AIR 1927 Lah 755 (755) (DB).

(5) Contract for payment of interest at exorbitant rate though not within Section 74 may amount to penalty. AIR 1918 Cal 334 (334) (DB) ** AIR 1917 Cal 630 (632) = 43 Cal 632 (DB) ** AIR 1917 Cal 502 (504) = 44 Cal 162 (DB) ** AIR 1916 Cal 771 (773) (DB).

(6) Original bond hard and unconscionable providing high rate of interest — On default, further interest at same rate as original from date of default — Stipulation applicable after default, held not penal. 1901 Pun Re No. 96, p. 324 (326, 327).

(7) An agreement to pay interest at the rate of Rs. 12-12-0 per cent. per annum is not unconscionable nor can such an agreement become so, merely because there is stipulation to pay compound interest, at the same rate, in the event of there being a default in the payment of the simple interest agreed upon. AIR 1920 Lah 238 (239) (DB).

(8) Where a bond was executed and the actual money advanced was less than half, while the balance was made up of interest, calculated in advance at an enormous rate and a provision was made in the bond for payment of enhanced rate of interest if default was made in the payment of instalments. Held, that the addition of interest in advance and the stipulation for enhanced rate of interest was penal and hence unenforceable. (1912) 36 Bom 164 (167, 168) (DB).

(9) Where the necessity for borrowing by a manager of a joint Hindu family is proved but necessity of a very high rate of interest or other onerous terms is not proved, then only ordinary commercial rate of interest and conditions should be allowed. AIR 1919 PC 12 (13) = 41 All 571 = 46 Ind App 145.

(10) Where the interest amounts, in 5 years, to a sum equal to the principal, it is not excessive. (1911) 9 Ind Cas 927 (928) (DB) (Lah).

(11) The circumstances in which a loan is incurred must be considered to determine whether a provision for compound interest agreed to be paid by a

Section 74 — Note 7 (contd.)

Hindu widow is reasonable or not — Borrowing of money at 12 per cent. compound interest by a widow for necessity held not unreasonable. (1911) 34 Mad 188 (196) (DB).

(12) Interest at As. -12- per cent. on mortgage bond stipulated to be increased to 1 per cent. in case of default in payment of interest for any three months. Enhanced interest is not excessive. AIR 1925 Sind 164 (165) = 19 Sind LR 237.

8. "Reasonable compensation". — (1) Section 74 recognises the right to reasonable compensation on breach of contract, which must mean some sort of compensation however small. AIR 1937 Nag 205 (208) = ILR (1937) Nag 367 ** AIR 1965 J & K 28 (31) = 1964 Kash LJ 352. (Granting of one half of the total compensation claimed under a clause of the contract is not unreasonable.)

(2) It is only in cases where the damages are by way of penalty that the Court has the power under Section 74 to fix reasonable damages. (1966) 68 Pun LR 619 (620). (AIR 1962 SC 1314 and AIR 1963 SC 1405, Followed.)

(3) Whatever the distinction between liquidated damages and penalty may be, Section 74 is broad enough to include both classes of cases and the section gives wide discretion to the Court, in the assessment of damages, even in cases, where the parties to the contract have, in anticipation of the breach, expressly determined by agreement the sum payable as damages for the breach. Court is not bound to award the entire amount agreed upon and at the same time cannot decree damages exceeding the amount previously agreed upon by the parties. There is no specific limitation for the reduction of amount payable as damages, though the words "reasonable compensation" necessarily imply that the discretion must be exercised with care, caution and on sound principles. (1883) 5 All 238 (241, 242) (DB) ** AIR 1931 Mad 137 (138) (DB) ** AIR 1930 Mad 428 (428) (DB) ** AIR 1928 Nag 74 (74) ** (1921) 62 Ind Cas 759 (760) (DB) (Call ** 1875 Pun Re No. 3 p. 7 (8, 9) (DB) ** 1968 Ker LT 713 (715) = 1968 Ker LJ 757 ** AIR 1964 J and K 26 (31) = 1964 Kash LJ 49 ** AIR 1962 J and K 77 (78) = 1962 Kash LJ 192 (DB) ** AIR 1959 Bom 452 (453, 454) = 59 Bom LR 1071.

(4) Where the parties have deliberately specified the amount of liquidated damages there can be no presumption that they at the same time, intended to allow the party who has suffered by the breach to give a go by to the sum specified and claim instead a sum of money

which was not ascertained or ascertainable at the date of the breach. AIR 1962 SC 1314 (1319) = (1962) Supp (3) SCR 549 = 65 Bom LR 267.

(5) Section 74 says that the compensation that can be awarded should not exceed the penalty stipulated for which shall be treated as the ceiling as it were. 1968 Ker LT 713 (715) = 1968 Ker LJ 757.

(6) The damages awarded cannot exceed the sum of money specified in the contract, but can exceed the actual damage or loss proved. AIR 1926 Nag 473 (474) ** AIR 1957 Cal 217 (219) ** AIR 1955 Cal 315 (318).

(7) If the obligation of the promisor is to pay a certain sum of money and it is agreed that if he fails to do so, he shall pay a larger sum, that larger sum will not normally be a "reasonable compensation". AIR 1953 Trav-Co 464 (464) (DB).

(8) Higher rate of interest from date of default is penal — In awarding compensation on breach, Court's discretion is not restricted to contract rate. AIR 1939 Pat 457 (459) (DB).

(9) If other evidence and circumstances indicate that the damage equals or is likely to exceed the amount named, then the Court will abide by the amount named. AIR 1934 Cal 285 (287) = 60 Cal 1379 ** AIR 1955 Raj 87 (90) = ILR (1954) 4 Raj 755 (DB) ** AIR 1947 Lah 112 (116) (DB) ** AIR 1931 Oudh 33 (34) = 6 Luck 321 (DB) ** AIR 1929 Lah 249 (252) (DB) ** AIR 1925 Pat 64 (65) = 3 Pat 657 (DB) ** AIR 1915 All 40 (41) ** (1913) 18 Ind Cas 183 (185). (Low Bur.) ** AIR 1963 SC 1405 (1411, 1412) = (1964) 1 SCR 515 ** AIR 1959 SC 1357 (1362) = (1960) 1 SCR 569. (Contract providing measure of liquidated damages — Arbitration in London — Arbitrators awarding maximum amount named in contract — Award not bad on face of it as being contrary to laws of India.) ** 1967 All LJ 126 (129, 130) = ILR (1966) 2 All 307 (DB) ** ILR (1966) 2 Punj 714 (DB) ** AIR 1960 Punj 637 (638, 639) = 62 Punj LR 650 (DB).

(10) If a Court finds the terms of the bond penal and the obligee only entitled to reasonable compensation and if the parties proceed to substitute what in their opinion would be the most reasonable compensation likely to be awarded by Court, such substituted amount would be the amount due. AIR 1929 Mad 794 (796) = 53 Mad 127 (DB).

(11) Under Section 74 the plaintiff must prove his damage in the general sense. AIR 1934 Cal 285 (287) = 60 Cal 1379 ** AIR 1963 Andh Pra 310 (311, 312) = (1963) 1 Andh WR 149 ** AIR 1958 Andh Pra 533 (541) = (1958) 2 Andh WR 153 (DB). (Compensation

Section 74 — Note 8 (contd.)

claimed for delay in completion of work — No proof of loss — Claim not allowed as such a claim is one for penalty.)

(12) It is a fact to be determined in each case whether the sum named in the contract is a genuine pre-estimate or just a sum fixed. In the former case, the sum named in the agreement may be decreed as a reasonable compensation under Section 74 but the plaintiff must prove the damages suffered by him. AIR 1955 Raj 87 (89) = ILR (1954) 4 Raj 755 (DB) ** AIR 1964 J and K 26 (29) = 1964 Kash LJ 49.

(13) If the plaintiff has sustained legal injury he is entitled to receive compensation whether or not actual damage or loss is proved to have been caused by the breach. The section dispenses with proof of actual loss or damage. 1968 Ker LT 713 (715) = 1968 Ker LJ 757 ** AIR 1963 SC 1405 (1411, 1412) = (1964) 1 SCR 515 = 1967 All LJ 126 (129, 130) = ILR (1966) 2 All 307 (DB) ** AIR 1967 Ker 195 (196). (Vendor's failure to pay mortgage debt as stipulated in agreement for sale — Vendee entitled to damages — Actual damages need not be established.)

(14) Where the clause relating to the award of damages as consequence of the breach of the contract is an integral part of the contract and has been added as a guarantee for the performance of the contract, and the sum fixed is pre-estimate of damages, agreed to by the parties, the Court should normally carry out the terms of the contract and grant damages as agreed to between the parties. AIR 1964 J and K 26 (29) = 1964 Kash LJ 49.

(15) Where the other evidence in the case shows that the amount named in the contract as payable on breach thereof is excessive and unreasonable, the plaintiff will have to prove his damages irrespective of the figure. AIR 1934 Cal 285 (287) = 60 Cal 1379 ** AIR 1935 Pesh 57 (58) ** AIR 1929 PC 179 (180) ** AIR 1956 Cal 41 (44) (DB).

(16) The contract made by the parties is in itself evidence and if there is no other evidence of damage this evidence alone will be considered sufficient. AIR 1934 Cal 285 (287) = 60 Cal 1379 ** AIR 1940 Sind 1 (10) (DB) ** 1937 All LJ 1385 (1386) ** (1912) 13 Ind Cas 43 (47) (DB) (All) ** 1910 Pun LR No. 148 p. 404 (406).

(17) The sum named in the contract is not conclusive evidence of damages, and if there is other evidence or circumstances showing that it was excessive, the Court will not consider itself bound by it. AIR 1934 Cal 285 (287) = 60 Cal 1379.

(18) Damages which are not direct result of defendant's action, or which are not contemplated cannot be recovered. AIR 1934 All 525 (526) (DB).

(19) As a general principle, the damages decreed must be commensurate with the injury sustained, when the injury consists of the breach of contract. Court acting upon the above principle would assess damages with a view to restore to the plaintiff such advantage as he might reasonably be expected to have derived from the contract had the breach never occurred. (1883) 5 All 238 (242) (DB).

(20) Enhanced rate from date of default — Held, reasonable compensation, not exceeding the penal rate, should not be less than the original rate. AIR 1923 Oudh 162 (162).

(21) A penal rate of interest on a mortgage bond may be reduced but should not be wholly disallowed. AIR 1919 Cal 860 (860) (DB).

(22) The fact that under Section 74 the Court is given power to reduce the rate of interest fixed in a mortgage bond does not make the interest awarded at the reduced rate any less a claim under the bond and the charge created by the bond will be available also for the interest so awarded. AIR 1934 Mad 695 (696) = 58 Mad 266 (DB).

(23) Loan on mortgage payable by yearly instalments with interest — Defaulted instalment to bear compound interest at higher rate — On default of three instalments whole sum to become exigible — Default made — Only simple interest on exigible sum could be awarded. AIR 1928 Nag 67 (67) = 23 Nag LR 168.

(24) Where a mortgage-deed stipulated interest of twelve annas per cent. per mensem and in case of default in payment of interest annually, the mortgagor made himself liable to pay interest at the rate of two per cent. per mensem on the unpaid interest till the payment of the entire mortgage money: Held that the provision for interest on interest was intended only as compensation to the mortgagee in the event of default on the part of the mortgagor and that if the provision was considered penal, the plaintiff could reasonably claim compensation at the rate charged by him. AIR 1933 Oudh 81 (82) (DB).

(25) In order to determine the reasonableness of a particular rate of interest, the whole conditions and the terms of lending must be considered together. AIR 1932 Mad 97 (99) (DB) ** AIR 1935 Mad 1072 (1073).

(26) Where the provisions as to interest are penal, it is the duty of the Court to decide what reasonable compensation should be awarded to a creditor, when a default is made by the debtor in the payment as stipulated, and the mere fact that the creditor has himself deemed it advisable to only claim compound interest at a lesser rate than the one provided in mortgage-deed does

Section 74 — Note 8 (contd.)

not necessarily preclude the Court from granting even a lower rate than that. AIR 1928 Nag 120 (122).

(27) Interest — Agreed rate not proved — 25 per cent. compound interest claimed — Considerable part of debt made up of previous interest at 25 per cent. — Award of 6 per cent. is not too low. AIR 1925 Lah 450 (451).

(28) Where the plaintiff failed to prove that 24 per cent. per annum with yearly rests was the market rate of interest on the transaction in suit: **Held**, that the market rate of 12 per cent per annum, with yearly rests, should be awarded. AIR 1924 Pat 580 (582) = 3 Pat 465 (DB).

(29) Court is not compelled to allow rate of interest, not reserved in contract, but claimed in suit. AIR 1938 Nag 112 (113) = ILR (1938) Nag 91 (DB).

(30) Where a penal rate is a common rate of interest in every day transactions, e.g., a rise from 10½ annas per cent. per mensem to 12 annas per cent. per mensem compound interest in default, it can be allowed as compensation under Section 74. AIR 1915 Mad 529 (530) (DB).

(31) Under Section 74 a Court cannot enforce a contract by which, if the principal with interest at 12 per cent. is not paid, double the amount shall become payable even if the interest is to be paid in paddy instead of in money. (1878) 1 Mad 349 (350, 351) (DB).

(32) Where a grain bond provided that on failure to repay at a certain date, the defendant would be liable to pay interest at 37½ per cent. per annum, and the plaintiff waited for six years before enforcing the bond by which time the original claim for Rs. 400 had risen to Rs. 1,700: **Held**, that the prayer of the plaintiff is not for the performance of the contract but for compensation for breach, and it is the Court's duty to grant compensation having regard to all the circumstances of the case. AIR 1923 Lah 452 (453) (DB).

(33) Contract for purchase of property — Penalty in case of breach by vendee — Default by vendee — Default due to failure of vendor to carry out his part of contract — **Held**, vendor could not ask for enforcement of provision contained in penalty clause — Further even if vendor had not been in default if no loss was made out by vendor, vendee was not entitled to any relief. AIR 1922 PC 339 (341).

(34) Where the contract of sale itself provided that in the event of a breach, Rs. 3,200 were to be paid as damages by the party failing to perform his part of the contract: **Held**, that in the absence of any equitable ground for interference, the stipulated sum should be decreed as damages. AIR 1925 Lah 284 (286) (DB).

(35) Merely because an agreement provides for more than the difference between the contract price and the market price the provision is not contrary to law. ILR (1955) 1 Cal 29 (36) (DB).

(36) The right of resale, after the breach of contract to purchase, may be allowed as a means of ascertaining damages subject to the rule of reasonable compensation contained in Section 74, and is not limited to cases where property has passed to the buyer. AIR 1915 Sind 46 (47) = 9 Sind LR 20.

(37) Certain goods worth Rs. X were contracted to be delivered annually — **Held**, Rs. X were not the maximum damages that could be paid by way of compensation on breach of agreement, the amount not being liquidated damages but being only the price of goods. (1894) 4 Mad LJ 201 (203) (DB).

(38) The suppliers of an oil plant entered into stringent guarantees with the purchaser in respect of (a) capacity, (b) efficiency and (c) economy, and by subsequent agreement named a figure as damages to be paid in case of non-fulfilment of the guarantees. On holding tests, the guarantee as to efficiency was not fulfilled. In a suit by the purchaser for damages: **Held**, that the amount was not excessive or unreasonable and being a genuine pre-estimate of damages, it was awarded. AIR 1934 Cal 285 (288) = 60 Cal 1379.

(39) Breach of warranty of petrol consumption of a car — Assessing damages at extra running costs for supposed life of motor is unreasonable. AIR 1934 All 392 (393) (DB).

(40) Reasonable compensation — Question of fact — Cannot be challenged in second appeal. AIR 1934 Pat 16 (18) ** AIR 1935 Mad 1072 (1073) (DB).

(41) Where the Courts have disregarded their duty to award only reasonable compensation not exceeding the amount specified, the mistake may be rectified, even though the point is first raised in second appeal. (1897-1900) 2 Upp Bur Rul 333.

(42) Contract to sell and deliver soda water plant — Extension of time — Compensation named in event of not completing contract within extended time — Breach — Sum stipulated as compensation per day, held was liquidated damages — Reasonable compensation awarded. AIR 1955 Cal 315 (319).

(43) Where an employer commits a breach of contract of service by dispensing with the service of his employee earlier than the stipulated period, the amount of compensation for breach of the contract would naturally be the salary that the employee would have earned from the breach of contract. If however he gets another employment at a higher salary it would be reasonable to award him only the salary for that

Section 74 — Note 8 (contd.)

period of contract during which he remained unemployed. (1950) 3 Sau LR 290 (291).

(44) Section 74 of the Contract Act is consistent with the right of the Government to collect penalty mentioned under Rule 29 of A. P. (Telangana Area) Forest Contract Rules (as framed under A. P. Act 2 of 1355-F) and Clause 7 of the forest agreement after the contract has been terminated merely because the contractor is allowed to continue the contract until the date of termination the Government is not precluded from collecting the whole penalty in view of Rule 31 (3) of the above Rules. AIR 1968 Andh Pra 198 (205) = ILR (1969) Andh Pra 12 (DB).

9. Exception. — (1) Where a person enters into a bond with a District Board under Article 498 of the Local Fund Code, which provides for forfeiture of the amount, deposited as earnest money or security for the due fulfilment of the contract, the contract falls within the exception to Section 74 of the Contract Act and the whole sum mentioned as penalty is payable. 1910 Mad WN 686 (687) (DB).

(2) Bond given for the performance of public duty (right to collect market fees) but not under the provisions of any law — Bond held not within exception to Section 74 not being a bail bond or recognizance. (1908) 31 Mad 54 (58).

(3) A bond in favour of the Secretary of State for India under which defendant was liable to pay Rs. 200 if he failed to perform his duties as hospital assistant and to pay Rs. 400 if he failed both to perform such duties and also to pay Rs. 200 is not a bond coming within exception to Section 74. (1909) 3 Sind LR 122 (123, 124) (DB).

(4) Administration bond executed under Section 78 of the Probate and Administration Act in favour of a District Delegate in respect of the grant of letters to the estate is not within the exception to Section 74. (1921) 64 Ind Cas 366 (368) (DB) (Cal).

(5) An administration bond executed under Section 256 of Succession Act does not fall within the exception to Section 74 of Contract Act and the assignee of such bond (under Section 257 of Succession Act) cannot recover more damages than he proves to have resulted to himself or those interested in the bond on which he relies. (1888) 10 All 29 (34, 35) (DB).

(6) A entering into contract with Municipality depositing Rs. 500 as security for due performance of contract and agreeing that security be forfeited on breach. Held, contract was not within the exception to Section 74, since the bond was not given under the provisions

of any law. (1893) 16 Mad 474 (475) (DB).

(7) Contract with Secretary of State to fell, remove and purchase timber and firewood — District Forest Officer having right to rescind the contract in case of breach of conditions and payment of sums named in contract as payable in case of breach of conditions — Breach of condition — Held, that the case did not fall within the exception to S. 74. AIR 1925 Bom 227 (230) = 49 Bom 194 (DB).

(8) Although the exception says that the person entering into the bond shall be liable upon breach of the bond to pay the whole sum mentioned therein, that does not mean that the Court is bound to exact the whole of the liability to the extent of the amount mentioned in the bond and to pass a decree for the whole amount. The Court's discretion is not entirely taken away and the Court can reduce the amount of the penalty according to the circumstances of the case. AIR 1921 Bom 447 (448) = 45 Bom 1213 (DB) ** AIR 1926 Nag 435 (444).

(9) Section 74 will not apply to surety bonds executed in favour of Courts. 1968 Cur LJ 199 (203) = 70 Pun LR 237.

10. Instalments — Illustrations (f) and (g). — (1) The principle underlying illustration (f) is that the whole of the debt being payable immediately the creditor agrees with the debtor to allow him to pay the amount by instalments so long as he pays them regularly. But the principle underlying Illust. (g) is that debtor by paying consideration gets the right to retain and use the amount of each instalment until the date of its becoming due and payable. If therefore in such a case the debtor commits breach and fails to pay one instalment, no doubt he becomes liable to pay to the creditor damages for breach but to be called upon to pay the whole of the balance in spite of the fact that he has given consideration for withholding the amounts of the other instalments till their respective due dates, would be in the nature of a penalty. AIR 1925 Mad 177 (180).

(2) An agreement to pay an amount by a given date with condition that on default a larger sum shall be paid is in the nature of a penalty. But if there is an agreement to pay a particular sum followed by a condition allowing to the debtor, as for example, the payment of a lesser sum or payment by instalment by a particular date or dates, then the party seeking to avail of the concession must carry out strictly the conditions on which it was granted and there is no power in the Court to relieve him from this obligation. AIR 1943 Pat 403 (405) (DB) ** AIR 1943 Sind 247 (251) = ILR

Section 74 — Note 10 (contd.)

(1943) Kar 245 (DB). (Consent decree — Amount admitted to be due Rs. 5,000 — Amount to be paid by instalments Rupees 3,200 — On failure to pay instalment, claim to admitted amount to revive — Stipulation not penal.) ** AIR 1941 Sind 196 (198) = ILR (1941) Ker 389 (DB) ** AIR 1935 Rang 341 (342) ** AIR 1931 Lah 696 (701, 702) (DB). (Creditor agreeing to accept lesser amount.) ** AIR 1931 Sind 42 (43) = 25 Sind LR 279 (DB). (Case of instalment-bond.) ** AIR 1929 All 558 (559) (DB) ** AIR 1927 Mad 965 (967) (DB) ** AIR 1926 All 278 (280, 282) (DB). (Compromise decree — Concession of payment by instalments.) ** AIR 1916 Cal 391 (392) (DB).

[See also AIR 1917 Mad 90 (93) (DB) ** (1911) 7 Nag LR 46 (47, 48).]

(3) Stipulation that on default the whole amount becomes due and should be paid with interest is not penal. AIR 1917 Pat 410 (411) (DB).

(4) Debt repayable in four instalments with simple interest at 1 per cent. per mensem — Defaulted instalments were to carry interest at 2 per cent. per mensem — On default of two instalments whole amount was recoverable with interest at 2 per cent. per mensem — **Held**, that the rate was not per se penal. (1936) 18 Nag LJ 267 (272).

(5) Money payable by instalments — In case of default of any instalment, payments made till then to be forfeited — Term as to forfeiture is penal. AIR 1915 PC 94 (95) ** AIR 1940 Oudh 257 (259) = 15 Luck 550 ** AIR 1930 Bom 306 (315) = 54 Bom 381.

(6) Principal and interest consolidated to be paid in instalments — Further stipulation making the whole amount due on default of instalment is penal. AIR 1922 Nag 49 (50).

(7) Provision to pay interest on default of amount of chit or instalments remaining unpaid — Provision for payment of whole amount within a month of default of further instalment is penal as the subsequent instalment is payable only after that month. AIR 1928 Mad 245 (245, 246).

(8) Compromise decree — Instalments — Stipulation to pay whole amount on default of one instalment — Further clause that interest at 36 per cent. will be payable — Clause is penal. AIR 1916 Cal 391 (392) (DB).

(9) Stipulation in compromise decree that appeal would stand dismissed in the event of failure to pay any one of the instalments on the due dates is penal in character. (1968) SCWR 45 (47, 48) = 1968 SCD 309.

(10) On default whole amount payable with enhanced interest — Stipulation is penal and Court may cut down the enhanced interest. AIR 1929 Mad 432 (436)

(DB) ** 1887 Pun Re No. 106 p. 239 (240) (DB).

(11) Compound interest to be paid on default of one instalment — On default of 3 successive instalments whole amount to become due — **Held**, that stipulation as to whole amount becoming due was penal. AIR 1926 Nag 90 (92) = 22 Nag LR 23 (DB) ** AIR 1926 Nag 484 (485).

(12) A stipulation that future interest shall be paid in a lump sum on a default occurring in the payment of any instalment can be relieved against under Section 74. (1911) 7 Nag LR 46 (47, 48) ** 1884 All WN 105 (105).

(13) Mortgage decree on award — On default of two instalments, mortgaged property to be sold for balance found due — Case is not one of penalty or forfeiture. AIR 1949 Bom 97 (98, 99) = ILR (1948) Bom 654 (FB). (AIR 1926 Bom 81; AIR 1922 Bom 170, Overruled.)

11. Hire-purchase agreements. — (1) The seizure clause in a hire-purchase agreement, however severe in its terms, is not a stipulation by way of penalty within the meaning of Section 74. AIR 1930 Rang 193 (195) = 8 Rang 236 ** AIR 1934 Nag 151 (151, 152) = 30 Nag LR 343 ** AIR 1955 Nag 269 (271) = ILR (1955) Nag 860 (DB).

[But see AIR 1929 Rang 368 (371) = 7 Rang 431.]

(2) Contract of hire — Hirer to pay the value of the article if he failed to return it — Section 74 does not apply. AIR 1928 Cal 57 (59) (DB).

(3) Hire-purchase contract — Stipulation for payment of unpaid instalments without any set off of price of goods sold, after seizure is not by way of penalty. AIR 1965 Pat 214 (216, 217) = 1965 BLJR 115.

12. Deposit — Forfeiture of. — (1) The Contract Act makes no special provision for the recovery of earnest-money paid on failure of the other party to perform its part of the contract. The remedy is merely one under Section 73 for loss or damage caused to a person by another person who has broken a contract. AIR 1927 All 621 (622) = 50 All 82 (DB). (The right to sue for recovery of earnest money is not transferable.) ** AIR 1917 Mad 161 (161) (DB). (The general right to damages remains unaffected by the forfeiture of any deposit although in estimating the damages, the amount may go towards mitigating the claim.)

[See also AIR 1926 Mad 410 (411) (DB). (Contract for sale of goods — Deposit by buyer — Breach of contract by buyer — **Held**, that seller was not entitled to keep the deposit irrespective of the damage suffered.)]

(2) Where instead of naming the amount to be paid in case of breach or stipulating for a penalty a sum is actually paid to the seller as earnest money to be appropriated towards the price or

Section 74 — Note 12 (contd.)

to be returned to the intending purchaser on failure of the sale for a fault not on the part of the purchaser or to be forfeited for default of the purchaser such a contract is entirely different than the contract contemplated by S. 74 of the Contract Act and it has no application to such a case. (1960) 64 Cal WN 396 (401).

(3) Where a contract to sell is rescinded, the seller must restore the benefits he has received under it under Section 64 if he rescinds it himself, and under Section 65 if the purchaser rescinds it, that is to say, he must refund the earnest money. But when the seller rescinds it himself, if he has suffered any actual damage he is entitled to get compensation for it under Section 73 and even if he has suffered none he can be awarded a reasonable amount as compensation not exceeding the earnest money if there is the usual agreement of forfeiture in the contract under Section 74. Either sum awarded as damages can be set off against the amount of earnest money he has to refund. AIR 1927 Nag 168 (169).

(4) In a suit for breach of a contract in calculating damages the deposit forfeited under the contract must be credited to the defendant. AIR 1949 Sind 1 (4) (DB).

(5) The furnishing of security for due fulfilment of contract is a part of the contract. When security forms part of the contract, the party breaking the contract cannot demand performance thereof by the other party, and consequently cannot claim refund of the security money, deposited for fulfilment of the contract. Departure from this rule can be made in those cases only where it is specifically provided in the agreement that the security money shall be liable to forfeiture only to the extent of the loss suffered or damage caused. 1965 All LJ 969.

(6) Stipulations providing for forfeiture of sums deposited or payment in advance as security for the performance — When transaction falls through by promisees' default, forfeiture will not be interfered with if deposit is a reasonable proportion of the amount payable under the contract. AIR 1942 Cal 382 (385). (Section 74 does not apply.) ** AIR 1958 Mys 10 (14) = ILR (1957) Mys 72 (DB) ** AIR 1956 Vindh Pra 42 (43) ** AIR 1955 Nag 38 (40) = ILR (1955) Nag 538 (DB). (Contract for sale of building — Defect in vendor's title — Breach of contract by Vendor — Vendee has right to return of earnest money.) ** AIR 1955 Orissa 20 (23, 24) (DB) ** AIR 1955 Orissa 11 (13) = ILR (1954) Cut 526 (DB). (Section 74 does not apply to deposits paid as a guarantee for the fulfilment of the contract.) ** AIR 1954 Madh B

134 (134) ** AIR 1952 Cal 93 (98). (Section 74, by its very terms, is inapplicable to cases of earnest money.) ** AIR 1952 Punj 380 (381) ** AIR 1952 Raj 187 (188) = ILR (1952) 2 Raj 5 ** AIR 1952 Sau 88 (90) ** AIR 1951 Mad 752 (753) ** AIR 1950 East Punj 278 (281) (DB). (Where the buyer is in default the seller is entitled to forfeit the earnest money, but if default is of the seller the buyer is entitled to the refund of the earnest money.) ** AIR 1947 Nag 193 (200) = ILR 1947 Nag 60 (DB) ** (1947) 52 Mys HCR 56 (67) (DB) ** AIR 1941 Mad 108 (109) ** AIR 1935 Lah 192 (193) (DB) ** AIR 1930 Bom 213 (214) (DB) ** AIR 1929 Nag 30 (32, 34) = 24 Nag LR 189 (FB). (AIR 1925 Nag 109, Not approved.) ** AIR 1927 Cal 964 (964, 965) = 55 Cal 638 (DB) ** AIR 1927 Lah 721 (721) (DB) ** AIR 1927 Mad 328 (329) ** AIR 1926 PC 1 (2) ** AIR 1926 Cal 339 (343) (DB) ** AIR 1923 Lah 363 (366) (DB) ** AIR 1923 Rang 47 (48) = 11 Low Bur Rul 420 ** AIR 1922 Cal 104 (104) = 55 Cal 642n (DB) ** AIR 1922 Nag 104 (105) = 19 Nag LR 131 ** AIR 1920 Cal 931 (932) (DB) ** AIR 1919 All 265 (267) = 41 All 324 (DB) ** AIR 1916 Cal 974 (975) (DB) ** AIR 1916 Mad 584 (585). (S. 74 does not apply.) ** AIR 1916 Sind 4 (7) = 10 Sind LR 4 (DB). (Seller seeking further damages must give credit for the deposit.) ** AIR 1915 Mad 546 (547) (DB) ** (1911) 33 All 166 (167) (DB) ** (1909) 36 Cal 960 (963) (DB) ** (1906) 29 Mad 118 (119) ** (1966) 68 Bom LR 891 (900) = 1966 Mah LJ 446. (Agreement by guardian on behalf of minor.) ** AIR 1964 Madh Pra 126 (128, 129) = 1963 MPLJ 184 (DB). (In finding out whether an amount paid by the purchaser is a part payment of the price or an earnest money, the proportion it bears to the total consideration in the bargain is of some significance. The larger the proportion, the lesser the probability of its being earnest money properly so called.) ** AIR 1962 J and K 77 (77, 78, 79) = 1962 Kash LJ 192 (DB). (Section 74 has no application to a deposit for due performance of the contract. It is the party aggrieved that can recover compensation for damages from another party who breaks the contract. But a party who himself has not fulfilled his obligations under the contract cannot invoke Section 74.) ** AIR 1959 Pat 176 (180) = 1958 BLJR 626. (AIR 1925 Nag 109, Diss. from.)

[See also AIR 1958 Punj 111 (115) = ILR (1958) Punj 294 (DB). (Vendor guilty of breach of contract — Vendee held entitled to get back his earnest money.) ** AIR 1957 Punj 141 (144) = ILR (1957) Punj 783 (DB). (Plaintiff held did not fail to perform, his part of the contract — Defendant not en-

Section 74 — Note 12 (contd.)

titled to forfeit security deposited for due performance of the contract.) ** AIR 1955 Mad 717 (717). (Deposit of money for due performance of contract within time — Absence of forfeiture clause — Failure to perform contract — Deposit should be returned.) ** AIR 1953 Mys 66 (68) = ILR (1952) Mys 230 (DB). (Contract for sale of goods — Buyer paying advance — Breach of contract — Both parties at fault — No provision for forfeiture of advance — Buyer held entitled to return of the advance.) ** AIR 1926 All 469 (469). (Plea that improvement trust may acquire the property is no justification for rescission by purchaser.) ** AIR 1942 Sind 37 (39) = ILR (1941) Kar 495 (DB) ** AIR 1963 Andh Pra 216 (220, 221) = (1963) 1 Andh WR 31 (DB). (Deposit of earnest and security forfeiture — Contract containing formalities to be followed upon non-performance of contract within time — Formalities not followed — Amount held could not be forfeited.) ** AIR 1963 Andh Pra 71 (71, 72) = (1962) 2 Andh WR 254. (Forfeiture of deposits made for due performance of contract — Section 74 not applicable — Express agreement providing for forfeiture not necessary.) ** AIR 1960 Cal 524 (531) = 64 Cal WN 798 (DB). (Deposit by buyer — Breach of contract forfeiture of deposit — Buyer is entitled to obtain refund of money paid by him whether such payment is regarded as advance simpliciter or as guarantee for future performance of contract.)

(7) Contract for sale of goods — Provision for recovery of costs for undelivered quantity — Stipulation as to forfeiture of security amounts to penalty — No actual loss to buyer — Seller entitled to refund of whole deposit. 1963 All LJ 251 (253) = 1963 All WR (HC) 206.

(8) Whether some amount is paid by way of earnest money or kept in deposit for the due performance of any obligation under the contract, it is always for the Court to determine under Section 74 what amount, if any, would be "reasonable compensation" under the circumstances of a particular case. AIR 1947 Lah 112 (116) (DB) ** AIR 1953 Orissa 105 (110) (DB) ** AIR 1963 SC 1405 (1411, 1412) = (1964) 1 SCR 515. (Application of section not restricted to cases where aggrieved party claims relief as plaintiff. AIR 1952 Bom 310 and AIR 1915 Mad 896 (FB), Overruled.) ** (1969) 1 Mad LJ 474 (479). (Vendor must plead and prove damage suffered by him.) ** 1967 All LJ 126 (135) = ILR (1966) 2 All 307 (DB) ** AIR 1966 Orissa 76 (79) = 32 Cut LT 521. (Deposit under Rule 8 of Orissa Forest Contract Rules — Its forfeiture

under Rule 34 (3) (e) is by way of penalty.) ** (1961) 63 Punj LR 167 (169). (Court has discretion to award reasonable compensation not exceeding security deposit.)

(9) Where the Court finds that the amount of deposit or payment in advance is so great in comparison with the amount payable under the contract that the parties under the stipulation for forfeiture could not have intended it as merely a security for performance, but rather as a punishment for non-performance of the contract, the Court can grant relief against forfeiture. AIR 1944 Mad 526 (527) = ILR (1945) Mad 269 (DB) ** AIR 1956 Vindh Pra 42 (43) ** (1947) 52 Mys HCR 56 (68) (DB) ** AIR 1937 Bom 417 (421) = ILR (1937) Bom 782 (DB). (Contract between plaintiff and Municipality — Plaintiff undertaking erection of building within certain time — Amount deposited to be returned to plaintiff if work finished within time — Plaintiff completing work and demanding refund of deposit — Municipality contending deposit forfeited, work not having been finished within time — Deposit held was by way of penalty within Section 74, Contract Act.) ** AIR 1937 Mad 681 (683, 684) ** AIR 1959 Ker 273 (274, 275) = 1958 Ker LT 801. (The provision in the security bond for a deposit of thrice the value of the goods on default of the production, is clearly in the nature of a penalty.)

(10) Contract between Government and plaintiff — Deposit of earnest and further security to be returned after completion of work — Forfeiture of deposit for non-completion of work within time — Implied condition — Section 74 does not apply. AIR 1963 Andh Pra 216 (219, 220) = (1963) 1 Andh WR 31 (DB).

(11) An advance paid in respect of a contract of sale is not liable to forfeiture on default like earnest money. The question whether an amount paid is earnest money or part of the purchase money depends on the real intention of the parties. AIR 1931 Lah 205 (207) = 11 Lah 699 (DB) ** AIR 1926 Mad 117 (118) ** AIR 1925 Sind 254 (256) (DB) ** (1969) 1 Mad LJ 474 (478) ** 1967 All LJ 126 (135) = ILR (1966) 2 All 307 (DB) ** AIR 1967 Delhi 91 (94, 96) (DB). (Distinction between earnest money and advance pointed.) ** (1965) 67 Pun LR 824 (828) (DB). (Mere use of word 'advance' or 'earnest money' is not conclusive of the nature of payment.) ** (1964) 2 Andh LT 180 (188, 189) = (1964) 2 Andh WR 183 ** AIR 1964 Raj 240 (241) = 1964 Raj LW 225. (Agreement to sell agricultural land — Vendor refusing to give vacant possession in the absence of a contract to contrary — Vendee is entitled to rescind

Section 74 — Note 12 (contd.)

contract and claim the money paid by him in advance to the vendor.) ** AIR 1963 Andh Pra 304 (305) = (1963) 1 Andh WR 253. (Fact that certain amount was mentioned as advance in some documents or that it was mentioned as consideration of sale in other document cannot take away right of seller when it was originally agreed under agreement to be earnest money.) ** (1963) 2 Mad LJ 153 (158) = ILR (1964) 1 Mad 634. (Distinction between earnest money and advance pointed.) ** (1960) 64 Cal WN 396 (399). (When a contract for sale is broken by an intending purchaser the right of the vendor to forfeit earnest-money is to be determined from the intention of the parties as evidenced by the agreement.) ** AIR 1959 Pat 176 (181) = 1958 BLJR 626. (What in fact constitutes an earnest money is the inherent character of the deposit made and not the name given to it.)

(12) Whether payment made as advance under a contract of sale is earnest to ensure due performance of the contract or not is a mixed question of law and fact and has to be ascertained by reference to the proportion the amount bears to the total sale price, the need to take a deposit intended to act as in terrorem, the nature of the contract and other circumstances not capable of being exhaustively listed. ILR (1966) 1 Mad 114 (117).

(13) There is distinction between the penalty for breach of contract and the forfeiture of a deposit of earnest money. When the latter is a payment actually made, the former is compensation for breach, Section 74 deals with compensation for breach. AIR 1930 Bom 213 (215) (DB) ** AIR 1954 Madh B 134 (135) ** ILR (1950) Nag 625 (629) (DB) ** AIR 1947 Nag 193 (200) = ILR (1947) Nag 60 (DB) ** 1967 All LJ 126 (129, 130) = ILR (1966) 2 All 307 (DB) ** AIR 1966 Orissa 76 (79) = 32 Cut LT 521.

(14) To come within the principles applicable to earnest money, a deposit must be paid at the time of entering upon the bargain. Those principles cannot be applied to any future payment to be made under the contract. An earnest is something paid or given at the time of the bargain to show that negotiation had been changed into a binding contract, and as a pledge for its due performance by the depositor to be forfeited in case of non-performance by his default. AIR 1916 Nag 104 (111) = 12 Nag LR 177 (DB) ** AIR 1929 Mad 817 (818) = 53 Mad 141 (DB) ** (1969) 1 Mad LJ 474 (478) ** AIR 1964 Madh Pra 126 (128, 129) = 1963 MPLJ 184 (DB). (When the amount is paid in

lump it is more probable that it is the earnest money guaranteeing performance. In the event of its being paid in two or more instalments the probability is in the other direction.) ** AIR 1959 Pat 176 (179) = 1958 BLJR 626.

(15) Deposit of some amount by a purchaser serves two purposes, if the purchase is carried out it goes against the purchase money but its primary purpose is that it is a guarantee that the purchaser means business. 1960 Jab LJ 536 (538) ** AIR 1960 Andh Pra 515 (516) ** AIR 1960 Punj 51 (55).

(16) The rule as to penalty dealt with in Section 74 is not applicable to cases of forfeiture of deposits made for the due performance of a contract. Where the instrument refers to some deposit as a guarantee for the performance of the contract, the party in default cannot claim a refund of the deposit, since such a deposit operates as motive to the parties to carry out the obligations under the contract. AIR 1963 Andh Pra 71 (71, 72) = (1962) 2 Andh WR 254.

(17) The rule of law applicable to cases of sale which forfeits the deposit in case of contract equally applies to leases also and there is no essential difference in the characteristics attached to each of these kinds of contracts. AIR 1916 Mad 584 (585, 586). (Where there is an express provision in the contract of lease which stipulates that the deposit which is a part of the rent will be forfeited on the breach of any of the conditions of the lease deed the contract must be given effect to without reference to Section 74 of the Contract Act: 16 Mad 474, Overruled.) ** AIR 1938 Lah 62 (63) (DB).

(18) Where in an auction of the leasehold rights for a long number of years, the highest bidder deposited one-fourth of the price 'on account of premium' and 'in part payment' subject to sanction the deposit of the 'bid money' was only towards part payment of the sale consideration and not an earnest money or a guarantee for the due performance of the contract. 1967 All LJ 126 (135) = ILR (1966) 2 All 307 (DB).

(19) Where A pays B a sum of money in advance for the performance of a contract at a future date which becomes impossible so that there is a failure of consideration, B is not entitled to keep A's money in his pocket and A is entitled to recover it under law of equity and good conscience — There is no express provision corresponding to this rule of equity in the Contract Act. AIR 1927 All 621 (622) = 50 All 82 (DB) ** AIR 1927 Sind 205 (205) = 22 Sind LR 197 (DB) ** AIR 1924 Bom 119 (127) = 48 Bom 259 (DB) ** AIR 1923 Mad 103 (107) (DB) ** (1912) 15 Cal LJ 410 (411) (DB). (Vendor failing to carry out his

Section 74 — Note 12 (contd.)

covenants.) ** AIR 1968 Assam 26 (27, 28) = ILR (1964) 16 Assam 513 (DB). (Contract coming to end not by repudiation or by breach of contract but by frustration — Vendee is entitled to get back earnest money but not to compensation.)

[See also AIR 1928 Lah 154 (154, 155, 156) = 9 Lah 67 (DB). (Joint Hindu firm appointing trustees to realize assets and discharge debts — Sale of property by the trustees — Vendee depositing earnest money — Trustees agreeing to secure signatures of proprietors — If trustees fail to secure the consent of all the members of a joint family in spite of express agreement, the vendee is entitled to rescission of the contract and restitution.)]

(20) Where upon an agreement of sale vendee deposits a sum of money with the vendor, the deposit, unless paid on any special terms, is not merely part-payment but is an earnest. AIR 1920 Cal 679 (680) (DB).

(21) Part payment of the purchase price cannot be forfeited because it is not a guarantee for the purpose of the contract which alone can be forfeited if transaction falls through. AIR 1950 East Punj 278 (281) (DB) ** AIR 1956 Him Pra 28 (34, 35) ** 1948 Bur LR (HC) 257 (263) (DB) ** AIR 1969 Mad 317 (319) = (1968) 2 Mad LJ 490. (Advances made by a purchaser to a vendor in respect of a sale are recoverable even if the transaction falls through the fault of the purchaser.) ** (1966) 1 Andh LT 233 (237) = (1966) 1 Andh WR 368.

[See also AIR 1968 Bom 35 (36) = 69 Bom LR 250 (DB) ** 1968 Cur LJ 489 (491) = ILR (1969) 1 Punj 529.]

(22) Plaintiff is entitled to a return of the earnest money if the contract gave him the option of withdrawing and if he was not satisfied as to the title of the defendant. AIR 1915 Lah 237 (237).

(23) Part payment of price in advance under contract of sale of certain property — Test of vendee's right to recover back deposit is whether action for specific performance at instance of vendor could be successfully resisted by vendee on ground that vendor's title was defective — Held on facts vendee was entitled to get refund of deposit. ILR (1966) 1 Mad 114 (119, 120).

(24) Agreement for sale of house — Time not stipulated — Vendors guilty of unreasonable delay — Vendee entitled to return of earnest money — Vendors held liable to pay interest. AIR 1958 Punj 111 (115) = 60 Pun LR 97 (DB).

(25) In order to enable the vendor to forfeit the deposit, there must be acts, on the part of the purchaser, which not only amount to delay sufficient to de-

prive him of the equitable remedy of specific performance, but which would make his conduct amount to a repudiation on his part of the contract. AIR 1916 Sind 71 (72) = 9 Sind LR 137.

(26) Smallness or largeness of deposit is one of the factors in determining whether there was deposit in reality, although it goes by that name in contract. AIR 1916 Mad 584 (586) ** AIR 1933 Nag 223 (224).

[See however AIR 1945 All 70 (75, 76) = ILR (1944) All 743 (DB). (Deposit of earnest money with vendor as guarantee for performance of contract to be forfeited on breach of vendee — Contract failing through purchaser's default — Vendee is not entitled to return of earnest money — Application of this principle does not depend upon the proportion of earnest money to the sale price.) ** (1964) 68 Cal WN 476. (Contract of sale of goods — Earnest money deposited under — Seller entitled to forfeit amount of default by buyer to perform contract — Defaulting buyer is not entitled to any relief on forfeiture by seller — Fact that the earnest money was as high as one-fourth of the total price would not conclude that it was penalty.)]

(27) Evidence should decide what is "earnest money" in the absence of written agreement. AIR 1922 All 478 (478) (DB).

(28) Question whether sum of money paid is a deposit to be forfeited or penalty is question of fact to be determined on facts of each case. AIR 1916 Mad 584 (586) ** 1960 Jab LJ 536 (538). (Contract to purchase oil engine — Deposit of Rs. 100 by purchaser with the order — Thereafter purchaser wriggling out his undertaking to purchase — Deposit held forfeited.)

(29) Whether in a given case a stipulation to forfeit the amount deposited is so unreasonable as to amount to a punishment for the non-performance of the contract, is a question of fact. AIR 1960 Andh Pra 515 (516).

(30) Where the vendor neither alleges nor proves that the advance is earnest money and it is merely treated as part payment of purchase money in the account books of the vendor it is not a deposit in the strict sense of the word. AIR 1928 Mad 326 (327) (DB) ** AIR 1957 Mad 228 (229).

(31) In a suit for damages upon a contract which provides for the forfeiture of the deposit money, where the plaintiff sues for more than the amount of deposit forfeited on the ground of insufficiency of the forfeited amount to cover the actual loss incurred, the plaintiff is entitled to claim only the difference between the loss incurred by him and the deposit money. AIR 1916 Mad 485 (485) = 38 Mad 801 (FB). (On appeal from 21 Ind Cas 759 (Mad).)

Section 74 — Note 12 (contd.)

(32) In a suit to recover money advanced towards a contract for the supply of goods the party making the advance is not entitled to interest from the date of the advance on the ground that the contract was not performed, when the contract did not provide for it and when no demand was made before suit. AIR 1927 Mad 99 (100) = 50 Mad 94 (FB) ** AIR 1963 Ker 247 (247, 248) = 1963 Ker LT 73. (Contract for sale becoming impossible by act of defendant-seller — He is liable to refund advance paid by plaintiff purchaser — In absence of contract interest for period before suit cannot be allowed.) ** AIR 1959 Mad 220 (220) = (1959) 1 Mad LJ 116 (DB). (Purchaser is also entitled to interest on the amount from the date of demand.)

(33) The incidents of earnest-money have no application to a contract when money is advanced to supplier on the understanding that the original advance was to be adjusted immediately or in the final settlement. The purchaser is entitled to the balance remaining with the supplier. AIR 1927 Nag 281 (282, 283).

(34) Agreement to purchase — Mere fact that deposit is demanded implies that if the contract is broken it should be forfeited. AIR 1938 Mad 246 (247).

(35) Where the conditions of sale of land by a Town Improvement Trust were that 10 per cent. of the purchase money was to be paid immediately and that on failure to pay the remainder in a fixed time, the property was to be re-sold: Held, that the trust was not entitled to the difference in price resultant on re-sale but only to the 10 per cent. deposit. AIR 1915 All 388 (389) = 38 All 52 (DB).

(36) Where a lease provides that the lessee shall be entitled to make alterations on the premises, subject to replacing them and, as security for replacing the alterations and rent, shall deposit certain amount which would be liable to be forfeited in case of non-observance of the terms, the clause relating to forfeiture does not amount to a stipulated penalty. In case of breach, in a suit by the other party for damages, credit for the amount forfeited must be given. Only the difference between the actual loss and the amount forfeited can be recovered. There is no difference between a suit for damages for breach of contract and a suit merely for value of damages caused. AIR 1937 Rang 357 (358).

(37) For recovery of earnest money, see also under S. 18 (d) of the Specific Relief Act 1877 = S. 13 of S. R. Act, 1963.

(38) Where the plaintiff is alleging a breach of the agreement on the part of the defendant and claiming to recover back the amount of the earnest money

it is for the plaintiff to show that the defendant has committed the breach by not disclosing to him, at the time of agreement a material defect in the property. AIR 1956 Bom 175 (178) (DB).

(28) Under Rule 90 of the Displaced Persons (Compensation and Rehabilitation) Rules which is a statutory provision the department has the right to forfeit part or whole of the initial deposit made by the purchaser of evacuee property. 1965 Pun LR (Supp) 170 (172).

13. Contract of service.— (1) A stipulation in a contract of service that a servant should pay by way of damages double his daily wages for absence without leave is a penalty. AIR 1919 Nag 95 (95) (DB).

(2) Where the plaintiff, a monthly hired workman in the service of the defendant Company, agreed that he should give 15 days' notice before leaving the company's service and in default, forfeit all arrears of wages, there was nothing illegal, nothing contrary to public policy in the stipulation. The plaintiff, by leaving the service without giving the required notice, forfeited all the wages that had not become payable though due to him. Section 74 had no application to the case. (1898) 2 Cal WN 687 (688, 689).

(3) Contract of service — Stipulation that employee shall pay £250 as liquidated damages in case he left service before a fixed period — Breach of contract by employee — Suit for damages — Held, that the Court could award the full sum stipulated without proof of actual damage or loss and that the lower Court's assessment of damages at Rs. 900 was unreasonably small — Rs. 2000 awarded as the proper sum. (1885) 11 Cal 545 (550) (DB).

(4) Agreement to render service for stipulated period and for payment of penalty for period of absence at a fixed rate — Right to recover damages on breach of agreement — Proof of actual damage or loss is necessary. AIR 1963 Andh Pra 310 (311, 312) = (1963) 1 Andh WR 149 (DB).

14. Breach of promise of marriage.—

(1) Breach of promise of marriage — Parents promising to return double the value of the gifts given to the girl at the betrothal — Courts should grant reasonable compensation only. AIR 1933 Rang 198 (198) = 11 Rang 143 (DB).

(2) It is doubtful whether the full amount named in the agreement should not be given. AIR 1916 Low Bur 45 (47) = 8 Low Bur Rul 399 (DB).

15. Pledge.— (1) The agreement that the pledge should become irredeemable if not redeemed after three months is not a stipulation by way of penalty. Even if it were an unfair agreement that would not in itself constitute it an

Section 74 — Note 15 (contd.)

agreement by way of penalty unless perhaps it could be shown that the value of the thing pledged was so very much larger than the amount of the loan that it would become obvious that the clause is really inserted as a means of bringing pressure upon the pledger to repay the loan within the contracted time. AIR 1939 Rang 413 (415, 416).

16. Compromise decree.— (1) A compromise being an agreement is subject to Section 74 and to the equitable relief which the Court can give under that provision, notwithstanding that the compromise is embodied in a decree. AIR 1937 Mad 234 (235) ** AIR 1957 Raj 378 (382) = ILR (1957) 7 Raj 276 ** AIR 1955 Pepsu 110 (111) = ILR (1955) Patiala 76 (DB) ** AIR 1954 Madh B 84 (85) = ILR (1953) Madh B 198 ** AIR 1953 Trav-Co 464 (464) (DB) ** AIR 1943 Pesh 33 (36) (DB) ** AIR 1946 Sind 150 (151, 152) = ILR (1946) Kar 132 ** AIR 1943 Sind 247 (250) = ILR (1943) Kar 245 (DB) ** AIR 1938 Sind 185 (187) (DB) ** AIR 1937 Nag 413 (415) ** AIR 1933 All 252 (254) = 55 All 334 (FB). (AIR 1924 All 689 = 46 All 571, **Overruled.**) ** AIR 1926 All 278 (280) (DB) ** AIR 1925 Mad 264 (264) ** AIR 1918 Mad 1307 (1309) (DB) ** AIR 1914 Mad 18 (18) (DB) ** AIR 1963 Gui 256 (257) = (1963) 4 Guj LR 1096. [But see AIR 1926 Pat 122 (125) (DB).]

(2) **Compromise decree — Default — Execution —** Executing Court can give relief to judgment-debtor if enforcement of decree amounts to penalty — Clause sought to be enforced not penal — Execution was maintainable. (1963) 65 Punj LR 78 (79, 80).

(3) The true test for deciding the question whether the provision relating to the payment of a larger amount than the amount decreed on compromise on default by the judgment-debtor to perform any of the conditions of the decree is or is not a penal clause depends on a determination of the question whether or not the larger amount was actually due to the decree-holder at the time of the compromise; in other words, whether the decree-holder is merely withdrawing a conditional concession granted by him to the judgment-debtor or whether he is attempting to recover an amount which was not actually due to him. AIR 1927 Lah 659 (662).

(4) Where a consent decree provides that in default of payment by the defendant on certain date of a certain smaller sum of money than is claimed to be due, the defendant shall pay to the plaintiff the larger sum claimed and which is really due plus the costs of the suit with interest at 9 per cent. per annum, time is not only the essence of such contract but it is also its

whole consideration and such decree cannot amount to a penalty. AIR 1929 Sind 98 (100, 102) = 23 Sind LR 375 (DB) ** AIR 1957 Pat 542 (544) (DB) ** AIR 1957 Raj 378 (382) = ILR (1957) 7 Raj 276 ** Madh BLJ 1954 HCR 569 (573) ** 1948 Jaipur LR 39 (43) (DB).

[See also 1961 Jab LJ 141 = 1960 MPLJ 1379. (Clause in compromise decree to pay Rs. 500/- more held to be penal.)]

(5) Where according to a compromise a suit is decreed for the whole amount claimed but a provision is made that if a smaller amount is paid within a stipulated time, the decree-holder would accept it in lieu of his whole claim, the provision for payment of the whole amount in case of default in the payment of the smaller amount is not a penal stipulation. AIR 1947 All 136 (136, 137) = ILR (1947) All 201 ** AIR 1969 Pat 85 (87) ** 1962 Ker LT 808 = ILR (1963) 1 Ker 71 (74).

(6) Stipulation in compromise decree that appeal would stand dismissed in the event of failure to pay anyone of the instalments on the due dates is penal in character. (1968) 1 SCWR 45 (47, 48) = 1968 SCD 309.

(7) **Compromise mortgage decree —** Provision to pay by instalments — In default whole amount realisable by sale of property without getting final decree — Instalment due on a particular date not paid — Permission to deposit money within three days granted — Money accordingly deposited — Notice issued to decree-holder — **Held,** judgment-debtor could not derive benefit of Order 34, Rule 4 (2), Civil P. C. — **Held,** further that provision to sell property in case of default in payment of instalment, not being penal, could not be relieved against. AIR 1934 Oudh 44 (45) = 9 Luck 387 (DB).

(8) Where in execution of a consent decree, the executing Court decides that a certain clause in the decree is not penal and does not fall under Sec. 74 of the Contract Act, and there has been no appeal from the decision, the question cannot be gone into in subsequent execution, even though reliance is placed not on Section 74 of Contract Act but generally on Section 47 of the Civil P. C. AIR 1946 Sind 150 (151, 152) = ILR (1946) Kar 132.

(9) By a compromise, time for payment of the amount that was settled was extended upto 3-11-1948. The circumstances however indicated that the parties really intended to reduce the amount of the liability and the time that was granted for payment was not of the essence of the contract. The parties never intended to apply the condition rigidly and the liability to pay on default the amount due under the

Section 74 — Note 16 (contd.)

decree was only meant to secure the performance of the agreement: Held, that the condition was in the nature of a penalty and could be relieved against under Section 74 of the Contract Act. AIR 1958 Madh Pra 333 (337) (DB).

(10) Executing Court has power to grant relief against penalty embodied in decree on the equitable principle underlying S. 74 and relieve one of the parties to the contract against any term which operates as a penalty although the contract may have been embodied in a decree of the Court. AIR 1951 Orissa 46 (47) = ILR (1950) Cut 69 (DB).

[See also AIR 1962 Mys 9 (10) = 39 Mys LJ 539. (Amount of claim reduced and made payable in instalments by a compromise decree — Entire claim to be recovered on default of instalment — Provision held in nature of penalty — Executing Court could relieve judgment-debtor against it.)]

[See however AIR 1963 Guj 256 (257) = (1963) 4 Guj LR 1096. (AIR 1951 Ori 46 and AIR 1933 All 252, Diss. from.)]

(11) Suit for specific performance of sale — Compromise decree — On default of deposit of price by plaintiff the suit to stand dismissed — The clause is in the nature of penalty — The defendant is entitled only to reasonable compensation. 1969 All LJ 279 (283).

17. Chit fund. — (1) Terms of a chit fund can be penal. AIR 1927 Mad 1105 (1107).

(2) In order to determine whether a clause in a bond by the bidder in the case of a chit fund transaction is a penalty or not, it is irrelevant to consider whether the amount of the chit that he buys and the amount of the instalments that he undertakes to pay are or are not the same. To hold that the obligation to pay the lump sum on failure to pay an instalment is a penalty would have the effect of relieving the purchaser of the chit fund from his obligation to carry out the contract that he has made and to pay the consideration that he has offered at the time of the auction. It can make no difference that the amount of the bond is larger than the amount of the chit fund. AIR 1935 Mad 385 (386) (DB).

(3) Chit fund — Subscriber buying the chit — Security bond in favour of stakeholder — Provision to pay all future instalments in lump on default to pay any, not penal. AIR 1933 Mad 657 (658) (DB) ** AIR 1933 Mad 252 (255) (DB).

(4) Where a chit agreement provided that in case the subscribers failed to pay their subscriptions regularly, they were not only to forfeit the dividend but were also to pay the whole amount on demand with interest thereon from the

date of auction. Held, that the agreement was not penal. AIR 1922 Mad 67 (69) (DB) ** AIR 1933 Mad 725 (726).

18. Landlord and tenant. — (1) Kabuliat — Covenant to pay higher rent if the lessee continues in possession after the term provided by the kabuliat expires — Case does not come within the meaning of Section 74 because it is not an attempted enforcement of the payment of a sum of money on failure to perform an act which the party has contracted nor a penalty payable on the performance of an act forbidden by the contract. AIR 1928 Pat 62 (63) ** AIR 1934 All 115 (116, 117). (Owner notifying tenant of enhancement in rent — Tenant vacating premises after three months of being notified is liable to pay enhanced rent but not for damages for breach of contract, as he did not break any contract.) ** AIR 1929 Pat 717 (720) = 9 Pat 487 (DB) ** AIR 1926 Pat 122 (123, 124) (DB) ** AIR 1918 Pat 269 (269). (A provision in a lease for enhanced rate of rent if the tenant holds over after the expiry of the term is valid.) ** (1913) 17 Cal L Jour 590 (592) (DB) ** AIR 1965 Andh Pra 33 (35, 36) = (1964) 1 Andh WR 69 (DB).

[But see AIR 1922 Pat 240 (241) (DB) ** AIR 1919 Cal 230 (231) (DB) ** AIR 1914 Lah 186 (187) (DB) ** (1913) 18 Cal L Jour 95 (97) (DB) ** (1895) 22 Cal 658 (663) (DB). (Rampini, J. dissenting: The question was not for compensation for breach of contract, and did not come within the purview of Section 74, but for rent at a rate which the defendant had agreed to.)]

(2) Landlord and tenant — Increased rent reserved in case lessee commits breach of covenant in lease deed — Such increased rent is not penalty but is in nature of liquidated damages — Acceptance of original rent by lessor with knowledge of breach — He does not lose his right to recover higher rent subsequently though he cannot recover for periods for which he has already received lower rent — Even if it is penalty, Courts cannot relieve against it. AIR 1935 Mad 335 (337) = 58 Mad 856.

(3) A stipulation for payment of interest on non-payment of rent within a certain time is not always penal. AIR 1925 Cal 722 (723) (DB).

(4) In absence of proof of coercion or undue influence tenant is liable to pay the rent with the interest provided in the kabuliat. AIR 1919 Cal 332 (333).

(5) Where a clause in the lease provided that interest at a certain rate per month should be paid in default, S. 74 does not apply. (1910) 12 Cal LJ 593 (594) (DB) ** AIR 1931 Cal 772 (772). (Interest and damages payable on default — Stipulation even if penal will

Section 74 — Note 18 (contd.)

not be relieved against.) ** AIR 1921 Cal 199 (201) = 48 Cal 93 (DB) ** AIR 1920 Cal 898 (899) (DB). (A landlord is entitled to recover interest at the rate stipulated in the contract though the rate is penal, hard and unconscionable.)

(6) Tenant remaining in occupation after expiry of lease — Damages for wrongful use and occupation — Tenant warned by landlord that he will have to pay specified sum as damages for wrongful use and occupation — Liability of tenant to pay damages specified — Tenant will be liable to pay that amount provided it was not penal and unconscionable. AIR 1961 J and K 39 (41) (DB).

(7) Although the Courts should not lightly interfere with contracts between landlords and tenants in case of permanent mokarrari leases, a stipulation to pay 75 per cent. interest besides full damages is an unconscionable one and should not be enforced. AIR 1916 Cal 166 (168) (DB). (Richardson J. dissenting:— Stipulation ought to be enforced according to its true construction. The mere fact that the interest is high is, in the circumstances, no ground for relief.) ** AIR 1920 Pat 97 (102) = 5 Pat LJ 302 (DB). (Provision for excessive mesne profits on failure to surrender on expiration of lease can be relieved against.) ** AIR 1917 Cal 737 (740) ** AIR 1917 Mad 162 (166) = 40 Mad 603 (FB). (The provision for the payment by the tenant of any damages that may be fixed by the landlord for cutting trees on the holding or their value is penal.)

(8) Stipulation to forfeit 6 months' rent, held as deposit, on breach of terms held not penal as Section 74 does not apply to forfeiture of deposit. Unreasonableness of the amount is the test of penalty. AIR 1918 Mad 36 (37) (DB).

(9) Provision in kabuliyat for a certain rate of interest in case of single default and enhanced rate in the event of consecutive defaults is penal. AIR 1934 Pat 16 (17).

(10) Paddy rent payable by fixed time — Stipulation to pay half as much again in default is stipulation by way of penalty — Landlord will get only reasonable compensation. AIR 1931 Cal 111 (111) = 58 Cal 84 (DB).

(11) A covenant for re-entry on alienation by a lessee is not a penalty. AIR 1919 Mad 12 (13) = 42 Mad 654 (DB).

(12) Where there was a contract for the sale of a ryoti land with transferable and heritable rights and title was clear and the vendee resiled from the contract, the vendor was deemed entitled to receive reasonable compensation for the breach, irrespective of the fact whether he sustained any actual loss or not. AIR 1929 Mad 783 (784).

(13) Deposit in a lease contract interest on which is to be credited towards rent and the deposit to satisfy arrears of rent is no legal deposit where there was no recitation of forfeiture in the contract. AIR 1929 Mad 817 (818, 819) = 53 Mad 141 (DB).

(14) Provisions in a lease for a term intended to secure vacant possession cannot be taken to be penal provisions. Terms as to forfeiture are by no means unusual or extraordinary in a lease, especially when there are conditions in the lease which are very liberal. AIR 1949 Cal 47 (54) (DB).

(15) In lease of brick fields for 10 years, the provision as to forfeiture providing for the removal by the lessee of bricks and other materials on the demised property before the expiry of the lease or within 3 months thereafter was by no means unusual or extraordinary and not penal in nature. AIR 1949 Cal 47 (54) (DB).

(16) A term in a rent note that the tenant would pay rent in advance at Rs. 34 per month and in case of default he would be liable to pay at the rate of Rs. 45 or vacate cannot be said to be penal. Madh BLJ 1955 HCR 1468 (1473).

(17) Where under a mulgeni chit the lessor is entitled to a higher rent on default made by the tenant the clause is a penal provision and the Court is entitled to award reasonable compensation. AIR 1949 Mad 618 (619, 620).

(18) The primary contract between the parties to a mining lease was that the lessees must pay the royalty or commission in the first week of the English calendar month following the month of accounting. In default of such payment it was contracted that the lessee would be liable to pay interest at the rate of 2 per cent per month from the beginning of the month till the date of payment — Held, that the stipulation to pay interest at 2 per cent. per mensem was in the nature of a penalty, and relief could therefore, be given by the Court under Section 74. AIR 1952 Pat 271 (273) = 31 Pat 280 (DB).

19. Penal stipulations — Illustrative cases.— (1) Where the agreement stated that "if I fail to pay agreeably to the condition written, then the remission made by you under the amicable settlement is not to hold good," it will be a stipulation by way of penalty. (1861) 8 Moo Ind App 239 (261) (PC).

(2) **Usufructuary mortgage** — No interest on principal — On default of mortgagor to deliver possession of a small part of property, simple interest on whole principal payable — On default of mortgagor to pay simple interest within one year, compound interest payable: Held that stipulation for payment of simple interest and compound interest on the entire sum advanced on mortgagor's

Section 74 — Note 19 (contd.)

failure to deliver only $\frac{1}{4}$ th property mortgaged, was unconscionable. AIR 1932 Lah 252 (253) = 13 Lah 542 (DB).

(3) Vendee agreeing that in case of default of payment to the prior mortgagees by the mentioned date, he would be liable to pay Rs. 15,000 as damages to the vendor: **Held** that the sum was in the nature of a penalty. AIR 1934 All 406 (422) = 56 All 766 (FB).

(4) Mortgage — Mortgagee in possession to appropriate rents and profits (net income of Rs. 250 per year) in lieu of interest — Stipulation that on default in payment of principal on due date, mortgagee would be entitled to usufruct plus interest at 1 per cent. p. m. — Stipulation held penal. AIR 1926 Nag 473 (474).

(5) Defendant agreeing to pay at Rs. 10 per month and at Rs. 15 on default for four consecutive months — Provision held penal. AIR 1921 Cal 175 (176) (DB) ** 1968 MPLJ 806 = 1968 Jab LJ 1043.

(6) Contract to lend paddy — Interest in paddy and whole to be finally converted into money — Rate of paddy varying in different years — Contract is penal. AIR 1935 Mad 899 (902) (DB).

(7) Mining rights in land sold by its owner — Sale deed providing that vendor would pay land assessment, and in default, vendee by paying same would be absolute owner of property — Covenant was penal. AIR 1938 Mad 304 (305) (DB).

(8) Where a plaintiff borrowed money on a mortgage bond which stipulated that the debt was to be satisfied within a specified period, failing which the creditors were to take possession of the mortgaged land outright for Rs. 600 made up of Rs. 300 principal and Rs. 300 penalty for breach of contract, and in the absence of proof of conduct of the parties to favour the supposition that when they executed the document they really believed that the right of redemption would be extinguished on failure of the stipulated payment, held that an extortionate stipulation was a penalty. ('72-92) 1872-92 Low Bur Rul 645.

(9) Agreement for the due maintenance of village irrigation — Samudyam land to be under management of main pattadar — Kists thereon to be paid by several pattadars proportionately — On default, double to be recovered from defaulter — Clause held penal. AIR 1943 Mad 598 (602).

(10) Compromise of doubtful rights — Agreement by defendants to pay Rupees 27,500 if they failed to pay Rs. 12,500 by certain date — Stipulation held in the nature of penalty. (1909) 3 Ind Cas 933 (934) (DB) (Mad).

(11) Defendants agreeing with plaintiff not to cut trees in a forest for 10 years — In case of default by any of them they agreed to pay a penalty of

Rs. 500 — **Held**, case fell under S. 74. (1899) 3 Cal WN 43 (45) (DB).

(12) Provision for surrender of possession of field in case default in the payment of yearly maintenance was made — Provision is penal. AIR 1931 Nag 60 (63) = 27 Nag LR 24.

(13) When one of the terms of the agreement amounts to a bonus to the seller on every broken contract, and it is accordingly an advantage to the seller to have every contract broken and to delay making a claim for the breach as long as the law of limitation will allow, such a term operates as a penalty for breach of contract within the meaning of S. 74. ('92-96) 1892-96 Upp Bur Rul 291.

(14) Compromise during execution — Decree-holder agreeing to accept smaller amount in full satisfaction if paid within two months or on default the decree-holder to proceed with execution without any objection being raised by judgment-debtor — Time is the essence of the contract and the stipulation is not penalty — Court will not relieve against forfeiture on the judgment-debtor's default. AIR 1937 Pat 542 (544) = 16 Pat 395 (DB).

(15) Where a mortgagor voluntarily and in pursuance of a deliberate bargain, enters into an agreement to pay commission to the mortgagee and pays the amount, the mortgagor cannot avoid his liability for the commission paid. AIR 1915 Oudh 31 (39) (DB).

(16) Where it is mentioned in the compromise decree that a certain amount was due to the plaintiff and that it would be paid by the execution of a sale-deed in his favour, the agreement transferring the property for the payment of the decretal amount cannot be called a stipulation by way of penalty. AIR 1942 Oudh 1 (5) = 17 Luck 249 (DB).

(17) Right of re-sale stipulated under certain conditions — Not penal. AIR 1922 Oudh 265 (265) = 25 Oudh Cas 186

(18) On partition a coparcener agreed to get an annuity on failure of which he was to resume his share: — **Held** the provision was not penal. AIR 1925 Mad 84 (85).

(19) Adjustment of decree providing that decree would be satisfied on payment of a smaller sum than originally claimed — Portion paid immediately — Balance to be paid within fixed date — Stipulation that on default decree-holder will realise it (decree) by execution — Default: **Held** that in absence of express stipulation that in case of non-payment amount remitted would not be allowed, whole amount of original decree could not be claimed in execution by way of penalty. (1937) 65 Cal LJ 210 (211).

(20) It cannot be said that a forfeiture clause in the Articles of Association of a Company by which the company could declare the shares of a person forfeited

75. Party rightfully rescinding contract entitled to compensation.—A person who rightfully rescinds a contract is entitled to compensation for any damage which he has sustained through the non-fulfilment* of the contract.

Illustration

A, a singer, contracts with B, the manager of a theatre, to sing at his theatre for two nights in every week during the next two months, and B engages to pay her 100 rupees for each night's performance. On the sixth night, A wilfully absents herself from the theatre, and B, in consequence, rescinds the contract. B is entitled to claim compensation for the damage which he has sustained through the non-fulfilment of the contract.

[*] See Sections 19, 39, 53 and 54 supra.

Section 74 — Note 19 (contd.)

in certain contingencies, is in the nature of a penalty clause and so contrary to the spirit of Section 74 of the Contract Act. AIR 1949 All 195 (197) = ILR (1949) All 331 (DB).

(21) A clause in a contract which terminates the contract and places the parties in the same position in which they were before the contract was entered into cannot be said to be a penal clause. AIR 1953 All 559 (562) = ILR (1954) 2 All 495 (DB).

(22) Plaintiff, a starch factory advanced manure worth Rs. 100 to defendant for tapioca cultivation to supply tapioca to plaintiff at agreed price — Interest was at 6 per cent. on Rs. 100 — On failure to supply, defendant agreed to pay damages on basis of 3 tons of tapioca per acre at Rs. 30 per ton — On breach of agreement plaintiff filed suit for recovery of Rs. 100 with interest at 6 per cent. and Rs. 90, the value of 3 tons as damages — Held, Rs. 90 as compensation for an advance of Rs. 100 was abnoxious being unreasonably high — Compensation of 9 per cent. over and above 6 per cent. interest held would be reasonable. 1968 Ker LT 713 (716) = 1968 Ker LJ 757.

(23) Agreement for sale of property — Property in possession of tenant at time of agreement — Plaintiff to deliver vacant possession to defendant within 4 months — Part of consideration left with defendant — Plaintiff entitled to this balance of consideration if he fulfilled condition of delivering vacant possession — Held, agreement did not become impossible of performance on ground of property being in possession of tenant — Defendant did not waive right to get vacant possession — Withholding balance of consideration by defendant in case vacant possession by plaintiff was not given held to be a penalty within S. 74. AIR 1964 J and K 26 (31, 32) = 1964 Kash LJ 49.

(24) A brought up and educated by his brother B — Before entering vocation A agreeing to pay percentage of his income in future to B — A employed in Public

Works Department — Held, that the payment provided in the agreement was not in the nature of penalty nor was there anything unconscionable or inequitable in the terms of the agreement so as to grant equitable relief — The relationship between A and B was not the relationship of a lender and borrower — There was no case for the application of Section 74 of the Act. AIR 1960 Mad 188 (190) = (1960) 1 Mad LJ 164.

(25) Instrument containing agreement to purchase and provided for (a) refund of part of purchase price paid and (b) payment of stipulated sum as damages in breach of contract — Held, (b) was covered by Section 74 of Contract Act and party could have only reasonable damages and there was no obligation to pay stipulated sum and in respect of (a) also there was no question of having incurred any obligation to pay any amount to other side and, therefore, instrument was agreement and not bond. 1968 Cur LJ 489 (491) = ILR (1969) 1 Punj 529.

(26) Agreement for sale of immovable property — Stipulation for forfeiture of amount expressly referred to in agreement as "paid out" of sale price, on breach of contract by vendee — Covenant for forfeiture is by way of penalty — First Appeal No. 37-D of 1952, dated 22nd August, 1957 (Punj), Reversed. AIR 1963 SC 1405 (1410, 1411) = (1964) 1 SCR 515.

(27) Auction of property under Provincial Insolvency Act — Forfeiture of 25 per cent. of the amount of bid is in the nature of penalty within the meaning of Section 74 of Contract Act. (1969) 2 SCWR 663.

Section 75 — Note 1

(1) When in an executory contract the plaintiff has performed his part of the contract and the defendant repudiates the contract itself, the plaintiff's rights under Sections 39, 65 and 75 are not necessarily alternative, they can be cumulative. ILR (1955) Mad 528 (547).

(2) If one party to a contract wrongfully repudiates it and the other party

CHAPTER VII

[Sections 76 to 123.]

SALE OF GOODS

[Repealed by the Indian Sale of Goods Act, 1930 (3 of 1930), S. 65.]

Section 75 — Note 1 (contd.)

does not accept the repudiation, the contract survives and the rights of the innocent party are preserved and accordingly he can perform his part and can recover on that footing. AIR 1963 AP 370 (373) = (1962) 2 Andh WR 442 (DB).

(3) Where a party to a contract wrongfully repudiates it before the time of performance, it is open to the other party either to accept the repudiation or to await the expiration of the time prescribed for performance. Where the other party does not accept the repudiation damages for breach of the contract cannot be fixed at the market price at the time of repudiation. (47) 52 Mys HCR 41 (54, 55).

(4) The damages are awarded as a pecuniary compensation for the injury which a party sustains as a result of a default by the other party — The party to be entitled to compensation must have done something to his own prejudice in the performance of his part of the contract — Where, therefore, the vendor had no goods to deliver, he suffered no injury by the breach of the vendee refusing to take delivery and was not entitled to any damages. AIR 1934 Nag 129 (132).

(5) When a contract for sale does not provide a penalty, the right of the seller to damages, on the failure of the buyer to complete payment, will arise under Section 73 or Section 75 and is something quite independent of the amount of any part payment made. AIR 1942 Sind 37 (39) = ILR (1941) Kar 495 (DB).

(6) Where there is an anticipatory breach, a claim for damages can succeed only if there is a rightful rescission of the contract, that is, there is rescission of the contract in fact by the injured party. (1965) 4 Law Rep 663 (696) (Mys) (DB).

(7) Contract — Damages — Anticipatory breach — Injured party can either rescind it or elect to treat it as continuing — Damages are to be assessed not from date of breach but from date on which it was rescinded. AIR 1937 Nag 289 (293) = ILR (1938) Nag 31.

(8) Mahomedan marriage — Negotiations concluded by pan rusum — Subsequent discovery that bride suffered from epileptic fits — Bridegroom's father can rescind contract but on rescission cannot

recover damages for pan rusum expenses as the damages arise out of rescission and not non-fulfilment. AIR 1937 Nag 270 (271, 273) = ILR (1937) Nag 299.

(9) If, after a voidable contract has been fulfilled, one of the parties discovers facts which if known earlier would entitle him to rescind the same without legal proceedings, he is not bound to sue for a formal rescission of the same before he can claim damages. 1882 Pun Re No. 60, p. 175 (176) (DB).

(10) Marriage contract — Plaintiff paying sum of money as tilak money to defendant in consideration of defendant consenting to marriage of plaintiff's minor daughter with defendant's minor son Plaintiff breaking marriage on ground that defendant's son was subject to epileptic fits and suing for recovery of money paid — Plaintiff held entitled to recover, even if contract be held illegal per se and therefore void ab initio. AIR 1951 Pat 519 (520, 521) (DB).

(11) Contract to be completed within 10 months of commencement — Date of commencement to be when order to commence work is given — Contractor enquiring about the date — Date communicated was one at the time of communication of which period of 10 months from such date had already expired — Held, rescission of contract on ground of non-compliance was illegal and contractor was entitled to compensation for entire damage. AIR 1963 Punj 558 (547) = ILR (1963) 2 Punj 463 (DB).

(12) Contract of employment — Change in essential terms of contract by employer — Held, change amounted to refusal by employer to perform previous contract in its entirety and employee could put an end to it and sue for breach. 1968 MPLJ 846 (850) = 1969 Jab LJ 37 (DB).

(13) Revenue auction sale — Property sold in execution of mortgage decree attached for revenue sale and its delivery to auction-purchaser objected by Government pleader — Proclamation for Revenue sale by Tahsildar mentioning that defaulter has equity of redemption — Auction-purchaser in revenue sale not entitled to recover damages from State — Knowledge of Government pleader about execution sale cannot be imputed to Tahsildar — State not liable. AIR 1964 Ker 109 (113) = 1964 Ker LT 102.

CHAPTER VIII

OF INDEMNITY AND GUARANTEE

124. "Contract of indemnity" defined.—A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person,* is called a "contract of indemnity."

Illustration

A contracts to indemnify B against the consequences of any proceedings which C may take against B in respect of a certain sum of 200 rupees. This is a contract of indemnity.†

[*] Not the promisee.

[†] Section 124 does not include contracts of insurance. Such contracts are governed by the provisions of the Insurance Act, 1938 (IV of 1938), the Life Insurance Act, 1956 (XXXI of 1956) and Marine Insurance Act, 1963 (XI of 1963).

SECTION 124 — SYNOPSIS

1. Scope.
2. Contract of indemnity.
3. Implied contract of indemnity.
4. Contract of indemnity — Effect.
5. Contract of indemnity — Suit on.
6. Contract of indemnity — Discharge of.
7. Limitation — See Section 125 and Limitation Act (1963), Arts. 27 and 113.

1. Scope.— (1) The expression 'contract of indemnity' in Section 124 has been used in a narrow sense and the general law about contracts of indemnity is much wider than the contract of indemnity as defined in the Contract Act. A contract of fire insurance or marine insurance is always a contract of indemnity though under the Contract Act, it would more properly come under Section 31 defining contingent contracts. AIR 1941 Lah 68 (69) (DB).

(2) Section 124 deals only with one particular kind of indemnity which arises from a promise made by the indemnifier to save the indemnified from the loss caused to him by the conduct of the indemnifier himself or by the conduct of any other person but does not deal with those classes of cases where the indemnity arises from loss caused by events or accidents which do not or may not depend upon the conduct of the indemnifier or any other person, or by reason of liability incurred by something done by the indemnified at the request of the indemnifier. AIR 1942 Bom 302 (303) = ILR (1942) Bom 670 ** AIR 1940 Bom 315 (316) = ILR (1940) Bom 552 (DB).

(3) Right to indemnity given by original contract should always be distinguished from right to damages arising from breach thereof. AIR 1928 Mad 43 (44).

(4) In a contract of indemnity there is no privity of contract between surety and debtor while in the case of a contract of guarantee, surety, credi-

tor and principal debtor are parties to the contract. AIR 1937 Oudh 19 (20) = 12 Luck 484 (DB).

(5) Forbearance to sue principal at the surety's request is sufficient consideration for promise by surety to pay the amount himself. 1911-2 Mad WN 145 (145) (DB).

(6) Sections 124 and 125 which deal with the contract of indemnity lay down only the rights of the promisee; the rights of the promisor are not mentioned — It is a well-known principle of law that where one person has agreed to indemnify another, he will, on making good the indemnity, be entitled to succeed to all the ways and means by which the person indemnified might have protected himself against or reimbursed himself for the loss. This principle is based on natural equity and is of general application. It is an essential part of the law about indemnity and the Contract Act does not impair it. (1890) 14 Bom 299 (303) (DB).

(7) There is a distinction between contract of indemnity and that of guarantee, or suretyship. In the case of the former the non-liability of the principal debtor does not affect the obligation undertaken by the indemnifier which is primary. Every contract of guarantee, however, is not a contract of indemnity having this effect, for in the absence of special circumstances, the liability of a surety is only ancillary and can rest only on a valid obligation on the part of the party whose debt or obligation is guaranteed. AIR 1957 Mad 164 (165, 167) = ILR (1957) Mad 176 (DB).

(8) Contract of guarantee presupposes three parties, the creditor, the principal debtor and the surety. First of all there is a contract between the principal debtor and the creditor. This is the base of the entire transaction. Then there must be a contract between the surety and the creditor by which the former guarantees the debt

Section 124 — Note 1 (contd.)

to the latter. There must be a further contract by which the principal debtor asks the surety to act as such though such a request need not always be express and may be implied. If a person undertakes to reimburse another for some loss which may be caused to him, say by a third person or by himself, but not at the request, express or implied, of the third person, then the person who having undertaken the liability and having been called upon to make good the loss will not be able to recover the loss so caused to him from the principal debtor, the latter being not privy but virtually a stranger to the undertaking given to the promisee. The position of the party undertaking the liability is that of an indemnifier and the contract is a contract of indemnity. AIR 1958 Raj 343 (346) = ILR (1958) 8 Raj 975 ** AIR 1949 Nag 48 (49) = ILR (1948) Nag 350.

[See also AIR 1952 All 587 (588) (DB) ** AIR 1959 Mad 122 (125) = 71 Mad LW 866 (2) (DB).]

(9) In indemnity, the possibility of risk of any loss happening is only contingent against the indemnifier. (1966) 59 ITR 378 (383) (Mad) (DB).

2. Contract of indemnity.— (1) Where property is transferred by a vendor to a vendee with a direction to the vendee to pay off a third person, the transfer may amount to a contract of indemnity. AIR 1938 All 297 (298, 299) = ILR (1938) All 500 (FB) ** AIR 1939 Pat 194 (197) = 17 Pat 751 (DB). (Covenant to pay off prior mortgage debt by vendee.) ** AIR 1918 Mad 1135 (1136) (DB).

(2) Plaintiffs executing and registering ijara deed in favour of defendants — Defendants agreeing to pay off mortgages executed by plaintiffs — Ijara deed held to be a contract to pay off mortgages and not a contract of indemnity. AIR 1938 Pat 275 (277) = 17 Pat 338 (DB).

(3) An agreement between the seller and the purchaser whereby the consideration for the sale is to be paid by the purchaser to a creditor of the vendor amounts to a contract of indemnity. AIR 1935 Nag 147 (148).

(4) The clause in a registered sale-deed that, "if upon the objection of any one any damage or loss accrues to the vendee, the vendor will be liable" amounts to a contract of indemnity and is not a mere covenant for title and quiet possession. AIR 1929 Lah 383 (388).

(5) Mother and minor daughter entering into contract with film company — Mother agreeing that minor should do service for company failing which, mother and daughter would compen-

sate loss suffered by Company — Daughter failing to fulfil contract — Suit by company to recover loss — Held, this was not a contract of indemnity by the mother. AIR 1938 Rang 359 (359) (DB).

(6) Surety's contract with creditor, if not collateral but creating original liability, is contract of indemnity. AIR 1918 Pat 345 (346) = 3 Pat L Jour 396 (DB).

(7) Contract between insurance company and its employee — Increment in salary to be proportionate to increase of business — Contract held could not be construed as contract of guarantee. AIR 1939 Lah 509 (510).

(8) Where after having declared that there were no prior encumbrances on the property, the sale deed contained a clause, "Should any dispute arise in respect of the above property and should you thereby sustain any loss, we shall make good the loss on the liability of our family property and on our personal liability," it was held that the covenant was not confined to encumbrances mentioned earlier but covered every dispute which caused loss to the vendee and thus amounted to a specific covenant to indemnify the vendee in case he sustained loss on account of any dispute in respect of the property. AIR 1950 Mad 621 (623) (DB).

(9) A, decree-holder, transferring decree to B — C executing security bond in favour of B undertaking to indemnify B for loss due to acquisition of rights under decree — Bond not showing judgment-debtor was party to arrangement — Deed is not guarantee but only as indemnity bond. AIR 1952 All 587 (588) (DB).

(10) Under the document, the executant agreed to reimburse the Municipal Committee to the extent of Rs. 200 in case of loss caused to it by the conduct of a certain bill collector. The document was signed by the executant and executed in favour of the Municipal Committee. It was not signed by the bill collector. There was no liability of the bill collector to the Municipal Committee. The document was executed in order to ensure a faithful discharge of duties by the bill collector. — Held that the document was a contract of indemnity and not one of guarantee notwithstanding the description of the executant as surety at the foot of the document. AIR 1949 Nag 48 (49) = ILR (1948) Nag 350.

(11) It is well known that a contract of insurance, specially fire insurance, is a contract of indemnity. AIR 1959 Cal 558 (563) = 63 Cal WN 367.

(12) Surety bond for repayment of loan executed at instance of principal debtor is contract of guarantee, not

Section 124 — Note 2 (contd.)

one of indemnity. (1962) 64 Pun LR 416 (419).

(13) Where the recital of any indemnity bond contained such expressions as "may come", "may from time to time" and "may in any way suffer" etc., but the operative part of the bond contained the expression "and shall also and at all times indemnify and save harmless the Government from all and every loss, injury, damages, costs or expenses which has been or shall or may at any times or time hereafter", it was held that the bond fixed the liability for the past and also for the future transactions. AIR 1967 Cal 119 (122, 125) (DB).

(14) Employees of Bank agreeing to see to repayment of irregular loan granted by them within a month or to repay the amount themselves — Agreement is a valid contract of indemnity. AIR 1964 Ker 267 (269) = 1963 Ker LJ 1076.

3. Implied contract of indemnity.—

(1) A right to indemnify generally arises from contract, express or implied, but it is not confined to cases of contract. A right to indemnify exists where the relation between the parties is such that either in law or equity there is an obligation upon the one party to indemnify the other. AIR 1946 Mad 472 (475) = ILR (1947) Mad 58 (DB).

(2) It is a general principle of law that when an act is done by one person at the request of another which act in itself is not manifestly tortious to the knowledge of the person doing it and such act turns out to be injurious to the rights of a third party, the person doing it is entitled to an indemnity from him who requested that it should be done. AIR 1938 PC 191 (192, 193) = ILR (1938) Bom 502 = 65 Ind App 286 = 32 Sind LR 786 ** AIR 1946 Mad 472 (477) = ILR (1947) Mad 58 (DB) ** AIR 1960 Punj 425 (427).

(3) Purchaser buying properties subject to charge impliedly undertakes to indemnify owner against incumbrance. AIR 1934 Mad 1 (4) = 57 Mad 218 (DB).

(4) Passing of receipt by benamidar at the request of one of the true owners without receiving money — Person passing receipt compelled to pay share of other real owner — Benamidar held was entitled to be indemnified by the true owner. AIR 1946 Mad 472 (477) = ILR (1947) Mad 58 (DB).

(5) Decree in suit by A against B upon a compromise — Suit by C against A — Suit compromised — A assigning to C decree obtained by him against B — Decree against B attached by Secretary of State for income-tax

dues against A — Decree against B put to execution — Offer by B of payment of a certain amount in full satisfaction of decree against B — Offer accepted and payment duly made — Payment noted as certified — Suit by C for declaration that assignment of decree in his favour was valid and that the Secretary of State had no right to attach the same — Suit decreed — C starting execution — Suit by B for declaration that he was entitled to be indemnified by the defendant (Secretary of State) in respect of all liabilities, costs, losses, damages and expenses arising out of execution of decree against him — Suit found on alleged contract of indemnity expressed or implied in the agreement following the acceptance of the amount by B in full satisfaction of decree — Held that there was no contract of indemnity which was essential to support B's claim — The payment was voluntary one and no damage could be claimed in respect thereof. AIR 1957 Cal 617 (621) (DB).

(6) Defendant placing orders through R, plaintiff's agent and making payments through him — Facts do not constitute implied contract of indemnity. AIR 1967 Andh Pra 145 (146) = (1966) 2 Andh WR 214.

4. Contract of indemnity — Effect.—

(1) Indemnity clause in a mortgage deed gives a right to the mortgagee to proceed against the mortgagor. (1921) 63 Ind Cas 108 (108) (DB) (Lah).

(2) In a suit on the contract of indemnity the indemnifier must pay taxed costs and also actual costs and reasonable expenses of the litigation. AIR 1929 Lah 388 (388).

(3) Vendor undertaking to indemnify the vendee against litigation — Vendee can claim pleader's fees unless they are unreasonable. AIR 1921 Mad 544 (545) = 43 Mad 898 (DB).

(4) Manager of Hindu joint family cannot claim money, misapplied by him, from members of the family who had contracted to indemnify him for debts incurred for family expenses. AIR 1921 PC 109 (112).

(5) Appellant giving letter written on stamped paper to another person desiring him to join in the appeal as co-appellant and undertaking to indemnify him from costs — Letter in the handwriting of appellant and sealed with his seal, though not signed, exonerates co-appellant from demand of costs. (1859) 7 Moo Ind App 148 (159) (PC).

(6) Sale of property by V on behalf of his minor son, N to P — S executing indemnity bond that in case N does not ratify sale on his attaining majority S would indemnify P — N not ratifying, but four years after

Section 124 — Note 4 (contd.)

attaining majority filing suit for recovery of possession — Suit decreed on ground that sale was void ab initio, being executed by committing fraud on law of registration — Suit by P against S and V for return of consideration and costs, etc., partly decreed — Separate appeals by S and V and cross-objections by P in High Court — Composite decree by High Court — S held liable on indemnity bond — V also held liable under Section 65, Contract Act, but prayer being in the alternative, suit dismissed against V — Leave to appeal to Privy Council granted to S — Leave confined to question of S's liability on bond — No application either to High Court or before Privy Council by P against High Court decree dismissing P's claim against V — Held, by Privy Council on appeal by S that upon bond S would have been liable in case sale was set aside on ground of N's refusal to ratify; but that sale having been found void due to fraudulent registration S was not liable. AIR 1949 PC 234 (238) = 76 Ind App 120 = ILR (1950) Mad 179. (AIR 1944 Mad 211, Reversed.)

(7) When loss occurs it is for the assured to prove the actual amount of his loss. The sums mentioned in the policy only show the outside limit of liability of the insurers. AIR 1959 Cal 558 (563) = 63 Cal WN 367.

(8) Where the workmen who met with death in an accident were engaged by a contractor working for the State, and even though there was no liability either on the contractor or the State to pay any compensation, inasmuch as the accident had occurred when the workmen were forbidden to be on the premises, the State pays the compensation, it cannot ask the contractor to indemnify it, under the indemnity clause in the contract. (1959) 72 Mad LW 572 (574, 575) = (1959) 1 Lab LJ 390.

5. Contract of indemnity — Suit on.—

(1) Indemnifier cannot sue debtor in his own name for want of privity of contract unless he gets assignment from promisee while surety can. AIR 1926 Mad 544 (551) = 49 Mad 156 (DB).

(2) Contract between A and B — B agreed to indemnify A — A's creditor cannot sue B. AIR 1936 Bom 344 (345) = 60 Bom 954.

(3) A creditor, who is not a party to a compromise among the debtors which contains a contract of indemnity, cannot institute a suit upon that contract. AIR 1932 Mad 457 (457) = 55 Mad 436 (DB).

(4) Cause of action for claim against promisor accrues to promisee when

promisee is damnified. Suit before actual loss is premature. AIR 1940 Bom 161 (162, 163) (DB) ** AIR 1935 Lah 974 (974). (Remote chance of being deprived of anything will not entitle person to realise damages from promisor or indemnifier.)

(5) Where under the terms of a sale deed, the consideration is to be paid by the vendee to a creditor of the vendors, the agreement by the vendee is a contract of indemnity. The indemnifier cannot be called on to make good his promise until the indemnified has incurred actual loss. AIR 1935 Nag 147 (148).

(6) Suit for specific performance of a contract to sell — Property agreed to be sold mortgaged to a third person — Plaintiff who had agreed to purchase the property got a letter whereby the defendant agreed to indemnify the plaintiff against all claims by third person: Held, that it is not necessary that actual damage should be caused before plaintiff can act. AIR 1926 Mad 597 (599).

(7) Where the defendant's promise to indemnify is absolute one an action can be brought the moment there is failure of performance and a plea of non-damnification would be bad. AIR 1914 Mad 655 (656) = 38 Mad 791 (DB).

(8) Mortgagor paying mortgage amount to mortgagee's alleged heir on indemnity by A can sue A if mortgagee's rightful heir obtains decree against property even before he pays decretal amount. AIR 1919 All 279 (280) = 41 All 395 (DB).

(9) Where in a suit under a contract or right of indemnity, the real sum due by defendant to plaintiff, for which the latter has obtained a decree, is less than the real loss incurred by defendant, defendant cannot ask for a decree on a third party notice for this latter sum and the case must proceed on the claim for indemnity as regards that first mentioned sum, i.e., the sum for which a decree has been passed. AIR 1920 Bom 352 (353).

(10) Assignment of debt — Assignor agreeing to indemnify — Suit against the debtor by the assignee dismissed — He is entitled to be indemnified — Failure to examine a witness in the suit no bar to the assignee's right of action on the indemnity. AIR 1918 Mad 358 (359).

(11) In the case of a joint indemnity bond the liability is joint. The decree on the bond need not specify liability of each. AIR 1954 Ajmer 7 (2) (8).

(12) In the case of a contract of indemnity, the indemnifier cannot be called on to make good his promise until the indemnified has incurred actual

125. Rights of indemnity-holder when sued.—The promisee in a contract of indemnity, acting within the scope of his authority, is entitled to recover from the promisor—

- (1) all damages which he may be compelled to pay in any suit in respect of any matter to which the promise to indemnify applies;
- (2) all costs* which he may be compelled to pay in any such suit if, in bringing or defending it, he did not contravene the orders of the promisor, and acted as it would have been prudent for him to act in the absence of any contract of indemnity, or if the promisor authorized him to bring or defend the suit;
- (3) all sums which he may have paid under the terms of any compromise of any such suit, if the compromise was not contrary to the orders of the promisor, and was one which it would have been prudent for the promisee to make in the absence of any contract of indemnity, or if the promisor authorized him to compromise the suit.

[*] See Sections 35 and 35A of the Civil Procedure Code (1908).

Section 124 — Note 5 (contd.)

loss. 1967 MPLJ 781 (788) = 1968 Jab LJ 134 (DB) ** AIR 1963 Pat 160 (165) = 1962 BLJR 942 (DB). (The defendant had to indemnify the plaintiff only to the extent of loss sustained by the plaintiff.) ** AIR 1959 Cal 558 (563) = 63 Cal WN 367. (Policies were not valued policies — Assured failing to prove actual amount of loss suffered — No decree can be passed in their favour.)

(13) Sale of properties by D to X — Execution of sale deed by D for himself and as guardian of his minor son — D agreeing to indemnify any loss that might be caused to X, in case sale of his son's half share should later on be set aside — **Held**, on facts, that suit could be brought for damages either on basis of indemnity bond or for breach of covenant of warranty of title, only if vendee were dispossessed from properties. AIR 1967 SC 359 (361) = (1966) 3 SCR 608. (A S. No. 371 of 1949, dt/- 7-1-1955 (Mad), Affirmed. AIR 1915 Mad 708 and AIR 1930 All 771 and AIR 1950 Bom 401, Approved.)

(14) Editor convicted for publishing defamatory matter — Suit by editor for damages against supplier for supplying wrong information — Not maintainable, unless there was contract to indemnify editor. AIR 1969 Punj 201 (204).

(15) Assessee as owner of property acquired by Government, receiving certain amount of compensation under an agreement between him and Government — Indemnity clause in agreement — No loss incurred by indemnified — Indemnifier cannot be held liable. 1967 MPLJ 781 (788) = 1968 Jab LJ 134 (DB).

(16) Motor insurance — Insurance against theft — Assured is entitled to only market value of car on date of theft. AIR 1967 Cal 35 (42).

6. Contract of indemnity — Discharge of.— (1) R indebted to B and B to H — R paying H with B's authority — H giving credit to B and letter of indemnity to R against losses — Latter is discharged by B obtaining credit from R for the money. AIR 1920 PC 121 (123).

7. Limitation.— See Section 125 and Limitation Act (1963), Articles 27 and 113.

Section 125 — Note 1

(1) Section 125 is by no means exhaustive. The indemnity-holder has other rights besides those mentioned in Section 125, which deals only with his rights in the event of his being sued. AIR 1942 Bom 302 (303) = ILR (1942) Bom 670 ** AIR 1946 Cal 159 (161) = ILR (1944) 2 Cal 318.

(2) If the indemnity-holder has incurred a liability and that liability is absolute, he is entitled to call upon the indemnifier to save him from that liability and to pay it off. AIR 1942 Bom 302 (303) = ILR (1942) Bom 670.

(3) Purchaser buying properties subject to charge impliedly undertakes to indemnify owner against incumbrance. AIR 1934 Mad 1 (4, 5) = 57 Mad 218 (DB).

(4) Part of purchase money left with vendee for paying vendor's creditors — It is not covenant by way of indemnity — On vendee's default, vendor can sue vendee without actual loss. AIR 1919 Mad 367 (368) (DB). (See also under Section 55 (5) (b), T. P. Act.) ** (1913) 36 Mad 348 (352) (DB). (Do.)

(5) Indemnity or guarantee need not be in writing — It may be inferred from conduct — If person who guarantees on behalf of firm has no authority, he is personally liable. AIR 1937 Sind 50 (50, 51) (DB).

"Compelled to pay".

(6) Amount which can be recovered under S. 125 is amount which has been paid, whether under compul-

Section 125 — Note 1 (contd.)

sion of adjudication or under terms of proper compromise — Measure of damages is extent to which promisee has been damnified. AIR 1919 Nag 126 (127, 128) = 15 Nag LR 78.

(7) Indemnifier can be asked to indemnify before person to be indemnified has incurred loss — "Compelled to pay" need not be construed as "already paid." AIR 1944 Pat 185 (187, 188) = 22 Pat 65 (DB). (See also under Section 55, T. P. Act.) ** AIR 1956 Bom 106 (108) = ILR (1956) Bom 60 (DB) ** AIR 1943 Mad 360 (362). (Suit by plaintiffs in apprehension of damage, calling upon defendants to make good their liability and thus save plaintiffs from harm to their properties is maintainable even though plaintiffs had not suffered any damage.) ** AIR 1917 Mad 874 (875) (DB). (Actual loss of possession is not necessary to sustain, when title is impaired, action for breach of contract of indemnity for loss of possession.) ** (1912) 34 All 429 (433) (DB). (Vendees covenanting to pay sum due on mortgage debt by vendors — Covenant not fulfilled — Mortgagee suing and obtaining decree — Suit by vendors for breach of covenant — It is not necessary to show real loss.) ** (1963) 1 Andh LT 344 (347) = (1963) 2 Andh WR 78.

[But see AIR 1919 Nag 126 (127) = 15 Nag LR 78. (Suit by surety on contract of indemnity before he has made payment and consequently before he is damnified, is premature.)]

(8) In one class of cases the indemnity-holder is not entitled to ask for a decree for payment of money to himself before the damage is incurred by him and that class of cases is one where the indemnifier is himself interested in the application of the money. In this class of cases, the only relief to which, the indemnity-holder is entitled is to call upon the indemnifier to perform specifically the contract of indemnity and pay the amount in question to the creditor concerned. In all other cases it may be open to the indemnity-holder to ask for a decree for the amount in question in his own favour. AIR 1956 Bom 106 (109) = ILR (1956) Bom 60 (DB).

(9) When A has agreed to indemnify B against any loss or injury, B is entitled to have recourse to this indemnity and to call upon A to discharge his liability as soon as the loss or injury becomes imminent. B is not bound to wait until he actually suffers loss or injury. He may sue *quia timet*. AIR 1946 Cal 159 (161, 162) = ILR (1944) 2 Cal 318.

(10) If a person gives wrong information to the representative of a newspaper and the same is published with

the result that the Editor is convicted, then the supplier of news, in absence of contract to the effect that if Editor suffered any loss on account of publication of news, he would pay damages, cannot be held liable. AIR 1969 Punj 201 (204).

Liability of promisee.

(11) Sum recovered by trustee in bankruptcy of a promisee from promisor in an indemnity contract should be applied exclusively to discharge claim agreed to be indemnified. AIR 1929 Cal 208 (209) = 56 Cal 262.

(12) Plaintiffs were owners of house and lands which were mortgaged. Lands alone were sold to defendant who agreed to indemnify against claims of mortgagee by paying off his mortgage. Plaintiffs also mortgaged house to defendant for sum required to pay off prior mortgage. Money was left with defendant. On failure of defendant to pay off prior mortgage, house and the lands were sold in execution of the mortgage decree. Lands were freed by defendant. But the house was sold and was purchased benami by defendant. Plaintiffs sued defendant for breach of contract to indemnify him: **Held**, that the defendant was bound to return house to plaintiffs if it was purchased by him benami or, if not purchased benami, he was bound in damages. Plaintiffs were also entitled as damages to all costs to which they were put. AIR 1923 Mad 492 (496).

(13) Assignment of mortgages to creditor in satisfaction of debts undertaking to make good loss in case of dispute — Scaling down of decree obtained on mortgages — Debtor liable to pay difference between full amount of bond and amount realised. AIR 1945 Mad 98 (99) = ILR (1945) Mad 491 (DB).

Costs.

(14) Promisee can recover costs properly incurred in resisting or ascertaining claim to which indemnity relates. AIR 1926 Nag 109 (114) = 22 Nag LR 49.

Right of promisor.

(15) In a contract to indemnify the promisor cannot impeach decree passed against promisee. AIR 1926 Nag 109 (113) = 22 Nag LR 49.

Rights of assignee.

(16) Guardian of minor widow executing indemnity bond in favour of debtor on his own and his minor son's behalf, charging joint family property against claims by minor widow — On attaining majority, widow suing debtor for money alleging that payment to her guardian was without leave of Court — Suit compromised and indemnity bond assigned to widow — Widow can enforce indemnity bond — She can pro-

126. "Contract of guarantee", "surety", "principal debtor" and "creditor".— A "contract of guarantee" is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the "surety"; the person in respect of whose default the guarantee is given is called the "principal debtor", and the person to whom the guarantee is given is called the "creditor". A guarantee may be either oral or written.

Section 125 — Note 1 (contd.)

ceed against properties charged in hand of purchasers who had purchased them after the execution of bond — Bond cannot however be enforced against the son's interest in property. AIR 1944 Mad 457 (460, 462) = ILR (1944) Mad 867 (DB).

Limitation.

(17) Cause of action for claim against promisor accrues to promisee when the latter is actually damnified. AIR 1940 Bom 161 (162) (DB).

(18) Vendee agreeing to discharge mortgage on property purchased — Default — Cause of action for suit by vendor arises on date fixed in covenant or when fulfilment demanded — But suit for specific performance is premature in absence of action by mortgagee or damage suffered. AIR 1933 Cal 641 (643) = 60 Cal 761.

(19) Article 83, Limitation Act (1908), applies to personal contracts of indemnity and not to case of indemnity arising under charge. AIR 1934 Mad 1(7) = 57 Mad 218 (DB).

(20) Vendees covenanting to pay vendors sum due on mortgage-debt by vendors — Covenant not fulfilled — Mortgagee suing and obtaining decree — Suit by vendors for breach of covenant — It is not necessary to show actual loss — Limitation runs from date of execution of deed. (1912) 34 All 429 (433) (DB).

(21) Where case depends on interpretation of "may be compelled to pay," S. 125 must be read along with Art. 83, Limitation Act (1908). Cause of action arises only after damage is suffered. AIR 1935 Lah 974 (974).

Section 126 — Synopsis

1. Scope.
2. Contract of guarantee — Meaning.
3. Contract of guarantee — Illustrations.
4. "Oral or written."
5. Guarantee for honesty.
6. Surety becoming principal debtor.
7. Contract of guarantee — Proof.
8. Limitation.

1. Scope.— (1) A surety bond in favour of the Court does not literally fall under this section as a "contract of guarantee." But principles underlying Sections 133 to 141 may be applied thereto. AIR 1944 Lah 428 (431) (DB) ** AIR 1939 Bom 23 (25) = ILR

(1938) Bom 794 (DB) ** AIR 1967 Mys 147 (149) = (1965) 2 Mys LJ 87. (Though in the absence of any stipulation in that behalf there is no ground for limiting a surety's liability only to decrees passed after contest, there is nothing unreasonable or wrong in a surety expressly stipulating that he would be bound by his guarantee only if a decree is passed after contest and he would not be bound by a consent decree.) ** AIR 1959 Bom 516 (517) = 1958 Nag LJ 72.

(2) A guarantee is a contract to indemnify upon a contingency and the Court is to determine what contingency the parties intended when they executed the contract. AIR 1930 Cal 17 (19) = 57 Cal 764 (DB).

(3) Suretyship agreement, though supplementary to principal contract (i.e. if principal contract falls agreement of suretyship also falls) is separate and distinct. AIR 1940 Sind 199 (200) = ILR (1940) Kar 347 (DB).

(4) The obligation which a surety incurs under the bond which he gives to the Court under the Code of Civil Procedure is excluded from the definition of 'contract of guarantee' contained in Section 126. AIR 1957 Madh Pra 98 (105) (DB).

(5) Plaintiff deposited a sum of money in a branch of a bank having its head office at Dacca. The defendant had given a personal undertaking that he would be personally liable for any loss that the plaintiff might sustain. Due to political happenings as a result of partition of India, the branch of the bank was closed. No payments were made to the depositors at that bank, from that date. The head office of the bank being at Dacca, in Pakistan, communication between India and Pakistan had been dangerous and difficult. The defendant pleaded frustration by reason of the partition of India. It was held that the doctrine of frustration did not apply and that the defendant could not be absolved from performance under Section 56. AIR 1957 Pat 256 (258) (DB).

(6) The word "surety" occurring in Article 57, Stamp Act (1899) has been used in the same sense in which it is used in Section 126. AIR 1964 All 519 (520) = 1964 All LJ 592 (DB).

(7) The words "has become liable as surety" in Section 145, Civil P. C. should not be confined to surety in the

Section 126 — Note 1 (contd.)

strict sense of the term as used in the Contract Act. 1961 Raj LW 31 (32).

2. Contract of guarantee — Meaning.— (1) The primary idea of suretyship is an undertaking to indemnify if some other person does not fulfil his promise. AIR 1936 All 327 (332) = 58 All 804 (FB).

(2) A contract of guarantee involves three parties, the creditor, the surety and the principal debtor, and a contract to which those parties are privy. The foundation is the contract between principal debtor and the creditor. Then there must be a contract between the creditor and the surety, by which the surety guarantees the debt. But if those are the only contracts the case is one of indemnity. In order to constitute a contract of guarantee, there must be a third contract, by which the principal debtor expressly or impliedly requests the surety to act as surety. AIR 1940 Bom 315 (316, 317) = ILR (1940) Bom 552 (DB) ** AIR 1958 Raj 343 (345) = ILR (1958) 8 Raj 975 ** AIR 1949 Nag 48 (49) = ILR (1948) Nag 350. (Contract of indemnity and contract of guarantee — There are two parties in the case of former and three parties in case of latter.) ** AIR 1968 Cal 371 (377) = 72 Cal WN 94 ** AIR 1968 Goa 29 (33) = 70 ITR 518. (There can be no contract of guarantee if liability does not exist. The liability of the guarantor presupposes the existence of a separate liability of the principal debtor and his liability is thus secondary which comes into existence only in default by the principal debtor.) ** AIR 1959 Mad 122 (125) = 71 Mad LW 866 (2) (DB).

[See also AIR 1957 Madh Pra 98 (105) (DB). (Surety giving bond to Court under Civil P. C. — It is not a contract of guarantee.)]

[But see AIR 1921 Mad 530 (531) (DB). (There need not be privity between principal debtor and surety.)]

(3) There can be no contract without a liability enforceable at law. AIR 1918 Bom 197 (199) = 42 Bom 444 (DB).

(4) A contract of guarantee presupposes the existence of a "principal debtor" and no such contract can be made as regards a broker before a sale has taken place when there is no principal debtor in existence in respect of whose default the guarantee can be given. AIR 1934 Nag 163 (164) = 30 Nag LR 205.

(5) Implied request to surety by principal debtor is sufficient for contract of guarantee. AIR 1937 Oudh 19 (20) = 12 Luck 484 (DB).

(6) There is no complete contract if the nature of security is not specified. 1934 Mad WN 1388 (1390) (DB).

(7) Agreement to pay on failure of others to pay constitutes contract of guarantee. AIR 1932 Nag 62 (65) = 28 Nag LR 325 (DB).

(8) It is not necessary that the principal debtor should as a matter of law be an express party to the contract of guarantee, it is sufficient that the principal debtor is a party by implication to the contract. AIR 1957 Pat 256 (257) (DB).

(9) The word "guarantee" has acquired a technical meaning. The essence of guarantee is that a guarantor agrees to discharge his liability only when the principal debtor fails in his duty. This presupposes the existence of a principal debtor. If there never was another person who can be properly described as the "principal debtor" there cannot be said to have been any "guarantee" either in its technical or ordinary meaning. AIR 1953 Madh B 26 (27) = 1953 Cri L Jour 253 (DB). (Promissory note executed jointly by a company and its managing agents does not come within the purview of Section 87-D of the Companies Act, 1913.)

(10) Contract of guarantee, unlike a contract of insurance, is not one of "uberrimae fidei" but a contract of "strictissima juris." AIR 1955 Cal 217 (223). (Contract construed.)

(11) There is distinction between contract of indemnity and a contract of guarantee. In the case of the former, the non-liability of the principal debtor does not affect the obligation undertaken by the indemnifier which is primary. Every contract of guarantee, however, is not a contract of indemnity having this effect, for in the absence of special circumstances, the liability of a surety is not ancillary and can rest on a valid obligation on the part of the party whose debt or obligation is guaranteed. AIR 1957 Mad 164 (165, 167) = ILR (1957) Mad 176 (DB) ** (1966) 59 ITR 378 (383) (Mad) (DB). (In the case of guarantee, there is an existing debt or duty the performance of which is guaranteed by surety — In indemnity, the possibility of risk of any loss happening is only contingent against the indemnifier.) ** AIR 1963 Mad 413 (418, 419) = (1963) 2 Mad LJ 20 (DB). (Overruled on another point in AIR 1969 SC 493 — Where the liability of the principal is held to be not enforceable, on the ground of the contract being illegal, there is no question of surety being made liable — App. No. 7 of 1956, Dt/- 8-7-1959 (Mad), Reversed.)

(12) The necessity of the principal-debtor being a party or his consent or request may be important and decisive for determining whether the contract is one of guarantee or one of indemnity,

Section 126 —Note 2 (contd.)

but for enforcing it against surety the question has no relevance. AIR 1955 Hyd 261 (263) = ILR (1955) Hyd 754 (DB).

(13) A person sought to be made liable as a surety should undertake to perform the promise or discharge the liability of a third party in case of his default. AIR 1952 All 996 (1001, 1010) = ILR (1952) 2 All 984 (DB).

(14) One of the essential elements for a transaction of a guarantee is the presence of three different parties as collaborating in the execution of a deed of guarantee. Where this element is missing and the principal debtor is not taken into consideration at all, the deed is not one of a guarantee but is only an indemnity bond. AIR 1952 All 587 (588) (DB). (Decree-holder transferring decree to B — C executing a surety bond in favour of B undertaking to indemnify B for loss due to acquisition of rights under decree — Bond is not one of guarantee but one of indemnity.)

(15) The primary idea of suretyship in an undertaking to indemnify the debtor in case he does not fulfil his promise, the contract of guarantee being thus a contract to indemnify. The central point in such a case is to determine what was the contingency which the parties had in their minds when the contract was entered into. AIR 1969 Andh Pra 294 (298) (DB).

(16) Guarantee is in the nature of a collateral engagement to answer for the debt, default or miscarriage of another as distinguished from an original and direct engagement for the party's own act. AIR 1964 Raj 76 (77) = 1963 Raj LW 430.

3. Contract of guarantee — Illustrations — Promissory note.— (1) A writing to S, in presence of D, please lend Rs. 1200 to D. "There will be no trouble (Nuks) in the payment of your money. Be assured, if there be any trouble, I hold myself responsible" — Privity between these parties proved — This is contract of guarantee and not contract of indemnity — A is liable to S as surety to discharge liability in default by D, the principal debtor. AIR 1937 Oudh 19 (20) = 12 Luck 484 (DB).

(2) Father mortgaging his separate property and having benefit of whole mortgage loan — Son made party to mortgage deed as party of second part not described as surety, but joining at the request of the mortgagee — Son held in reality to be a surety and entitled to benefit of security to the extent of his contribution towards mortgage debt. AIR 1942 Mad 628 (629) = ILR (1942) Mad 851 (DB).

(3) Money given by A to B for investment on security of immovable property — B instead of doing so lending it to C on promissory note drawn by C in name of B — B endorsing it to A and informing him that he would come to him with borrowers and clear loan — B held liable as endorser as well as guarantor of payment. AIR 1939 Mad 848 (849) (DB).

(4) A mere recommendation by C that A should buy goods of B will not entail on C the consequences that might flow from his guaranteeing that A will not suffer any loss if he takes up B's offer of sale. AIR 1927 Mad 62 (65, 66) (DB) ** AIR 1915 Mad 528 (528) (DB).

(5) Employment contract between insurance company and employee — Increment in salary to be proportionate to increase of business — Contract, held could not be construed as one of guarantee and that securing of business was not condition precedent to accrual of salary. AIR 1939 Lah 509 (510).

(6) Trustee not undertaking any personal liability to creditors is not a surety. (1907) 30 Mad 235 (240) (DB).

(7) A person who writes to a creditor under his signature that he shall be responsible for the payment of the debt due to him from another person stands in a position of a principal debtor and not of a surety. AIR 1937 Pat 410 (411) = 16 Pat 27 (DB).

(8) Relative of judgment-debtor offering cheque to decree-holder in satisfaction of claim — Relative is not surety. AIR 1941 Pesh 6 (7) (DB).

(9) Person promising to pay extra rate of interest in consideration of creditor giving time to debtor, without any liability on part of debtor, is not surety. AIR 1930 All 543 (544) (DB).

(10) Persons who are jointly and severally liable on promissory notes are not sureties. One of two joint promisors paying whole debt cannot claim lien on shares of another held by creditor. AIR 1933 Mad 39 (42) = 55 Mad 949 (DB).

(11) Where on arrest of A by a decree-holder for realising decree debt, B, relation of A, gives Government promissory notes as security for fulfilment of obligation under decree, there is neither contract of guarantee as contemplated by Section 126, nor any personal liability as surety under Section 145, C. P. C., (1908). This creates only equitable charge on G. P. Notes in favour of decree-holder to secure amount due under decree. AIR 1916 Cal 30 (30) (DB).

(12) Under a sub-brokerage contract, the sub-broker undertook to make good the loss arising out of the default of the constituents introduced by

Section 126 — Note 3 (contd.)

him. By a letter the sub-broker agreed to be liable for an ascertained amount due from the various constituents introduced by him and stipulated that the amount should be debited to his account :

Held that the contract embodied in the letter was neither a contract of indemnity nor a contract of guarantee. AIR 1940 Bom 315 (317) = ILR (1940) Bom 552 (DB).

(13) Where under the sub-brokerage contract the sub-broker was to get fifty per cent. broker's commission, to introduce constituents to the broker and to be answerable to the broker for the performance by the constituents introduced of their obligations, it was held that the contract was one of indemnity and not of guarantee and therefore the broker was under Section 135 entitled to compromise the amount due from the constituents without the consent of the sub-broker. AIR 1940 Bom 315 (317) = ILR (1940) Bom 552 (DB).

(14) Where after the debt has been contracted, A, the alleged surety came forward and promised that he would see that the debtor duly discharged his obligation, but the creditor did not suffer any detriment at the instance of A, it was held that the promise was not supported by consideration and for that reason could not be enforced in a Court of law. A promise of this description could not amount to a guarantee. AIR 1952 Trav-Co 202 (202) (DB).

(15) If a person undertakes to reimburse another for some loss which may be caused to him say, by a third party or by himself, but not at the request, express or implied, of a third party, then the person who having undertaken the liability and having been called upon to make good the loss will not be able to recover the loss so caused to him from the principal debtor, the latter being not privy, but virtually a stranger to the undertaking given to the promisee. Such a contract is not a contract of guarantee but one of indemnity. AIR 1953 Raj 343 (345, 346) = ILR (1958) 8 Raj 975.

(16) A surety for a debt for which a minor made himself liable cannot be proceeded against on his contract of guarantee because under Section 128 the liability of the surety is co-extensive with that of the principal debtor unless it is otherwise provided by the contract. The obligation of the surety does not become a primary one when no liability can ever be fastened on the principal debtor by reason of his minority at the time of the contract. AIR

1957 Mad 164 (168) = ILR (1957) Mad 176 (DB).

(17) Undertaking to perform the promise or discharge the liability of a third person — Letter reciting the writer as a debtor — Writer just come of age — Liable, if at all, only as a debtor — Not liable as a surety. AIR 1952 All 996 (1001, 1010) = ILR (1952) 2 All 984 (DB).

(18) Where two persons were described as principal debtors and two others as sureties in the opening part of the document but in the operative part all these four persons had undertaken upon themselves the liability to pay the amount due under the bond on demand by the plaintiff, held that though two persons have been described as sureties they all were joint contractors. 1961 Raj LW 394 (395).

(19) Where a reference was made in the bond to the request of the principal debtor to the surety to give security and the surety thereupon agreed to comply with the request of the principal debtor and on that basis he executed the bond in favour of the creditor who accepted the same, this satisfied the test of the document being a surety bond. AIR 1959 Mad 122 (125) = 71 Mad LW 866 (2) (DB).

(20) Terms of guarantee fixing last date for enforcement of guarantee — Time limit made integral part of guarantee — No attempt made to enforce it — Guarantee is no longer enforceable. AIR 1967 SC 1634 (1637) = (1968) 1 SCJ 290.

(21) Loan secured from Bank — Letter, promissory note and deed of hypothecation executed in favour of Bank by three defendants of which B was one — **Held** all documents read together satisfied conditions of Sec. 126, and that B was surety and not co-obligant. AIR 1965 SC 1856 (1860) = (1965) 3 SCR 318.

(22) Overdraft account of B with bank — Sum of money due on — Bank agreeing to give overdraft facility to B — In consideration thereof A, jointly with B executing promissory note containing unconditional undertaking to pay the said amount and gave by their letter continuing security for repayment of any balance due on overdraft — **Held**, on construction of aforesaid letter that the letter was to make A only a surety. AIR 1964 Andh Pra 555 (557) = (1964) 2 Andh WR 362.

(23) Money deposited with National Chamber of Commerce, Kanpur, as margin money under rules of chamber by one constituent for registering contracts entered into with another constituent of Chamber — Contracts prohibited under Government Control Order — Position of chamber held was

Section 126 — Note 3 (contd.)

that of stake-holder and not quite that of surety. AIR 1963 All 294 (298) (DB).

4. "Oral or written."— (1) A contract of guarantee need not necessarily be in writing. It may be expressed by word of mouth or it may be tacit or implied and may be inferred from the course of conduct of the parties. Chapter VIII is not exhaustive on the subject. AIR 1930 All 848 (849) (DB) ** AIR 1937 Sind 50 (50) (DB) ** AIR 1969 Andhra Pra 294 (298) (DB).

(2) Where the terms of a contract of guarantee though oral, have been mentioned with sufficient precision in plaint, the contract cannot be held to be uncertain or void within the meaning of Section 29. AIR 1957 Pat 256 (258) (DB).

5. Guarantee for honesty.— (1) There is a broad and substantial distinction between a surety for the payment of a debt and one for the honesty of a guardian and in order to find out whether a particular transaction belongs to the one class or the other, one will, in each case, have to refer to the terms of the bond itself and the circumstances of the case. AIR 1932 Pat 162 (164) = 10 Pat 94 (DB).

(2) If the employer of a servant whose fidelity has been guaranteed continues to employ him even after a proved act of dishonesty without notice to the guarantor the surety is discharged. AIR 1955 Cal 217 (221, 222).

(3) A surety's liability for the faithful discharge by another of his duties depends in each case on the exact terms of that guarantee. The surety is not discharged from the liability for the principal debtor's default because the default would not have happened if the creditor had used all the powers of superintending the performance of the debtor's duty which he could have exercised, because the employer of servant whose due performance of work is guaranteed does not contract with the surety that he will use the utmost diligence in checking the servant's work. AIR 1955 Cal 217 (221).

(4) The continued employment of a servant without notice to surety in order to discharge the surety must be after the creditor or employer has proof of the servant's acts of dishonesty and not merely suspicions or reports about them. The theory is a theory not of suspicion but of satisfaction. AIR 1955 Cal 217 (223).

6. Surety becoming principal debtor.— (1) If on failure of principal debtor, the money is claimed from the surety and the surety executes a promissory note, he becomes a principal debtor. AIR 1945 All 233 (234, 235) = ILR (1945) All 117 (DB).

(2) Plaintiff and defendant originally creditor and surety — Subsequent agreement by which surety undertaking to pay sum unconditionally — Surety becomes principal debtor — Suit against him within three years of the agreement is maintainable even though the agreement has been entered into on failure of principal debtor to pay. 1935 All WR 492 (492, 493).

(3) The obligation of the surety does not become a primary one when no liability can ever be fastened on the principal debtor by reason of his minority at the time of the contract. AIR 1957 Mad 164 (168) = ILR (1957) Mad 176 (DB).

7. Contract of guarantee — Proof.

(1) Contract of guarantee as also the consideration for it must be strictly proved when they are relied upon. Due weight must be given to custom of merchants in drawing presumptions. AIR 1935 Pat 376 (379) (DB) ** AIR 1969 Andh Pra 294 (298) (DB).

(2) Guarantor merely guaranteeing payment of debtor's debt is entitled to require debt to be proved against him — Debtor agreeing to debt proved in particular way — Guarantor is bound by that mode of proof. AIR 1941 Bom 108 (119, 120) = ILR (1941) Bom 273 (DB).

(3) Whether a guarantee is enforceable or not depends upon the terms under which the guarantor bound himself. To this there are some exceptions. In case of ambiguity when all other rules of construction fail the Courts interpret the guarantee contra proferentem, that is, against the guarantor or use the recitals to control the meaning of the operative part where that is possible. But whatever the mode employed, the cardinal rule is that the guarantor must not be made liable beyond the terms of his engagement. AIR 1967 SC 1634 (1636) = (1968) 1 SCJ 290.

(4) The terms of a guarantee must be strictly construed. The surety receives no benefit and no consideration. He is bound therefore, merely according to the proper meaning and effect of the written engagement that he has entered into. AIR 1967 Mys 147 (149) = (1965) 2 Mys LJ 87.

8. Limitation.— (1) Section 128 of the Contract Act defines the liability of a surety but does not affect the statute of limitation. A payment by the principal debtor does not bind the surety for the purposes of limitation. AIR 1918 Cal 707 (710, 712) = 44 Cal 978 (DB).

(2) A promissory note payable on demand being a debt in praesenti and payable without demand, the limitation runs from the date of its execution and the liability of the surety being

127. Consideration for guarantee.—Anything done, or any promise made, for the benefit of the principal debtor, may be a sufficient consideration to the surety for giving the guarantee.

Illustrations

(a) B requests A to sell and deliver to him goods on credit. A agrees to do so, provided C will guarantee the payment of the price of the goods. C promises to guarantee the payment in consideration of A's promise to deliver the goods. This is a sufficient consideration for C's promise.

(b) A sells and delivers goods to B. C afterwards requests A to forbear to sue B for the debt for a year, and promises that, if he does so, C will pay for them in default of payment by B. A agrees to forbear as requested. This is a sufficient consideration for C's promise.

(c) A sells and delivers goods to B. C afterwards, without consideration, agrees to pay for them in default of B. The agreement is void.

Section 126 — Note 8 (contd.)

collateral with that of the principal debtor, the position both in England and in Indian law is that it will always depend upon the form of the contract as entered into between the surety and the creditor and whether or not the principal debtor and the surety are co-contractors. AIR 1957 Orissa 106 (108) = ILR (1957) Cut 454.

(3) For the purposes of application of S. 20, Limitation Act (1908), the debt of the surety is distinct from the debt of the principal debtor though both of them arise out of the same transactions. Section 128 which makes the liability of the surety co-extensive with that of the principal debtor has reference only to the quantum of the liability and is not intended to affect the application of the statute of limitation. AIR 1957 Orissa 106 (108) = ILR (1957) Cut 454.

(4) See also AIR commentaries on the Limitation Act (1963), Schedule I, Article 27, Note 4.

Section 127 — Note 1

(1) The illustrations given in the Acts form no part of the Acts and are not absolutely binding on Courts (Obiter — Per Stuart C. J.) (1877) 1 All 487 (496) (DB).

(2) A contract of guarantee cannot be enforced unless there is some consideration for guarantee. AIR 1916 Oudh 284 (285).

[See however AIR 1960 Him Pra 1 (6). (Contract Act not in force when surety bonds were executed — Bonds not to be treated as void on ground of want of consideration.)]

(3) Consideration between debtor and creditor is good for guarantee — Not necessary that surety should receive consideration. AIR 1929 Lah 203 (204) ** AIR 1929 All 72 (73) (DB).

(3-A) Execution of guarantee letter and promissory note by guarantor — Forbearance to sue debtor on that basis — Amounts to consideration. AIR 1970 Andh Pra 158 (161, 162) (FB).

(4) Consideration between creditor and principal debtor is a valid and good consideration for the guarantee given by the surety. It is not necessary that consideration should flow from creditor and be received by surety. AIR 1969 Andh Pra 294 (298) (DB).

(5) The word "done" in the section shows that past benefit to the principal debtor can be good consideration for a bond of guarantee. AIR 1940 Oudh 346 (347) = 15 Luck 656 (DB).

[But see AIR 1964 Raj 76 (78) = 1963 Raj LW 430. (Anything done or any promise made for benefit of principal debtor must be contemporaneous to surety's contract of guarantee in order to constitute consideration therefor. AIR 1940 Oudh 346, Diss. from.)]

(6) A binding promise to forbear is good consideration for a guarantee, though there be no contract by the plaintiff to forbear. (1904) 31 Cal 242 (248) (DB) ** 1879 Pun Re No. 120, page 358 (359) (DB).

(7) Mere promise to release a claim against another is not a consideration for a guarantee of payment — But actual release of the claim is consideration. AIR 1916 Mad 1213 (1214) (DB).

(8) Suit for specific performance of a contract of lease to sell — Suit compromised and agreement entered into by the lessee for due observance of all conditions laid down in the lease one of which was for payment of purchase money by regular instalments — Subsequent to the registration of the agreement surety bond executed separately for the lessee properly discharging his liability : Held, the surety bond was supported by consideration. AIR 1918 PC 226 (228).

[See however (1877) 1 All 487 (494) (DB). (Advance of money on hypothecation bond where the name of a person was mentioned as surety for the balance — Such person not a party to

128. Surety's liability.—The liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract.

Illustration

A guarantees to B the payment of a bill of exchange by C, by the acceptor. The bill is dishonoured by C. A is liable not only for the amount of the bill but also for any interest and charges which may have become due on it.

Section 127 — Note 1 (contd.)

the bond but subsequently executing surety bond : **Held**, there was no consideration for the surety bond under this section.)

(9) Newly admitted partner acknowledging liability of partnership — There is consideration — Acknowledgment created new contract. **AIR 1943 PC 147 (152) = ILR (1944) Kar (PC) 85. (AIR 1939 Pat 323, Reversed.)**

(10) Arrest of certificate debtor under Bengal Public Demands Recovery Act, 3 of 1913 — Release on surety bond provided by defendant : **Held**, release of the certificate debtor was consideration for the surety bond. **AIR 1937 Cal 625 (628) = ILR (1937) 2 Cal 698 (DB).**

(11) Person embezzling money promising to repay the amount — Surety for the payment with the object of saving the former from prosecution though no specific understanding to that effect : **Held**, the consideration was not illegal. **AIR 1941 Oudh 593 (596, 597) (DB).**

(12) Though past or executed consideration is insufficient to support a provision of guarantee, an executory or future consideration is sufficient for the purpose. (1946) 36 Trav L Jour 210 (220) (DB).

(13) Where after the debt has been contracted A the alleged surety came forward and promised that he would see that the debtor duly discharged his obligation but the creditor did not suffer any detriment at the instance of A, it was held that the promise was not supported by consideration and for that reason could not be enforced in Court of law. A promise of this description could not amount to a guarantee. **AIR 1952 Trav-Co 202 (202) (DB).**

SECTION 128 — SYNOPSIS

1. Scope.
2. Liability of surety.
3. Surety for minors.
4. Where the debt is unenforceable against the principal debtor.
5. Surety for a limited amount.
6. Joint family — Son's liability for father's surety debt.
7. Surety bond to Court.
8. Limitation upon liability provided by contract.
9. Suit against surety.
10. Burden of proof.
11. Limitation.

1. Scope.— (1) The liability of a surety cannot form the subject-matter of a trust. **AIR 1939 Bom 309 (311).**

(2) The legislature which enacted the co-extensiveness of the liability of the surety with that of principal debtor may subsequently vary or modify that provision under a different Act. (1881) 5 Bom 647 (650) (DB). (Section 72, Dekhan Agriculturists Relief Act XVII of 1879 — Extension of period of limitation in respect of agriculturists — No distinction between liability as principal and surety.)

(3) Surety for person ordered to keep peace or to be of good behaviour — Liability of surety is independent liability and is not co-extensive with that of the person bound over — Provisions relating to contracts of guarantee and surety's liability in chapter 8 are wholly inapplicable to such bond by surety. **AIR 1946 All 333 (335, 336) = ILR (1946) All 801 = 47 Cri LJ 757 (FB).**

(4) Mortgage decree against A — Suit by A's son against decree-holder for declaration that property was not liable to sale in execution, the decree being obtained on immoral debts — A made pro forma defendant — Stay of execution asked for — Stay granted on furnishing surety for interest and depreciation of property — During pendency of son's suit decree-holder realizing Rs. 9759 from surety — Suit ultimately dismissed — In execution of mortgage decree, decree-holder obtaining personal decree against A under Order 34, Rule 6 for Rs. 8425 and odd — A cannot claim refund of excess amount recovered from surety in son's suit, since surety cannot demand any money from A, who was merely a pro-forma defendant in the suit. **AIR 1949 East Punj 213 (218).**

(5) A contract of guarantee must be construed strictly in favour of the surety. **AIR 1948 Nag 123 (124) = ILR (1947) Nag 643.**

2. Liability of surety.— (1) "Liability" means liability enforceable at law. **AIR 1918 Bom 197 (199) = 42 Bom 444 (DB).**

(2) A surety who guarantees the performance of an agreement without consideration is not bound by his guarantee. **AIR 1928 Bom 539 (545).**

(3) Surety's liability is co-extensive with that of principal debtor. **ILR (1942) 1 Cal 11 (17) (DB) ** AIR 1940**

Section 128 — Note 2 (contd.)

Bom 247 (249) = ILR (1940) Bom 387 (DB). (Liability is not alternative.) ** AIR 1937 Rang 197 (198). (Surety guaranteeing payment and promising to execute new pronote on failure — Failure to execute new pronote — Surety is liable on old note.) ** AIR 1934 All 525 (526) (DB) ** AIR 1933 Lah 1024 (1026) (DB) ** AIR 1933 Nag 287 (288). (Section 128 of Contract Act and Section 145, Civil P. C. should be read together.) ** AIR 1929 Lah 393 (394). (Surety's liability is joint and several with principal debtor.) ** (1903) 16 CP LR 76 (77) ** (1879) 4 Cal LR 145 (147) (DB) ** AIR 1969 SC 297 (298) = (1969) 1 SCJ 380. (Surety's liability is not deferred until the creditor exhausts his remedies against the principal debtor—Judgment and decree in A. F. O. D. No. 300 of 1959, dated 3-12-1962 (Pat), Reversed.)

(4) In the absence of some special equity the surety has no right to restrain an action against him by the creditor on the ground that the principal is solvent or that the creditor may have relief against principal in some other proceedings. AIR 1969 SC 297 (298) = (1968) 1 SCJ 380. ((1802) 31 ER 1272 Rel. on. Judgment and decree in A. F. O. D. No. 300 of 1959, dated 3rd December, 1962 (Pat), Reversed.)

(5) Where the creditor obtains a decree against surety and principal, surety has no right to restrain execution against him until the creditor exhausts his remedies against principal. AIR 1969 SC 297 (298) = (1968) 1 SCJ 380. (Judgment and decree in A. F. O. D. No. 300 of 1959, D/- 3-12-1962 (Pat), Reversed.)

(6) Surety becomes liable only on contract of suretyship and not by mere fact of loan. He is liable for each loan as soon as it is made. (1911) 21 Mad LJ 457 (460) (DB).

(7) The liabilities of principal and his surety though arising under the same transaction are distinct. AIR 1919 Cal 636 (637) (DB) ** AIR 1957 Orissa 106 (108) = ILR (1957) Cut 454 ** AIR 1946 Nag 135 (136) = ILR (1946) Nag 353 (DB).

(8) A surety's liability depends upon the terms of his contract because his is a collateral obligation. AIR 1940 Cal 401 (402) = ILR (1940) 2 Cal 362 ** AIR 1939 Bom 309 (312). (Entitled to insist on the strict adherence to the terms of his obligation.) ** AIR 1931 Oudh 430 (432) (DB) ** AIR 1930 All 848 (851) (DB). (His liability cannot be enhanced beyond the proper meaning of his written engagement.) ** AIR 1914 Sind 154 (157) = 8 Sind LR 112. (Guarantee-broker is not liable if seller suffers loss on account of his own unreasonable delay in re-selling goods.) ** AIR 1967 Goa 88 (90) (DB) ** AIR

1967 Mys 147 (149, 150) = (1965) 2 Mys LJ 87 ** AIR 1959 Cal 746 (748) (DB). (Overdraft arrangement between Bank and A — B giving security of fixed deposit receipt — Amount due on overdraft — Letter of B not authorising Bank to adjust against fixed deposit — Fixed deposit receipt not endorsed and discharged on maturity — Bank held had no authority and option to adjust.)

(9) There can be no contract of guarantee if liability does not exist. The liability of the guarantor presupposes the existence of a separate liability of the principal debtor and his liability is thus secondary which comes into existence only in default by the principal debtor. AIR 1968 Goa 29 (33) = 70 ITR 518.

(10) With regard to contracts of guarantee for advances made by a bank to the principal debtor, an arrangement between the principal debtor, and the surety, behind the back of the bank, cannot affect the bank's right. Nor are those rights affected by the fact that the bank's agent has made accommodation advances without authority when the terms of guarantee were sufficiently wide to cover them. AIR 1930 PC 272 (273).

(11) Surety is liable not only for the principal but also for interest due under the contract. AIR 1935 Mad 748 (750) ** AIR 1929 All 687 (688). (Liability of principal debtor for tort in regard to amount embezzled — Surety liable also for interest allowed thereon.) ** AIR 1925 Sind 164 (166) = 19 Sind LR 237. (Surety for payment of interest — Not liable for post diem interest in a mortgage.)

(12) A surety cannot be compelled to pay the sum assured unless the creditor first realizes the debt due from the properties of the principal debtor. AIR 1967 Goa 88 (90) (DB).

(13) Death of principal debtor does not discharge the surety. AIR 1920 Nag 275 (2) (276) ** AIR 1924 Lah 428 (428) ** AIR 1922 Nag 112 (112). (The decree need not specifically state the liability.)

(14) Surety for guardian of minor's properties is liable for his dealings with the entire properties even though some were not included in the petition for appointment. (1908) 12 Cal WN 481 (485) (DB).

(15) The liability of a surety for guardian of property is limited to the amount of his bond. AIR 1929 Pat 626 (629) (DB).

(16) Debtor giving security to surety — Creditor cannot derive benefit thereof unless he can show direct interest in it by contract, trust, or bankruptcy of both debtor and surety or upon

Section 128 — Note 2 (contd.)

refusal by debtor to pay. AIR 1924 Cal 578 (582, 583) = 51 Cal 185 (DB).

(17) An oral guarantee by a person, not a party to the contract, of the performance by one of the parties to the contract is binding in Burma. AIR 1939 PC 110 (111) = 1939 Rang LR 358 = 66 Ind App 198.

(18) Composition between partners and some of the creditors of an insolvent firm — Partners executing security bond guaranteeing payment — Suit on failure — Held that any of the consenting creditors can sue on the surety bond as the facts proved that the debtor was separately and individually dealt with. AIR 1930 Lah 1029 (1033) (DB).

(19) Principal debtor allowed to withdraw from Court money deposited by a person who became liable to him under decree — Person getting rid of the liability in appeal seeking to recover from the principal debtor by attachment of properties — Stay of proceedings by Debt Settlement Board — Held that his execution against surety was not premature and that surety was liable. AIR 1940 Cal 224 (224).

(20) Surety cannot escape liability on ground that circumstances were such that principal debtor was entitled to avoid contract, when in fact contract was not avoided. AIR 1916 Mad 1066 (1067) (DB).

(21) Surety is discharged from his liability by reason of the composition between creditor and principal debtor. AIR 1959 Mad 122 (126) = 71 Mad LW 866 (2) (DB).

(22) Where lessor can, but does not, determine lease on first default, the lease continues as before and if default is subsequently made sureties of lease under original security bond continue liable. (1910) 7 Mad L Tim 92 (93) (DB).

(23) Security deposited for faithful discharge of duties as khazanchi of a Bank — Khazanchi's duty stipulated to be bound to inform bank of insolvent circumstances of customers — Khazanchi dealing fraudulently with Bank as customer — Security is liable to forfeiture for loss caused by such fraudulent dealings. AIR 1920 PC 35 (40) = 47 Ind App 164 = 10 Low Bur Rul 167.

(24) Guarantor undertaking to pay creditor certain sum if creditor would continue to deal with debtor — Creditor not continuing to deal — Guarantor is not bound to fulfil contract. AIR 1927 PC 272 (274).

(25) A employing B at one place on C standing surety for B — Employment terminated — B employed by A afresh at a different place taking a

security bond from another person — C, held to have been discharged. AIR 1967 All 506 (512) = (1968) 2 Lab LJ 708 (DB).

(26) Suit on mortgage — Surety for payment of deficiency arising on sale of mortgaged property also joined — Conditional decree for balance cannot be passed against him — His liability arises only when mortgage property is found insufficient. AIR 1948 Nag 123 (125) = ILR (1947) Nag 643.

(27) Under Section 128, the liability of a surety being co-extensive with that of the principal debtor, unless it is otherwise provided for by the contract, the contract of guarantee has to be construed to find out the exact point of time when the liability of the surety arises. The question depends on the terms of the contract of guarantee by which the surety has bound himself. AIR 1948 Nag 123 (124) = ILR (1947) Nag 643 ** AIR 1960 Andh Pra 210 (211, 212) = (1959) 2 Andh WR 435 (DB) ** AIR 1959 Andh Pra 96 (98) (DB). (It is open to parties to agree that the liability of surety shall arise only in a particular contingency.)

(28) Where the liability of the surety arises only on the happening of a contingency, the surety is not liable on his contract until that contingency has actually happened. AIR 1948 Nag 123 (124) = ILR (1947) Nag 643.

(29) A guarantee will only extend to a liability precisely answering the description contained in the guarantee. The surety like any other contracting party cannot be held bound to something for which he has not contracted. AIR 1959 Ker 176 (177, 178) = 1958 Ker LT 938 (DB).

(30) Where the defendant acting as a commission agent contracts to supply mustard oil of pure quality to the plaintiff, he must be held to be the guarantor of the quality and would be answerable for the quality of the oil and the right of the plaintiff against the defendant in accordance with Section 128 of the Contract Act would be co-extensive with the liability of the manufacturer. AIR 1963 Pat 407 (411, 412) = ILR 40 Pat 950 (DB).

(31) The liability of a surety is co-extensive with that of the principal debtor and if the amount to be recovered by the creditor from the principal debtor could be recovered as arrears of land revenue from the principal debtor, it can also be recovered in the same manner from his surety. (1962) 64 Punj LR 416 (419).

(32) Money deposited with National Chamber of Commerce, Kanpur, as margin money under rules of chamber by one constituent for registering contracts entered into with another con-

Section 128 — Note 2 (contd.)

stituent of Chamber — Contracts prohibited under Government Control Order — Position of Chamber held was that of stake-holder and not quite that of surety. AIR 1963 All 294 (298) (DB).

(33) A non-resident time charterer who chartered a ship for a single voyage for carrying its own goods on payment of daily hire to the owner of the ship is not liable to tax under Section 172 of the Income Tax Act, 1961, and therefore a person who had guaranteed the payment of tax on behalf of the time charterer is also not liable to pay the tax. AIR 1968 Goa 29 (35) = 70 ITR 518.

3. Surety for minors.— (1) A surety for a debt for which a minor made himself liable cannot be proceeded against on his contract of guarantee because under Section 128 the liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract. The obligation of a surety does not become a primary one when no liability can ever be fastened on the principal debtor by reason of his minority at the time of the contract. AIR 1957 Mad 164 (168) = ILR (1957) Mad 176 (DB). (19 Bom 697, Not followed.)

[But see (1895) 19 Bom 697 (703) (DB). (Bond by minor — Surety — Surety is liable irrespective of the validity of minor's contract.) ** AIR 1940 Nag 327 (331) = ILR (1940) Nag 632. (Contract by minor — Surety representing that he is a major and agreeing to compensate if representation proves false or if the contract was found defective in any other respect — Held he was liable to compensate.)]

4. Where the debt is unenforceable against the principal debtor.— (1) where original agreement is void surety is liable as principal debtor. AIR 1921 Lah 79 (80) = 22 Cri LJ 662 = 2 Lah 204 ** AIR 1919 Oudh 276 (277) = 22 Oudh Cas 109.

[See however AIR 1926 Nag 466 (468) (DB). (Original contract itself unenforceable — Liability of surety also cannot be enforced.) ** AIR 1967 Goa 88 (90) (DB) ** AIR 1963 Mad 413 (418, 419) = (1963) 2 Mad LJ 20. (Overruled on another point in AIR 1969 SC 493 — Appeal No. 7 of 1956, D/- 8-7-1959 (Mad), Reversed.)]

(2) Claim time-barred against principal debtor but not against surety — Plaintiff is entitled to a decree as against the surety only. AIR 1932 Rang 88 (89) = 10 Rang 398 ** AIR 1918 Cal 707 (713) = 44 Cal 978 (DB). [But see AIR 1918, Bom 197 (199) = 42 Bom 444 (DB).]

(3) The liability of a surety is only co-extensive with that of the principal debtor. A non-agriculturist surety will not be liable for the entire debt when the principal debt has been scaled down under the provisions of the Agriculturists Relief Act, but will be liable only to the extent of the scaled down debt due by the principal debtor. AIR 1951 Mad 48 (54, 55) = ILR (1951) Mad 305 (FB). (AIR 1942 Mad 145, Overruled.) ** AIR 1966 Ker 203 (204) = 1965 Ker LT 1266 (DB). (Co-extensiveness of surety's liability has nothing to do with consequences of recovery of debt — Otherwise contract — Provision in suretyship bond in someway qualifying measure of surety's obligation is not otherwise provision. AIR 1944 Nag 277, Diss. from.)

[But see AIR 1955 Bom 419 (431). (Discharge of principal debtor by operation of law does not discharge surety — AIR 1942 Mad 145, Relied on.) ** AIR 1952 Nag 201 (202) = ILR (1951) Nag 864. (Settlement of debt by Debt Relief Court does not affect liability of surety who has executed bond for discharge of debt created by decree-passed against judgment-debtor — AIR 1947 Nag 61 (FB) and AIR 1948 Nag 390, Relied on.)]

(4) Where the principal debtor is discharged the decree-holder cannot proceed against the surety without expressly reserving such a right in the document discharging the judgment-debtor. The general rule governing the release of surety applies to the person who has become surety in execution proceedings also so that if the principal debtor is released by the creditor, the surety is also discharged. AIR 1958 Andh Pra 512 (513) (DB).

5. Surety for a limited amount.— (1) Surety bond guaranteeing payment upto a certain amount — Creditor is not prohibited from advancing more but the surety will be liable only to the extent of guarantee. AIR 1939 Nag 31 (32) = ILR (1941) Nag 415 ** AIR 1937 Mad 360 (362).

(2) Surety promising to make good discrepancies upto an extent of Rs. 1000 — Subsequent letter by him to the creditor asking him to entrust further business — Held, it did not convert the liability to an unlimited liability. (1913) 14 Mad L Tim 249 (256) (DB).

6. Joint family — Son's liability for father's surety debt.— (1) Son is liable for surety debt of father unless the debt is tainted with immorality. AIR 1931 All 631 (632) = 53 All 695 (DB) ** AIR 1970 Punj 67 (71, 74) (FB).

7. Surety bond to Court.— (1) Surety bond for payment of decree amount under Order 21, Rule 40 (3), C. P. C.

Section 128 — Note 7 (contd.)

begins to operate only from the date of acceptance by the Court. AIR 1928 Mad 469 (470) = 51 Mad 161 (DB).

(2) Surety bond to Court for due appearance of judgment-debtor on date of hearing or as ordered by Court — Judgment-debtor appearing on some hearings and ordered to appear at the next hearing — The debtor absconding the surety was held liable AIR 1939 Sind 270 (271) = ILR (1939) Kar 401 (DB).

(3) Surety for due appearance of accused let on bail — Accused absconding, the security under bail bond realised from accused's property — Held, that Section 128 did not apply to the case and that the surety could be asked to pay what he undertook to pay. AIR 1933 Sind 320 (321) = 35 Cri LJ 315 (DB).

(4) Surety to administration bond — Letters of administration found to have been obtained by fraudulent misrepresentation to Court — Surety not aware of the same — Court cancelling letters of administration and transferring bond to the Administrator-General — Suit against surety by the Administrator-General to recover moneys realised by the administrator and misappropriated by him — Held, suety was liable. (1908) 35 Cal 955 (961) = 35 Ind App 109 (PC). ((1906) 33 Cal 713 (FB), Affirmed.)

(5) Under Section 145, Civil P. C., surety bonds given to Courts can be enforced in execution proceedings and a separate suit is not necessary. This is so even where the surety purports to mortgage his property by way of security. AIR 1952 Nag 201 (202) = ILR 1951 Nag 864 ** 1968 Cur LJ 199 (202) = 70 Punj LR 237.

[See also AIR 1966 Andh Pra 151 (152) = (1965) 1 Andh LT 245 (DB). (Security bond to Court by judgment-debtor — Bond cannot be enforced under Section 145 — Bond can be enforced under Section 151 in execution proceedings.)]

(6) A bond for the performance of a decree which is governed by S. 145, C. P. Code, though not in the strict sense, a contract of guarantee, in the absence of any stipulation in that behalf there is no ground for limiting a surety's liability only to decrees passed after contest. There is nothing unreasonable or wrong in a surety expressly stipulating that he would be bound by his guarantee only if a decree is passed after contest and that he would not be bound by a consent decree. AIR 1962 J and K 72 Rel. on. AIR 1967 Mys 147 (149) = (1965) 2 Mys LJ 87.

(7) Liability of surety for person ordered to keep peace or to be of

good behavior under the Code of Criminal Procedure, is independent liability and is not co-extensive with that of the person bound over. Provisions relating to contracts of guarantee and surety's liability in Chapter 8 of the Contract Act are wholly inapplicable to such bonds by surety. AIR 1946 All 333 (335, 336) = ILR (1946) All 801 = 47 Cri LJ 757 (FB).

8. Limitation upon liability provided by contract.— (1) The term "unless it is otherwise provided by the contract" cannot be ignored. 1942 Nag LJ 39 (41).

(2) Liability of surety can be limited or made contingent by special contract. AIR 1926 Nag 449 (450).

(3) A guarantee will only extend to a liability precisely answering the description contained in the guarantee. The surety like any other contracting party cannot be held bound to something for which he has not contracted. AIR 1959 Ker 176 (177, 178) = 1958 Ker LT 938 (DB).

(4) Guarantee must be construed by circumstances. AIR 1930 Cal 17 (19) = 57 Cal 764 (DB). (Guarantee for what may "ultimately be found due from principal debtor" — No liability until deficiency is found after taking steps against latter.) ** 1937 All LJ 1265 (1271) (DB). (Contract restraining plaintiff's right to recover from surety until remedies are exhausted against principal — No cause of action arises till the condition is fulfilled.) ** (1903) 16 CPLR 76 (77). Surety under mortgage bond liable for deficiency after realising from property — Remedies against properties must be exhausted first.)

(5) Agreement to pay on failure of others to pay does not limit the liability of surety within the meaning of Section 128, Contract Act. AIR 1932 Nag 62 (64) = 28 Nag LR 325 (DB) ** AIR 1941 Lah 16 (16) = ILR (1941) Lah 323 (DB). (Surety contract containing the term that the surety will be responsible if the person supplying goods was "unable to realise the price thereof from the firm" — Held, that no condition that his liability would come into operation only if all remedies against principal debtor were exhausted could be read into these words.) ** AIR 1960 Raj 319 (320) = 1960 Raj L 375 (DB). (Surety bond for due performance of decree — Surety agreeing to pay decretal amount in case of failure of defendant to pay — Default in payment — Held, there was no contract express or implied from which it could be inferred that liability of surety was limited.)

[See however AIR 1961 Raj 247 (249, 250) = 1961 Raj LW 290. (Surety liable only if decretal amount could

Section 128 — Note 8 (contd.)

not be recovered from properties of judgment-debtor — Liability of surety held was not co-extensive with that of judgment-debtor.)]

(6) Where the surety has by the terms of the document executed by him in favour of the creditor, expressly limited his liability to the advances made by the plaintiff to defendant in connection with the work of construction of a certain building, it cannot be extended to the advances made by the plaintiff to the principal debtor for other purposes 1947 Marwar LR (Civ) 51 (53) (DB).

(7) Where the liability of the judgment-debtor as undertaken under a security bond is limited to a specific sum, the liability is not co-extensive with the amount that may ultimately be decreed and the undertaking that the judgment-debtor would render himself liable to any amount that might be finally decreed means that the liability would not exceed the specified sum. AIR 1966 Andh Pra 151 (152) = (1965) 1 Andh LT 245 (DB).

9. Suit against surety.— (1) Concurrent suit against both the principal and surety are maintainable. AIR 1928 Mad 1262 (1263) (DB).

(2) Suit against surety only is maintainable. AIR 1919 Lah 450 (457) = 1918 Pun Re No. 91 (DB) ** AIR 1919 Lah 355 (356) = 1919 Pun Re No. 93 ** AIR 1919 Sind 103 (103) = 13 Sind LR 92 (DB) ** AIR 1952 Vind Pra 18 (18). (Suit against surety in first instance.) ** AIR 1947 Bom 403 (404) = ILR (1947) Bom 75 (DB). (On default by lessee of tolls, the Government without first proceeding against his property, can sell his surety's land.) ** 1959 All LJ 789 (793) = 1959 All WR (HC) 644. (Contract can be enforced against surety, in absence of contract to contrary, without proceeding against principal debtor.) ** AIR 1959 Madh Pra 26 (26) = 1958 MPLJ 253.

(3) Execution can be taken against the surety alone. AIR 1934 Mad 186 (188, 189) = 57 Mad 688 (DB).

(4) Decree obtained against principal debtor under Co-operative Societies Act where sureties could not be made parties — Held, suit to recover the same from the surety when the principal absconded was not barred. AIR 1934 Pat 52 (53).

(5) A surety is not a necessary party to the suit against the debtor. AIR 1943 All 289 (291) = ILR (1943) All 598.

(6) The surety is a necessary party in a suit filed for the enforcement of the mortgage. But it is one thing to join him as a necessary party and quite another to claim a decree against him. The mortgagee can join the

surety as a necessary party under Order 34, Rule 1, C. P. Code, without claiming any relief against him. That he is required to do by virtue of Section 91 of the T. P. Act, read with Order 34, Rule 1, C. P. Code. This is because the surety can, as a person interested, claim to redeem the property. But these provisions do not entitle the mortgagee to claim relief of a conditional nature against the surety, where he has agreed to make good the deficit which may be found due on the sale of the mortgaged property. Unless the cause of action has arisen no relief can be claimed against the surety. AIR 1948 Nag 123 (125) = ILR (1947) Nag 643.

(7) A suit to enforce a contract of guarantee can succeed even if the plaintiff has not exhausted his remedies against the principal debtor. AIR 1957 Pat 256 (259) (DB) ** AIR 1962 Pat 405 (406) = 1962 BLJR 34.

[But see AIR 1960 Madh Pra 68 (69) = 1960 MPLJ 81.]

10. Burden of proof.— (1) Onus of proof that liability is limited is on the surety. AIR 1935 Lah 729 (731) = 16 Lah 757 (DB).

(2) Suit on pro-note executed by defendant by way of security in favour of plaintiff to ensure that X would give certain crop to plaintiff — Plaintiff must prove that X committed breach of agreement to get a decree on the basis of pro-note. ILR (1965) 15 Raj 252 = 1965 Raj LW 47 (48).

11. Limitation.— (1) Against a surety limitation commences to run from the date of his own contract. AIR 1919 Cal 636 (637) (DB) ** AIR 1940 All 116 (117) (DB) ** AIR 1960 Andh Pra 210 (212) = (1959) 2 Andh WR 435 (DB).

(2) Payment by principal of interest does not extend limitation against surety even if payment is made with the surety's consent. AIR 1918 Cal 707 (710) = 44 Cal 978 (DB).

[See however 1962 Raj LW 20 (20). (Payments signed by both principal debtor and surety — Limitation is extended against them both.)]

(3) Acknowledgment by principal debtor does not bind surety. AIR 1931 Lah 691 (694) = 13 Lah 240 (DB).

[See however ILR (1961) 1 Ker 493 (505). (Guarantee for general balance due from principal debtor — Debtor keeping debt alive by acknowledgments — Limitation is saved also against the surety.)]

(4) A promissory note payable on demand being a debt in praesenti and payable without demand, the limitation begins to run from the date of its execution, and the liability of the surety being collateral with that of the principal-debtor, the position both

129. "Continuing guarantee".—A guarantee which extends to a series of transactions is called a "continuing guarantee."

Illustrations

(a) A, in consideration that B will employ C in collecting the rent of B's zamindari, promises B to be responsible, to the amount of 5,000 rupees, for the due collection and payment by C of those rents. This is a continuing guarantee.

(b) A guarantees payment to B, a tea-dealer, to the amount of £ 100, for any tea he may from time to time supply to C. B supplies C with tea above the value of £ 100, and C pays B for it. Afterwards B supplies C with tea to the value of £ 200. C fails to pay. The guarantee given by A was a continuing guarantee, and he is accordingly liable to B to the extent of £ 100.

(c) A guarantees payment to B of the price of five sacks of flour to be delivered by B to C and to be paid for in a month. B delivers five sacks to C. C pays for them. Afterwards B delivers four sacks to C, which C does not pay for. The guarantee given by A was not a continuing guarantee, and accordingly he is not liable for the price of the four sacks.

Section 128 — Note 11 (contd.)

in English and in Indian law is that it will always depend upon the form of the contract as entered into between the surety and the creditor and whether or not the principal-debtor and the surety are co-contractors. AIR 1957 Orissa 106 (108) = ILR (1957) Cut 454.

(5) For the purposes of application of S. 20, Limitation Act (1908), the debt of the surety is distinct from the debt of the principal debtor, though both of them arise out of the same transaction. Section 128 has reference only to the quantum of the liability and is not intended to affect the application of the statute of limitation. AIR 1957 Orissa 106 (108) = ILR (1957) Cut 454 ** AIR 1964 Cal 358 (360).

Section 129 — Note 1

(1) Question of continuing guarantee is to be determined with reference to the whole instrument. Cases of ambiguity require consideration of nature of business, position of parties and surrounding circumstances. AIR 1930 All 730 (731) = 52 All 997 (DB).

(2) In considering whether bond constitutes continuing guarantee surrounding circumstances must be considered unless wording of guarantee precludes it — Husband allowed to overdraw from Bank to the extent of Rs. 18,000 on his wife's depositing with Bank the deeds of her house as security — Bank advancing Rs. 18,000 — Husband wanting further finance — Wife executing legal mortgage in respect of house in favour of Bank for Rs. 25,000 to allow husband to overdraw to that extent — Banking account kept on the same basis — Security providing for total amount of Rs. 25,000 with interest or for any amount for time being owing and due to Bank from the wife "on footing of the bond" which specially referred to husband's overdraft — Held, that Court was not precluded

from enquiring whether there was continuing guarantee; that the mortgage was a continuing guarantee for her husband's liability on his overdraft account limiting her liability to the amount stated in mortgage deed. AIR 1941 Mad 282 (283, 284) = ILR (1941) Mad 313 (DB).

(3) There is no analogy between a security bond executed by a surety under Section 55 (4), Civil P. C., and a continuing guarantee as defined under Section 129, Contract Act. In the former case there is no series of transactions giving rise to distinct liabilities which the guarantee is intended to cover but there is only a single transaction under which the surety undertakes responsibility for certain things to be done in future though on different occasions. AIR 1942 Mad 101 (102).

(4) Illustration (a) to Section 129 is wrong as statement of law. AIR 1930 Rang 173 (174) = 8 Rang 320 (DB).

(5) Guarantee for performance of definite, existing arrangement (lease) — Consideration not variable as result of future dealings — Contract is not one of continuing guarantee. AIR 1930 All 730 (731, 732) = 52 All 997 (DB).

(6) Contract of surety for the appearance of the judgment-debtor on each and every occasion when required is one of continuing guarantee and is revocable by notice to creditor. AIR 1931 All 243 (244) = 52 All 1014.

(7) Repayment of mortgage debt guaranteed by surety to extent of certain amount — Contract held, contract of continuing guarantee — Suit against guarantor held maintainable before suit on mortgage. AIR 1931 PC 224 (225) = 58 Ind App 306 = 59 Cal 320. (AIR 1930 Cal 17 = 57 Cal 764 (DB), Reversed.)

(8) A request to advance money to another person up to a certain limit for his trade is continuing guarantee. Formal written acceptance is not neces-

130. Revocation of continuing guarantee.—A continuing guarantee may at any time be revoked by the surety, as to future transactions, by notice* to the creditor.

Illustrations

(a) A, in consideration of B's discounting, at A's request, bills of exchange for C, guarantees to B, for twelve months, the due payment of all such bills to the extent of 5,000 rupees. B discounts bills for C to the extent of 2,000 rupees. Afterwards, at the end of three months, A revokes the guarantee. This revocation discharges A from all liability to B for any subsequent discount. But A is liable to B for the 2,000 rupees, on default of C.

(b) A guarantees to B, to the extent of 10,000 rupees, that C shall pay all the bills that B shall draw upon him. B draws upon C. C accepts the bill. A gives notice of revocation. C dishonours the bill at maturity. A is liable upon his guarantee.

[*] Notice by word of mouth would be sufficient, it seems, whether the guarantee be oral or in writing.

Section 129 — Note 1 (contd.)

sary. AIR 1933 Mad 756 (758) = 57 Mad 398 (DB).

(9) Surety asking dealer to keep person's khata up to Rs. 200 gives continuing guarantee to the extent of Rs. 200. AIR 1939 Nag 31 (32) = ILR (1941) Nag 415.

(10) Guarantee for payment of rent for series of months is a continuing guarantee. AIR 1930 Sind 316 (318) = 25 Sind LR 262 (DB).

(11) Surety to be liable to extent of one year's rent on default by principal during period of lease — It is a continuing guarantee for the whole period of lease — Surety continues to be liable even after death of principal during course of lease period and succession of his widow, in the absence of any personal element in the contract and in the absence of any revocation by him. AIR 1942 Oudh 325 (326, 327) = 17 Luck 712.

(12) Security by B for the due collection and payment by A of the rents to the extent of a certain sum — Contract is a continuing guarantee. AIR 1928 Cal 204 (206) = 55 Cal 154 (DB).

(13) When a person becomes a surety that an administrator will duly get in and administer the estate of a deceased person, this cannot be said to be a continuing guarantee within the meaning of this section. (1909) 31 All 56 (57) (DB) ** AIR 1932 All 262 (263) = 54 All 293 (DB). (Surety to administration bond cannot revoke guarantee at his will. But Court has power to relieve him of his liability to future transactions. But surety is liable for past mal-administration discovered later.) ** AIR 1921 Upp Bur 25 (26) = 4 Upp Bur Rul 22 ** AIR 1917 Low Bur 173 (173) (DB) ** (1905) 28 Mad 161 (166) (DB).

(14) The guarantee of fidelity is not a continuing guarantee and is not revoked by guarantor's death. Such guarantee continues till appointment is held. AIR 1920 PC 35 (37) = 47 Ind App 164 = 10 Low Bur Rul 167 ** AIR

1930 Rang 173 (174) = 8 Rang 320 (DB). (Guarantee can be recalled on definite proof of servant's misconduct.)

[But see (1902) 15 CPLR 136 (139, 140). (Guarantee for fidelity of servant is continuing guarantee and in the absence of intention to contrary does not enure to the benefit of creditor after death of guarantor.)]

(15) Company employing a person — Certain persons entering into continuing guarantee for due performance of duties — Defalcations committed — Suit by company against guarantors — Burden of proof is on company to prove such lack of diligence and faithfulness as caused breach of agreement of guarantee. AIR 1937 Rang 37 (38).

(16) Security bond for due payment of instalments of license money is not a continuing guarantee and not revocable arbitrarily. AIR 1926 Bom 465 (466) (DB) ** AIR 1925 Nag 7 (9) = 22 Nag LR 158 (DB). (Continuing guarantee must refer to a series of transactions of which some are unknown and indefinite or not certain to come into existence.)

(17) Suretyship under Order 41, R. 6, Civil P. C., is not continuing guarantee. AIR 1917 Cal 594 (595) (DB).

Section 130 — Note 1

(1) Continuing guarantee can be revoked by notice. AIR 1930 Sind 316 (318) = 25 Sind LR 262 (DB) ** AIR 1918 PC 210 (211) ** (1909) 31 All 56 (57) (DB). (Motive for revocation is immaterial.)

(2) When personal guarantee is not given, provision of Contract Act relating to revocation of security cannot be availed of to put an end to the security. (1896) 19 Mad 140 (143) (DB).

(3) Guarantee covering a definite case does not enable a surety to nullify the security by withdrawal, by mere notice to creditor. AIR 1917 Cal 699 (700) (DB).

(4) Agreement for production of judgment-debtor whenever required by Court is a continuing guarantee and may be revoked by surety with refer-

131. Revocation of continuing guarantee by surety's death.—The death of the surety operates, in the absence of any contract to the contrary, as a revocation of a continuing guarantee, so far as regards future transactions.*

[°] Cf: Section 208 infra.

Section 130 — Note 1 (contd.)

ence to any future date. AIR 1931 All 243 (244) = 52 All 1014 ** AIR 1934 Lah 962 (962) (DB).

(5) Where by the surety bond the surety is liable for one year's rent on default of the principal during period of lease, in the absence of any personal element in the contract and in absence of any notice to the landlord revoking the guarantee, the surety is liable for the period of one year, even if the principal dies in the meanwhile and is succeeded by his widow. AIR 1942 Oudh 325 (326, 327) = 17 Luck 712.

(6) Pleading denial of liability in a suit is not a notice terminating continuing guarantee. (1903) ILR 27 Bom 418 (424) (DB).

(7) Though the case of surety whose security is accepted by a Court cannot be treated as one falling under Section 129 or Section 130, Contract Act, so as to entitle him to put an end to the agreement at his will, yet the High Court to which the guarantee is given has power to exonerate the surety from all liability for future transactions. AIR 1932 All 262 (262) = 54 All 293 (DB).

(8) Surety for a Receiver is not discharged by his giving notice. He becomes a surety only on the Court accepting him and consent of Court is necessary for discharge. AIR 1926 PC 32 (33).

(9) There is no analogy between a security bond under Section 55 (4), Civil P. C., and a continuing guarantee as defined in Section 129, Contract Act. A surety in former case cannot be released at his pleasure and Section 130, Contract Act, does not apply. AIR 1942 Mad 101 (102).

(10) A suretyship under Order 41, Rule 6 of the C. P. Code is not a continuing guarantee within Section 130, Contract Act. AIR 1917 Cal 594 (595) (DB).

(11) Section 130 does not apply to special contract of suretyship by surety to administration bond, irrespective of the grant of Letters of Administration. AIR 1917 Low Bur 173 (173) (DB) ** AIR 1932 All 262 (263) = 54 All 293 (DB) ** AIR 1921 Upp Bur 25 (26) = 4 Upp Bur Rul 22. (Administration bond under Section 78, Probate and Administration Act.) ** (1905) 28 Mad 161 (166) (DB).

(12) Where A and B bound themselves and their heirs for conduct of C, but could terminate suretyship on giving notice to postal authorities in whose service C got in, suit for contribution in the absence of notice

during lifetime of A against heirs of A will lie by B who had to pay under surety bond for misconduct of C as guarantee was continuing guarantee and properties of A were liable therefor. AIR 1921 All 287 (288) = 43 All 132 (DB).

Section 131 — Note 1

(1) Contract must be looked into to determine whether death operates as revocation. AIR 1928 Cal 204 (206) = 55 Cal 154 (DB).

(2) Death of person guaranteed does not operate as revocation of guarantee. AIR 1942 Oudh 325 (326) = 17 Luck 712.

(3) Guarantee of fidelity for fixed period and of permanent character is not a continuing guarantee and is not revoked by guarantor's death. Such guarantee continues till appointment is held. AIR 1920 PC 35 (37) = 10 Low Bur 167 = 47 Ind App 164.

[But see (1902) 15 CPLR 136 (139, 140.)]

(4) Lease granted on condition that rent for certain years was guaranteed by S — S guaranteeing on condition that G would reimburse S for rents paid under guarantee — Held, even if this be a case of confirming guarantee, G's liability was not determined on his death. (1888) 10 All 531 (533) (DB).

(5) Guarantee for securing an appointment is not a continuing guarantee and therefore is not revoked by the death of the guarantor. AIR 1920 PC 35 (37) = 10 Low Bur Rul 167 = 47 Ind App 164.

(6) Surety depositing securities with Bank for faithful performance by his son of duties of Khazanchi — Employment of son terminable by three month's notice on either side — Guarantee to continue so long as son continued to be employed: Held, that surety could not determine guarantee forthwith at any time. Since there was a contract that the guarantee was to continue till the employment of the son, it could not be determined by death of surety. AIR 1917 Low Bur 51 (53) (DB).

(7) Where surety bond binds the surety and his representatives for the due performance of his services by the principal and the bond contains a provision that the guarantee was terminable by six months' notice, surety's death does not free his representatives from liability for default of the principal subsequent to the death of surety. AIR 1921 All 287 (288) = 43 All 132 (DB).

(8) Though Sections 131 to 139 of the Contract Act do not apply in terms to

132. Liability of two persons, primarily liable, not affected by arrangement between them that one shall be surety on other's default.—Where two persons contract with a third person to undertake a certain liability, and also contract with each other that one of them shall be liable only on the default of the other, the third person not being a party to such contract, the liability of each of such two persons to the third person under the first contract is not affected by the existence of the second contract, although such third person may have been aware of its existence.

Illustration

A and B make a joint and several promissory note to C. A makes it, in fact, as surety for B, and C knows this at the time when the note is made. The fact that A, to the knowledge of C, made the note as surety for B, is no answer to a suit by C against A upon the note.

133. Discharge of surety by variance in terms of contract.—Any variance, made without the surety's consent, in the terms of the contract between the

Section 131 — Note 1 (contd.)

a surety bond executed in favour of a Court the principles contained in these sections do apply to such a case. (1965) 2 Law Rep 108 (110, 111)).

Section 132 — Note 1

(1) A and B executing pro-note and making themselves jointly and severally liable — Mere knowledge by promisee that B was only security for A cannot affect liability of promisors under pro-note. AIR 1942 Mad 134 (136) (DB) ** AIR 1929 All 664 (665) (DB). (Person who executes pro-note cannot be held in law to have position of surety.) ** AIR 1926 Sind 156 (157) = 20 Sind LR 106 ** AIR 1951 Mad 239 (240) (DB).

(2) Pro-note by A and B on joint and several liability for "security for overdraft" — A, real borrower and B merely guarantee — Liability of both held unaffected by any contract between them. AIR 1943 Mad 216 (217) (DB).

(3) A and B executing pro-note and making themselves jointly and severally liable — It is not open to B to let in parole evidence to vary terms of pro-note and whittle down his liability by reasons of any private arrangement with A to which promisee was not party. AIR 1942 Mad 134 (136) (DB).

(4) Where a bill does not declare in express terms the rights of the co-obligors, inter se, there is nothing in law to prevent one of them to prove such terms by parole evidence, provided that he does not thereby intend to affect the rights of the creditors to demand immediate payment from either or both of the co-obligors or joint promisors. AIR 1926 Sind 156 (157) = 20 Sind LR 106.

(5) Pro-note — Joint executants — Plea by one executant that he signed as surety for the other is not maintainable. AIR 1935 Mad 643 (645).

(6) The liability which is undertaken by the acceptor and the drawer of a bill is in no sense a joint liability. It is true that they each contract to pay the same sum of money, but they con-

tract severally in different ways and subject to different conditions. Section 132 is not applicable to such a case. (1877-78) 3 Cal 174 (184) (DB).

(7) Though Sections 131 to 139 of the Contract Act do not apply in terms to a surety bond executed in favour of a Court the principles contained in these sections do apply to such a case. (1965) 2 Law Rep 108 (110, 111).

SECTION 133 — SYNOPSIS

1. Discharge of surety on variation of contract.
2. Variation operating as discharge.
3. Variation not operating as discharge.

1. Discharge of surety on variation of contract.— (1) The principle of the law of the discharge of sureties is that the surety, like any other contracting party, cannot be held bound to do something for which he has not contracted. If the original parties have expressly agreed to vary the terms of the original contract, no further question arises. The original contract has gone, and unless the surety has assented to the new terms, there is nothing to which he can be bound, for the final obligation of the principal debtor will be something different from the obligation which the surety guaranteed. Presumably he is discharged forthwith on the contract being altered without his consent, for the parties have made it impossible for the guaranteed performance to take place. AIR 1935 PC 21 (24) = 59 Bom 180 = 62 Ind App 23 ** AIR 1941 Bom 108 (119, 120) = ILR (1941) Bom 273 (DB) ** AIR 1938 Mad 585 (588) (DB) ** AIR 1918 PC 210 (212) ** (1966) 79 Mad LW 189 = (1966) 1 Mad LJ 457 (458) ** 1962 Raj LW 711 = ILR (1963) 13 Raj 391 (393) ** AIR 1961 Punj 281 (286) (DB). (Variation in terms of original contract between debtor and creditor without consent of surety — Surety bond executed in favour of creditor stands discharged — Counter guaran-

principal *[debtor] and the creditor, discharges the surety as to transactions subsequent to the variance.†

Illustrations

(a) A becomes surety to C for B's conduct as a manager in C's bank. Afterwards B and C contract, without A's consent, that B's salary shall be raised, and that he shall become liable for one-fourth of the losses on overdrafts. B allows a customer to overdraw, and the bank loses a sum of money. A is discharged from his suretyship by the variance made without his consent, and is not liable to make good this loss.

(b) A guarantees C against the misconduct of B in an office to which B is appointed by C, and of which the duties are defined by an Act of the Legislature. By a subsequent Act, the nature of the office is materially altered. Afterwards, B misconducts himself. A is discharged by the change from future liability under his guarantee, though the misconduct of B is in respect of a duty not affected by the later Act.

(c) C agrees to appoint B as his clerk to sell goods at a yearly salary, upon A's becoming surety to C for B's duly accounting for moneys received by him as such clerk. Afterwards, without A's knowledge or consent, C and B agree that B should be paid by a commission on the goods sold by him and not by a fixed salary. A is not liable for subsequent misconduct of B.

(d) A gives to C a continuing guarantee to the extent of 3,000 rupees for any oil supplied by C to B on credit. Afterwards B becomes embarrassed, and, without the knowledge of A, B and C contract that C shall continue to supply B with oil for ready money, and that the payments shall be applied to the then existing debts between B and C. A is not liable on his guarantee for any goods supplied after this new arrangement.

(e) C contracts to lend B 5,000 rupees on the 1st March. A guarantees repayment. C pays the 5,000 rupees to B on the 1st January. A is discharged from his liability, as the contract has been varied, inasmuch as C might sue B for the money before the 1st of March.

[*] Inserted by the Repealing and Amending Act, 1917 (24 of 1917), S. 2 and Sch. I.

[†] Whether or not in a material point?

Section 133 — Note 1 (contd.)

tor under counter indemnity bond also discharged.) ** 1959 All WR (HC) 644 = 1959 All LJ 789 (794).

(2) The application of this principle must always depend upon a correct analysis of the contract in fact made. Guarantees frequently relate to obligations without special reference to any specific contract between the creditor and the principal debtor. In such a case the doctrine referred to would have a very limited application. But when the contract between the creditor and the principal debtor is the basis of the surety bond and has been shown to the sureties before the bond is executed and is referred to in the body of the judgment the principle will apply. AIR 1935 PC 21 (25) = 62 Ind App 23 = 59 Bom 180.

(3) The avoidance of contract by material alteration is inapplicable where the document is not altered while in possession of the creditor bank or its agent but is altered by the principal debtor in whose possession the document was and who was at the time acting as the agent of the surety. AIR 1963 SC 746 (747, 749, 751, 753) = (1963) Supp 1 SCR 63.

(4) A variation of conditions requires the consensus of all the principal par-

ties. AIR 1929 Lah 203 (204) ** ILR (1963) 13 Raj 391 (393).

(5) Consent by the surety to the variation necessarily implies that the surety has the knowledge of the nature of the variation. AIR 1921 Bom 164 (165) = 45 Bom 157 (DB).

(6) In determining the liability of a surety the terms of the bond must in every case be carefully studied; and if there is any change in the position of the principal debtor as regards his creditor, it must materially affect the position of the surety, before the latter can be absolved from liability. AIR 1931 Oudh 426 (429) = 7 Luck 226 (DB) ** AIR 1929 Lah 203 (204) ** (1913) 14 Mad L Tim 249 (255) (DB).

[But see AIR 1936 Mad 576 (579) (DB). (Variation in small particular absolves surety.)]

(7) Per Hidayatullah, J.— Unsubstantial alterations in an instrument which are to the benefit of the surety do not discharge the surety from the liability. Where, however the alteration is to the disadvantage of the surety, or its unsubstantial character is not self-evident the surety can claim to be discharged. The Court will not then inquire whether it in fact harmed the surety.

Section 133 — Note 1 (contd.)

A document jointly executed by two persons creating a liability equal for both cannot be regarded as materially altered, if the liability is reduced equally for both but the alteration is made only by one of them. Such an alteration must be regarded as unsubstantial and not otherwise than beneficial to the surety. AIR 1963 SC 746 (747, 749, 751, 753) = 1963 Supp (1) SCR 63. ((1862) 45 ER 1225 and (1614) 11 Co. Rep. 26-b, Not applied.)

(8) If there is a substantial alteration in the contract even if there is no actual prejudice to the surety which can be shown to exist, the surety will be discharged as neither the Court nor the jury will go into the question whether there has been any actual prejudice or not. The surety is the sole judge as to whether he will continue to remain liable on the new contract or not. AIR 1932 Bom 168 (171) = 56 Bom 101 (DB).

(9) Surety bond in favour of Court guaranteeing performance of decree that may be passed against debtor in suit by creditor — Sections 133 to 139 do not apply but the principles thereof do. AIR 1944 Mad 396 (396, 397) = ILR (1944) Mad 708 (DB) ** AIR 1939 Bom 23 (25) = ILR (1938) Bom 794 (DB) ** 1958-1 Andh WR 380 (381) (DB). (Court proceedings — Surety bond for payment of decretal amount — Court extending time for payment granted to judgment-debtor — Consent of creditor but no consent of surety — Surety is discharged.) ** AIR 1957 Cal 645 (648) (DB). (AIR 1935 Nag 258 and AIR 1920 Mad 355, Not foll.) ** AIR 1953 Mys 68 (70, 71) = ILR (1953) Mys 277 (DB) ** AIR 1967 Mys 147 (149) = (1965) 2 Mys LJ 87 * (1965) 2 Law Rep 108 (111) (Mys) ** AIR 1959 Bom 516 (517) = 1958 Nag LJ 72.

[See however AIR 1935 Nag 258 (263, 264) = 31 Nag LR (Sup) 83 (DB). (Sections 133 to 139 do not apply.)]

(10) Where the Court in whose favour the surety bond is executed is not responsible for any change in the situation of surety, he is not entitled to ask the Court to relieve him of his obligation under the bond on the ground that the decree-holder has arrived at certain arrangements with the principal judgment-debtor. AIR 1935 Nag 258 (263, 264) = 31 Nag LR (Sup) 83 (DB).

(11) Section 133 provides only for a particular case of variance, namely, where the contract of guarantee contemplates a series of transactions extending over a period of time. It does not apply to a variance made in the case of a contract consisting of a single

transaction. AIR 1932 Bom 168 (174) = 56 Bom 101 (DB).

(12) Section 133 cannot operate to alter the primary law of the contract of guarantee that the promisee must show performance before he can hold the promisor to his promise. AIR 1935 PC 21 (25) = 62 Ind App 23 = 59 Bom 180.

(13) Warrant of attachment before judgment withdrawn on surety bond by A — Subsequent application for sealing of workshop and appointment of receiver — Another surety bond by B and application not proceeded with — No mention of first surety when second surety was furnished — Nothing to show that liability under first surety was preserved — Principles of Ss. 133 to 139 held applied — B's surety held took the place of A's surety which therefore held stood discharged. AIR 1958 Punj 337 (338).

(14) Attachment before decree — Surety bond — Decree — Execution — Stay application by judgment-debtor on ground that he wanted to prefer appeal — Stay granted — Order mentioning that "previous bond executed subsisted only till the decree in the original suit granted" — Decree confirmed in appeal — Execution started against surety — Question whether stay order had effect of discharge of surety — Reference of previous bond in the stay order held was rather casual — Liability under bond did not terminate — Mere forbearance on the part of the creditor did not, in the absence of any provision in the guarantee to the contrary, discharge the surety under Section 137 of the Contract Act — Sections 133, 135 and 139 of the Contract Act did not in terms apply — (Applicability of these sections considered.) AIR 1953 Mys 68 (70, 71) = ILR (1953) Mys 277 (DB).

(15) The provisions of Section 133 are not subject to a contract to the contrary between the parties to the contract. This section is in unqualified terms. It was not necessary to put in the words 'notwithstanding any contract to the contrary' in this section, because wherever the legislature wanted that the terms of the contract between the parties should take precedence over the provisions of any section, the words 'in the absence of any contract to the contrary' or 'in the absence of any special contract' have been inserted in that particular section as has been done in Sections 152 and 163 of the Act. AIR 1961 Punj 281 (285) (DB).

2. Variation operating as discharge.—

(1) Surety for honesty of Municipal Tax Collector — Son of Tax Collector collecting taxes with consent of Muni-

Section 133 — Note 2 (contd.)

principal authorities without notice to surety — Surety is not liable for defalcation by son. AIR 1938 Rang 126 (127).

(2) Security bonds were executed by sureties during pendency of a suit against their principal debtors. During pendency of execution proceedings the judgment-debtor went up in appeal and execution was stayed on offering fresh securities for the decretal amount. Held, that the old sureties were materially prejudiced and hence they were discharged. AIR 1939 Bom 23 (26) = ILR (1938) Bom 794 (DB).

(3) A executed surety bond at X — Case transferred to Y where another surety executed bond for same accused without A's knowledge or consent — A, held, was discharged. AIR 1934 Sind 152 (154) = 36 Cri L Jour 215 (DB).

(4) Plaintiff appointing defendant 1 as sub-agent to sell goods on certain terms — Defendant 2 standing as surety — Express waiver of all or any of his rights as surety which may be inconsistent at any time and guarantee not to be revoked at any time during the employment of the sub-agent — Variation of the terms without the knowledge of the surety — Surety is discharged as to transactions subsequent to variation. AIR 1921 Bom 164 (165) = 45 Bom 157 (DB).

(5) Surety for instalments on strength of property attached before judgment — Permission for private alienation given after decree — Surety discharged. AIR 1924 Lah 194 (194).

(6) Creditor corresponding with or granting time to debtor without surety's consent — Surety is relieved of liability. AIR 1944 Mad 396 (397) = ILR (1944) Mad 708 (DB).

(7) If a consent decree is passed without the knowledge and consent of surety, the surety is discharged. AIR 1926 Cal 818 (818) ** 1967 All LJ 273 (276) (DB). (If such decree was not contemplated at time surety executed surety bond.)

(8) Surety bond in favour of Court — No contemplation regarding payment of decretal amount by instalment — Compromise decree providing for decretal amount being paid in instalment — Surety not a party — Held, that the compromise decree prejudicially affected the interests of the surety and he was discharged. (1965) 2 Law Rep 108 (112) (Mys) ** AIR 1959 Mad 122 (126) = 71 Mad LJ 866 (2) (DB).

(9) Bond in favour of Court — Surety agreeing to pay decretal amount in case judgment-debtor failed to appeal and obtain stay — Compromise in execution — Decretal amount agreed

to be paid in instalments with interest — Substantial variation in the original contract — Surety is discharged. AIR 1959 Bom 516 (517) = 1958 Nag LJ 72.

(10) Surety for appearance of defendant in Court — Plaintiff returned for presentation to proper Court — Surety is discharged. AIR 1939 Mad 933 (934).

(11) Receiver appointed under consent order — Security bond — Default in carrying out duties of receiver as enjoined on him by consent order — Power to substitute another receiver on default — Giving time to defaulter-receiver absolves surety. AIR 1936 Mad 576 (580) (DB).

(12) Partners starting business on certain capital with a stipulation to dissolve partnership when loss occurs — Surety for one partner guaranteeing partner's share in loss — When losses actually occurred, changes and additions made in business thus changing its character and constituting breaches and variations in contract of suretyship — Surety is not liable for losses in new business. AIR 1939 Lah 193 (194) (DB).

(13) Sub-agency — Change in terms as to remuneration of sub-agent in variance of contract — There is variation of contract with sub-agent (principal debtor). AIR 1921 Bom 164 (165) = 45 Bom 157 (DB).

3. Variation not operating as discharge. — (1) Agreement to buy a certain quantity of cotton at a certain rate and time — Defendant guaranteeing the performance of it — Subsequent agreement by plaintiff to sell same cotton at a higher rate — Suit by plaintiff against surety for recovery of difference between the two rates — Surety is not discharged as the first contract is not rescinded by the second. AIR 1920 Bom 78 (80).

(2) Compromise of a suit for a recovery of a debt the terms whereof are that the debt should be paid in instalments and attachment to continue till the terms had been complied with — A standing surety for defendant's performance of his part — Order of Court giving judgment-debtor liberty to sell attached property — This order is not a variation of the contract and the surety is not discharged. AIR 1924 Lah 211 (212) (DB).

(3) A breach of contract is not a variation and hence a breach of contract between the principal and the creditor does not in any way discharge the surety although the creditor has not enforced any remedy against the principal. (1909) 36 Cal 626 (627, 628) (DB).

(4) Contract of guarantee by defendant with plaintiff Bank to extent of Rs. 3,00,000 — Bank opening second ac-

134. Discharge of surety by release or discharge of principal debtor.—The surety is discharged by any contract between the creditor and the principal debtor, by which the principal debtor is released or by any act or omission* of

Section 133 — Note 3 (contd.)

count with principal debtor on deposit of Rs. 20,000 without consent and knowledge of defendant. Held, guarantee was not discharged. AIR 1917 Cal 537 (541, 544) (SB).

(5) Where a promissory note recited a consideration of Rs. 3,000 but only Rs. 1,000 were paid in cash, Rs. 1,700 being due on old dealing and Rs. 300 being set-off for interest in advance: Held, that there was no variation of the contract which could exonerate the surety. AIR 1935 Mad 748 (750).

(6) Where a surety bond is given to the Court an alteration in the judgment-debtor's position by the act of third party does not render the bond unenforceable as Section 133 does not apply in such circumstances. AIR 1936 Lah 470 (471).

(7) A surety giving security under Order 36, Rule 5, Civil P. C. for property to be attached before judgment continues to be liable though the suit is decreed by award of arbitrators. AIR 1918 Sind 53 (2) (54) = 11 Sind LR 122 (DB).

(8) A surety for due payment of instalments by the judgment-debtor is not discharged where the judgment-debtor offers to come to terms and the decree-holder does not accept them within the time fixed by the judgment-debtor. The belated acceptance by the decree-holder does not amount to a variance. ('04) 1 All L Jour 38 (39).

(9) Surety for securing stay of execution is not discharged from liability by the agreement entered into between the decree-holder and the judgment-debtor, without surety's consent, by which interest was increased and further time was granted to judgment-debtor. AIR 1925 Lah 552 (555).

(10) It cannot be laid down as broad proposition of law that the mere fact that a decree happens to be a consent decree it discharges from liability a surety who had guaranteed payment by the defendant of the sum that might be decreed. AIR 1932 Cal 858 (861, 863) = 59 Cal 1450 (DB).

(11) Charging interest higher than 7 per cent. by any bank rendered illegal — Without guarantor's permission bank charging interest at 8 per cent. — Indebtedness under guarantee in respect of principal is not affected. AIR 1918 PC 210 (212).

(12) The execution of a new surety bond in respect of the same accused executed at X does not of its own force discharge the bond which had previously been executed by another

person at Y. AIR 1934 Sind 152 (153, 154) = 36 Cri L Jour 215 (DB).

(13) Yadast executed by principal promising to pay on certain date does not vary the liability of surety in respect of a pro-note payable on demand. 1934 Mad WN 341 (344) (DB).

(14) Variance of terms of contract between principal debtor and creditor without surety's consent — Credit limit of Rs. 1,00,000 reduced to Rs. 50,000 and again raised to Rs. 1,00,000 — No Written agreement between principal debtor and creditor to this effect, there being only entries in the creditor's account books were as a result of a private instruction to the cashier — Such instructions, held were not binding on the debtors and could not vary the term in the formal agreement — Inference of variation could not also be drawn from the surety's withdrawal of half the amount deposited by him since he was under no obligation to make any deposit under the terms of the guarantee and hence surety held was liable under the surety bond. AIR 1968 SC 1432 (1435) = (1969) 1 SCJ 162.

(15) Bond executed as security for the money to be advanced to the joint family firm by the mortgagee bank under cash credit account — Transference of debt from cash credit account into overdraft account — It does not amount to variation within the meaning of the section. 1962 BLJR 68 (73) (DB).

(16) A appointed gomasta in Government treasury — B undertaking to make good any loss due to A's negligence or misconduct — Bond to enure during A's service — B to remain responsible for defalcation discovered within one year of A's resignation or dismissal — Subsequently Government abolishing A's post — A continuing as treasurer's servant — Security bond held was wide enough to cover circumstances — Change in A's position held was not material so as to absolve B from liability. AIR 1931 Oudh 426 (429) = 7 Luck 226 (DB).

SECTION 134 — SYNOPSIS

1. Scope.

2. "Any act or omission of the creditor."

3. Omission to sue principal within limitation — Effect.

1. Scope.— (1) Section 134, Contract Act, presupposes to existence of a contract of guarantee, to which the creditor and the surety, if not also the debtor, are parties. The liability of the surety arises from an undertaking

the creditor, the legal consequence of which is the discharge of the principal debtor.†

Illustrations

(a) A gives a guarantee to C for goods to be supplied by C to B. C supplies goods to B, and afterwards B becomes embarrassed and contracts with his creditors (including C) to assign to them his property in consideration of their releasing him from their demands. Here B is released from his debt by the contract with C, and A is discharged from his suretyship.

(b) A contracts with B to grow a crop of indigo on A's land and to deliver it to B at a fixed rate, and C guarantees A's performance of this contract. B diverts a stream of water which is necessary for irrigation of A's land and thereby prevents him from raising the indigo. C is no longer liable on his guarantee.

(c) A contracts with B for a fixed price to build a house for B within a stipulated time, B supplying the necessary timber. C guarantees A's performance of the contract. B omits to supply the timber. C is discharged from his suretyship.

[*] See Ss. 39, 53, 54, 55, 62, 63, 67.

[†] See Section 137 *infra* and Section 39 of Negotiable Instruments Act, 1881.

Section 134 — Note 1 (contd.)

given by him to the creditor in consideration of something done by the latter. Where, therefore, there is no contract between the surety and creditor and a security bond is executed by the surety at the instance of the debtor and in pursuance of orders of the Court granting stay of execution, the creditors are not parties to the contract of guarantee, even if they are empowered under the bond to enforce it. In such circumstances, Section 134 does not apply. AIR 1936 All 549 (552) (DB).

(2) Relative of judgment-debtor offering cheque to decree-holder in satisfaction of his claim — Relative held not a surety for judgment-debtor — Relative stopping payment of cheque — Decree-holder held has an independent cause of action against relative — Relative, held cannot take advantage of Section 134, Contract Act. AIR 1941 Pesh 6 (7) (DB).

(3) Where a surety executes a subsequent note in discharge of the first note, the principal debtor is discharged, and under Section 134 of the Contract Act, the co-sureties are also discharged from liability. The debt under the subsequent promissory note is quite a new transaction and a co-surety who is ignorant of it, cannot be made liable without his consent to make contribution. AIR 1922 Mad 119 (119) (DB).

(4) Decree passed against both surety and principal debtor by which rights and liabilities of surety were replaced by those created by decree — Before Debt Conciliation Board creditor released principal — Surety not absolved — Section 134 does not apply. 1939 Nag L Jour 402 (402, 403).

(5) Warrant of attachment before judgment withdrawn upon A executing surety bond — Subsequent application

by plaintiff for sealing of factory and appointment of receiver — Application not pressed upon B executing another surety bond — No mention of first surety when second surety was given — Nothing to show that liability under first surety bond was preserved — B's surety held took the place of A's surety which stood discharged — Principles of Sections 133 to 139 applied. AIR 1958 Punj 337 (338).

(6) Award against principal debtor and surety making them equally liable — Debtor applying under Madras Debt Conciliation Act — Debtor's liability for debt discharged under Section 10 (2) of that Act — Creditor can still recover debt from surety — Section 134, Contract Act, does not apply where creditor has obtained decree against both the surety and the principal debtor — Madras Debt Conciliation Act, Section 10 (2) does not affect surety's liability under award. AIR 1948 Mad 252 (254) = ILR (1948) Mad 707 (DB).

(7) Liability of the principal debtor to pay to the surety whatever sum the latter has rightfully paid under the guarantee will not arise until the creditor has recovered from the surety the amount due under the award or decree passed against both the principal debtor and the surety and such contingent and future liability is obviously not within the purview of the proceedings under the Madras Debt Conciliation Act, and cannot be affected by the discharge of the principal debtor's liability to the creditor under Section 10 (2) of that Act. AIR 1948 Mad 252 (255) = ILR (1948) Mad 707 (DB).

(8) Sureties in criminal case — Transfer of case — Sureties will not stand discharged — Provisions of Contract Act not applicable — Principle of equity also not applicable. AIR 1960 All 419 (420) = 1960 Cri LJ 873.

Section 134 — Note 1 (contd.)

(9) Liability of a surety under a bond executed for performance of a decree under Section 145 C. P. C., may be determined or put an end to only by the Court in whose favour the bond is executed. AIR 1967 Mys 147 (149) = (1965) 2 Mys LJ 87.

(10) Sections 133 to 139 of the Contract Act do not in terms apply to a surety bond executed in favour of a Court, but the principles contained therein apply. AIR 1967 Mys 147 (149) = (1965) 2 Mys LJ 87 ** (1965) 2 Law Rep 108 (110, 111) (Mys).

2. "Any act or omission of the creditor."— (1) Discharge of debtor without the consent of the surety destroys the liability of the surety though he had signed as a co-executant where the creditor knew that he was a surety. AIR 1924 Rang 360 (360).

(2) Section 134 discharges surety if legal consequence of creditor's act discharges debtor. AIR 1939 PC 110 (113, 114) = 66 Ind App 198 = 1939 Rang LR 358.

(3) Where in a suit against principal debtors and the surety, the names of the original debtors are struck out upon an application by the creditor, the only result is to preclude the bringing by the creditor of a fresh suit in respect of the subject matter against them, and is not to release or discharge the principal debt. AIR 1939 PC 110 (111, 114) = 1939 Rang LR 358 = 66 Ind App 198. (AIR 1937 Rang 302, Reversed.)

(4) When a person institutes a suit against both the principal and his sureties, and subsequently waives his claim against the principal, the sureties are also discharged from their liabilities. (1902) 1 Low Bur Rul 150 (150) ** AIR 1917 Lah 194 (195) ** ('13) 20 Ind Cas 189 (190) (DB) (Low Bur). (Where forbearance contemplated in Section 134 does not extend to actual waiver which has the effect of discharging the principal, forbearance is something short of waiver.)

(5) Decree against principal debtor and surety — Principal debtor compromising with creditor without consent of surety — Effect — Surety is discharged. AIR 1968 J and K 93 (95, 96) = 1968 Kash LJ 90 = 1968 Lab IC 1157 (DB).

(6) Release of principal debtor expressly reserving rights against surety does not absolve surety. AIR 1933 Mad 309 (311) = 56 Mad 625 (DB) ** AIR 1930 Lah 812 (813) ** AIR 1920 Mad 216 (217) (DB).

(7) Creditor proceeding against surety first but not absolving principal debtor — Surety is not discharged as the principal is not discharged thereby. AIR 1926 Bom 465 (466) (DB).

(8) Failure of creditor to serve summons on debtor would enable Court to dismiss the suit against debtor; but that reason does not free the surety from his liability as such. (1890) 14 Bom 267 (269) (DB) ** AIR 1937 Rang 72 (73) = 14 Rang 594 ** AIR 1914 Bom 242 (242) = 39 Bom 52 (DB) ** (1912) 8 Nag LR 188 (189).

[But see AIR 1918 Upp Bur 1 (2) = 3 Upp Bur Rul 62.]

(9) Surety cannot be held to be discharged merely by laches of decree-holder in executing his decree. (1961) 1 Andh WR 147 (152) (DB). (Judgment debtor applying in insolvency — Surety not discharged — Decree-holder can execute decree against surety.)

(10) A suit may be maintained against the surety though the principal has not been sued. AIR 1919 Lah 450 (457) = 1918 Pun Re No. 91 (DB) ** AIR 1925 Sind 164 (166) = 19 Sind LR 237. (But his liability to pay future interest merges in the preliminary decree.) ** AIR 1919 Sind 103 (103) = 13 Sind LR 92 (DB).

(11) It is always open to a creditor to pursue his remedy against one of the debtors and forbearance to sue the others does not bring the case within Sections 134 and 139 of the Contract Act. AIR 1927 Lah 396 (397).

(12) Abatement of suit as against principal debtor owing to his death during pendency of suit does not discharge surety. AIR 1932 Lah 419 (420) = 13 Lah 817 (DB).

[But see AIR 1928 Lah 246 (247).]

(13) The legal consequence of the creditor's act in taking over the debtor's estate is to discharge the principal debtor. AIR 1923 Mad 340 (341) (DB).

(14) Mortgage by A in favour of G — K standing surety — A adjudicated insolvent — Sale of mortgaged property by Receiver — Only part payment made to G — Receiver keeping balance as commission — Suit by G for balance against A and K — Claim against A given up — G can proceed against K — Section 134 does not apply. AIR 1935 Lah 906 (907).

(15) Where the original agreement is void, as in the case of a minor's contract, the surety is liable as principal debtor and is not discharged by the creditor withdrawing his claim against the debtor or his legal representative after his death. AIR 1916 Lah 376 (377) = 1916 Pun Re. No. 54.

(16) Drawee of hundi relieved of obligation — Drawer is also relieved. AIR 1936 Nag 260 (262) = ILR (1939) Nag 601.

(17) Wife depositing shares as collateral security for liability of company

Section 134 — Note 2 (contd.)

in which husband was principal shareholder — Company going into liquidation — Creditor taking company's property in full satisfaction of his dues — Wife induced to sign a letter continuing shares to be security for advances — Wife subsequently induced to give fresh guarantee of indebtedness, misrepresenting that she was still liable as surety. Held that principal debt having been discharged the wife was absolved from all liability. AIR 1934 PC 210 (213).

(18) A surety is not discharged by the discharge of the principal debtor by operation of law. AIR 1942 Mad 145 (146) (DB). (Therefore when a new statutory provision (e. g., Madras Agriculturists' Relief Act) has had the effect of granting a partial discharge to the principal debtor and the creditor has taken no part in releasing the principal debtor from his liability the remedy of the creditor against the guarantor will not be affected. Hence the relief as against the guarantor should not be restricted to the amount of the debt as scaled down in the Act.)

(19) Composition between principal and creditor discharging principal — Surety expressly contracting to remain liable even after the principal's discharge is not absolved. AIR 1940 Mad 437 (438) = ILR (1940) Mad 757 (DB).

(20) Decree against principal and surety passed — Surety becomes joint judgment-debtor — He cannot plead acts of creditor to discharge his liability as surety. AIR 1944 Mad 423 (423).

(21) A employing B at one place on C standing surety for B — Employment terminated and B employed by A afresh at a different place taking a security bond from another person — C held to have been discharged. AIR 1967 All 506 (512) = (1968) 2 Lab LJ 708 (DB).

(22) Every granting of time or accepting of additional security will not discharge the surety unless it comes under Section 134 by being an element in a new contract between the creditor and the principal debtor to which the surety is not a party. AIR 1967 Madh Pra 250 (253) = 1967 MPLJ 224 (DB) ** 1959 All LJ 789 (794) = 1959 All WR (HC) 644.

(23) Grant of time or accepting of additional security does not decide the question of discharge of surety either way because these may happen without their being parts of a contract. AIR 1967 Madh Pra 250 (253) = 1967 MPLJ 224 (DB).

3. Omission to sue principal within limitation — Effect. — (1) Section 134,

Contract Act, applies where there is either a release or a discharge of the principal debtor. The section intends that the act or omission of the creditor should be something in the nature of a breach of the contract on his part — The failure of the creditor to bring a suit within the period of limitation against the principal debtor is not an act or omission of the nature contemplated by that section. AIR 1935 Lah 729 (732) = 16 Lah 757 (DB) ** AIR 1932 All 610 (612) = 54 All 1007 (DB).

(2) Omission of creditor to sue the principal within the period of limitation does not discharge the surety. (1910) 33 Mad 308 (310) (DB) ** 1941 Oudh WN 473 (474) ** 1939 Nag L Jour 402 (403). (When a creditor expressly reserves a right against the surety to proceed for the debt, the surety cannot say that he is discharged on account of creditor's remedy being barred against the principal debtor.) ** 1935 All WR 492 (493). (When a surety agrees with creditor to pay, unconditionally, the sum borrowed by the debtor, specially, he creates the relation of creditor and debtor between the creditor and himself and when he is sued on that, the plea that creditor's remedy against the debtor is barred cannot absolve surety from liability.) ** AIR 1929 Nag 145 (148) = 25 Nag LR 74 (DB) ** AIR 1927 Lah 396 (397) ** AIR 1924 Nag 411 (412) = 20 Nag LR 140 ** (1883) 7 Bom 146 (148, 149) (DB). (Section 134 of the Contract Act is qualified by Section 37 of the Act.) ** (1880-81) 5 Bom 647 (659) (DB) ** AIR 1939 PC 110 (112) = 66 Ind App 198 = 1939 Rang LR 358. (Surety is not discharged unless there is a specific term to that effect in the security bond.) ** AIR 1956 All 8 (9) = ILR (1956) 1 All 173 (FB). (11 All 310, 24 All 504, AIR 1928 All 46, 8 All 259, AIR 1932 All 610, AIR 1919 All 56, 1930 All LJ 1084 and AIR 1936 All 549, Overruled.) ** AIR 1958 Cal 530 (531) (DB). (AIR 1939 PC 110, Foll.) ** AIR 1958 Cal 530 (531) = 62 Cal WN 493 (DB). (The surety is not discharged unless there is a specific term to that effect in the security bond.)

(3) As for Section 20, Limitation Act, the liabilities of the principal debtor and surety are distinct though their liabilities arise out of the same transaction. If the surety has made certain payments and endorsements on the bond on which the suit is based, he is liable even if remedy against the debtor is barred by Limitation Act. AIR 1932 Rang 88 (88, 89) = 10 Rang 398.

[See also under Section 137.]

135. Discharge of surety when creditor compounds with, gives time to, or agrees not to sue, principal debtor.—A contract between the creditor and the principal debtor, by which the creditor makes a composition with, or promises to give time to, or not to sue, the principal debtor, discharges the surety, unless the surety assents to such contract.*

[*] See the Negotiable Instruments Act (1881), S. 39.

SECTION 135 — SYNOPSIS

1. Applicability.
2. Composition.
3. Extension of time.
4. Assent of surety.

1. Applicability. — (1) The principles underlying Sections 133 to 141 apply to surety bonds executed in favour of Courts though the sections are not themselves applicable. AIR 1944 Lah 428 (431, 432) (DB) ** AIR 1939 Bom 23 (25) = ILR (1938) Bom 794 (DB) ** AIR 1933 Mad 309 (310) = 56 Mad 625 (DB). (Bond for restitution of execution.) ** (1953) 6 Sau LR 368 (369) ** (1963) 3 SCR 921 (925, 926) ** AIR 1967 Mys 147 (149) = (1965) 2 Mys LJ 87 ** (1965) 2 Law Rep 108 (110, 111) ** AIR 1962 J and K 72 (74) = 1962 Kash LJ 23 (DB) ** AIR 1962 Orissa 54 (59) = ILR (1961) Cut 356 (DB) ** AIR 1959 Bom 516 (517) = 1958 Nag LJ 72.

[But see AIR 1927 Lah 336 (336). (Section 135 has no application to surety bond executed under Section 55 (4), Civil P. C., such a bond being in favour of Court.) ** AIR 1920 Mad 355 (356) = 43 Mad 272 (DB). (Section does not apply to surety under O. 38, R. 3, Civil P. C.)]

(2) Section 135 has no application unless there is an initial tripartite agreement between the principal debtor, the surety and the creditor fixing specified dates for payment and subsequent extension of time by the creditor without reference to the surety. AIR 1962 Madh Pra 69 (71) = 1962 Jab LJ 429.

(3) Surety for appearance of judgment-debtor — Decree-holder giving time to judgment-debtor — Whether surety is discharged or not depends on discretion of Court, such a bond being in power of Court. AIR 1930 Lah 896 (897).

[See also AIR 1933 Cal 337 (338) (DB). (Surety executing bond for appearance of judgment-debtor — Judgment-debtor appearing and paying part of decree-debt — Acceptance by decree-holder's pleader — Surety's liability ceases on principle of S. 135.)]

(4) Auction-purchaser at execution allowed to, withdraw deposit on furnishing security to re-deposit when asked — Surety bond executed — Auction-purchaser asked to re-deposit — Time asked — Decree-holder not objecting — Time granted, but order reviewed and surety asked to deposit amount — Surety held not absolved, the bond being in favour of the Court and the consent of decree-

holder, therefore, being immaterial. AIR 1938 Lah 472 (473).

(5) Sub-brokerage contract on behalf of broker to introduce constituents is not contract of guarantee but one of indemnity — Broker can compromise without sub-broker's consent. AIR 1940 Bom 315 (317) = ILR (1940) Bom 552 (DB).

(6) Person executing a promissory note jointly with another binding himself jointly and severally, cannot plead that he was surety for the other and take advantage of Section 135 unless he brings himself under the definition of surety given in Section 126 and is a party to contract of guarantee. AIR 1943 Mad 216 (217) (DB).

(7) Attachment before decree — Surety bond — Decree — Execution — Stay application by judgment-debtor on ground that he wanted to appeal — Stay granted — Order mentioning that "the previous bond executed subsisted only till the decree in the original suit granted" — Decree confirmed in appeal — Execution started against surety — Question whether stay order had the effect of discharge of surety — Reference of the previous bond in the stay order held was rather casual — Liability under bond did not terminate — Mere forbearance on part of creditor did not, in the absence of any provision in the guarantee to the contrary, discharge the surety under Section 137 — Sections 133, 135 and 139 did not in terms apply — Their application considered. AIR 1953 Mys 68 (70, 71) = ILR (1953) Mys 277 (DB).

(8) Warrant of attachment before judgment withdrawn upon A's furnishing surety bond for Rs. 1,000 — Few days later plaintiff applying for sealing of foundry and workshop and appointment of receiver — B produced as surety for Rs. 10,000 — Matter not proceeded with further — No mention of first surety bond at time the second surety was given — Nothing to show that first surety was preserved or excluded. Held, that the principles of Sections 133 to 139 applied and that B's surety took the place of A's surety, which stood discharged. AIR 1958 Punj 337 (338).

(9) The idea underlying Section 135 is that where the creditor does something behind the back of the surety, and does it to his prejudice, by advancing facilities to the principal debtor, which are likely to harm the surety, the surety is no more to be bound by his undertaking. AIR 1952 All 587 (589) (DB).

(10) Where a person by his letter of guarantee expressly referred to the terms

Section 135 — Note 1 (contd.)

and conditions of the borrower's agreement with the Government and stipulated as follows:

'I agree that failure on your part to enforce any of your remedies against the borrower shall not have the effect of releasing me from my liability under this guarantee'

Held, that the Guarantor could not claim discharge of his guarantee on the ground of indulgence alleged to have been granted by the Government to the borrower. AIR 1960 Cal 416 (419) = 64 Cal WN 126.

(11) No composition between creditor and principal debtor — No giving of time to principal debtor — No promise not to sue — Section 135 does not apply. 1959 All LJ 789 (794) = 1959 All WR (HC) 644.

2. Composition. — (1) Sections 134 and 135 apply to private composition behind back of surety — Principle of these sections does not apply to composition after notice to surety and accepted by Court — In such case, it becomes act of the Court. AIR 1921 Mad 236 (242) = 44 Mad 381 (DB).

(2) Creditor accepting composition during insolvency after part payment by surety — Surety is not entitled to refund. AIR 1921 Mad 236 (239) = 44 Mad 381 (DB).

(3) Composition between principal and creditor discharging principal — Surety expressly contracting to remain liable even after principal is discharged, is not absolved. AIR 1940 Mad 437 (438) = ILR (1940) Mad 757 (DB).

(4) Surety for amount which may be decreed by Court — Maximum liability fixed at Rs. 500 — Plaintiff in suit claiming Rs. 3000 — Parties to suit compromising and agreeing to definite sum of Rs. 950 — Surety held discharged. AIR 1932 Pat 313 (315) = 11 Pat 590 (DB).

(5) Adjustment materially altering decree, though not certified, discharges the surety. AIR 1943 Bom 246 (249) = ILR (1943) Bom 382.

(6) Where the plaintiff as the endorsee of a promissory note sues the maker of it, and the latter pleads that the plaintiff knew that the note was an accommodation note made for the benefit of the acceptor and that the plaintiff, after the note fell due, took a mortgage from the principal debtor, viz., the acceptor, and gave him time, these facts if found true, would be sufficient to discharge the maker from liability. (1890) 13 Mad 172 (177).

(7) Consent decree without surety's consent or knowledge discharges surety. AIR 1926 Cal 818 (818) ** AIR 1968 J and K 93 (95, 96) = 1968 Kash LJ 165 (DB) ** AIR 1962 Orissa 54 (55, 59) = ILR (1961) Cut 356 (DB) ** AIR 1959 Bom 516 (517) = 1958 Nag LJ 72.

(8) Though in the absence of any stipulation in that behalf there is no ground for limiting a surety's liability only to decrees passed after contest, there is nothing unreasonable or wrong in a surety expressly stipulating that he would be bound by his guarantee only if a decree is passed after contest and that he would not be bound by a consent-decree. AIR 1967 Mys 147 (149) = (1965) 2 Mys LJ 87.

(9) When a party undertakes to be bound by a decree or order as may be passed by the Court, he undertakes to be bound by a consent decree as well as by one passed after contest. AIR 1961 Ker 312 (314) = 1960 Ker LT 866 (DB).

(10) The question whether the liability of surety is discharged by a compromise decree depends upon the terms of the bond itself. If the terms indicate that surety undertook the liability on the basis that the dispute should be decided on merits by Court and not amicably settled, the compromise will effect a discharge of the surety. But if the terms show that the parties and the surety contemplated that there might be an amicable settlement as well, and the surety executed the bond knowing that he might be liable under compromise decree, there can be no discharge of surety. (1963) 3 SCR 921 (926) ** AIR 1968 Delhi 108 (109). (Whether particular decree is within scope of surety bond or not depends upon terms of surety bond and decree and consequently is question of fact.) ** AIR 1961 Ker 312 (314) = 1960 Ker LT 866 (DB). (Surety bond for performance of decree — Compromise decree passed — Terms of bond showing that compromise decree nor excluded.)

(11) Surety agreeing to pay decretal amount as decreed in suit after contest — Suit compromised and decreed on basis of award — Surety is discharged. AIR 1928 Cal 177 (178) = 55 Cal 91 (DB).

(12) Surety for performance of decree that may be passed — Compromise of suit not explicitly or implicitly excluded from scope of surety bond — Bona fide compromise of suit between creditor and principal debtor does not discharge surety. AIR 1931 Bom 55 (56) = 55 Bom 97 (DB).

(13) Suit compromised — Compromise not contemplated by surety for defendant and prejudicial to his interest — Surety is discharged. AIR 1930 Bom 122 (124) = 54 Bom 118 (DB).

(14) Unless there are terms in a surety bond executed under Order 41, Rule 5, Civil P. C. limiting the liability of the surety only to a decree passed after contest, expressly excluding a compromise decree, and the compromise is bona fide the surety's liability continues even after the

Section 135 — Note 2 (contd.)

consent decree. Section 135 does not apply to such a case. (1950) 55 Mys HCR 7 (10) (DB). (AIR 1926 Cal 818; AIR 1932 Pat 313 and AIR 1930 Bom 122, Not followed.)

(15) Where a surety-bond is given in favour of the Court in proceeding started for attachment of property before judgment then it cannot be said as a broad proposition that wherever there is a consent decree in the suit the person who stood surety for the claim of the plaintiff is discharged. It depends in each case on the terms of the decree and on the terms of the bond as to whether the consent decree in question discharged the surety. AIR 1957 Cal 645 (646, 647) (DB). (Held, on construction of bond in this case that there was nothing in terms of bond to exclude consent decree and hence surety was not discharged thereby.)

(16) Attachment before judgment — Surety executing bond in favour of Court — Compromise decree — Surety not a party to the decree nor consenting to it — Compromise decree providing for payment by instalments and thus postponing payment — Held, that the decree did prejudicially affect the interest of the surety and the surety stood discharged. (1965) 2 Law Rep 108 (111).

3. Extension of time. — (1) Where a creditor extends time for the payment of debt, without surety's consent, the surety is discharged. AIR 1915 Low Bur 62 (62) ** ('29) 120 Ind Cas 552 (552) (All).

(2) Defence by surety that creditor gave time to the principal debtor without his consent, contemplates a subsequent contract between a creditor and the principal debtor whereby time originally fixed is subsequently extended. AIR 1929 All 664 (665) (DB).

(3) Giving of time does not mean mere forbearance to sue, but entering into a binding agreement by which the creditor precludes himself from suing within a certain time. AIR 1933 Mad 756 (758) = 57 Mad 398 (DB).

(4) What really constitutes giving of time is the extension of the period of which, by the contract between then the principal debtor was originally obliged to pay the creditor by substituting a new and valid contract between the creditor and the principal debtor to which the surety does not assent. AIR 1968 SC 1432 (1436) = (1969) 1 SCJ 162.

(5) Stipulation in surety bond that surety was not to be discharged by any dealings between creditor and principal debtor — Surety is not in any way relieved by time given to principal debtor without his knowledge or concurrence. (1901) 23 All 137 (146, 147) = 27 Ind App 168 (PC).

(6) Money decree against debtors and sureties — Debtors allowed time, thus increasing interest and burden on sureties

— Decree-holder not entitled to interest after time when he might and ought to have put up property for sale. (1879) 4 Cal 331 (335, 336) (PC).

(7) When the payment of only a portion of a guaranteed debt is allowed to be postponed, the discharge of the surety extends only to such portion and not to the rest of the liabilities with regard to which he is not prejudiced. (1913) 14 Mad L Tim 249 (253) (DB).

(8) Sec. 135 does not apply to claims which have been decreed. Liability of surety is not discharged by the decree-holder's giving time to principal judgment-debtor. (1906) 9 Oudh Cas 28 (28, 29).

(9) Court and not decree-holder granting time to judgment-debtor to pay by adjourning case from time to time in spite of decree-holder's opposition — Surety is not discharged — Surety acquiescing in orders of Court cannot say that time was granted without his consent. AIR 1944 Nag 277 (277).

(10) Striking of balance by principal debtor unsigned by surety does not discharge surety, inasmuch as while it extended time and privileges to the creditor, it did not confer any benefit on principal debtor. AIR 1931 Lah 627 (627) (DB).

(11) Creditor granting time to the debtor and allowing instalments without surety's consent — Surety is discharged from liability. AIR 1944 Lah 428 (430) (DB) ** (1967) 1 SCWR 345 (352).

(12) Consent order — Instalments or giving time to principal debtor — Surety is discharged unless it is expressly provided to proceed against surety. AIR 1933 Mad 309 (310) = 56 Mad 625 (DB).

(13) The question as to whether an advance of interest operates as giving time to the principal debtor is a mixed question of law and fact. As a rule acceptance of interest in advance by creditor operates as giving time to principal debtor and consequently as a discharge to the surety. (1879) 4 Cal 132 (134) (DB).

(14) Drawer of hundi paying interest to holder in order to obtain time for payment — Liability of accommodation acceptor depends on whether he knew of and consented to the arrangement. (1881) 6 Cal 241 (242) (PC).

(15) The mere taking of additional security will not discharge the surety, but the surety will be discharged if, along with the taking of additional security, there is an express or implied contract to give time to the debtor. AIR 1933 Mad 756 (758) = 57 Mad 398 (DB).

(16) A mere agreement between the creditor and the principal debtor, by which the creditor promised to give time to the principal debtor does not discharge the surety under Section 135, unless the agreement amounts to a contract, i. e., at the instance of the debtors. Where,

Section 135 — Note 3 (contd.)

therefore, there is no consideration to an agreement of the above nature, surety is not discharged by reason of the forbearance of the creditor to realize the instalments payable by the principal debtor. (1900) 22 All 351 (352) (DB) ** AIR 1936 Pesh 80 (80, 81) ** AIR 1933 Sind 311 (312). (Mere gratuitous agreement to give time does not discharge surety.) ** AIR 1967 Madh Pra 250 (252, 253) = 1967 MPLJ 224 (DB) ** 1962 MPLJ 895 (896, 897).

[But see (1913) 14 Mad L Tim 249 (253) (DB). (When surety is prejudiced by the grant of time to the principal debtor, it is immaterial under the Indian law whether the agreement for grant of time is or is not backed by consideration.)]

(17) Surety's liability does not come to an end if the creditor gives time to the principal debtor in consideration of part payment of the debt by the latter. AIR 1914 Mad 117 (117).

(18) An acknowledgment by the principal debtor does not save limitation against the surety unless it is shown that the latter allowed himself to be represented by the person who made the payment. AIR 1931 Lah 691 (694) = 13 Lah 240.

(19) Entering into an agreement with a principal debtor granting him time will not discharge the surety if the right against the surety is reserved. This principle is applicable to all negotiable instruments even though Section 139 of the Negotiable Instruments Act provides for such reservation only in the case of bills of exchange. AIR 1934 Mad 75 (78) = 57 Mad 482 (DB).

(20) Where a person stands surety for the sum that may be decreed and the suit is decreed but the execution is stayed on the judgment-debtors' furnishing security as a condition precedent, it does not amount to giving time to the principal debtor without the consent of the surety operating to release the surety from his obligation. AIR 1949 Mad 194 (195).

(21) It is not simply neglecting to sue the principal debtor which would have any effect upon the surety's liability, but there must be a positive agreement with the principal debtor that the creditor will postpone the suing of him or enforcing other remedies to a subsequent period before a surety can claim his discharge. AIR 1950 Trav-Co 66 (72) = 1950 Trav-Co LR 289 (FB).

(22) Where time is given to the principal debtor to enable him to raise money by private sale of a portion of his property with a view to discharge his debt, it amounts only to an act of forbearance within the meaning of Section 137 and not an incident of giving time under a "contract" within the meaning of Section 135. AIR 1952 All 587 (589) (DB).

(23) Surety executing bond in proceeding for attachment before judgment — Consent decree passed — Surety not party to decree — According to bond surety standing liable for payment of Rs. 3,000 and odd — By consent decree judgment-debtor given time to make payment of decretal amount — If within that time judgment-debtor paid Rs. 2000 and odd decree was to remain as fully satisfied — Otherwise decree-holder was to proceed to execute decree, when that amount was not paid within extended time and not earlier — **Held**, that the decree-holder in effect gave time to judgment-debtor and came within the mischief of Section 135 and that the surety was discharged. AIR 1957 Cal 645 (647) (DB). (Observations of Rankin C. J. in AIR 1932 Cal 858, **Held**, obiter.)

(24) Extension of time given by decree-holder — It may discharge surety — Application of principle depends on facts of case — Where giving of time is merely technical and no real prejudice is caused to the rights of the surety, the surety cannot claim to be discharged — Short extensions given by way of accommodation by the Court or the decree-holder while the warrant of attachment was still kept pending will not relieve the surety from his liability. (1953) 6 Sau LR 368 (370).

(25) The agreement between a creditor Bank and principal debtor provided that the latter should be responsible for the quality and quantity of goods pledged with the Bank and also for the correctness of the statements and returns furnished to the Bank from time to time. The goods pledged were further declared and agreed to be not actually weighed or valued in order to verify the returns furnished by the debtor. When on one occasion the Bank on actual weighment found some deficit in the quantity of goods, it granted some time for the principal debtor to make up the deficiency.

Held, that the Bank's act of giving time to the principal debtor considered in the light of the above terms in the agreement did not tantamount to giving of time within the meaning of Section 135 of the Contract Act so as could exonerate the surety. AIR 1968 SC 1432 (1436) = (1969) 1 SCJ 162.

4. Assent of surety. — (1) Principle that the rights of surety are not to be interfered with without his consent, ought to be applied even to a case not governed by Contract Act. AIR 1939 Bom 23 (25) = ILR (1938) Bom 794 (DB).

(2) There is material from which the consent of the surety to the variation of terms of the contract entered into by the debtor with the creditor the performance of which is guaranteed by the surety, can be inferred, then the surety will be bound by the variation of the terms. Such assent may have been obtained prior to the arriving of the altered terms or may

136. Surety not discharged when agreement made with third person to give time to principal debtor.—Where a contract to give time to the principal debtor is made by the creditor with a third person, and not with the principal debtor, the surety is not discharged.

Illustration

C, the holder of an overdue bill of exchange drawn by A as surety for B, and accepted by B, contracts with M to give time to B. A is not discharged.

137. Creditor's forbearance to sue does not discharge surety.—Mere forbearance* on the part of the creditor to sue the principal debtor or to enforce any other remedy against him does not, in the absence of any provision in the guarantee to the contrary, discharge the surety.

Illustration

B owes to C a debt guaranteed by A. The debt becomes payable. C does not sue B for a year after the debt has become payable. A is not discharged from his suretyship.

[*] That is, a forbearance as is not the subject of S. 135 supra.

Section 135 — Note 4 (contd.)

even be obtained subsequent thereto by way of ratification. In both the cases the surety cannot escape liability merely because original terms of payment were altered and time for payment is extended to the debtor. AIR 1962 Madh Pra 69 (72) = 1962 Jab LJ 429.

(3) There can be no variation without consent and if there is such variation surety is discharged. 1962 Raj LW 711 (712) ** ILR (1963) 1 Punj 360 (372) (DB) ** AIR 1962 Madh Pra 69 (71) = 1962 Jab LJ 429. (Fresh contract subsequent to original contract — Creditor agreeing to give further time to the principal debtor for performance without reference to surety.)

(4) Where the surety acquiesces in an order of Court granting time to judgment-debtor to pay, it cannot be said that time was granted without surety's consent. AIR 1944 Nag 277 (277).

(5) Arrangement with creditor on behalf of surety by agent authorized or authority subsequently ratified — Arrangement is binding on surety none the less when agent is principal debtor — No direct notice to surety is necessary — Surety is not discharged from his liability. AIR 1929 PC 273 (279).

(6) Where a firm was the indorser of a hundi, and on the date of the agreement to enlarge time the firm was not in existence no consent by the firm would be possible, so as to bind it with liability on the hundi. AIR 1951 Cal 466 = 84 Cal L Jour 33 (43).

(7) Where under a surety bond the surety guarantees the payment of a fixed sum by the principal debtor and as regards the instalments and their due dates he agrees to abide by what the creditor might fix and the creditor initially fixes the dates for payment of instalments and subsequently extends the time

for payment without reference to the surety, S. 135 will not apply and the surety will not be discharged. AIR 1962 Madh Pra 69 (72) = 1962 Jab LJ 429.

(8) Banker and customer — Cash credit agreement — Contract of indemnity by guarantee brokers — Bank granting extension to principal debtor after expiry of term of cash credit agreement without assent of guarantee brokers — Bank also permitting itself to be denuded of security either by lack of supervision or connivance — Surety is discharged. ILR (1963) 1 Punj 360 (372) = 65 Punj LR 735 (DB).

Section 136 — Note 1

(1) Though the provisions of Sections 126 and 135 to 139 (and a portion of Section 133) do not apply where the bond has been executed by the surety in favour of the Court, the principles underlying those sections do certainly apply. AIR 1959 Bom 516 (517) = 1958 Nag LJ 72 ** AIR 1967 Mys 147 (149) = (1965) 2 Mys LJ 87 ** (1965) 2 Law Rep 108 (110, 111).

Section 137 — Note 1

(1) Mere forbearance to sue the principal debtor or to enforce any other remedy against him does not, in the absence of any provision in the guarantee to the contrary, discharge the surety. AIR 1918 PC 226 (228) ** AIR 1920 Lah 80 (84) = 1 Lah 262 (DB) ** AIR 1950 Trav-Co 66 (72) = 1950 Trav-Co LR 289 (FB). (Surety is not discharged unless there is positive agreement to postpone enforcement.) ** AIR 1967 Madh Pra 250 (253) = 1967 MPLJ 224 (DB).

(2) The fact that the creditor has not sued the principal debtor and exhausted the remedies against him is no defence to an action against the surety. There is no rule of law that a creditor cannot proceed against the surety unless he has first exhausted his remedies against the debtor. AIR 1935 Mad 748 (749) ** AIR

Section 137 — Note 1 (contd.)

1917 Mad 101 (101, 102) (DB) ** (1869) 6 Bom HCR 241 (242) (DB) ** 1959 All LJ 789 (794) = 1959 All WR (HC) 644.

(3) Principal debtor and surety — Mortgage decrees obtained by prior and subsequent mortgagees — Subsequent mortgagee not immediately executing decree but waiting for execution by prior mortgagee — Sale not sufficient even to satisfy prior mortgagee — Subsequent mortgagee then proceeding to execute decree against surety — **Held**, that failure by subsequent mortgagee to proceed against principal debtor did not discharge surety. AIR 1935 Oudh 260 (262) (DB).

(4) Debtor asking creditor for time to pay the instalments payable by him — Creditor agreeing provided there is no legal impediment in granting time — **Held**, a mere agreement between the creditor and the principal debtor does not discharge the surety unless the agreement amounts to a contract — In this case the agreement amounted to a mere gratuitous forbearance on the part of the creditor within Section 137. (1900) 22 All 351 (352) (DB).

(5) Where K supplied goods to employees of M who was surety for his employees, a statement by K that he did not intend to file a suit against the employees does not amount to waiver of claim so as to discharge M from liability nor does it take the case out of Section 137. AIR 1929 Rang 187 (187).

(6) Decree-holder agreeing to accept payment by instalments of decretal amount in execution of decree — Certain person standing surety to the effect that in case of default in instalments the whole amount was payable with interest within certain time — Default by judgment-debtor — Decree-holder failing to execute decree which becomes time-barred — He then sued surety for amount — **Held**, that as the bond laid down the period within which decree-holder had to execute his decree in case of default, his action in not doing so was much more serious than "mere forbearance" in favour of his debtors, and hence his suit was to be dismissed. (1886) 8 All 259 (261) (DB).

(7) A failure to sue the principal debtor until recovery is barred by the statute of limitation does not operate as a discharge of the surety. AIR 1939 PC 110 (112) = 66 Ind App 198 = ILR (1939) Rang 358. (Obiter.) ** 1941 All WR (HC) 123 (124) ** AIR 1932 Lah 419 (420) = 13 Lah 817 (DB) ** AIR 1956 All 8 (9) = ILR (1956) 1 All 173 (FB). (11 All 310, 24 All 504, AIR 1928 All 46, 8 All 259, AIR 1932 All 610, AIR 1919 All 56, 1930 All L Jour 1084 and AIR 1936 All 549, **Overruled.**) ** AIR 1958 Cal 530 (531) (DB). (AIR 1928 All 46, **Held, no longer good law.**)

[But see AIR 1936 All 549 (552) (DB) ** AIR 1936 Pesh 20 (22) (DB) ** (1902) 24 All 504 (510) (DB) ** (1889) 11 All 310 (313) (DB).]

(8) Plaintiff suing surety along with debtor — Debtor not alive at the time of institution of suit — Failure on part of plaintiff to substitute debtor's legal representative within time thus allowing claim against debtor to become time-barred — **Held**, that surety was not discharged as suit against him was instituted within time and forbearance by creditor to enforce remedy against debtor did not discharge surety. (1886) 12 Cal 330 (332, 333) (DB).

(9) The fact that a person forbears to sue the moment the debt becomes due, at the request of the debtors, does not amount to a promise to give time to the debtors so as to discharge the surety. AIR 1936 Pesh 80 (80, 81).

(10) The abatement of an appeal as against the principal debtor does not necessarily imply that the debt payable by him is extinguished or discharged — The liability of the surety continues in spite of the abatement. AIR 1920 Oudh 75 (75).

(11) Where time is given to the principal debtor to enable him to raise money by private sale of a portion of his property with a view to discharge his debt, it amounts only to an act of forbearance within meaning of Section 137 and not, an incident of giving time under a 'contract' within meaning of Section 135. AIR 1952 All 587 (589) (DB).

(12) Attachment before judgment — Surety bond — Decree — Execution — Stay application by judgment-debtor on ground that he wanted to appeal — Stay granted — Order mentioning that "the previous bond executed subsisted only till the decree in the original suit granted" — Decree confirmed in appeal — Execution started against surety — Question whether stay order had the effect of discharge of surety — Reference of previous bond in the stay order held was rather casual — Liability under bond did not terminate — Mere forbearance on part of creditor did not in the absence of any provision in the guarantee to the contrary discharge the surety under Section 137 — Sections 133, 135 and 139 did not in terms apply — Their application considered. AIR 1953 Mys 68 (70, 71) = ILR (1953) Mys 277 (DB).

(13) The plaintiff instituted a suit against a company and its surety after the company had gone into liquidation. On an application of the plaintiff the name of the company was struck out and the suit was proceeded with against the surety and decreed against him. It was contended for the surety that he was discharged from liability under S. 134. It was held that the suit was not instituted against the company at all so that it was not the case of exonerating the principal debtor but that the case was covered by Section 137 and that the conduct of the plaintiff in amending his

138. Release of one co-surety does not discharge others.—Where there are co-sureties, a release by the creditor of one of them does not discharge the others; neither does it free the surety so released from his responsibility to the other sureties.*

[*] See Section 44.

139. Discharge of surety by creditor's act or omission impairing surety's eventual remedy.—If the creditor does any act which is inconsistent with the rights of the surety, or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged.*

Illustrations

(a) B contracts to build a ship for C for a given sum, to be paid by instalments as the work reaches certain stages. A becomes surety to C for B's due performance of the contract. C, without the knowledge of A, prepays to B the last two instalments. A is discharged by this prepayment.†

(b) C lends money to B on the security of a joint and several promissory note made in C's favour by B, and by A as surety for B, together with a bill of sale of B's furniture, which gives power to C to sell the furniture, and apply the proceeds in discharge of the note. Subsequently, C sells the furniture, but, owing to his misconduct and wilful negligence, only a small price is realized. A is discharged from liability on the note.

(c) A puts M as apprentice to B, and gives a guarantee to B for M's fidelity. B promises on his part that he will, at least once a month, see M make up the cash. B omits to see this done as promised, and M embezzles. A is not liable to B on his guarantee.

[*] Cf: Section 125 (2); also see Section 145 infra.

[†] See Section 133 supra.

Section 137 — Note 1 (contd.)

plaint and striking off the name of the company did not operate to discharge the surety from liability. (1947) 51 Cal WN 257 (259).

(14) Laches of decree-holder in executing decree against judgment-debtor — Judgment-debtor applying in insolvency — Surety not discharged — Decree-holder can execute decree against surety. (1961) 1 Andh WR 147 (152) (DB).

(15) Though the provisions of Sections 126 and 135 to 139 (and a portion of Section 133) do apply where the bond has been executed by the surety in favour of the Court, the principles underlying those sections do certainly apply. AIR 1959 Bom 516 (517) = 1958 Nag LJ 72 ** AIR 1967 Mys 147 (149) = (1965) 2 Mys LJ 87 ** (1965) 2 Law Rep 108.

Section 138 — Note 1

(1) Sureties for satisfaction of decree — Enforcement of surety bond against one or release of one does not operate as discharge of others — Their liability though joint and several is not distinct. AIR 1966 SC 1427 (1431) = (1966) 3 SCR 451.

(2) Surety bond — Execution of subsequent surety bond by another — Nothing to show whether the liability under the first surety bond was preserved or excluded from the sum mentioned in the record — Prior surety is discharged.

AIR 1958 Punj 337 (338) = 59 Pun LR 501.

(3) Surety Bond executed in favour of Court under Section 145, C. P. C. — Sections 133 to 139, Contract Act, do not apply but the principle applies to such bonds. AIR 1967 Mys 147 (149) = (1965) 2 Mys LJ 87 ** (1965) 2 Law Rep 108 (Mys).

SECTION 139 — SYNOPSIS

1. Acts inconsistent with rights of surety.
2. Omission to do any act which creditor's duty to surety requires him to do.
3. Impairment of surety's eventual remedy.
4. Liability of surety.
5. Surety for performance of an act.
6. Bond in favour of Court.
7. Surety for employee's honesty.

1. Acts inconsistent with rights of surety. — (1) Positive act on part of obligee to the prejudice of surety must be proved for surety's discharge — Mere laches or acquiescence on obligee's part is not enough. AIR 1938 Rang 90 (91, 92) = 1937 Rang LR 405 ** AIR 1936 Lah 305 (306) = 16 Lah 583 (DB). (Surety bond executed in favour of employer by which S standing surety for faithful discharge of duties by K, an accountant — Embezzlements made by K — Mere laches

Section 139 — Note 1 (contd.)

of employer or negligence in supervision is no ground for discharging S from his liability.)

(2) Creditor without surety's consent granting time to debtor and allowing instalments — Surety is discharged from liability. AIR 1944 Lah 428 (430) (DB).

(3) Surety guaranteeing full payment with interest of any amount deposited in bank in case Bank goes into liquidation — Bank going into liquidation — Creditor realising dividend from liquidator — Suit by creditor against surety for recovery of deposit with interest: **Held**, that the suit was maintainable as the act of the creditor in getting dividend was not inconsistent with the rights of surety against the principal debtor — Surety's liability being co-extensive with that of his debtors, the surety was liable to pay interest also. AIR 1922 Lah 89 (90, 91) (DB).

(4) The opening of a second account in favour of the principal debtor whose credit has been guaranteed in respect of a previous account, without the consent and knowledge of the surety does not discharge the guarantee. AIR 1917 Cal 537 (541) (SB).

(5) Where certain persons executed a surety bond in favour of the creditors and paid an instalment but subsequently some of the creditors in breach of the agreement sued the debtors: **Held**, that the liability of the sureties was not extinguished because of such suits. AIR 1930 Lah 1029 (1033) (DB).

(6) Where the Court obtains a security bond hypothecating immovable property to secure a proper disposal of money due to minors and the Court breaks the contract by acting inconsistently with the rights of the sureties, the sureties are thereby discharged. AIR 1935 Lah 863 (865) (DB).

(7) Surety for production of property under Order 38, Rule 5, Civil P. C. — Compromise of suit not contemplated by surety and prejudicial to his rights — passing of decree in terms of compromise discharges surety. AIR 1930 Bom 122 (124) = 54 Bom 118 (DB).

(8) Surety bond executed when property of debtor was under attachment in execution of ex parte decree — Attachment withdrawn — Ex parte decree set aside and suit decreed on merits — Property again attached in execution — Attachment released by creditor in spite of surety's objection — Surety discharged to the extent of the property released and not absolutely under Section 139. AIR 1934 All 616 (616, 617).

(9) Where the lease of the right to collect tolls contained a clause that if payment of kist falls into arrears the toll will be liable to be re-sold or conducted under amani: **Held**, that the alternative of re-sale or conduct under amani was

one entirely within the option of the District Board and neither the contractor nor the surety was entitled to plead as a condition of the discharge of the obligations, that the Board should have adopted that course on default of payment of kist. AIR 1934 Mad 85 (88) (DB).

(10) Warrant of attachment before judgment removed on the defendant furnishing surety in Rs. 1000 of A — Few days later application by plaintiff for sealing foundry and workshop and for appointment of receiver — B produced as surety to the extent of Rupees 10,000 — Matter not proceeded further — No mention of first surety when second surety was given — Nothing to show that liability under first surety was preserved or excluded from sum of Rs. 10,000: **Held** that the principles of Sections 133 to 139 applied and that B's surety took the place of A's surety which stood discharged. AIR 1958 Punj 337 (338).

(11) Surety for sum that may be decreed — Suit decreed — Execution stayed on judgment-debtor furnishing security as condition precedent — It does not amount to giving time — Release of security does not release surety to that extent — By giving up the security in the course of his execution proceedings, the decree-holder had not done something which was inconsistent with the right of the surety impairing the remedy of the surety which attracted the provisions of Section 139 and discharge the surety — Section 139 must be read along with Section 141 and not in such a way as to abrogate Section 141 when it applies. AIR 1949 Mad 194 (195).

(12) Discharge of surety — Laches of decree-holder in executing decree against judgment-debtor — Judgment-debtor applying in insolvency — Decree-holder not inactive in the levy of execution and had not done anything to jeopardise the interest of surety. Surety not discharged — Decree-holder can execute decree against surety — Contract Act (1872), Sections 134, 137, 139. (1961) 1 Andh WR 147 (152) (DB).

(13) Where a person borrows a loan under Rehabilitation Finance Administration Act for starting a factory, the petitioner stands a surety and the Administration, namely creditor has done nothing by which the properties of the principal debtor out of which the surety could later on recover amount, have been affected, the principle of Section 139 will not apply. 1959 All LJ 789 (795) = 1959 All WR (HC) 644.

(14) Creditor granting time to the debtor — No new contract — No acceptance of additional surety by creditor — No collusion between the creditor and debtor — **Held**, granting of time was

Section 139 — Note 1 (contd.)

merely an act of forbearance on the part of creditor — Surety was not discharged either under Section 135 or Section 139. AIR 1967 Madh Pra 250 (255) = 1967 MPLJ 224 (DB).

2. Omission to do any act which creditor's duty to surety requires him to do.—

(1) Section 139 incorporates in substance the rule that it is the duty of the person who has secured a guarantee to do every act necessary for the protection of the rights of the surety. AIR 1965 Mys 209 (212) = (1964) 2 Mys LJ 260 (DB).

(2) Puisse mortgagee obtaining decree absolute against surety and mortgagor — Mortgaged property sold by prior mortgagee in execution of his decree but proceeds found insufficient to discharge his debt — Failure of puisse mortgagee to execute his decree does not discharge surety from personal liability — Section 139 held inapplicable. AIR 1935 Oudh 260 (262) (DB).

(3) Creditors cannot call upon the guarantor to pay any sum under his guarantee when they themselves have failed to carry out the most important term of their contract, such as conveyance of the property to the purchaser. AIR 1934 Cal 699 (702) (DB).

(4) A creditor is not bound to insist upon any particular kind of security from the principal debtor. It is only when he takes some security from the principal debtor that the surety can claim a right to the benefit of that security. Of course, if a creditor takes security from the principal debtor, it is his duty to see that that security remains enforceable against the principal debtor, and if any formalities are required by law in connection with that security, it would be his duty to see that such formalities are observed. But more than this the creditor is under no obligation to do. AIR 1955 Bom 419 (425).

(5) Charge on company's property in favour of creditor not registered as required by Section 125, Companies Act — No undertaking by the creditor to the surety to get the debt secured by procuring a charge — Surety also entitled under Section 134 Companies Act to get the charge registered not getting it done the surety cannot be discharged of his liability on the ground that the creditor failed to get the debt secured by a charge unless he can show that he received some injury in consequence of the creditor's conduct. AIR 1964 Mad 134 (135, 136) = 76 Mad LW 789.

(6) Overdraft account of B with bank — A standing surety — Equitable mortgage by B of most of his properties not referred to in letter of surety in favour of Bank in respect of another debt without A's knowledge — A held not discharged as there was no breach of duty owed by the creditor to the surety. AIR

1964 Andh Pra 555 (558) = (1964) 2 Andh WR 362.

(7) A variation of the liability undertaken or a departure in the terms of the bond resulting from an act or omission of the creditor will discharge the surety from his obligation under the bond, and it is immaterial whether the variation is substantial or material. AIR 1938 Mad 422 (423) (DB).

[See 1912 Pun LR No. 58, p. 183 (196) (DB). (Creditor doing certain acts inconsistent with rights of his surety and omitting to do certain acts which his duty to surety required him to do: Held that surety was discharged from liability under Section 139 of Contract Act to the extent that he was deprived from recovering from principal debtor amount claimed by creditor — Surety was allowed his costs for it was found that plaintiff's suit against him was wholly unjustifiable.)]

(8) A creditor's omission to sue the principal within limitation is not an act of omission of the kind contemplated by Section 134 or Section 139, whereby the surety is discharged. AIR 1927 Lah 396 (397) ** AIR 1932 Lah 419 (420) = 13 Lah 817 (DB).

[But see AIR 1928 All 46 (49) = 50 All 211 (DB).]

(9) Where the plaintiff-surety in his very action against the third person sues the principal debtor, the plaintiff's own act of suing the principal debtor in this suit itself goes against the plaintiff's contention that his eventual remedy against the principal debtor is impaired. In such a case he cannot be heard to say that he has been discharged on the ground that his eventual remedy against the principal debtor is barred. AIR 1955 Cal 217 (222).

3. Impairment of surety's eventual remedy. — (1) Under Section 139 before the surety is discharged the following two conditions must be satisfied (1) the creditor must do an act which is inconsistent with the rights of the surety or he must omit to do any act which his duty to the surety requires him to do; and (2) by the action or inaction of the creditor referred to in ground one. The eventual remedy of the surety himself against the principal debtor is impaired. (1962) 64 Punj LR 416 (420).

(2) Section 139 is a residuary provision and its object is to ensure that no arrangement different from that contained in the surety's contract is forced upon him and that the surety if he pays the debt has the benefit of every remedy which the creditor has against the principal debtor. AIR 1964 Andh Pra 555 (557) = 1964-2 Andh WR 362.

(3) In order to attract Section 139 there must not only be either an act inconsistent with the rights of the surety or an omission to do an act which it is

Section 139 — Note 3 (contd.)

the creditor's or employer's duty to do but also the impairment of the eventual remedy of the surety against the principal debtor. This impairment of the surety's eventual remedy against the principal debtor is the very crucial factor in this section. If the surety's eventual remedy is not impaired then the surety is not discharged under Section 139. AIR 1955 Cal 217 (221).

(4) Section 139 only applies where eventual remedy of surety against debtor is impaired — Suit against principal debtors withdrawn but continued against surety — Surety is not discharged as his remedy against the debtor is not impaired. AIR 1939 PC 110 (113) = 66 Ind App 198 = 1939 Rang LR 358. (Reversing AIR 1937 Rang 302 (DB).) ** AIR 1935 Lah 729 (732) = 16 Lah 757 (DB). (Suit dismissed against principal debtor in default — Application for restoration of suit by creditor filed beyond time — Act is not sufficient to discharge surety from his liability.)

(5) Where a person stands surety for several defendants, but the plaintiff proceeds against one defendant only, the exoneration of the remaining defendants discharges the surety. AIR 1920 Mad 311 (311, 312) (DB).

(6) Surety guaranteeing payment of part of debt — Application by principal debtor to Debt Conciliation Board for settlement of debts — Creditor excluding debt guaranteed by surety from his statement of debts — Surety's remedy against principal debtor is impaired and surety is discharged. AIR 1938 Nag 413 (415) = ILR (1939) Nag 175.

(7) Principal and surety — Discharge of surety — Surety undertaking to pay any amount that may be decreed against two defendants in a suit — Compromise decree passed against one defendant and suit as against other defendant dismissed — Surety is discharged. AIR 1938 Mad 422 (423) (DB).

(8) Bills of exchange, each drawn by A upon and accepted by B, payable to drawer's order and endorsed by drawer to a Bank — A executing conveyance of all property to official trustee upon trust for the benefit of A's creditors — Deed assented to and executed by Bank — Deed not containing any composition with or release by creditors, or any covenant on their part not to sue A — Suit by Bank against B to recover amount payable under the bills: Held that the trust deed did not impair the eventual remedy of B and as such he was not discharged from this suretyship under Section 139, Contract Act. (1878) 3 Cal 174 (188, 189) (DB).

(9) Creditor parting with security without consent of surety to the prejudice of surety — Surety is discharged.

AIR 1968 Mys 56 (60) = (1967) 2 Mys LJ 168 (DB).

(10) Charge on the property of the company in favour of the creditor not registered under Section 125 — Liquidator of the company holding the agreement to be a pledge and not a charge needing registration — Remedy of the company cannot be said to have been impaired — No question of relief under Section 139 or Section 141 Contract Act arises. AIR 1964 Mad 134 (135, 136) = 76 Mad LW 789.

(11) Charge on company's property in favour of creditor not registered as required by Section 125 of the Companies Act — Creditor agreeing with the surety to secure the debt by procuring a charge — Failure of creditor to do so — There is impairment of the rights of surety — Surety has cause of action against creditor under Section 139 Contract Act. AIR 1964 Mad 134 (135) = 76 Mad LW 789.

(12) Decree against principal debtor surety — Debtor compromising with creditor without consent of surety — Surety is discharged as the remedy of the surety was impaired. AIR 1968 J and K 93 (95, 96) = 1968 Kash LJ 165 (DB).

(13) Loan taken by principal debtor from State under East Punjab Refugees Rehabilitation (Loans and Grants) Act (6 of 1948) for installing printing press — Sale by principal debtor of press without previous written consent of State is void under Section 6 (4) of the Act — State not instrumental in effecting sale — All necessary steps for safeguarding security taken by State — Eventual remedy of surety against principal debtor is not impaired — Surety is not discharged. (1862) 64 Pun LR 416 (421).

4. Liability of surety. — (1) To enable the surety to enforce his right against the principal debtor, there are two essential conditions (i) that the debt itself must subsist, (ii) that his remedy against the principal debtor must remain unimpaired — Consequently, the creditor will be entitled to compel the surety to perform his promise only if the debt subsists and the surety's remedy is unimpaired. AIR 1938 Nag 413 (414) = ILR (1939) Nag 175.

(2) Surety binding himself to make good any loss if the employee was proved to have committed embezzlement — Embezzlement committed by employee — Suit against employee for amount embezzled — Suit decreed in part — Second suit against surety is not barred as the causes of action are different — Section 139 does not apply. (1913) 11 All LJ 689 (690).

(3) Charge on property purchased by loan money — Property removed by borrower in unauthorised manner — Surety agreeing that loan could be recovered from them without taking steps against principal debtor —

140. Rights of surety on payment or performance.—Where a guaranteed debt has become due, or default of the principal debtor to perform a guaranteed duty has taken place, the surety, upon payment or performance of all that he is liable for, is invested with all the rights which the creditor had against the principal debtor.*

[*] As to amount that could be recovered by a surety from the principal, see Section 145 infra.

Section 139 — Note 4 (contd.)

Principal debtor's whereabouts not known — Suit against surety — Held amount could be recovered from them. 1959 All LJ 789 (794) = 1959 All WR (HC) 844.

5. Surety for performance of an act.—

(1) A surety who has bound himself for a person's doing certain things, is not discharged from his liability unless it is shown that the creditor has by his conduct either prevented the things from being done or connived at the omission or enabled the person to do what he ought not to have done, and that but for such conduct the omission would not have happened. AIR 1920 Mad 259 (266) (DB).

(2) Surety to produce in Court judgment-debtor on dismissal of appeal and in case of failure, to pay decretal amount — Appeal dismissed — Failure to give notice or to require production of debtor — Sureties are not liable to pay decretal amount. AIR 1925 All 5 (6).

6. Bond in favour of Court. — (1) Surety bond given to Court — Although Sections 133, 135 and 139 do not in terms apply, principles underlying them can be applied. AIR 1939 Bom 23 (25) = ILR (1938) Bom 794 (DB) ** AIR 1944 Lah 428 (431, 432) (DB) ** AIR 1953 Mys 68 (71) = ILR (1953) Mys 277 (DB). (Where surety bond is given to Court there is no creditor within the meaning of Section 126.) ** (1965) 2 Law Rep 108 (Mys).

(2) There is nothing unreasonable or wrong in a surety expressly stipulating in the bond executed in favour of Court for the performance of a decree governed by Section 145 C. P. C., that he would be bound by his guarantee only if a decree is passed after contract and that he would not be bound by a consent decree. But in the absence of a stipulation to that effect the liability of the surety will not be limited to decrees passed after contest. AIR 1967 Mys 147 (149) = (1965) 2 Mys LJ 87 ** AIR 1959 Bom 516 (517) = 1958 Nag LJ 72.

7. Surety for employee's honesty. —

(1) Continuing guarantee for the honesty of a servant — Servant discovered dishonest during the course of service — Servant not dismissed but continued in service without the knowledge or consent of surety — Master cannot subsequently have recourse to surety to make good any loss which may arise during the subsequent service. AIR 1944 Lah 424 (426, 427) (DB).

(2) Surety's liability for the faithful discharge by a servant of his duties depends in each case on the exact terms of that guarantee. The surety is not discharged from the liability for the principal debtor's default because the default would not have happened if the creditor had used all the powers of superintending the performance of the debtor's duty which he could have exercised, because the employer of a servant whose due performance of work is guaranteed does not contract with the surety that he will use the utmost diligence in checking the servant's work. AIR 1955 Cal 217 (221).

(3) Where a person stands surety for an employer for his honesty, and undertakes liability for any dereliction of duty, misappropriation, negligence, etc. on the part of the employee, the continued employment of the servant without notice to the surety, merely upon a suspicion, does not discharge the surety. It is only the continued employment without notice to surety after the employer has proof of the servants' negligence or dishonesty, that would discharge the surety. The employer cannot dismiss the servant merely on suspicion or merely because some shortage in the cash of which the servant was in charge was reported without investigation and without giving the servant a chance to be heard in his favour. AIR 1955 Cal 217 (223).

(4) Surety under indemnity bond for fidelity of manager of Bank — Misappropriation by manager — Connivance of Directors in fraud of the manager — Surety is discharged. AIR 1965 Mys 209 (213) = (1964) 2 Mys LJ 260. ((1886) 6 ER (HL) 1534; (1854) 23 LJ Ch 434; (1889) 22 QBD 394 and AIR 1965 Cal 217, Rel. on.)

(5) Section 139 besides prohibiting on the part of the creditor acts of commission and omission which would impair the remedy of the surety incorporates the further rule which is implicit in its provisions that where an employer by his own conduct assists infidelity on the part of his employee, the guarantor who guarantees fidelity on the part of the employer stands discharged. AIR 1965 Mys 209 (212, 217) = (1964) 2 Mys LJ 260 (DB).

Section 140 — Note 1

(1) A surety paying off a debt is entitled to all the rights and securities of the creditor as against the principal deb-

Section 140 — Note 1 (contd.)

tor. AIR 1919 All 56 (58) = 42 All 70 (DB) ** AIR 1927 All 538 (540) = 49 All 640 (DB). (Part payment of debt by surety is not enough to step into creditor's shoes.) ** AIR 1918 Low Bur 115 (115). (It is immaterial whether the surety has incurred a fresh obligation to the creditor.) ** (1947) 52 Mys HCR 325 (328) (DB). (Surety paying off Crown debt due from principal debtor.)

(2) A surety who has paid the debt of his principal is subrogated to all the remedies and rights which the creditor has not only against the principal but against the others and to all the securities and rights of action generally which the creditor has in respect of the debt. AIR 1936 Mad 342 (343). (A and B undertaking to be liable jointly and severally for each other's debt owing to a Bank — Bank recovering B's debt from C who stood surety for B — C held was subrogated to right of action which the Bank had against A.) ** (1947) 52 Mys HCR 325 (328) (DB). (A, surety for repayment of loan granted to B by Government under Land Improvement Loans Act — A and B mortgaging their land as security — B's default — A paying off debt — A being in position of co-mortgagor is entitled under Section 95, T. P. Act to a charge on the mortgaged property of B.) ** AIR 1969 SC 297 (299) = (1969) 1 SCJ 380.

(3) Section 140 expressly says that the surety upon payment of all that he is liable for is invested — that is immediately invested — with all the rights which the creditor had against the principal debtor. The condition laid down by the section for this right to arise is the payment by the surety of all that he is liable for, and not the payment of all that may be due to the creditor who holds the securities. Where the guaranteed debt is a fraction only of the debt, the surety's right comes into existence immediately on payment of that fraction, for that fraction, is, so far as he is concerned, the whole. Both under S. 140, Contract Act, and under the English law the surety's right to the benefit of the security vests in him the moment he pays the guaranteed amount. The creditor cannot afterwards make an appropriation to the prejudice of the rights of the surety which have accrued to him. Indeed, he cannot do so even before, as the surety is entitled to the benefit of every security held by the creditor, at the time when the contract of suretyship was entered into. The question is not whether the surety has a remedy against the principal debtor but whether he has any right against the creditor in respect of the securities held by him. A surety for a part only of a debt is on payment of that part entitled pro tanto to the security held by the creditors as cover

for the debt as a whole. AIR 1944 Mad 195 (204, 205) = ILR (1944) Mad 304 (DB).

(4) The language of Section 140 of Contract Act makes it plain that even without the necessity of a transfer, the law vests in the surety all the rights which the creditor has against the principal debtor. AIR 1968 SC 1432 (1437) = (1968) 3 SCR 724.

(5) Word "invested" dispenses with necessity of any written assignment. AIR 1925 Bom 547 (559).

(6) The word "invested" in Section 140, Contract Act, denotes that there is an automatic vesting of the rights of the creditor in the surety. There is no need for a formal assignment by the creditor in favour of the surety for the purpose of his acquiring the rights which the creditor had at the time of payment. (1947) 52 Mys HCR 325 (328) (DB).

(7) A surety's rights against debtor arise only when the surety is requested by the debtor to take responsibility — An indemnifier cannot sue in his own name without an assignment from the promisee while a surety can. AIR 1926 Mad 544 (553) = 49 Mad 156 (DB).

(8) A and B referring dispute to arbitration — C who stood surety for A paying amount to B awarded against A — Agreement of reference discovered to be void — Suit by C against A to recover amount paid under award — There being implied contract between A and C, C was held entitled to recover amount from A. AIR 1939 Lah 187 (188).

(9) A surety for the appearance of a judgment-debtor is not entitled to recover any sum forfeited under the surety bond either from the actual person for whom he stood surety or from any person who induced him to so stand. AIR 1932 Lah 23 (23).

(10) Surety for the appearance of one of several judgment-debtors jointly and severally liable under decree can recover the amount paid by him from them. His right is on a higher footing than one for contribution. AIR 1921 Mad 530 (531) (DB).

(11) Bankruptcy of debtor — Surety's right to the security in the hands of the creditor cannot be enforced before payment of the entire debt. Where the surety guarantees the whole debt he is entitled to exemption to that portion for which dividend has been allowed; but where he guarantees only a part he cannot get any dividend until the creditor is discharged in respect of the whole debt. AIR 1930 Cal 17 (20) = 57 Cal 764 (DB).

(12) A executing a pronote in favour of B, C being the surety — A selling his property and asking vendee to discharge the debt — The debt having been collected from the surety, held that the surety can sue A and the vendee as he

141. Surety's right to benefit of creditor's securities.—A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into, whether the surety knows of the existence of such security or not; and, if the creditor loses, or, without the consent of the surety, parts with such security, the surety is discharged to the extent of the value of the security.

Illustrations

(a) C advances to B, his tenant, 2,000 rupees on the guarantee of A. C has also a further security for the 2,000 rupees by a mortgage of B's furniture. C cancels the mortgage. B becomes insolvent, and C sues A on his guarantee. A is discharged from liability to the amount of the value of the furniture.

(b) C, a creditor, whose advance to B is secured by a decree, receives also a guarantee for that advance from A. C afterwards takes B's goods in execution under the decree, and then, without the knowledge of A, withdraws the execution. A is discharged.*

(c) A, as surety for B, makes a bond jointly with B to C, to secure a loan from C to B. Afterwards, C obtains from B a further security for the same debt. Subsequently, C gives up the further security. A is not discharged.

[*] This appears to illustrate S. 139, supra.

Section 140 — Note 1 (contd.)

is entitled to all equities in favour of the creditor. AIR 1927 Mad 421 (421, 422).

(13) A joint decree was passed against surety and principal debtor. Surety applied to the Debt Conciliation Board for settlement of his debt. Debt was reduced and made payable in instalments. Surety made some payments: Held, that the surety could recover these payments from the principal debtor. 1942 Nag LJ 311 (312).

(14) C becoming surety for a firm consisting of two parties A and B — A assigning his share to D — Creditor not accepting assignment or absolving assignor from liability — Assignee D is still liable to the creditor of the firm and surety is entitled to recover from him amounts paid by him to creditor. 1907 Pun Re No. 107, p. 501 (503).

(15) The principles underlying Ss. 133 to 141 apply to surety bonds executed in favour of Courts under the Civil P. C. although the sections are not in terms applicable. AIR 1944 Lah 428 (431, 432) (DB).

Section 141 — Note 1

(1) The expression 'security' in Section 141 is not used in any technical sense; it includes all rights which the creditor had against the property at the date of the contract. The surety is on payment of the amount due by the principal debtor entitled to be put in the same position in which the creditor stood in relation to the principal debtor. If the creditor has lost or has parted with the security without the consent of the surety, the latter is by the express provision contained in Section 141, discharged to the extent of the value of the security lost or parted with. AIR 1967 SC 1105 (1108, 1109) = (1967) 1 SCR 266 ** AIR 1968 SC 1432 (1437) = (1968) 3 SCR 724.

(2) The value of the security must mean the value of the security at the time when it was given to the creditor. Therefore, the words 'the surety is discharged to the extent of the value of the security' must mean that if the value of the security is less than the liability undertaken by the surety then the surety must be held to be discharged to the extent of the value of the security and that he will still be required to discharge the liability which exceeds the value of the security. But if the value of the security given is far in excess of the liability, then it is clear that the surety must be held to be discharged wholly. AIR 1968 Mys 56 (60) = (1967) 2 Mys LJ 168 (DB).

(3) Under Section 141, security can be parted with not only by positive action of creditor but even by his inaction. AIR 1967 SC 1105 (1109) = (1967) 1 SCR 226.

(4) Section 141, prima facie, has reference to the simple case of a surety for a single debt for which the creditor holds a security or securities. AIR 1944 Mad 195 (201) = ILR (1944) Mad 340 (DB).

(5) Provisions of Section 141 apply equally to a case of continuing guarantee. AIR 1968 Mys 56 (60) = (1967) 2 Mys LJ 168 (DB).

(6) Section 141 does not cover a case where there had been a loss due to an act of God or enemies of the State or due to unavoidable accident. AIR 1957 Punj 310 (311) = ILR (1957) Punj 656 (DB).

(7) Section 141 of the Indian Contract Act has limited the surety's right to securities held by the creditor at the date of his becoming surety and has modified the English rule that the surety is entitled to the securities given to the creditor both before and after the contract of surety. But subject to this variation, Sec-

142. Guarantee obtained by misrepresentation invalid.—Any guarantee which has been obtained by means of misrepresentation made by the creditor, or with his knowledge and assent, concerning a material part of the transaction, is invalid.*

[*] Cf. S. 19 supra.

Section 141 — Note 1 (contd.)

tion 141 of the Indian Contract Act incorporates the rule of English law relating to the discharge from liability of a surety when the creditor parts with or loses the security held by him. AIR 1968 SC 1432 (1437) = (1968) 3 SCR 724.

(8) The surety is entitled to demand all the securities held by the principal debtor at the time of payment whether they had been received simultaneously with the loan advanced or subsequently. Section 141 only means that a surety cannot complain if before payment the creditor loses or parts with a security obtained by him after the contract of suretyship was entered into. Section does not enable the creditor to withhold from the surety any security actually held by him at the time when the debt is paid or in any other way to detract from the rights of the creditor as declared by Section 140. Section 141 only gives him liberty of action in respect of securities not held by him at the time of the contract of suretyship provided he exercises it before payment. AIR 1944 Mad 195 (200, 201) = ILR (1944) Mad 340 (DB).

(9) Contract by State of M. P. for sale of "felled trees" — Consideration was payable in instalments — A, standing surety for purchaser — Payment of first instalment — Removal of entire quantity of trees without payment of subsequent instalments — Proceedings against surety for recovery of amount of unpaid instalments — Held, security of the State under terms of contract to prevent removal of trees and right to sell them for non-payment of price, coupled with charge on the goods was lost when State permitted removal of trees by purchaser — Under Section 141, Contract Act, therefore, surety stood discharged of his liability to the extent of the security lost. AIR 1967 SC 1105 (1109) = (1967) 1 SCR 266.

(10) Agreement by A to advance certain sum to B and as security for that B to mortgage to A certain properties — Sureties — Subsequent agreement between A and B varying amounts to be advanced and properties to be mortgaged — Consent of sureties not obtained — Sureties are discharged from original contract. AIR 1932 Bom 168 (174) = 56 Bom 101 (DB).

(11) Property under attachment — Surety for judgment-debtor — Attachment released by creditor — Surety discharged to the extent of the property released. AIR 1934 All 616 (616, 617).

(12) Mortgagee is not at liberty to appropriate the mortgaged property to the

discharge of another debt due to him without the consent of the person who has stood surety for the mortgage-debt and if he does so he is bound to credit the surety with the value of the property. (1889) 2 CPLR 193 (194).

(13) Suit by mortgagee against principal debtor and surety on mortgage for more than Rs. 100 — Statement by mortgagee in plaint that he was suing on mortgage only as money bond, giving up his mortgage right — Except such statement, no other act of relinquishment, oral or documentary, giving up mortgage right — Mortgage right not being extinguishable except by registered document under Section 17 (i) (b) of Registration Act, mortgage right held was not extinguished by such statement — Surety, therefore, held was not discharged. AIR 1937 Mad 501 (502, 503).

(14) One of joint promisors paying entire debt — He is not surety nor entitled to subrogation in place of creditor in respect of securities held by latter. AIR 1933 Mad 39 (42) = 55 Mad 949 (DB).

(15) Surety for sum that may be decreed — Suit decreed — Execution stayed on judgment-debtor furnishing security as condition precedent — It does not amount to giving time — Release of security does not release surety to that extent — In releasing security granted for stay, there was nothing inconsistent with the decree-holder's duties to the surety within the meaning of Section 139 — Section 139 must be read with S. 141 and not in such a way as to abrogate it when it applies. AIR 1949 Mad 194 (195).

(16) A standing surety for B for loan granted to B by Government — Both A and B mortgaging their properties as security — B committing default and A paying off debt — A is entitled to a charge on properties of B which were mortgaged by virtue of Section 95, T. P. Act and Section 141, Contract Act. (1947) 52 Mys HCR 325 (328) (DB).

(17) A creditor is not bound to insist on any particular kind of security. It is only when he takes some security from the principal debtor that the surety can claim a right to the benefit of that security. If the creditor takes security from the principal debtor, it is his duty to see that that security remains enforceable against the principal debtor and if any formalities are required by law in connection with that security, it would be his duty to see that such formalities are observed. But more than this the credi-

143. Guarantee obtained by concealment invalid.—Any guarantee which the creditor has obtained by means of keeping silence as to material circumstances is invalid.

Illustrations

(a) A engages B as clerk to collect money for him. B fails to account for some of his receipts, and A in consequence calls upon him to furnish security for his duly accounting. C gives his guarantee for B's duly accounting. A does not acquaint C with B's previous conduct. B afterwards makes default. The guarantee is invalid.

(b) A guarantees to C payment for iron to be supplied by him to B to the amount of 2,000 tons. B and C have privately agreed that B should pay five rupees per ton beyond the market price, such excess to be applied in liquidation of an old debt. This agreement is concealed from A. A is not liable as a surety.

144. Guarantee on contract that creditor shall not act on it until co-surety joins.—Where a person gives a guarantee upon a contract that the creditor shall not act upon it until another person has joined in it as co-surety, the guarantee is not valid if that other person does not join.*

[*] Cf: Sections 33 and 133 supra.

145. Implied promise to indemnify surety.—In every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety; and

Section 141 — Note 1 (contd.)

tor is under no obligation to do. AIR 1955 Bom 419 (425).

(18) Non-registration of a charge against a Company's property in respect of company's debts — Charge invalid against liquidator only — Surety guarantor who could have got the charge registered under Section 134 of the Companies Act (1956) cannot take advantage of his failure to do so and claim relief under Section 141 of the Contract Act. AIR 1964 Mad 134 (135, 136) = 76 Mad LW 789.

Section 143 — Note 1

(1) The expression "keeping silence" in Section 143 of the Contract Act implies intentional concealment as distinguished from mere non-disclosure. The withholding must be fraudulent which necessarily must be the case when a material circumstance is intentionally concealed. (1891) 15 Bom 585 (591) (DB).

(2) The mistake which invalidates a contract under Section 143 must be occasioned either by means of a misrepresentation made by the creditor or with his knowledge and assent concerning a material part of the transaction or by the creditor keeping silence as to a material circumstance. There is nothing in law to indicate that sureties are entitled to evade their contract of guarantee because of a mistake induced by the principal debtor. (1906) 33 Cal 713 (755) (FB).

(3) To justify the application of the rule enacted by S. 143, Contract Act, it must be proved not only that there was silence as to a material circumstance but that the guarantee was obtained by means of such silence. (1883) 6 Mad 406 (408) (DB).

(4) Contract of service — Continuing guarantee for honesty of servant already

in employ — Part gross misconduct not disclosed to surety — Surety is not responsible for dishonesty of servant. AIR 1944 Lah 424 (425) (DB).

(5) There is a difference between fiduciary guarantees and guarantees by persons in favour of banks. In the former case there may be a duty to disclose all material facts, there is no such duty in the case of a bank which takes a guarantee from a person to disclose the indebtedness of the person guaranteed at the date of the guarantee. Where, therefore, the suretyship is with regard to an advance to be made by a bank, the latter need not disclose part indebtedness to the surety. But if it gives wrong information when asked for, the suretyship is annulled. AIR 1930 Mad 874 (879) = 53 Mad 826 (DB) ** AIR 1940 Mad 437 (439) = ILR (1940) Mad 757 (DB).

(6) M's bid at sale of Abkari farm accepted subject to his furnishing security — Failure to furnish security — Re-sale at loss — M becoming indebted for loss — In re-sale M again declared purchaser — N accepted as M's surety — N not inquiring nor informed by Collector as to M's indebtedness — N held was not discharged by reason of non-disclosure of M's indebtedness by Collector. (1883) 6 Mad 406 (413) (DB).

Section 145 — Note 1

(1) Apart from Section 140 of the Contract Act, a surety has a right under Section 145 to be indemnified by the debtor and the surety's rights under this section are not limited to the rights of the creditor against the debtor. AIR 1932 All 610 (613) = 54 All 1007 (DB).

(2) The implied rights possessed by a surety are available when the suretyship has been undertaken at the request, actual or constructive of the principal

the surety is entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee, but no sums which he has paid wrongfully.

Illustrations

(a) B is indebted to C, and A is surety for the debt. C demands payment from A, and on his refusal sues him for the amount. A defends the suit, having reasonable grounds for doing so, but is compelled to pay the amount of the debt with costs. He can recover from B the amount paid by him for costs, as well as the principal debt.

(b) C lends B a sum of money, and A, at the request of B, accepts a bill of exchange drawn by B upon A to secure the amount. C, the holder of the bill, demands payment of it from A, and, on A's refusal to pay, sues him upon the bill. A, not having reasonable grounds for so doing, defends the suit, and has to pay the amount of the bill and costs. He can recover from B the amount of the bill, but not the sum paid for costs, as there was no real ground for defending the action.

(c) A guarantees to C, to the extent of 2,000 rupees, payment for rice to be supplied by C to B. C supplies to B rice to a less amount than 2,000 rupees, but obtains from A payment of the sum of 2,000 rupees in respect of the rice supplied. A cannot recover from B more than the price of the rice actually supplied.

Section 145 — Note 1 (contd.)

debtor, but not otherwise, since no one can make himself the creditor of another by volunteering to discharge his obligations. AIR 1917 Mad 83 (85) = 39 Mad 965 (DB).

(3) Where a person stands surety for another there is always an implied warranty by the latter, that he would indemnify such person in case he is damnified owing to a default made by him in the performance of any of the conditions imposed upon him under the security bond. AIR 1930 Lah 399 (400). (Surety for payment of decretal amount — Surety paying decretal amount on default by judgment-debtor — Surety is entitled to decree for decretal amount against judgment-debtor.)

(4) Surety, having undertaking the obligation at request of debtor, becomes entitled to recover from him whatever sums he has rightfully paid under the guarantee. AIR 1937 Oudh 19 (21) = 12 Luck 484 (DB).

(5) The liability of the principal debtor to pay the surety cannot arise from a mere implied promise to indemnify the surety, contained in Section 145 but must be the result of a contract between the surety and the creditor to which the debtor also is a party. AIR 1917 Mad 83 (86) = 39 Mad 965 (DB).

(6) A joint decree, ex parte against the principal debtor, but on contest against the surety — Surety making payment — Ex parte decree set aside — Surety can claim amount paid to the decree-holder. AIR 1924 Lah 657 (659).

(7) Where a mortgage suit was dismissed against the principal debtor, but a money decree is passed against the surety, the latter can recover the amount paid for the former. AIR 1925 Nag 392 (392).

(8) Creditor's suit against principal debtor and surety — Summons against

principal debtor not served — Creditor proceeding against surety alone — Remedy by suit against debtor, held, barred and that debt not extinguished — Remedy of surety under Section 145, Contract Act, to recover from debtor any sum which he was compelled to pay, or which he rightfully paid under his guarantee, held, remains open and unimpaired to surety. AIR 1937 Rang 72 (73, 74) = 14 Rang 594.

(9) A person, who is merely a surety, can be indemnified in an appropriate case, before actual payment, by an anticipatory action. AIR 1926 Mad 1035 (1037) (DB).

(10) Where the debtor executes a mortgage in consideration of his liability towards the sureties, but the mortgage is unregistered and, therefore, unenforceable, it does not amount to a contract, and there is no personal liability to pay under that mortgage-deed; consequently under sureties can maintain a suit against the debtor for the moneys paid by them in his account. AIR 1937 Nag 104 (104) = ILR (1937) Nag 353.

(11) Contract made and to be performed in Native State — Failure of contract — Surety obliged to pay — Surety suing principal in British India — Surety is entitled to recover money paid by him from principal. (1882) 8 Cal 337 (342, 343) = 9 Ind App 58 = 1882 Pun Re No. 7 (PC).

(12) Where a bail bond is forfeited, the surety cannot recover from person bailed, on grounds of public policy. AIR 1930 Cal 596 (597) = 57 Cal 1093.

(13) Surety for appearance cannot be allowed to recover any sum forfeited — Section 145 has no bearing on the matter. AIR 1932 Lah 23 (23).

(14) Payment by plaintiff to Panchayat at instance of defendant to remove ban imposed upon latter by his castemen — Section 145 did not apply — It

146. Co-sureties liable to contribute equally.—Where two or more persons are co-sureties for the same debt or duty, either jointly or severally, and whether under the same or different contracts, and whether with or without the knowledge of each other, the co-sureties, in the absence of any contract to the contrary, are liable, as between themselves, to pay each an equal share of the whole debt, or of that part of it which remains unpaid by the principal debtor.*

Illustrations

(a) A, B and C are sureties to D for the sum of 3,000 rupees lent to E. E makes default in payment. A, B and C are liable, as between themselves, to pay 1,000 rupees each.

(b) A, B and C are sureties to D for the sum of 1,000 rupees lent to E and there is a contract between A, B and C that A is to be responsible to the extent of one-quarter, B to the extent of one-quarter, and C to the extent of one-half. E makes default in payment. As between the sureties, A is liable to pay 250 rupees, B 250 rupees, and C 500 rupees.

[*] See Section 48.

Section 145 — Note 1 (contd.)

was not a case of surety — Plaintiff acted as agent of defendant — Liability of defendant to reimburse plaintiff in respect of amount paid can be enforced. AIR 1962 Raj 86 (87, 88) = 1961 Raj LW 359 (DB).

(15) The expression "whatever sum he has paid" occurring in Section 145 means a payment in money, or by transfer of property and not merely the incurring of a pecuniary obligation in the shape of a bond, promissory note, or acknowledgment of liability. (1903) 26 Mad 322 (328, 329) (DB) ** AIR 1936 Rang 235 (236, 237) = 14 Rang 511. (Surety executing bond to pay in future — No payment.) ** AIR 1930 Lah 812 (814). (Surety executing pro-note — No payment.) ** AIR 1926 Nag 429 (431) ** AIR 1924 Lah 657 (659) ** AIR 1920 Nag 265 (265). (Execution of mortgage by a surety for the satisfaction of the decree is payment.) ** AIR 1919 Nag 126 (127) = 15 Nag LR 78. (Fact that principal debtor is released and surety's liability is adjudged is not payment.)

[But see AIR 1930 Bom 331 (333). (Suit for indemnity is maintainable even if no actual payment is made but the surety has become only liable in praesenti.)]

(16) A payment by surety to creditor, made after suit against the principal debtor had been instituted and with the object of assisting that suit to reach a successful termination, might be held to be a wrongful payment; while a payment made before the institution of such suit might be held to be a rightful payment. AIR 1930 Lah 812 (814).

(17) Where a surety keeps alive his liability by payments within time, at a time when creditor's remedy against principal has become barred, such payments are not wrongful. AIR 1925 Bom 244 (246) = 49 Bom 202 (DB).

(18) A payment in order to be a rightful payment must be one in conformity with what is right or just or fair or equi-

table. If the claim of the creditor is barred by time against both the surety and the debtor, the payment, made by the surety to the creditor would not be right or just. The burden of proving that this payment even though it was after the expiry of the period of limitation was yet rightful is on the plaintiff. AIR 1959 Madh Pra 297 (298) = 1959 MPLJ 140.

(19) The liability of the principal debtor to pay to the surety whatever sum the latter has rightfully paid under the guarantee will not arise until the creditor has recovered from the surety the amount due under the award or decree passed against both the principal debtor and the surety and such contingent and future liability is obviously not within the purview of the proceedings under the Madras Debt Conciliation Act, and cannot be affected by the discharge of the principal debtor's liability to the creditor under Section 10 (2) of the Act. AIR 1948 Mad 252 (255) = ILR (1948) Mad 707 (DB).

(20) Banker and customer — Security deposit — Amount deposited for due performance of contract with Government — Liability of Banker to depositor — In the absence of any contractual relationship with the officer of Government with whom deposit was meant to be kept as security, Banker liable to pay the depositor. AIR 1968 SC 1115 (1117) = (1968) 3 SCR 396.

Section 146 — Note 1

(1) In the case of co-sureties it is well-settled that if creditor calls upon one of them to pay the principal debt or any part of it, that surety has a right, upon principles of equity, to call upon his co-sureties for contribution. (1904) 26 All 407 (418) (FB).

(2) The relation of co-sureties is not analogous to that of co-mortgagors — In the case of co-sureties no complication can possibly arise from the enforce-

147. Liability of co-sureties bound in different sums.—Co-sureties who are bound in different sums are liable to pay equally as far as the limits of their respective obligations permit.

Illustrations

(a) A, B and C, as sureties for D, enter into three several bonds, each in a different penalty, namely, A in the penalty of 10,000 rupees, B in that of 20,000 rupees, C in that of 40,000 rupees, conditioned for D's duly accounting to E. D makes default to the extent of 30,000 rupees. A, B and C are liable to pay 10,000 rupees.

(b) A, B and C, as sureties for D, enter into three several bonds, each in a different penalty, namely, A in the penalty of 10,000 rupees, B in that of 20,000 rupees, C in that of 40,000 rupees, conditioned for D's duly accounting to E. D makes default to the extent of 40,000 rupees. A is liable to pay 10,000 rupees, and B and C 15,000 rupees each.

(c) A, B and C, as sureties for D, enter into three several bonds, each in a different penalty, namely, A in the penalty of 10,000 rupees, B in that of 20,000 rupees, C in that of 40,000 rupees, conditioned for D's duly accounting to E. D makes default to the extent of 70,000 rupees. A, B and C have to pay each the full penalty of his bond.

CHAPTER IX OF BAILMENT*

148. "Bailment", "bailor" and "bailee" defined.—A "bailment" is the delivery of goods by one person to another for some purpose upon a contract that they

Section 146 — Note 1 (contd.)

ment of the right of contribution. (1904) 26 All 407 (419) (FB).

(3) A guarantee drawn up in the plural number but signed by one surety only is binding on the surety who signed it unless he can show that he was to be liable only if the other surety or sureties signed. AIR 1926 Mad 62 (63).

(4) A surety is liable to allow, co-sureties the benefit of any counter-security he has received from the debtor. AIR 1924 Mad 848 (848).

(5) Surety paying in excess of his share — Suit against co-surety and principal debtor is maintainable — All that the co-surety is entitled to claim is that he shall share proportionately in the proceeds of the security when it is realised. He is not in a position to insist that his liability is to be postponed until the security is realized and its extent ascertained on the ground that the property which has been conveyed to the plaintiff surety by the mortgagee on his paying the mortgage amount under the mortgage-deed is unrealized. AIR 1938 Cal 405 (408, 409).

(6) Where the sureties are bound by the same instrument as the principal debtor, a suit by one surety against another for contribution is a suit on an implied contract, and, therefore, within the jurisdiction of a Court of Small Causes. ('79-80) 4 Bom 321 (323) (DB).

SECTION 148 — SYNOPSIS

1. Bailment — General.

2. Delivery of possession.

3. Effect of transfer of ownership.

4. Bankers.

5. Carriers.

6. Explanation.

1. Bailment — General. — (1) 'Bailment' is a technical term of the Common Law though etymologically it might mean any kind of handing over. AIR 1954 Trav-Co 305 (308) = ILR (1954) Trav-Co 208 (DB).

(2) A 'bailment' has been aptly defined by Chancellor Kent, as a delivery of a thing entrusted for some special object or purpose upon a contract, express or implied, to conform to the object or purpose for the trust. AIR 1928 Sind 106 (107) = 23 Sind LR 13 = 29 Cri L Jour 431 (DB) ** (1946) 36 Trav LJ 410 (413) (DB).

(3) Bailments are of two kinds: voluntary and involuntary. When the bailee dies and the goods bailed pass into the hands of a person representing him, that person becomes an involuntary bailee. AIR 1921 Cal 416 (418) ** AIR 1968 Tripura 63 (67). (Seizure of goods under Section 178, Sea Customs Act (1878) cannot fall under definition of bailment, either voluntary or involuntary.)

(4) The Contract Act does not recognise the variations of bailment recognised by the Roman Law. (1946) 36 Trav LJ 410 (413) (DB).

(5) Bailment is established only when there is delivery of goods by one person to another for some purpose upon a contract that they shall, when the pur-

shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. The person delivering the goods is called the "bailor". The person to whom they are delivered is called the "bailee".

Explanation.—If a person already in possession of the goods of another contracts to hold them as a bailee, he thereby becomes the bailee, and the owner becomes the bailor of such goods, although they may not have been delivered by way of bailment.

[*] As to bailments to carriers, see the Carriers Act, 1865 (3 of 1865); the Indian Railways Act, 1890 (9 of 1890); Carriage by Air Act, 1934 (20 of 1934), Chap. III; Carriage of Goods by Sea Act, 1925 (26 of 1925); Merchant Shipping Act, 1958 (44 of 1958).

Section 148 — Note 1 (contd.)

pose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. AIR 1937 Lah 572 (576) = ILR (1937) Lah 380 (DB) ** AIR 1954 Trav-Co 305 (308) = ILR (1954) Trav-Co 208. (There may however be cases where there is no enforceable obligation to redeliver or deal with the goods as directed.) ** ('46) 36 Trav LJ 410 (413) (DB) ** AIR 1959 SC 1394 (1398) = (1960) 1 SCR 401. (Bailee's duty is to deal with goods according to the directions of the bailor.) ** AIR 1968 Tri 63 (67) ** AIR 1966 Mad 177 (179) = (1966) 1 Mad LJ 6 (FB).

(6) "For some purpose" does not indicate that bailee is to make use of goods deposited. (1935) 18 Nag L Jour 97 (99).

(7) There is an implied contract in bailment to return articles in reasonable time after the purpose is served. AIR 1930 Oudh 395 (396) = 6 Luck 80 (DB).

(8) In order to constitute bailment there must be a contractual obligation on the bailee to return the specific goods delivered to him by the bailor. AIR 1951 Ajmer 24 (24, 25). (Advance of money to B for depositing it as security with Government — Person advancing has no interest in specific coins and currency notes advanced and hence B's agreement to repay does not amount to a contract to return specific goods.)

(9) "Directions" contemplated by Section 148, according to which goods are to be disposed of, cover the case of directions given after the purpose is accomplished. AIR 1922 Nag 127 (128).

(10) The bailee is not under the control of the bailor like a servant under his master's control. Madh BLJ 1955 HCR 1465 (1466).

(11) Entrusting a person with goods for safe custody is a species of bailment. AIR 1942 Mad 299 (300) ** AIR 1937 All 255 (257). (Custodian is not agent of true owner.)

(12) Ornaments borrowed on agreement to return after short time — Transaction is bailment and not sale. (1946) 36 Trav LJ 410 (412) (DB).

(13) Where A hired a camel of B intending it for the use of C to reach a certain place and then being returned to B at the destination and B delivered the camel to C as directed by A it was held that though the contract of hire itself was between A and B there came into existence a contract of bailment between B and C when the former delivered the camel to C at the instance of A for special use. 1946 Jaipur LR 148 (150) (DB).

(14) Where an agreement provided that A was to advance money and purchase goods for B and hold them with himself as security for the money, and that B should pay interest on the amount and also rent to A it was held that it was a case of bailment for security. AIR 1958 Pat 174 (176) (DB).

(15) Company depositing promissory note with Government as security in respect of private warehouse — Government becomes bailee and must return note without demand on termination of license. AIR 1939 Cal 746 (748) = ILR (1939) 2 Cal 52 = 41 Cri L Jour 134.

(16) Issue of water-proof coat to railway servant on condition of renewal, at his cost, on damage or loss, is bailment. AIR 1934 Rang 41 (42) = 35 Cri L Jour 788.

(17) The true legal relation between the guest and hotel keeper in respect of the furniture used by the former is that of bailor and bailee as defined by Sec. 148. The bailment is one of hire; the guest hires not only the rooms which he occupies but the furniture which they contain. (1900) 22 All 164 (166) (DB).

(18) Where property is deposited with Court in pursuance of its order there is no contractual relationship and hence no bailment also. AIR 1956 All 75 (78) = ILR (1957) 1 All 94 (DB).

(19) Stolen property recovered by Government is not property made over to Government under any contract whatsoever and hence the Government is not in the position of a bailee in respect of that property. AIR 1950 All 206 (207) = ILR (1951) 1 All 135 ** AIR 1937 Lah 572 (577) = ILR (1937) Lah 380 (DB)

Section 148 — Note 1 (contd.)

** 1960 All WR (HC) 394 = 1960 All LJ 529.

(20) There can be bailment and the relationship of bailor and bailee in respect of specific property without there being an enforceable contract. Nor is consent indispensable for such a relationship to arise. AIR 1967 SC 1885 (1888) = (1967) 3 SCR 938. (A finder of goods of another has been held to be a bailee under certain circumstances.)

(21) When a person travels by a road-way bus the mere fact that the passenger is allowed free allowance of certain luggage and the luggage is to be kept at a specific place (on the roof of the bus in this case) does not make it a case of any implied contract of the return of the luggage at the destination. It is not a case of entrustment of luggage or a case of bailment creating a liability of the carrier under Section 148 of the Contract Act. AIR 1963 All 70 (70) = 1963 All WR (HC) 136.

(22) Where the manager of a tea estate company sent tea to the clearing agent who stored it awaiting instructions the company, the agent was in the position of a bailee and not a mere servant of the company. AIR 1961 Ker 84 (86) = 1960 Ker LT 743.

(23) Per P. Chatterjee J.:— Agreement between retailer and Government for distribution of food through fair price shop — Held, that elements of bailment were satisfied in following way (a) there was delivery of goods, (b) Goods were delivered by Government to retailer, (c) purpose was to enable retailer to sell to consumers and (d) contract was that when so sold, retailer would get price and Government would get money deposited by retailer. AIR 1967 Cal 568 (583, 584) = 1967 Cri LJ 1599 (FB).

(24) Where the plaintiff was filed on a definite averment that the storing agent did not deliver certain goods and the plaintiff, claimed a specific amount towards their value, the burden lies at the outset, on the plaintiff to prove its case. The burden will shift to the defendants after the plaintiff discharges the onus. AIR 1969 Tripura 26 (31).

(25) The transaction known as a hire-purchase agreement partakes of the nature of a contract or bailment with an element of sale added to it. AIR 1962 SC 53 (58) = (1962) 2 SCR 644.

(26) In a hire-purchase agreement there is an aspect of bailment of the goods subjected to the agreement. AIR 1965 SC 1082 (1088) = (1965) 2 SCR 112.

2. Delivery of possession. — (1) In order to constitute a bailment a change of possession is essential. AIR 1952 Hyd 78 (79) = ILR (1952) Hyd 152 = 1952 Cri L Jour 707 ** Madh BLJ 1955 HCR

1465 (1467) ** AIR 1968 Mys 133 (136) = (1967) 1 Mys LJ 490 (DB).

(2) The present possession, custody or care of the thing which is yielded up by the bailor to the bailee constitutes the consideration for the engagement or promise of the bailee to redeliver the thing. (1946) 36 Trav LJ 410 (415) (DB).

(3) Under the Indian law like English law the person who is in de facto control of the property would normally be treated as the person who is in possession of the same. AIR 1952 Hyd 78 (79) = ILR (1952) Hyd 152 = 1952 Cri L Jour 707.

(4) Where one has mere custody without possession, like a servant, or a guest, using as the case may be either the master's goods or the host's goods, is not a bailee. Madh BLJ 1955 HCR 1465 (1467) ** AIR 1954 Trav-Co 305 (308) = ILR (1958) Trav-Co 208 (DB).

(5) There must be the putting into the possession of the bailee or of his agent of the goods in question — Merely putting into possession of documents of title does not constitute bailment of goods. AIR 1934 All 568 (568, 569).

(6) Plaintiff arranging with defendant to get made certain jewels from goldsmith working in defendant's house — Every evening plaintiff receiving from goldsmith half made jewels, putting them in box given by defendant for her use, keeping box in room and taking key in possession — Defendant, held was not bailee, since there was no delivery of goods, the key remaining with plaintiff. AIR 1938 Mad 32 (32, 33).

(7) Where the defendant took possession of an elephant with the two mahuts attached to it from the plaintiff under a contract of lease for a period of one year for use for timber work at a particular annual rent and on certain specified conditions and the two mahuts were under the control and service of the defendant for the period of lease, it was held that the transaction constituted a bailment and the relationship between the plaintiff and the defendant was that of bailor and bailee. AIR 1954 Trav-Co 305 (308, 309) = ILR (1954) Trav-Co 208 (DB).

(8) Where under an agreement A provided B with some elephant and mahuts to work in his forest on daily wages and B merely had a right to give directions to the mahuts who have been sent or later on substituted by A it was held that there was no transfer of the mahuts or elephants and hence no bailment of the elephants to B. AIR 1956 Assam 55 (61, 62) = ILR (1956) 8 Assam 7 (DB).

(9) Bailor holding possession of pledged goods in trust for bailee — There is constructive delivery to bailee. AIR 1966 Andh Pra 163 (166) = (1966) 2 Andh WR 518 (DB).

Section 148 (contd.)**3. Effect of transfer of ownership. —**

(1) Where there is no obligation to return identical subject-matter, either in its original or in an altered form, there can be no bailment. AIR 1943 Nag 168 (169) = ILR (1943) Nag 436 = 44 Cri L Jour 423 ** AIR 1968 Tripura 63 (67).

(2) Delivery of Government promissory notes to a Government treasury for cancellation and consolidation into a single note is not a bailment. There is a complete transfer of possession and ownership. (1878-80) 2 All 756 (762) (DB).

(3) Some precious stones and lumps of gold of special quality and three sovereigns were given to a goldsmith to convert them into jewellery and were lost by theft not caused by want of proper care: Held, that as the intention was to convert the identical stones and lumps of gold into jewellery, the ownership did not pass to the goldsmith and the transaction being one of bailment, he was absolved from liability for the loss under Sections 148, 151. (1912) 15 Ind Cas 431 (431) (Burma.) ** AIR 1936 Oudh 264 (265) = 12 Luck 128. (Silver entrusted for making ornaments.)

4. Bankers. — (1) Deposit of money in bank is not bailment. AIR 1946 Nag 114 (115) = ILR (1946) Nag 210.

(2) There is distinction between bailment and deposit. Money paid into a bank to be credited into the current account of the person making the payment does not constitute a case of bailment. AIR 1946 Nag 114 (115) = ILR (1946) Nag 210.

(3) The relationship between a native banker and the person depositing money with him, in the ordinary way of business, is that of borrower and lender and not bailor and bailee. (1889) 13 Bom 338 (341) (DB).

(4) In the ordinary course of his trade, a banker is entitled to use moneys paid into his bank as his own, unless there is a direction which creates fiduciary relation between the banker and customer. Where the banker is to collect and remit, there is confidence and trust. Where the banker is to use and repay on demand there is no trust. (1909) 32 Mad 68 (70, 71) (DB).

(5) Deposit by German firms in German Bank in name of a resident in India on condition that money was to be repaid only towards future supplies of machinery by firms — Position of Bank is that of a bailee or stake-holder and not debtor or trustee. AIR 1962 SC 1764 (1777) = (1963) 2 SCR 297.

5. Carriers. — (1) Section includes bailment for carriage. (1909) 32 Mad 95 (119, 120, 121) (FB).

(2) A shipowner is a bailee within the terms of Section 148. (1909) 32 Mad 95 (120) (FB).

(3) When a railway company receives and undertakes to carry goods from a station on its railway to a place on another distinct railway with which it communicates it is a contract with the receiving company for the whole distance and the other railway company will be regarded as its agent, and not as contracting with the bailor. AIR 1939 All 649 (654).

(4) Railway company allowing goods to be placed in their premises for transportation is liable as bailee to consignor. AIR 1936 All 69 (72) = 58 All 576 (DB).

(5) The railway is liable as a bailee for the goods entrusted to it whether for the purpose of carriage or for being kept in custody in the cloak room. The only difference is in the source of that liability that is to say while in the former case it arises out of its character as a carrier; in the latter case it arises under a pure and simple contract of bailment. AIR 1949 Cal 591 (593) = ILR (1950) 1 Cal 173.

(6) Looked at only from the provisions made applicable under Section 72, Railways Act, there can be little doubt that the Railway accepts the consignment as a bailee only from the consignor, who is a bailor. AIR 1965 Andh Pra 263 (264) = (1965) 1 Andh WR 342 ** AIR 1967 All 549 = ILR (1967) 1 All 398.

(7) Carriage of goods by air inland — Liability for damage to goods — Law applicable — Not governed by Carriers Act (1865), or Contract Act (1872), but by English Common Law as administered in India. AIR 1961 Cal 383 (386).

(8) A common carrier is liable to the owner for loss or damage to any property delivered to such carrier to be carried whether such loss or damage has arisen from the negligence of the carrier or any of his agents or servants. The term 'at the owner's risk' used in the goods receipt only means that the owner would be liable for any loss or damage to the goods, which are lying with the Company if such loss or damage was not caused by any negligence on the part of the carrier. AIR 1964 Punj 318 (319) = 1963 Cur LJ 256.

(9) It is true that, for purposes of delivering postal articles or receiving money payable therefor, the Post Office may be the agent of sender or the addressee, but that is not the same thing as saying that there is, in such cases, a contract between the sender and the Post Office or that the postal service is a common carrier. 1969 MPWR 100 (102).

149. Delivery to bailee how made.—The delivery to the bailee may be made by doing anything which has the effect of putting the goods in the possession of the intended bailee or of any person authorized to hold them on his behalf.*

[*] Cf. Sale of Goods Act, 1930 (3 of 1930), S. 33.

150. Bailor's duty to disclose faults in goods bailed.—The bailor is bound to disclose* to the bailee faults in the goods bailed, of which the bailor is aware, and which materially interfere with the use of them, or expose the bailee to extraordinary risks; and if he does not make such disclosure, he is responsible for damage arising to the bailee directly from such faults.

Section 148 — Note 5 (contd.)

(10) Port trust accepting delivery of goods from ships — Port trust is bailee of ship-owner or consignor but certainly not of consignee — Madras Port Trust Act (II of 1905), Sections 39, 40. (1968) 2 MLJ 199 (201). ((1963) 2 SCR (Suppl.) 915 and (1967) 2 MLJ 594, Foll.)

6. Explanation. — (1) After order of redelivery judgment-debtor and decree-holder become bailor and bailee. AIR 1929 Lah 386 (387).

(2) The explanation to Section 148, Contract Act, makes it clear that a seller can become a bailee if he contracts to hold the goods as a bailee. AIR 1961 Cal 54 (58) (DB).

(3) Where the conditions of auction sale provided that loss would be at risk and expense of purchaser from the moment sale is declared and that cash in full was to be paid at the fall of hammer and delivery was to be taken within fifteen days, the conditions were inconsistent with the position of there being any relationship of bailor and bailee. AIR 1961 Cal 54 (58) (DB).

(4) Where the bailor by a letter requested the bailee to have the pledged goods to remain in his possession and promised to hold the same in trust for the bailee and to give possession to the bailee whenever he demanded the same, the bailor's continuance in possession was the possession of the bailee. AIR 1966 Andh Pra 163 (166) = (1965) 2 Andh WR 518 (DB).

(5) Elephant taken on hire for one month — Elephant retained beyond one month — Measure of damages equal to hire. 1963 Ker LJ 1079 (1081, 1082).

Section 149 — Note 1

(1) There can be no delivery of possession in the legal sense of the word unless the receipt of the goods by the bailee is his conscious act. AIR 1955 Mad 505 (510) (DB).

(2) When the goods have not been put in possession of railway company mere acceptance of consignment notes is not acceptance of goods. AIR 1929 Pat 296 (299) = 8 Pat 808 (DB).

(3) In order to constitute a delivery of goods under Section 149 of the Act there

must be an actual tender of the goods by the bailor and acceptance of the same by the bailee. Therefore, the mere marking of the serial number by the goods clerk on the forwarding note unaccompanied by any such tender to and acceptance of the goods on behalf of the railway would not render the railway liable as a bailee for the loss of the goods. AIR 1923 All 449 (450) = 45 All 235 (DB).

(4) The omission to observe certain formalities, like the granting of a receipt, would not detract from the efficacy of an actual delivery of the goods by the consignor and the acceptance of the same by an employee on behalf of the railway as a legal delivery sufficient to constitute a bailment in the eye of the law. AIR 1958 Assam 5 (9) (DB) ** AIR 1922 All 9 (11, 12) = 44 All 218 (FB) ** AIR 1953 Bom 46 (49, 50) = ILR (1953) Bom 242 (DB).

(5) Lady handing over jewels to goldsmith to be melted for making new jewels — Every day lady receiving half-made jewels and keeping them in box in goldsmith's house with key in her possession. Held, there was no delivery to goldsmith who could not therefore, be regarded as bailee. AIR 1938 Mad 32 (33).

(6) It is not always necessary that bailee himself should be in physical possession of goods. Delivering them to a person authorised to hold them on behalf of bailee is also sufficient delivery. AIR 1966 Andh Pra 163 = (1965) 2 Andh WR 518.

(7) Where bailor requested bailee to have pledged goods to remain in bailor's possession and promised to hold same in trust for bailee and to give possession to bailee whenever he demanded, it was held that there was constructive delivery or delivery by attornment to bailee. Bailor's continuance in possession was possession of bailee. AIR 1966 Andh Pra 163 (166) = (1965) 2 Andh WR 518 (DB).

Section 150 — Note 1

(1) In the case of hire of specific chattel where the hirer does not depend upon the skill and judgment of the bailor there is no question of implied warranty of fitness of the chattel for particular purpose. AIR 1958 Ker 380 (383) = ILR (1957) Ker 542.

If the goods are bailed for hire, the bailor is responsible for such damage, whether he was or was not aware of the existence of such faults in the goods bailed.

Illustrations

(a) A lends a horse, which he knows to be vicious, to B. He does not disclose the fact that the horse is vicious. The horse runs away. B is thrown and injured. A is responsible to B for damage sustained.

(b) A hires a carriage of B. The carriage is unsafe, though B is not aware of it, and A is injured. B is responsible to A for the injury.

[*] Cf. Transfer of Property Act, 1882, S. 55(1)(a).

*151. Care to be taken by bailee.—In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence† would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed.‡

[*] The responsibility of all the Trustees of the Port of Madras constituted under the Madras Port Trust Act, 1905 (Mad. Act 2 of 1905), in regard to goods has been declared to be that of a bailee, under Sections 151, 152 and 161, without the qualifying words "in the absence of any special contract" in Section 152—See S. 40(1) of that Act.

See also Bombay Port Trust Act (Bom. Act 6 of 1879), S. 61-B; Calcutta Port Act (Beng Act 3 of 1890), S. 112(1); Cochin Port Trust Act (Mad. Act 8 of 1925), S. 39(1); Tuticorin Port Trust Act (Mad. Act 2 of 1924), S. 41(1).

[†] Cf. Transfer of Property Act, 1882 (IV of 1882), S. 76(a).

[‡] As to railway contracts, see the Indian Railways Act, 1890 (9 of 1890), S. 72. As to the liability of common carriers, see the Carriers Act, 1865 (3 of 1865), S. 8. As to the responsibility of a Board of Trustees in relation to a port, see Major Port Trusts Act, 1963 (38 of 1963), Ss. 42(6) and 43(1)(ii).

*152. Bailee when not liable for loss, etc., of thing bailed.—The bailee, in the absence of any special contract, is not responsible for the loss, destruction or deterioration of the thing bailed, if he has taken the amount of care of it described in section 151.

[*] See Foot-note remark (*) under S. 151. See S. 43(1)(ii) of the Major Port Trusts Act, 1963 (38 of 1963) and S. 73 of Railways Act, 1890 (9 of 1890).

SECTIONS 151 & 152 — SYNOPSIS

1. Scope.

1A. Common carriers — General.

1B. Carriers by air.

2. Carriers by sea.

3. Carriers by railway.

4. Inn-keeper's liability.

5. Negligence of servant.

6. Standard of care.

7. Special contract.

8. Burden of proof.

1. Scope. — (1) "Loss" in Section 152 denotes loss to goods distinct from loss to owner. AIR 1928 Lah 774 (776) = 10 Lah 360 (DB).

(2) Bank taking possession of document of title only is responsible for safe custody of document and not of goods. AIR 1934 All 568 (569).

(3) Section 151 which refers to all kinds of bailment includes also pledges. Hence a pledgee is also liable to the incidents of a bailment such as the duty to take requisite care and return the goods pledged when the debt is paid off.

AIR 1952 Nag 8 (8) = ILR (1952) Nag 49.

(4) The right of the bailor to claim damages from the bailee for wrongful detention of the goods bailed or for their loss, destruction or deterioration, if the bailee has not taken the amount of care of the goods as described in S. 151, Contract Act, is a "sanctioning right" which is not contemplated as a pecuniary liability in sub-section (6) of Section 2 of the Displaced Persons (Debts Adjustment) Act (1951). AIR 1961 Punj 340 (347) = 63 Pun LR 275 (FB).

1-A. Common carriers — General. —

(1) A common carrier is a person who professes himself ready to carry goods for everybody. Common carriers are considered to be in the position of insurers with regard to the goods entrusted to them. AIR 1959 Mad 285 (287, 288) = (1959) 2 Mad LJ 373. (Express stipulation between parties that the carrier is not a common carrier — Sections 151 and 152 will apply — Parties can enter into contract reducing liability of private carrier.)

(2) A common carrier is liable to the owner for loss or damage to any pro-

Sections 151 & 152 — Note 1-A (contd.)

erty delivered to such carrier to be carried, whether such loss or damage has arisen from the negligence of the carrier or any of his agents or servants. AIR 1964 Punj 318 (319) = 1963 Cur LJ 256.

(3) The legal liability of the common carriers to make good the loss or damage to the goods in transit to the bailor of goods is insurable interest. AIR 1964 Cal 209 (214 to 217).

1-B. Carriers by Air. — (1) Carriage by Air Act (20 of 1934), does not apply to carriage of goods by air within India. Matter in respect of carriers and consignees of goods by air in India has to be decided on principles of ordinary law, that is, those contained in the Contract Act and the principles of English law which have been held to be applicable to common carriers in India. AIR 1959 Mad 285 (287) = (1959) 2 Mad LJ 373.

(2) The liability of the internal carrier by Airways who is not governed by the Indian Carriage by Air Act, 1934, or by the Carriers Act, 1865, is governed by the English Common law since adopted in India and not by the Contract Act. Under the English common law, the carrier's liability is not that of a bailee only, but that of an insurer of goods. AIR 1960 Assam 71 (72, 73, 75, 76) = ILR (1957) 9 Assam 443 (DB). (Contract giving carrier complete immunity from liability — Not hit by Section 23, Contract Act — View of Sankaran Nair J. in ILR 32 Mad 95 (FB), Dissented from.) ** AIR 1964 Cal 396 (398, 399). (Carrier has absolute freedom to contract out of his liability even in cases of negligence.) ** AIR 1962 Cal 290 (294) = 65 Cal WN 949 (DB). (Special contract with Air Lines Corporation — Company not liable for damages to goods contracted to carry — Contract is governed by common law of England.)

2. Carriers by sea. — (1) In India the liabilities of a carrier are governed by the English Common Law. (1891) 18 Cal 620 (625) = 18 Ind App 121 (PC). (3 Bom 109, Overruled.) ** AIR 1931 Sind 124 (125) = 25 Sind LR 222 ** AIR 1919 Upp Bur 17 (18) = 3 Upp Bur Rul 120. (Licensee of ferry is common carrier.) ** AIR 1918 Cal 824 (824) (DB). (Liability is that of insurer.) ** (1911) 38 Cal 28 (41) (DB). (Do.)

(2) Where contract to carry passenger was made by foreign Company in Calcutta, they were bound by provisions of S. 151 of the Contract Act. (1881) 6 Cal 227 (235) (DB).

[But see (1905) 28 Mad 400 (403) (DB). (Carriers by sea for hire are common carriers by the common law of England and where the contract is made in Calcutta, whatever be the nationality of the carriers they will be governed by the *lex loci contractu*, which is the common law of England.)]

(3) Owners of lighter carrying goods are liable for loss of and damage to goods as bailees under Section 152 if in using lighter, they did not take amount of care described in Section 151. AIR 1917 Sind 47 (49) = 11 Sind LR 1.

(4) Under Section 39 (3), Madras Port Trust Act, 2 of 1905, a shipping company is relieved of its liability in regard to the goods carried by it as soon as it delivers them to the Port Trust and obtains their receipt. Thereafter the Port Trust itself under Section 40 (1) of that Act becomes a bailee within the meaning of Sections 151, 152 and 161 of the Contract Act and hence it cannot escape liability for the loss of the goods unless it is able to show that it had taken as much care of the goods as a man of ordinary prudence would take of his own goods under similar circumstances. ILR (1957) Mad 840 (844) ** AIR 1970 Mad 48 (56) (DB). (On facts the Board was held negligent.) ** AIR 1963 Mad 347 (347, 348) (DB). (Nature of duties performed by Port trust indicated.) ** (1962) 1 Mad LJ 340 (343, 345) ** AIR 1959 Mad 367 (368) = (1959) 1 Mad LJ 149.

(5) Under Section 112 (1) of the Calcutta Port Act, the Commissioners are liable for the loss, destruction or deterioration of goods which are landed and remain in the possession or under the control of the Commissioners and the standard of liability is the same as that of a bailee. 1964 Cal LJ 56 (57) (DB).

(6) Carriage of goods — Bill of Lading — Clause providing for cesser of liability of carrier as soon as goods are free from ship tackle — Clause cannot relieve carrier or his agents from prime obligation of delivering goods to consignee, unless there was custom to the contrary in port. AIR 1965 Ker 51 (52, 53) = 1964 Ker LT 78.

3. Carriers by railway. — (1) The railway company cannot be treated as insurers in regard to the goods consigned for carriage. AIR 1918 Cal 892 (893, 894) (DB) ** ILR (1953) 1 Cal 268 (270).

(2) The liability of the railway for the goods delivered to them for transmission is that of bailee under Sections 151 and 152. AIR 1958 Assam 5 (7). (Mere fact that a receipt had not been granted by the railway would make no difference.) ** AIR 1958 Bom 238 (239). (Partial loss of goods due to negligence or misconduct of servants — Railway liable as bailee.) ** AIR 1957 Cal 190 (194) ** AIR 1957 Madh Pra 192 (193, 194). (Its liability is not governed by the English common law rules.) ** AIR 1957 Madh Pra 157 (159) ** AIR 1956 Pat 434 (436) ** AIR 1953 Pat 206 (207). (Consignment kept exposed to wind — Goods damaged — Railway cannot escape liability on the ground that they had no proper facility to store the goods at the place.) ** ILR (1953) 1 Cal 268 (270) ** ILR (1951) 2 Cal 340 (342). (Statutory liability of

Sections 151 & 152 — Note 3 (contd.)

the railway can be restricted by contract.) ** AIR 1950 Assam 175 (179) = ILR (1950) 2 Assam 489 (DB) ** ILR (1950) 2 Cal 477 (480) ** AIR 1948 Nag 65 (66, 67) = ILR (1947) Nag 335. (Railway as bailee of goods entrusted to it for carriage cannot be made liable for damages arising out of unforeseen and unavoidable events.) ** AIR 1947 Bom 169 (182) = ILR (1947) Bom 274 ** AIR 1944 Cal 50 (52) = ILR (1943) 1 Cal 397 ** AIR 1924 Pat 39 (40) ** AIR 1922 All 9 (11) = 44 All 218 (FB) ** AIR 1918 Cal 892 (893, 894) (DB) ** (1894) 17 Mad 445 (446). (Liability is subject to provisions of Act 9 of 1890.) ** 1886 Pun Re Civ. No. 97, p. 240 (241) (DB). (Liability is however subject to provisions of Act 9 of 1890.) ** AIR 1960 SC 233 (238) = (1960) 2 SCR 75. (Goods consigned from Quetta in Pakistan to New Delhi in India — Goods carried by Pakistan Railway and Indian Railway — No treaty between two countries regarding liability for loss of goods in case of through traffic — Liability of Forwarding Railway shall, subject to the provisions of the Railways Act, be that of a bailee under Sections 151, 152, 161 of Contract Act.) ** AIR 1970 Madh Pra 55 (59) = 1969 MPLJ 737 (DB). (Mere fact that rain water entered the wagon and caused damage, held would not fix liability on Railways.) ** AIR 1969 Bom 401 (406) (DB). (Goods damaged by fire in transit—Negligence of railway servants was presumed after considering evidence.) ** AIR 1964 Andh Pra 477 (481) = (1964) 2 Andh LT 208 (DB) ** AIR 1963 Mad 394 (394) = (1964) 2 Mad LJ 329 (DB) ** AIR 1961 Mad 398 (400, 401) = (1961) 1 Mad LJ 348. (Goods in open wagon looted by large scale raids by thieves — Administration is not liable.) ** AIR 1960 Mad 149 (153) = (1959) 2 Mad LJ 365 (DB) ** AIR 1959 Andh Pra 84 (86) = (1959) 1 Andh WR 55. (Consignment lost from railway warehouse after expiry of time allowed for delivery free of wharfage — Wharfage charges recovered — Railway held liable for damages or for loss.) ** AIR 1959 Pat 337 (339) = ILR 37 Pat 1355 (DB).

[See also (1884) 10 Cal 210 (214) (FB). (It is doubtful whether Section 151 and Section 161, Contract Act, apply to carriers by rail. But even so the railways can protect themselves from liability by special contract as they were entitled to do before the Carriers Act was passed.) ** 1961 MPLJ 920 (923) (DB). (Coal of colliery company lying on railway platform — Coal neither accepted by railway nor delivered to it for transport — Railway is not bailee and not responsible for loss of coal.)]

(3) Railway Company which is in the position of a bailee, should take as much care as an ordinary prudent man would take in respect of his own property. AIR

1917 All 172 (173) ** AIR 1957 Bom 276 (278) = ILR (1957) Bom 647. (Contract to despatch goods by passenger train — Delay in transit to despatch by parcel train contrary to contract — Railway liable for resultant loss due to damage of goods.) ** AIR 1957 Cal 573 (576). (Misdelivery of goods on production of forged notes — Railway cannot be said to have exercised the care of an ordinary man of prudence.) ** AIR 1957 Cal 190 (194) ** AIR 1928 Cal 498 (500) (DB). (Carrying goods in unlocked wagon amounts to a wilful neglect to take care.) ** (1913) 37 Bom 1 (15) (DB). (Destruction of goods by fire — Held, on facts that the railway company was negligent in preventing damage after discovering the fire.) ** AIR 1963 SC 422 (423, 424) = (1963) 2 SCR 702 ** (1968) 2 Andh LT 269 (271). (Railway Administration cannot impose conditions to absolve them from responsibility as carrier without regard to standard of care required of them by statute.) ** AIR 1965 All 184 (187). (Railway administration delivering consignment to person other than endorsed on self-consigned railway receipt cannot escape its liability.) ** AIR 1963 Mad 394 (394, 396) = (1964) 2 Mad LJ 329 (DB). (The liability of the railway is not confined to closed wagons alone. It equally extends to open wagons so that the railway cannot disown the liability by contending that the goods were loaded in open wagons.) ** AIR 1963 Raj 162 (167 to 170) = 1963 Raj LW 135 (DB) ** AIR 1961 Madh Pra 251 (253) = 1961 MPLJ 484 (DB). (Railway Administration cannot be expected to take extra-ordinary care of goods.) ** AIR 1961 Raj 211 (213) = 1961 Raj LW 148 (DB). (Failure to put locks on the wagons is failure on the part of Railway to take care of goods as a bailee and amounts to wilful neglect.) ** AIR 1959 Pat 337 (339, 340) = ILR 37 Pat 1355 (DB). (Misdelivery — Parcel clerk without carefully comparing entries on railway receipt with those in delivery books giving delivery of goods to person producing railway receipt on behalf of consignee — Entries in receipt not tallying with those in the book — Clerk cannot be said to have acted as an ordinary prudent man in doing so.) ** AIR 1957 Madh Pra 192 (193, 194) = 1957 MPLJ 636.

(4) In judging the question of the amount of care to be taken by a railway administration, it will be quite proper and reasonable to take note of the opportunities and means that are properly and reasonably available to the railway administration for safeguarding the interests of the consignee. AIR 1963 Raj 162 (167, 168, 169, 170) = 1963 Raj LW 135 (DB) ** AIR 1959 Pat 337 (339, 340) = ILR 37 Pat 1355 (DB). (Amount of care to be taken by railways or their employees, depends upon circumstances of each case.)

Sections 151 & 152 — Note 3 (contd.)

(5) The railway which has misdelivered goods cannot escape its liability by showing that the person entitled to its delivery had made no effort to retrieve the goods. AIR 1957 Cal 573 (576).

(6) Where loss is due to theft by a railway servant the company is liable; but when it is by an outsider railway company is not liable. AIR 1928 Cal 697 (700) (DB).

(7) Special contract in risk-note exempting Railway Company from liability in case of loss etc. — Company is not liable. (1893) 17 Bom 417 (421) (DB) ** AIR 1955 Madh B 70 (73) (DB). (Risk note G obtained by railway lessens its liability as a bailee for loss arising out of negligence under Section 151, Contract Act.) ** AIR 1955 Mad 274 (277). (Consignment despatched at owner's risk — Railway cannot be made liable for its destruction unless it is due to negligence which amounts to misconduct.) ** ILR (1950) 2 Cal 477 (480). (Railway which is bound to deliver goods within reasonable time will be liable for loss or deterioration caused by unreasonable delay in transit or delivery of goods. But it can contract out of liability by suitable risk notes.) ** AIR 1932 All 584 (585). (Exemption under risk-note form A and B is available only during transit on ordinary route.) ** AIR 1917 All 338 (339) = 39 All 418 (DB). (Railway is not liable unless plaintiff shows that loss was due to theft or wilful neglect, of railway servants.) ** (1903) 30 Cal 257 (261) (DB) ** (1884) 10 Cal 210 (213) (FB).

(8) A Railway Company receiving goods for carriage is not bound to inquire into the apparent owner's title or to see that the risk note is read and understood by the person who delivers the goods. It is a contract binding on the consignor. In such a case the responsibility of the railway as bailee is governed by Sections 150 and 151, limited by the agreement referred to above. AIR 1928 Cal 170 (173) = 55 Cal 142 (DB).

(9) Goods referred to in Section 75, Railways Act (1890) sent on "risk note" and not complying with that section — Railway company is not liable for loss of the goods. (1912) 34 All 656 (657) (DB).

(10) Transit of horse by railway — Horse sustaining injuries — No agreement signed by sender under Section 10, Railways Act IV of 1879 — Company is liable. 1882 Pun Re No. 27 p. 375 (382) (DB).

(11) Railway Company accepting goods for carrying — "Bill of lading mentioning goods received in good condition" — Also providing that no English Common Law was applicable — Goods found damaged before being taken into custody by Company — Estoppel does not arise, as Railway Company's liability did not depend upon bill of lading or English

Common Law. AIR 1935 Sind 218 (219, 220).

(12) Section 11, Railways Act IV of 1879 — Payment of increased charge puts Company in the position of ordinary bailees. (1893) 17 Bom 723 (727).

(13) A passenger depositing his luggage in a railway cloak-room is entitled to recover from the railway, when the luggage is lost, the entire value of the goods lost but not any consequential damages. AIR 1949 Cal 591 (593, 594) = ILR (1950) 1 Cal 173.

(14) No doubt the failure of the party to take delivery of the goods within a reasonable time would relieve the railway of its liability as a bailee under the contract of carriage but in continuing to keep the goods with a right to collect wharfage charges from the party at the time of delivery it becomes liable as a bailee under a contract of bailment for warehousing the goods for the loss arising from the damages caused to the goods during such warehousing. AIR 1955 Cal 264 (265, 266, 267) (DB).

[But see ILR (1953) Punj 579 (593, 594). (Liability not terminated by laches of party.)]

(15) Consignor's suit for compensation for non-delivery is a suit in contract, and not in tort. AIR 1923 Pat 285 (286) = 2 Pat 442 (DB).

(16) Railway company is liable to compensate for loss of or damage to goods, though claim is not put forward till after delivery has been taken and "clear" receipt is granted. Receipt is only prima facie evidence of fact and raises presumption in favour of receipt of goods. Bailor is not precluded from proving that goods were really damaged or deficient in quantity when delivered to him. (1912) 39 Cal 311 (318) (DB).

(17) Absence of proof of negligence — Railway Company taking care of consigned goods with prudence — Loss of consigned goods — Railway Company was not responsible for loss. AIR 1934 Pat 583 (583) (DB).

4. Inn-keeper's liability. — (1) English law not applicable to adjudge hotel manager's liability — His liability is that of bailee — Proprietor liable for damages caused to guest, when there were thefts, and he himself was aware of insecurity of premises. AIR 1922 All 471 (472, 473) = 44 All 735 (DB).

5. Negligence of servant. — (1) Bailee is liable for employee's negligence unless expressly exempted. AIR 1924 Rang 356 (358) ** AIR 1953 Bhopal 5 (6). (Bailment of horse — Horse injured due to negligence of servant of bailee to take proper care of it — Bailee liable for the damage done.)

(2) Bailee is responsible for negligence of servants in the use and custody of goods, in the course of employment, but not for unauthorised act done outside

Sections 151 & 152 — Note 5 (contd.)
course of employment. AIR 1934 Cal 151 (155) (DB).

(3) In the case of a master and servant, where the master is the bailee, and the servant is either dishonest or negligent, the master must be held liable, if the negligence of the servant is established and the master can be shown to have employed dishonest servants or not supervised their actions. AIR 1959 Madh Pra 77 (80) = 1958 MPLJ 694 (DB).

(4) Ordinarily, the bailee's liability extends to damage caused by the negligence of his servants acting in the course of their employment about the use or custody of the thing bailed; but it does not extend to damage caused by the acts or defaults of third person which he could not by ordinary diligence have foreseen or prevented. (obiter). AIR 1960 Cal 455 (457) (DB).

6. Standard of care. — (1) The standard of care which is expected of a bailee in regard to the goods bailed is that of a person of ordinary prudence. (1954) 56 Bom LR 944 (947) ** AIR 1957 Mys 55 (56, 57) = ILR (1956) Mys 281. (Standard of care required is that of an average prudent man in respect of his own goods of the same bulk and value in similar circumstances.) ** AIR 1957 Pat 147 (151). (Test applied for determining whether bailee was guilty of negligence or not is to see whether the care taken by him is the care of a prudent man.) ** ILR (1953) 1 Cal 268 (270) ** AIR 1952 All 205 (205, 206) ** AIR 1952 Nag 8 (9) = ILR (1952) Nag 49. (Pledge being a bailment covered by Section 151 pawnee is liable if he loses the goods due to his failure to take the care of a prudent man.) ** ILR (1951) 2 Cal 340 (342) ** AIR 1966 Bom 134 (139) = (1965) 67 Bom LR 823. (Government official attaching goods and keeping them in his custody — He is in position of bailee.) ** AIR 1964 Cal 374 (378, 379, 380, 382) = 68 Cal WN 554 (DB). (Car received for repairs by automobile garage damaged by fire — Garage owners, held had failed to take reasonable care either in averting risk of fire or in protecting car after fire had broken out.) ** AIR 1961 Punj 340 (346, 347) = 63 Pun LR 275 (FB). (Primary liability of the bailee in a contract of bailment is not a pecuniary liability but that stated in Section 151.)

(2) A gratuitous bailee is bound to take the same care of the property entrusted to him as a reasonable, prudent and careful man may fairly be expected to take of his property of the like description. AIR 1955 Vindh Pra 30 (31) ** AIR 1934 Cal 151 (154) (DB). (Same standard of care is required both from a gratuitous bailee and a bailee for hire.)

(3) In the Contract Act the duty of care in the case of bailee is uniform whether it is gratuitous or for hire or for

gain. The consideration in the case of gratuitous bailment is the trust reposed in entrusting one's valuables to the care of another. AIR 1959 Madh Pra 77 (79) = 1958 MPLJ 694 (DB).

(4) No hard and fast rule can be laid down for fixing measure of care due from a bailee. That should variably depend upon the facts of each case. AIR 1957 Mys 55 (55, 56) = ILR (1956) Mys 281. (That several others act in the same way as the bailee has done cannot bring the 'care' taken by him within the meaning of 'care' prescribed under the section.) ** AIR 1936 Oudh 264 (265) = 12 Luck 128. (Finding as to necessary care not open to revision.) ** AIR 1933 All 158 (159) (DB) ** AIR 1924 Cal 92 (94) (DB). (Carrier of goods — Degree of care required must vary with nature and condition of thing carried.) ** (1911) 9 Ind Cas 470 (471) (Low Bur.) (Perishable articles — Special precautions on the part of bailee necessary.)

(5) Bailee has to communicate bailor, in emergency, with reasonable diligence. AIR 1933 All 158 (159) (DB).

(6) Where the goods bailed are lost or destroyed without any negligence on the part of the bailee and due to causes which are beyond his control the bailee cannot be made responsible for such loss or destruction. AIR 1952 All 205 (206). (Goods destroyed by fire during communal riot.) ** AIR 1952 Nag 8 (8) = ILR (1952) Nag 49. (Pawnee losing goods without his fault does not forfeit his right to recover the debt.) ** 1949 Bur LR (HC) 605 (621). (Goods destroyed by war — Bailee not removing goods from place where they were kept by mutual consent — No direction from bailor to remove goods to different place — Held, bailee was not guilty of negligence.) ** AIR 1933 All 158 (159) (DB). (Destruction of goods by unprecedented floods — Bailee who has not fallen off the standard of statutory care is not responsible for the loss.) ** AIR 1932 Cal 257 (258). (Destruction by fire due to unknown causes.) ** AIR 1916 All 7 (8) (DB). (Deposit of money for safe custody — Depositee placing the amount in bank solvent at the time — Subsequent failure of Bank would not render depositor liable for the loss of the money.) ** AIR 1964 Andh Pra 477 (481) = (1964) 2 Andh LT 208 (DB). (Loss of goods in transmission — Railway authorities taking all reasonable care — Consignments looted by unruly mob under circumstances beyond control — Held, in the circumstances that Railway Administration had exonerated itself from liability.) ** (1964) 68 Cal WN 368 (379). (Goods and articles stored in godown owned by assured — Assured is bailee in respect of such goods — Damage caused to goods by fire — Bailee taking care of goods and not shown to be negligent — He is not liable for loss caused by fire.) ** AIR 1959 Pat 442

Sections 151 & 152 — Note 6 (contd.)

(444) = 1959 Pat LR 103 (DB). (Goods with bailee damaged by unprecedented floods — Vis major — Bailee, held under circumstances, entitled to compensation.)

(7) Plaintiff instructing defendant, who was a commission agent in bullion, to purchase silver bars and keep them with defendant — Defendant purchasing bars and reporting that they were kept at plaintiff's risk — Bars kept by defendant at his pedhi unlocked and unattended — Three bars lost — Defendant was bound to take ordinary care as bailee and was liable for loss, being guilty of negligence — The fact that bars were kept at plaintiff's risk was an additional term, which was not accepted by plaintiff — Defendant was not therefore, absolved from ordinary liability of bailee which he had accepted by purchasing bars. AIR 1939 Bom 101 (101, 102, 103) (DB).

(8) Plaintiff entrusted driving beam of his sewing machine to defendant, who was a coppersmith, for repair. He wanted broken tip soldered with copper. Defendant undertook to do repair. He employed another coppersmith to do the work under his instructions. In the course of soldering excessive heat was applied, and other tip of driving beam was melted, rendering driving beam useless. Held, in a suit for damages, that Section 151 governed the case, which required from defendant care of skilled coppersmith. Held also, that, if a man undertakes, whether for reward or not, to do something requiring special skill, he may be fairly called on, if things go wrong, to prove his competence. 1968 Upp Bur Rul 11 (12, 13).

(9) Bailees insuring their own goods against fire, but not the goods bailed to them — Omission to insure is not absence of due care. (1888) 11 Mad 459 (466) (DB).

(10) Plaintiff sending uninsured jewelry by V. P. P. to save insurance fee — Defendant doing same, plaintiff not objecting — Plaintiff cannot urge that defendant's neglect to insure on a particular occasion was want of due care as laid down in Section 151. 1906 Pun Re No. 70, p. 260 (263) (DB).

(11) A bailee cannot be made responsible when the goods are lost due to a wrong judgment made by him in a moment of peril and emergency. AIR 1917 PC 173 (175, 176).

(12) Bailees are not liable for theft of goods bailed, if they had taken due care of the articles. 1900 Pun Re No. 90, p. 371 (376) (DB) ** (1912) 15 Ind Cas 431 (431) (Low Bur). (But bailee is liable to make good the loss of goods which were not the subject-matter of bailment, e.g., sovereigns given to goldsmith for making ornaments.)

(13) Pressure of work, or avoidable accident cannot help carrier to avoid

liability under Section 151. AIR 1925 Cal 737 (738, 739) (DB).

(14) A borrowed car from B — Car damaged by accident — B repaired car and sued A for amount — Held, it was contract of bailment, A failed to carry out obligation and suit was governed by Article 115, Limitation Act. AIR 1939 Oudh 518 (519) = 9 Luck 189 (DB).

(15) Whether it can be inferred from facts found that ordinary prudence has been exercised, is a question of law and justifies an interference in second appeal. AIR 1915 Mad 80 (81).

7. Special contract. — (1) If there is a special contract, the bailee may be held liable for the loss, etc., even though he has taken such care of the thing bailed, as is required by Section 151. AIR 1937 Sind 207 (208) (DB) ** AIR 1965 SC 1655 (1659) = (1965) 2 SCR 782. (A bailee of goods under a works contract may undertake a more onerous liability than what is prescribed under Section 151 of the Contract Act.) ** AIR 1959 Ker 273 (274).

(2) There is nothing in Sections 151 and 152 which excludes the liberty of the parties to enter into a contract exempting the bailee from the liability imposed upon him by the sections. (1954) 56 Bom LR 944 (947) ** AIR 1929 Rang 145 (146, 147) = 7 Rang 339. (Pawnbroker can exempt himself from liability for the pledged goods which had been destroyed.)

[See AIR 1964 Punj 318 (319) = 1963 Cur LJ 256. (Term "at the owner's risk" in goods receipt — Means that owner will be liable for any loss or damage to goods lying with company if such loss or damage was not caused by any negligence of carrier.)]

(3) The clause in the contract intended to exempt the bailee from the statutory liabilities under Sections 151 and 152 must state the exemption in explicit terms. AIR 1924 Rang 356 (357). (Exemption from liability for servant's negligence must be explicit.)

(4) The law of England unlike the law of the United States of America does not forbid a carrier to exempt himself by contract from liability for the negligence of himself and his servants and the only condition which he has to observe is to provide for such exemption in express, plain and unambiguous terms. The same principles prevail in India as well. (1909) 32 Mad 95 (104, 107) (SB). (Per White C. J. and Wallis J. (Sankaran Nair J., dissenting): (Shipowner can exempt himself by contract from liability for loss arising from his own or his servants' negligence.) ** AIR 1955 Mad 602 (603). (Shipping company — Special contract with shipper exempting it from liability as a carrier of goods — Nature and extent of exemption is a question depending on the construction of the contract.) ** AIR 1953 Mad 3 (7) = ILR

Sections 151 & 152 — Note 7 (contd.)

(1953) Mad 396. (Common carrier — Carriage of goods by sea — Carrier's liability is not affected by Sections 151 and 152, Contract Act — Bill of lading exonerating carrier from liability for loss due to negligence or otherwise — Short delivery — Carrier is not liable for loss.) ** AIR 1951 Trav-Co 1 (4) (DB). (Common carriers — Rights and liabilities are governed by English Common Law principles and not by Indian Contract Act — Carrier can protect himself from all kinds of loss or damage.) ** AIR 1928 Bom 5 (7) = 52 Bom 37 (DB).

[But see AIR 1919 Low Bur 61 (66) (DB).]

(5) The common carriers can validly contract with the consignors that they will not be liable for the loss or destruction of goods beyond their own transport system and that as regards the administration of the transport system beyond that limit they will act only as agents. AIR 1955 Assam 229 (231) (DB).

(6) In the case of railways, under the very provisions of Section 72 of the Railways Act, which have made them liable as bailees on the terms contained in the Contract Act, they are entitled to limit their liability for negligence or misconduct by agreements contained in approved risk notes. ILR (1950) 2 Cal 477 (480) ** ILR (1951) 2 Cal 340 (342).

(7) A carrier cannot retrospectively restrict his normal liability under a contract of carriage by issuing at the destination a ticket containing a special term to that effect of which the person delivering the goods was not made aware when the carrier accepted them for carriage. AIR 1956 Nag 145 (146) = ILR (1955) Nag 786.

(8) Consignment at railway risk — Railway as bailee is bound to return goods at destination — Failure to deliver goods at destination — Railway cannot take advantage of provisions of S. 152 by showing that it had taken all possible care of consignment during its transit — Since the risk of railway is a special condition of booking Section 152 which applies in the absence of special contract, would not be attracted. AIR 1962 Pat 384 (390) = 1962 BLJR 77 (DB).

(9) Attachment of movable property before judgment — Property attached kept in custody of third party on his executing bond to return goods and to pay price of goods if he failed to do so — Goods destroyed by fire — Held, that the custodian or supardar was a bailee and his liability was regulated by the provisions of the Contract Act. It could not be said that the bond executed by the custodian was a special contract to the contrary envisaged under Section 152. AIR 1962 Assam 23 (27, 28) = (1960) 1 Assam LR 243 (DB).

(10) Cash box of bank permitted to be kept in police custody by Police authorities with reservation that the police authorities were not responsible for the contents of the box — Box stolen — Held the reservation made by the Inspector General of Police did not operate to limit the responsibility of the bailee under the contract of bailment and thereby bailee was not absolved from liability to take such care as required by Section 151 of Contract Act. 1965 Jab LJ 243 (246) (SC).

8. Burden of proof. — (1) When the goods bailed are lost, the burden of proof of showing that the goods are lost is on the bailee who is in the better know of the circumstances. AIR 1957 Mys 55 (56) = ILR (1956) Mys 281.

(2) The bailor suing the bailee for damages for loss of goods must prove that the loss was incurred because of bailee's negligence or absence of diligence. AIR 1917 PC 173 (175, 176).

(3) In the case of carriage of goods by railway it is for the bailor-plaintiff to prove that the goods were lost by the negligence of the bailee, the railway. AIR 1957 Cal 190 (194) ** AIR 1957 Madh Pra 157 (159) ** AIR 1956 Pat 434 (436) ** AIR 1964 Cal 374 (377, 378, 380, 381, 384) = 68 Cal WN 554 (DB).

(4) Mere happening of an accident is not sufficient evidence of negligence. The plaintiff must give some affirmative evidence of negligence on part of the defendant. (1887) 9 All 398 (408) (DB).

[But see 1901 Upp Bur Rul 337. (A entrusting cask to B for being brought to his house — Cask broken through accident while in care of B and his servant — Occurrence of accident throws burden on B to prove that it took place in spite of care exercised by him.)]

(5) It is for the bailee who seeks to be relieved of his responsibility for the loss, destruction or deterioration of the goods to prove that he had taken proper care of the goods to the extent required by Section 151 of the Act. ILR (1957) Mad 840 (844) ** AIR 1957 Cal 573 (576). (Onus is on railway to show that goods were lost in spite of reasonable care taken by it.) ** AIR 1957 Nag 59 (60). (Railway has to prove that it had taken all possible care.) ** AIR 1954 Trav-Co 305 (311) = ILR (1954) Trav-Co 208 (DB). (Railway company must prove that loss of goods was due to causes which were consistent with due care on its part.) ** 1954-2 Mad LJ 677 (678). (Onus is on Railway Administration to show that it took proper care if it wants to escape a bailee's liability.) ** AIR 1950 Assam 175 (179) = ILR (1950) 2 Assam 489. (Railway must lead evidence to show that they had discharged their obligation as

153. Termination of bailment by bailee's act inconsistent with conditions.—A contract of bailment is avoidable at the option of the bailor, if the bailee does any act with regard to the goods bailed, inconsistent with the conditions of the bailment.

Illustration

A lets to B, for hire, a horse for his own riding. B drives the horse in his carriage. This is, at the option of A, a termination of the bailment.

Section 151 & 152 — Note 7 (contd.)
required by Sections 151 and 152 of the Act.) ** AIR 1950 Pat 215 (218) = 29 Pat 170 (DB). (Loss or damage of goods prima facie evidence of negligence. Hence onus lies on railway as bailee to prove otherwise.) ** AIR 1947 Bom 169 (182) = ILR (1947) Bom 274. (Railway if it wants to escape bailee's liability should prove that it did not fail to take proper care.) ** AIR 1924 Cal 1056 (1058) (DB). (Loss or damage raises prima facie presumption of negligence against bailee.) ** AIR 1923 Rang 74 (74) (DB). (Do.) ** AIR 1920 Oudh 70 (72) = 23 Oudh Cas 96. (Do.) ** AIR 1963 SC 422 (423, 424) = (1963) 2 SCR 702. (Railway protection police specially deputed to protect goods in transit — No evidence given as to the extent of precaution taken by protection police — Held, loss of goods in transit was due to negligence of Railway administration.) ** AIR 1969 Andh Pra 386 (388) ** AIR 1964 Andh Pra 477 (481) = (1964) 2 Andh LT 208 (DB) ** (1963) 2 Andh LT 59 (61) (DB) ** 1962 All LJ 738 = ILR (1962) 2 All 334 (346) (DB) ** AIR 1962 Mad 244 (246) = (1962) 2 Mad LJ 60 (DB). (Loss by private stealth committed by a person other than the bailee is not sufficient to rebut the presumption of negligence against the bailee on the happening of the loss.) ** (1962) 1 Mad LJ 340 (345). (Goods taken into charge by Port Trust — Damage to goods due to heavy rains — Onus is on Trust to show absence of negligence.) ** AIR 1962 Pat 384 (390) = 1962 BLJR 77 (DB). (Failure to return the thing bailed, if it is not explained, will be presumed to be by bailee's default.) ** AIR 1961 Madh Pra 251 (255) = 1961 MPLJ 484 (DB) ** AIR 1959 Andh Pra 84 (86) = (1959) 1 Andh WR 55 ** ILR (1959) 1 Cal 450 (455). (The fact that the goods were admittedly placed in charge of the railway and have not been returned, raises the presumption of negligence.) ** 1959 BLJR 680 (682). (Loss or damage to goods entrusted to bailee — Prima facie evidence of negligence — Burden of disproving negligence lies heavily on bailee.)

[See also AIR 1963 Rajasthan 162 (170) = 1963 Raj LW 135 (DB). (Suit against railway for loss of goods — Pleadings of both parties not placing reliance on Section 74-C of Railways Act — Both plaintiff and defendant contesting on basis of ordinary liability of bailee — Court held rightly placed burden to

disprove negligence on defendant railway.)]

(6) Plaintiff proving no delivery — Onus to prove absence of negligence and care on part of railway, or its servants is on railway Company — Onus is not shifted by fact that plaintiff had signed risk note B. AIR 1928 All 103 (105) = 50 All 246 (DB) ** AIR 1937 Sind 85 (86) = 31 Sind LR 22 (DB) ** AIR 1934 Cal 151 (153) (DB). (Burden cannot be enhanced to absurd extent, by requiring Railway Co., to prove its reasonable care and cause of loss.) ** AIR 1926 Lah 217 (218) ** AIR 1914 Bom 154 (159) = 39 Bom 191. (The bailee can show that cause, while unknown, must have been external to himself and beyond his control. He can also prove that, while unknown, and, in all probability, attributable to himself cause was such as could not be foreseen and prevented by all reasonable care.)

(7) The party seeking to escape his ordinary liability as a bailee under a special contract must establish the existence of the contract. AIR 1956 Nag 145 (145) = ILR (1955) Nag 786.

(8) Tests in Sections 151 and 152 determine Railway Company's liability. Onus is on the company to prove exoneration of its liability by special risk note. AIR 1923 Pat 285 (287) = 2 Pat 442 (DB).

(9) Goods sent at owner's risk — By elimination of risk notes and by reason of new Section 74-A, Railways Act, the onus of proof of negligence or misconduct would be upon railway except in a case where goods are carried at owner's risk — But where the damage cannot be attributed either to defective condition of goods or the defective packing of goods, the two contingencies mentioned in Section 74-A, the primary onus of a bailee to show that he had taken such care of goods as a man of ordinary prudence would take in case of his own goods must be discharged by railway administration for denying relief to plaintiff. AIR 1960 Mad 149 (153) = (1959) 2 Mad LJ 365 (DB).

Section 153 — Note 1

(1) Bailee is liable, if he does any act with regard to the goods bailed which causes loss to the bailor. AIR 1931 Oudh 15 (16) = 5 Luck 220 (DB).

154. Liability of bailee making unauthorised use of goods bailed.—If the bailee makes any use of the goods bailed, which is not according to the conditions of the bailment, he is liable to make compensation to the bailor for any damage arising to the goods from or during such use of them.

Illustrations

(a) A lends a horse to B for his own riding only. B allows C, a member of his family, to ride the horse. C rides with care, but the horse accidentally falls and is injured. B is liable to make compensation to A for the injury done to the horse.

(b) A hires a horse in Calcutta from B expressly to march to Benares. A rides with due care, but marches to Cuttack instead. The horse accidentally falls and is injured. A is liable to make compensation to B for the injury to the horse.

155. Effect of mixture, with bailor's consent, of his goods with bailee's.—If the bailee, with the consent of the bailor, mixes the goods of the bailor with his own goods, the bailor and the bailee shall have an interest, in proportion to their respective shares, in the mixture thus produced.

156. Effect of mixture without bailor's consent, when the goods can be separated.—If the bailee, without the consent of the bailor, mixes the goods of the bailor with his own goods, and the goods can be separated or divided, the property in the goods remains in the parties respectively; but the bailee is bound to bear the expense of separation or division, and any damage arising from the mixture.

Illustration

A bails 100 bales of cotton marked with a particular mark to B. B, without A's consent, mixes the 100 bales with other bales of his own, bearing a different mark: A is entitled to have his 100 bales returned, and B is bound to bear all the expenses incurred in the separation of the bales, and any other incidental damage.

157. Effect of mixture, without bailor's consent, when the goods cannot be separated.—If the bailee, without the consent of the bailor, mixes the goods of the bailor with his own goods, in such a manner that it is impossible to separate the goods bailed from the other goods and deliver them back, the bailor is entitled to be compensated by the bailee for the loss of the goods.*

Illustration

A bails a barrel of Cape flour worth Rs. 45 to B. B, without A's consent, mixes the flour with country flour of his own, worth only Rs. 25 a barrel. B must compensate A for the loss of his flour.

[*] See Section 155 supra.

158. Repayment, by bailor, of necessary expenses.—Where, by the conditions of the bailment, the goods are to be kept or to be carried, or to have work done upon them by the bailee for the bailor, and the bailee is to receive no remunera-

Section 154 — Note 1

(1) Purchaser of car, under hire-purchase system, is in the position of a bailee when he has not paid all the instalments. AIR 1933 Bom 465 (467) = 58 Bom 189.

(2) Where a car has been entrusted to the defendant as a bailee and the evidence establishes that he was using the car for his private purposes in contravention of his agreement with the plaintiff, the bailor, he is liable for the damage arising from such use. (1934) 35 Pun LR 705 (707, 708) (DB).

(3) On the death of a bailee, his estate is responsible for the loss. AIR 1931 Oudh 15 (16) = 5 Luck 220 (DB).

Section 157 — Note 1

(1) Where the bailor finds that the goods had been tampered with by the bailee and some of his goods are missing from the stock he is justified in refusing to accept them in toto. He is not bound to accept even a part of his goods as offered by the bailee. The option is his and if he exercises it the bailee is bound to compensate him for the loss or damage to his goods. (1961) 3 OJD 227 (233, 234) = (1961) 27 Cut LT 340 (DB).

Section 158 — Note 1

(1) A person entrusted with the property attached before judgment is no doubt entitled under Section 158, Contract Act, to get the expenses incurred by him in maintaining and guarding the pro-

tion, the bailor shall repay to the bailee the necessary* expenses incurred by him for the purpose of the bailment.

[*] See Section 70 supra.

159. Restoration of goods lent gratuitously.—The lender of a thing for use may at any time require its return, if the loan was gratuitous, even though he lent it for a specified time or purpose. But, if, on the faith of such loan made for a specified time or purpose, the borrower has acted in such a manner that the return of the thing lent before the time agreed upon would cause him loss exceeding the benefit actually derived by him from the loan, the lender must, if he compels the return, indemnify the borrower for the amount in which the loss so occasioned exceeds the benefit so derived.

160. Return of goods bailed on expiration of time or accomplishment of purpose.—It is the duty of the bailee to return, or deliver according to the bailor's directions, the goods bailed, without demand, as soon as the time for which they were bailed has expired, or the purpose for which they were bailed has been accomplished.*

[*] See Ss. 24, 152 and 170.

Section 158 — Note 1 (contd.)

erty. But he must enforce his right by a separate suit only and not by an application made under Section 145, Civil P. C. Madh BLJ 1954 HCR 735 (736, 737).

SECTION 160 — SYNOPSIS

1. Scope.
2. Railways.
3. Liability of bailee.

1. Scope. — (1) In the very nature of the contract of bailment, the duty should normally be laid on the bailee to deliver back the goods bailed even if the purpose of bailment is not accomplished. AIR 1958 Ker 380 (383) = ILR (1957) Ker 542 (DB).

(2) The use of the words 'without demand' indicates that the directions referred to in the section are the directions before the purpose of the pledge has been accomplished. AIR 1922 Nag 127 (128).

(3) Section 160 does not contemplate direction by the pawnee's assignee but by the pawnor himself about the delivery of the pawned property. AIR 1922 Nag 127 (128).

2. Railways. — (1) Railway Company is bound to deliver goods as per reasonable instructions of consignor, and also of consignee if latter's name appears on Railway receipt. AIR 1929 All 960 (960) = 52 All 126 (DB).

(2) Section 160 provides for the return of goods bailed not only to the bailor but also according to his directions. Therefore, a consignee, who is not the owner but to whom the goods are consigned for sale on commission basis, is entitled to maintain the suit against Railways for damage caused to the goods in transit. AIR 1956 All 338 (341) = ILR (1956) 1 All 526 (FB).

[But see AIR 1966 Guj 6 (14) = (1964) 5 Guj LR 879 (DB).]

(3) Consignment at railway risk — In absence of proof of damages due to

accident or vis major railway is liable to pay damages to the bailor. AIR 1962 Pat 384 (390) = 1962 BLJR 480 (DB).

(4) Liability of railway as bailee is as that of an ordinary man of prudence under Sections 151, 152, 160 and 161 of the Contract Act — In judging question of amount of care, note must be taken of means and opportunities available to railway administration for safeguarding interests of consignee. AIR 1963 Raj 162 (168, 169, 170) = 1963 Raj LW 135 (DB). (Duty to compare Railway Receipt with Junction or Through Invoice before effecting delivery is involved in taking reasonable and proper care of goods entrusted for transport — Traffic Manual of B. B. and C. I. Railway, Chap. XI, Booking of Goods Traffic Rules 32, 45 — Prevailing practice or mischance of documents having been sent to Accounts Officer earlier is no answer to claim on misdelivery.)

(5) From the mere omission of Section 160 of the Contract Act in Section 72 (1) of the Railways Act it cannot be inferred that it is not the duty of the railway administration to return or deliver the goods consigned. The obligation to return or deliver the goods is implicit in Section 72, Railways Act read with Section 161, Contract Act. AIR 1953 Punj 184 (185) (FB).

(6) A case of non-delivery of goods is a case of breach of duty which is laid upon a railway as a bailee by Section 160 of the Contract Act, which is not one of the sections mentioned by Section 72, Railways Act, and hence the railway in such a case cannot even limit its liability by a special agreement. AIR 1928 Lah 774 (777) = 10 Lah 360 (DB).

[See however AIR 1931 Nag 29 (31) = 27 Nag LR 230. (Railway can by agreement only limit its responsibility for the goods delivered for carriage. It cannot completely repudiate its responsibility.)]

(7) The railway carrier's duty to deliver the goods is subject to their right to

*161. Bailee's responsibility when goods are not duly returned.—If, by the default of the bailee, the goods are not returned, delivered or tendered at the proper time, he is responsible to the bailor for any loss, destruction or deterioration of the goods from that time.†

[°] Section 161 has been declared to apply to the responsibility of the Trustees of the Port of Madras as to goods in their possession—see the Madras Port Trust Act, 1905 (Mad. Act 2 of 1905). See also Bombay Port Trust Act (Bom. Act 6 of 1879); Calcutta Port Act (Beng. Act 3 of 1890); Cochin Port Trust Act (Mad. Act 8 of 1925) and Tuticorin Port Trust Act (Mad. Act 2 of 1924); Major Port Trusts Act, 1963 (38 of 1963), S. 43(1)(ii) for similar provisions.

[†] As to railway contracts, see the Indian Railways Act, 1890 (9 of 1890), S. 72.

Section 160 — Note 2 (contd.)

retain goods until they receive due remuneration for services they have rendered in respect of them. During all that period the liability to take care of the goods continues on them. AIR 1957 Madh Pra 192 (194).

(8) There is nothing in the bailment sections of the Contract Act, which lay any obligation on the bailor to take delivery from the bailee when he offers it. Normally, as the property in the goods entrusted to a carrier remains with the owner, he is bound to take delivery, even if they are damaged, his remedy being to claim compensation; nor can he cast upon the bailee responsibility for further custody as a bailee without payment of shortage or demurrage dues. But no hard and fast rule can be laid down in this respect; each case has to be decided on its own facts. AIR 1953 Mad 217 (218) = ILR (1953) Mad 916 (DB).

(9) Consignee is liable for demurrage if he unjustifiably refuses to take delivery. But that liability ceases from the date of notice that goods will be sold by the company if delivery is not taken. AIR 1918 Cal 824 (826) (DB).

3. Liability of bailee.—(1) In the case of a bailee for hire, there is implied warranty, of fitness of goods. In case of breach of warranty, there is no liability to pay hire. Bailee can leave the article where it is and give notice to bailor that there has been a breach of the warranty. AIR 1921 Bom 191 (191) = 45 Bom 1017 (DB).

(2) Where the company has deposited with Government, as security, in respect of ware-house, Government promissory note the Government is liable to return note without demand after termination of license as bailee. AIR 1939 Cal 746 (748) = ILR (1939) 2 Cal 52 = 41 Cri L Jour 134.

(3) It is unreasonable for person, who borrowed ornaments for use in ceremony to detain them after ceremony, and after the owner has demanded their return. AIR 1930 Oudh 395 (396) = 6 Luck 80 (DB).

(4) A bailee becomes liable for conversion when he refuses to redeliver the goods even upon a mere demand of the bailor. But before any such liability can

arise it is essential that there should be a contract of bailment as between the plaintiff and the defendant himself which must be alleged and proved by the plaintiff. Where the plaintiff's allegations amount at the most only to a bailment as between the defendant and a third party there is no case upon which the plaintiff could succeed against the defendant. ILR (1951) 1 Cal 443 (468, 469).

[See also AIR 1960 J & K 141 (143, 144) (DB). (Held, on facts that the Trade Agent at Amritsar merely made arrangements for the transport of the goods of the traders to Srinagar and was looking after their interests under the instructions from the Jammu and Kashmir Government and that there was no contractual relationship of a bailor and bailee between him and the traders. There was, therefore, no obligation on him to re-deliver the goods.)]

(5) It is a rule in equity that if a creditor holding security sues for his debt, he is under an obligation on payment of the debt to hand over the security; and if having improperly made away with the security, he is unable to return it, to his debtor, he cannot have judgment for the debt.

This principle would not be applicable to securities like fixed deposit accounts with a Banking Company after liquidation. The rule will not apply to a case where the security is a debt due by the bank for which debt the bank's creditor would, by reason of the liquidation, have no cause of action against the bank. AIR 1959 Cal 746 (748, 749) = (1960) 30 Com Cas 473 (DB).

(6) In an action in detinue against an ordinary bailee it is good defence if he establishes that he had discharged the only duty which the law imposed on him, viz., to take reasonable care of the goods. ILR (1951) 1 Cal 443 (470).

(7) Bailee having parted with the goods bailed with the consent of the bailor cannot claim it back — No suit for recovery of such goods is maintainable. AIR 1917 Pat 129 (131) = 19 Cri L Jour 220.

SECTION 161 — SYNOPSIS

1. "By the default of the bailee".
2. "Goods not returned" etc. — Effect of.

Section 161 — Synopsis (contd.)

3. Remedy of the bailor.
4. Assessment of compensation.
5. Liability of Railway Company.
6. Liability of carrier by air.
7. Burden of proof.
8. Limitation.

1. "By the default of the bailee". —

(1) Payment of port charges before date fixed for sale — Sale by Commissioners — Suit for compensation : Held that as the sale took place owing to default of Commissioners under Section 161, Contract Act, Commissioners were responsible for the value of goods. AIR 1931 Rang 95 (96).

(2) Section 161 has to be read subject to Sections 160 and 173 and therefore, the default referred to in the section can arise only when the time for which the goods had been bailed has expired or the purpose for which they had been bailed has been accomplished. Therefore, in the case of a pledge which admittedly has no time-limit the default cannot arise until the debt is paid off or a proper tender of payment is made by the debtor. 1949 Bur LR (HC) 605 (613). (Since the rule of law is that the debtor must find his creditor the failure of the pawnee to intimate the debtor any change of his place would not amount to a default of a bailee within the purview of Section 161 read with Sections 160 and 173.)

2. "Goods not returned" etc. — Effect of.

(1) Section 161 lays down the common law rule that a bailee who retains goods after the period for which it has been bailed does so at his own risk and is liable for the loss, destruction or deterioration of the goods whether or not he was at fault. AIR 1937 Mad 411 (415) (DB) ** AIR 1924 Cal 1056 (1057) (DB). (The substance of the rule enunciated by Sections 160 and 161 is what should be familiar to the students of archaic English law, namely, that trespass lies where the bailee has destroyed the bailed property or lost it, while where the bailee has been guilty of conversion of the bailed goods either by a user of it in a different manner or for a different purpose from that agreed upon or by failure to redeliver it or to deliver it over in accordance with the terms of the contract, the bailor may sue him in trover.)

(2) A bailee who wrongfully detains the goods of the bailor after the expiry of the period of bailment must answer for the loss or deterioration of the goods. 35 Pun LR 705 (708, 709) (DB) ** 1961 MPLJ 1282 = ILR (1960) Madh Pra 293 (297) (DB). (He cannot escape the liability by stating that goods were destroyed by fire.)

(3) Where the bailee sub-bails the goods with the authority of the bailor the sub-bailee becomes the bailee of the

bailor himself and responsible to him under Section 161 for any loss, destruction or deterioration of the goods. ('57) ILR (1957) Punj 1 (15).

(4) Under Section 161 the bailor is entitled to the loss, destruction or deterioration of the goods but not to any consequential damages. ('55) Madh BLJ 1955 HCR 400 (405).

[See also ILR (1960) Madh Pra 293 (297) = 1961 MPLJ 1282 (DB). (The plaintiff was not entitled to any interest on the price of the cloth.)]

(5) "Deterioration" would also include the fall in value due to the fluctuations in price. AIR 1930 All 132 (134) = 52 All 238 (DB).

(6) Proper time in Section 161, Contract Act is not the same thing as reasonable time. AIR 1959 Andh Pra 84 (86) = (1959) 1 Andh WR 55.

3. Remedy of the bailor. — (1) There is in every case of bailment or pledge an implied contract for the return of the goods on demand and a refusal to return the goods is also unlawful. Therefore, an action could lie against the bailee in contract as well as in tort. AIR 1919 All 102 (103) = 41 All 643 (DB).

(2) A bailee unlawfully or negligently losing or parting with the property can be sued at the option of the bailor for wrongful conversion or in detinue. If the suit is for wrongful conversion judgment is given for the recovery of damages for the conversion. If the suit is in detinue judgment is given for the delivery of the chattel or for payment of its value and damages for detention. AIR 1958 SC 274 (278, 280) = 1958 SCR 781.

(3) Executor of deceased bailee is personally liable, if he refuses to return goods on due date. AIR 1916 Low Bur 93 (94) (DB).

(4) On bailee's death, his estate is liable for loss caused to bailor, his heir being constructive trustee — Section 161 is not exhaustive. AIR 1931 Oudh 15 (16) = 5 Luck 220 (DB).

(5) Master of ship landing goods and leaving them in charge of Port Trust — Legal effect — The port trust must be deemed to be the agent for the consignee — Liability of Port Trust in respect of goods is that of a bailee under Sections 151, 152 and 161 of the Contract Act. AIR 1959 Mad 367 (368) = (1959) 1 Mad LJ 149.

(6) The position of the port commissioner in respect of goods landed and remain in his possession or under his control is that of a bailee — His act of delivery or non-delivery of goods is an act done in official capacity — If a case is filed against him for damages for short delivery beyond three months from the date of cause of action, the provisions of Section 142, Calcutta Port Act

Section 161 — Note 3 (contd.)

(1890) will be attracted and the suit will be barred. 1964 Cal LJ 56 (62) (SB).

(7) Consignor sending original way-bill through bank for acceptance and payment by draft — No valid pledge in favour of bank held created — Condition in way-bill that delivery of goods will be made on production of way-bill only — Carrier delivering goods to consignor himself in breach of condition — **Held**, assuming that the carrier was liable to the Bank his liability only extended to the value of the goods actually entrusted for carriage by the consignor to the carriers. The claim could not be for the amount advanced by the Bank to the Consignor on several drafts. AIR 1968 Mys 133 (139) = (1967) 1 Mys LJ 490 (DB).

4. Assessment of compensation. — (1) In an action for damages, full value of the chattels, at the time of the conversion, is the measure of damages. Bailor is not, however, entitled to more damages than value of goods, if he delays filing suit. AIR 1916 Low Bur 93 (94) (DB).

(2) The compensation awarded to a bailor under Section 161 is in the nature of damages awarded to compensate the loss of the goods to him. The Courts would not allow in addition interest on that amount because to do so would be to award damages upon damages which the Courts would generally never do. Madh BLJ 1955 HCR 400 (406).

(3) In an action in detinue against the hirer of a machine hiring charges per day are not the proper basis for estimating the loss of the owner during the period of detention where owing to the break-down of the machine the hirer himself has not been using it. In such a case even if the parties have agreed to pay such charges by way of penalty the Court would refuse to give effect to it and estimate the loss on the basis of a percentage on capital as representing a fair return on the investment by the owner. AIR 1958 Ker 380 (384) = ILR (1957) Ker 542 (DB).

(4) Court can draw presumption as regards value against pledgee, not producing property in his possession, or improperly disposed of by him. AIR 1930 Mad 364 (368) (DB).

(5) Bailee refusing to return goods at proper time — Suit for recovery of articles or its value maintainable — Value is the market value — If no market value their cost of replacement; if no market for replacement then the price offered by the buyer — When the articles has no saleable value parties should be restored to their original position. AIR 1966 Mad 184 (187) = (1966) 1 Mad LJ 154 (DB).

5. Liability of Railway Company. — (1) In the absence of a risk note or any thing to show a special agreement the

ordinary rule applicable to a bailee would apply also to the railway and under Section 72, Railways Act, its liability would be governed by Section 161 of the Contract Act. AIR 1922 All 63 (64).

(2) The maximum liability of a railway as a carrier of goods is as defined under S. 72 Railways Act the liability of a bailee under Sections 151, 152 and 161 of the Contract Act. That liability can however be restricted by a contract between the parties. ILR (1951) 2 Cal 340 (342) ** AIR 1969 Bom 401 (405, 406) (DB).

(3) The railway is bound to take such care of the goods which is enjoined on a bailee by Section 151 even during the period contemplated by Sections 160 and 161. It is only then that it can escape the liability for loss, destruction or deterioration of the goods under Section 152. AIR 1957 Madh Pra 192 (194) ** AIR 1963 Raj 162 (170) = 1963 Raj LW 135 (DB). (Railway not only not taking proper care but acting negligently — Railway is liable for loss.) ** AIR 1961 Madh Pra 251 (256) = 1961 MPLJ 484 (DB). (No negligence by Railway — Railway not liable.) ** AIR 1961 Mad 398 (400) = (1961) 1 Mad LJ 348.

(4) Railway Administration cannot impose conditions to absolve them from responsibility as carrier without regard to standard of care required of them by statute. (1968) 2 Andh LT 269.

(5) A railway company which expresses its readiness to deliver the goods consigned only if an unjust or unreasonable condition is complied with by the party commits a default within the meaning of Section 161. AIR 1931 Nag 29 (31) = 27 Nag LR 230.

(6) Party not entitled to claim open delivery from Railway Administration — Right of party is to take delivery and claim damages. AIR 1966 Madh Pra 52 (55) (DB).

(7) Under Section 161, Contract Act the railway in the absence of any special contract would be responsible for the loss to the party which arises due to the delay in the delivery of goods by the railway. AIR 1922 All 63 (64) ** AIR 1963 Orissa 68 (70) = ILR (1962) Cut 690 ** AIR 1959 Andh Pra 84 (86) = (1959) 1 Andh WR 55. (Railway is liable — Burden proving proper care as required by Section 151 of the Contract Act was upon Railway.)

(8) Railway carrier — Misconduct — Delay in delivery of consignment — Fall in market price as a result of price control — Consignee not entitled to compensation — Loss is too remote and indirect. AIR 1960 Madh Pra 289 (291) = 1960 MPLJ 1397 (DB).

(9) Where because of the deviation from the ordinary route of transit the railway has lost its protection under the

Section 161 — Note 5 (contd.)

risk notes its liability in regard to the goods consigned for transit has to be determined treating it as an ordinary bailee. Therefore, the railway which as an ordinary bailee should under Section 161 deliver the goods in proper time cannot be considered to have done so when it delivers due to the deviation much later than it could have if it had despatched the goods by the normal route. AIR 1927 Pat 354 (1) (354) (DB).

(10) If the goods continue to be with the railway only because of the failure of the consignor's representative to take delivery, the railway will cease to be liable as a bailee under the contract of carriage. AIR 1955 Cal 264 (266, 267) (DB).

(11) Where consignee refuses to take delivery, liability of railway for loss or damage as bailee remains. But consignee is liable to compensate the railway for necessary expenses. AIR 1948 Nag 65 (66, 67) = ILR (1947) Nag 335.

(12) Refusal by Railway authority to re-weigh goods — Consignee refusing to take delivery — Railway not liable for loss or damage — Rule 118 made under Indian Railways Act is discretionary. (1968) 70 Bom LR 254 = 1968 Mah LJ 539.

(13) Ownership of goods passes by the endorsement of a railway receipt to the endorsee and the endorsee is not only entitled to take delivery of the goods but is also entitled to sue the railway for non-delivery of the consignment. ILR (1953) Punj 579 (582). (AIR 1947 Bom 169, Dissented from.)

(14) An endorsee of a railway receipt, where the endorsement was made not to transfer the property in the goods to him but only to depute him as an agent of consignor to take delivery and hold the goods on behalf of the consignor, has no right to sue to recover from the railway the value of any goods lost, destroyed or deteriorated. AIR 1954 All 747 (749) (DB).

(15) Scope of Railways Act (1890), Section 72 (prior to amendment in 1961) — Suit against Railway — Right to maintain — Consignor alone competent — Bare consignee having railway receipt — Not competent — In view of Sec. 72 of Railway Act which refers to Sec. 161, Contract Act, in event of damage caused to goods the railway is responsible only to consignor. AIR 1962 Guj 266 (268).

(16) Goods consigned from Quetta in Pakistan to New Delhi in India — Goods carried by Pakistan Railway and Indian Railway — No treaty between two countries regarding liability for loss of goods in case of through traffic — Suit by consignee for compensation for non-delivery at New Delhi against Dominion of India — Liability of Forwarding Railway, under implied contract of bail-

ment was that of a bailee under Sections 151, 152 and 161 of the Contract Act and in the absence of risk note the Forwarding Railway would be liable if it did not observe the standard of diligence required of an average prudent man. AIR 1960 SC 233 (238) = (1960) 2 SCR 75 ** ILR (1959) Cal 450 (455).

6. Liability of carrier by air. — (1) Air Lines Corporation as common carrier agreeing to carry goods from Bombay to Calcutta by air — Carrier Company under the Contract not to be liable for loss even at Company's fault or negligence of staff — Suit for damages to goods — Held, under the contract the carrier company was not liable. AIR 1962 Cal 290 (294) = (1961) 65 Cal WN 949 (958) (DB).

(2) Carriage by Air — Inland air consignment note — Clause exempting carrier from liability in case of damage, loss, pilferage or detention — 'Loss' means loss to carrier and not to consignor or consignee — Claim for compensation for non-delivery — Held, there would be no exemption under the clause if there was proof of misconduct — Bailee had statutory liability under Contract Act. AIR 1959 Cal 755 (757) = ILR (1960) 1 Cal 701.

7. Burden of proof. — (1) It is incumbent upon the bailor who under law is entitled to the return of the goods or value thereof to prove what that value was. Where he adduces no evidence on the point it cannot be assumed on his mere allegation that the goods were of the best quality and assessed as such. The rule to be followed in such a case is to assess the value of the goods on the assumption that it was of the cheapest quality. (1947) 52 Mys HCR 166 (171).

(2) The moment the default of the bailee is established, and the responsibility falls to be determined by S. 161, the burden shifts on to him to prove that the loss, for which he is sought to be made responsible, by the bailor occurred prior to the commencement of default on his part. AIR 1932 All 584 (585).

(3) Suit by consignee against Railway company as bailee for loss of goods — Article 30, Limitation Act applies — The burden is upon the Railway company who seek to non-suit the plaintiff on the ground of limitation to establish that the loss occurred beyond one year from the date of the suit. AIR 1960 SC 233 (239) = (1960) 2 SCR 75.

(4) Loss of goods by bailee — Burden of proving proper care as required is on the bailee. AIR 1959 Andh Pra 84 (86) = (1959) 1 Andh WR 55.

(5) Goods accepted for carriage — Proof of care taken by it — Mere fact

162. Termination of gratuitous bailment by death.—A gratuitous bailment is terminated by the death either of the bailor* or of the bailee.

[*] But if there are joint bailors or joint bailees, S. 42 would seem to apply.

163. Bailor entitled to increase or profit from goods bailed.—In the absence of any contract to the contrary, the bailee is bound to deliver to the bailor, or according to his directions, any increase or profit which may have accrued from the goods bailed.

Illustration

A leaves a cow in the custody of B to be taken care of. The cow has a calf. B is bound to deliver the calf as well as the cow to A.

164. Bailor's responsibility to bailee.—The bailor is responsible to the bailee for any loss which the bailee may sustain by reason that the bailor was not entitled to make the bailment, or to receive back the goods or to give directions, respecting them.

165. Bailment by several joint owners.—If several joint owners of goods bail them, the bailee may deliver them back to, or according to the directions of, one joint owner without the consent of all, in the absence of any agreement to the contrary.

166. Bailee not responsible on re-delivery to bailor without title.—If the bailor has no title to the goods, and the bailee, in good faith, delivers them back to, or according to the directions of, the bailor, the bailee is not responsible to the owner in respect of such delivery.*

[*] See the Indian Evidence Act, 1872 (1 of 1872), S. 117.

Section 161 — Note 7 (contd.)

that rain water entered the wagon and caused damage, held would not fix liability on Railways. AIR 1970 Madh Pra 55 (59, 60) = 1969 MPLJ 737 (DB).

(6) Board taking charge of goods under Sections 39 and 40, Madras Port Trust Act (2 of 1905) — Its responsibility is that of bailee under Sections 151, 152 and 161 — Damage to goods, prima facie evidence of bailee's negligence — Bailee to disprove it. AIR 1970 Mad 48 (55) (DB).

8. Limitation. — (1) Article 145 of the Limitation Act (1908) governs suits for recovering deposit from an involuntary bailee. Fact of possession with bailee becoming wrongful, after demand is made, does not make Art. 49 applicable. AIR 1921 Cal 416 (419).

(2) Suit for return of goods is one for recovery of specific movable property — Article 49, Limitation Act (1908) applies — Possession becomes unlawful on failure or refusal to return the goods on demand. 1967 All WR (HC) 262 (263) = 1967 All LJ 934 ** AIR 1960 Madh Pra 175 (177) = 1960 MPLJ 429.

(3) Goods carried on by Pakistan Railway and Indian Railway — No treaty between two countries regarding liability for loss of goods in case of through traffic — Suit by consignee for compensation for non-delivery at New Delhi against Dominion of India — Liability of the forwarding Railway under implied contract of bailment was that of bailee under Sections 151, 152 and 161 of the

Contract Act — Article 30 Limitation Act (1908) applies. AIR 1960 SC 233 (234) = (1960) 2 SCR 75.

Section 162 — Note 1

(1) The object of Section 162 is simply to bring out the general principle of law on the surface that the heir of a bailee, when the bailment is gratuitous, does not occupy on the death of such bailee the character of a bailee. The section does not do away with the principle of law that such an heir occupies the character of a constructive trustee in regard to the subject-matter of the bailment. AIR 1931 Oudh 15 (16) = 5 Luck 220 (DB).

[But see AIR 1921 Cal 416 (418).]

Section 163 — Note 1

(1) Old shares in a company pledged — New shares issued to share-holders out of dividend — Pledgee must deliver the new shares also as "increase or profit." AIR 1925 PC 86 (89) = 52 Ind App 187 = 49 Bom 283.

Section 165 — Note 1

(1) Rule as to validity of delivery by bailee to one of joint bailors is not general rule of Law of Contracts. (1910) 20 Mad LJ 709 (715) (DB).

Section 166 — Note 1

(1) Pledgee of goods, who without notice of plaintiff's title, delivered them to pledgor, in good faith, is not guilty of conversion. (1913) 37 Bom 122 (136, 137, 138) = 40 Ind App 1 (PC) ** AIR 1923 Bom 155 (160) (DB). (Pledgee delivering according to directions of pledgor.)

167. Right of third person claiming goods bailed.—If a person, other than the bailor, claims goods bailed, he may apply to the Court to stop the delivery of the goods to the bailor, and to decide the title to the goods.

168. Right of finder of goods; may sue for specific reward offered.—The finder of goods has no right to sue the owner for compensation for trouble and expense voluntarily incurred by him to preserve the goods and to find out the owner; but he may retain the goods against the owner until he receives such compensation; and, where the owner has offered a specific reward for the return of goods lost, the finder may sue for such reward, and may retain the goods until he receives it.

169. When finder of thing commonly on sale may sell it.—When a thing which is commonly the subject of sale is lost, if the owner cannot with reasonable diligence be found, or if he refuses, upon demand, to pay the lawful charges of the finder, the finder may sell it—

- (1) when the thing is in danger of perishing or of losing the greater part of its value, or,
- (2) when the lawful charges of the finder, in respect of the thing found, amount to two-thirds of its value.

170. Bailee's particular lien.—Where the bailee has, in accordance with the purpose of the bailment, rendered any service involving the exercise of labour or skill in respect of the goods bailed, he has, in the absence of a contract to the contrary, a right to retain such goods until he receives due remuneration for the services he has rendered in respect of them.

Illustrations

(a) A delivers a rough diamond to B, a jeweller, to be cut and polished, which is accordingly done. B is entitled to retain the stone till he is paid for the services he has rendered.

(b) A gives cloth to B, a tailor, to make into a coat. B promises A to deliver the coat as soon as it is finished, and to give a three months' credit for the price. B is not entitled to retain the coat until he is paid.

Section 166 — Note 1 (contd.)

** AIR 1959 Andh Pra 331 (332, 333) = (1959) 1 Andh WR 105 (DB).

(2) When a bailee delivered goods bailed to him to the original bailor when he had notice of the sale by the original bailor, to another person, and with knowledge that he was going to sell it to a third party, the bailee is guilty of conversion, and liable for damages. AIR 1940 Rang 249 (250) = 1940 Rang LR 361.

(3) When Railway deliver goods in absence of receipt to a person who, in their opinion is entitled thereto, they cannot have immunity from claim of rightful owner. AIR 1959 Andh Pra 331 (332, 333) = (1959) 1 Andh WR 105 (DB).

Section 168 — Note 1

(1) Principle of salvage lien applies to India — Person making payment for his own benefit, to save his property or under personal covenant binding on him — Principle does not apply. AIR 1941 Mad 208 (216) (DB).

(2) The section has no application to person in whose possession the goods (385) = 10 Luck 104. (Seller, having

Government officers. 1948 Bur LR (HC) 159 (163) (DB).

Section 170 — Note 1

(1) Where there is an express contract, it must be performed in its entirety, and nothing can be claimed under it. So when a person agreed to repair an organ for a certain sum he cannot retain the organ, for remuneration of part of work done, when he refuses to repair it for any reason. (1884) 6 All 139 (141) (DB) ** AIR 1926 Cal 464 (464, 465) = 53 Cal 174 = 26 Cri LJ 1505 (DB). (A person who is entrusted to repair article is not entitled to claim lien, after doing a certain amount of work which makes no improvement thereupon.)

(2) When under one contract goods are delivered at recurring periods, and in different consignments, the bailee has a lien on all the goods for charges in respect of any goods comprised in the contract. (1882) 8 Cal 312 (316, 317).

(3) For application of the section, custody of goods must involve exercise of labour or skill. 1885 Pun Re. No. 60, p. 126 (127) (DB) ** AIR 1934 Oudh 380 come after being already in custody of

171. General lien of bankers, factors, wharfingers, attorneys and policy-brokers.—Bankers, factors, wharfingers, attorneys of a High Court and policy-brokers may, in the absence of a contract to the contrary, retain as a security for a general balance of account, any goods bailed to them; but no other persons have a right to retain, as a security for such balance, goods bailed to them, unless there is an express contract to that effect.*

[*] As to lien of an agent, see S. 221. As to lien of a Railway Administration, see the Indian Railways Act, 1890 (9 of 1890), S. 55.

Section 170 — Note 1 (contd.)

goods sold for unpaid price, does not come under Section 170.)

(4) A bailee who has been entrusted with cattle for grazing has, in absence of contract to the contrary, no right of his own accord to sell the cattle for recovery of his grazing dues. AIR 1940 Nag 273 (274).

(5) The lien will not be available only if there is a contract to the contrary, i.e., a contract that goods will be returned without waiting for remuneration and a contract merely fixing remuneration is not such contract to the contrary. ILR (1968) 1 Ker 639 (642).

(6) The holder of a lien is a secured creditor. He may rest on his security and not prove it. ILR (1968) 1 Ker 639 (643).

SECTION 171 — SYNOPSIS

1. Scope.
2. Banker's lien.
3. Factor's claim.
4. Wharfinger's lien.
5. Attorney's lien.
6. Agent's lien.

1. Scope. — (1) In the absence of any provisions in the Contract Act, English law, in the matter of liens, can be applied in India, on grounds of justice, equity and good conscience. AIR 1946 Nag 114 (116, 117) = ILR (1946) Nag 210.

(2) Lien is a right of defence, and not right of action and therefore there is no bar of limitation. AIR 1946 Nag 114 (115) = ILR (1946) Nag 210.

(3) In the absence of contract to contrary, bailee cannot sell goods pledged and if he sells he loses his lien. AIR 1930 Sind 36 (39) = 24 Sind LR 268.

(4) General lien confers on lien-holder the right to retain the goods until payment is made but it does not carry with it the right of sale to secure the debt or indemnity. It is merely a right to retain goods or chattel, and does not create right as in favour of a pledgee. AIR 1927 Lah 408 (410) = 8 Lah 373 (DB).

2. Banker's lien. — (1) Banker's lien can properly arise only over things which belong to the customer but which are held by the bank as security. If a thing is in the possession of the bank but the ownership is not in the customer then no right of lien can be exercised by the bank. AIR 1945 Mad 447 (449) = ILR (1946) Mad 200 ** AIR 1960 Punj 632

(636) = ILR (1960) 2 Punj 823 (DB). (A bank has no lien upon the deposit of a partnership for a balance due by one of the partners.)

(2) Where a banker has advanced money to another, he has a lien on all securities which come into his hands for the amount of his general balance, unless there is an express contract or circumstance to the contrary. AIR 1956 Punj 118 (119, 120) = ILR (1956) Punj 291 (DB). (Money is also a species of goods over which the banker can exercise his lien.) ** AIR 1955 Punj 250 (251). (Defect in title of the customer or equities in favour of third parties cannot vitiate banker's lien over securities in his possession provided he had acted honestly without notice of the defect.) ** AIR 1960 Punj 1 (2, 3) = 61 Pun LR 842 (DB).

(3) In the case of goods deposited or securities placed in the custody of a bank the ownership of them continues to be in the customer. AIR 1956 Mad 570 (573).

(4) A banker can look to his general lien as a protection against loss on account, overdraft or on loan. Money is a species of goods over which lien may be exercised. AIR 1956 Punj 118 (119, 120) = ILR (1956) Punj 291 (DB).

(5) Banker's lien covers all moneys of a particular customer, except those held in trust account. Profits placed in old overdraft account by Administrator-General through mutual error, did not give bank lien thereon, as Administrator-General acted in fiduciary character, and right to liquidate old overdraft was *pari passu* with general body of creditors. AIR 1934 Rang 66 (70, 71) = 12 Rang 25.

(6) The lien of a bank over the money of its customer does not extend to amounts which have been handed over to and accepted by it for a specified purpose by the customer. AIR 1926 Sind 225 (225) = 21 Sind LR 385 (DB). (Money paid in for transmission — Bank can have no lien on it even if the payee is the customer himself.)

(7) There is a distinction between a Banker's lien and the Bank's right to set off. A lien is confined to securities and property in Bank's custody. Set off is in relation to money and may arise from a contract or from mercantile usage or by operation of law. AIR 1960 Punj 632 (635) = ILR (1960) 2 Punj 823 (DB).

Section 171 — Note 2 (contd.)

(8) Where money is placed in a bank as fixed deposit the ownership of the money passes to the bank and therefore the bank which is itself the owner of the money cannot exercise any lien over the money under Section 171. AIR 1956 Mad 570 (573) ** AIR 1946 Nag 114 (115) = ILR (1946) Nag 210. (Money paid into bank to be credited in the current account of the customer does not constitute a case of bailment so as to attract the provisions of Section 171.)

(9) A bank may not be able to exercise any right of lien over the money deposited by the customer inasmuch as it itself becomes the owner of the money deposited but still it has the right to adjust such amounts against any debt due to it from the customer. The purpose of the lien in such cases is attained by the application of the principle of set-off. AIR 1945 Mad 447 (449, 450) = ILR (1946) Mad 200 ** AIR 1956 Mad 570 (573) ** AIR 1965 Mad 266 (277, 278) = (1965) 2 Com LJ 37. (Whether the right of the bank is called a lien or set-off the said right can be exercised only by the bank by setting the funds deposited in its branch by the customer transferred to it with the consent of the customer. It is not open to the customer to call upon the bank to exercise any such lien or set-off.)

(10) Under the English law where a customer having two accounts with a bank owes to the bank on one of them, the bank can claim a lien on the other account and liquidate the debt due to it by transferring monies therefrom. This provision is equally applicable in India where there is no specific provision governing the question. AIR 1946 Nag 114 (116, 117) = ILR (1946) Nag 210 ** AIR 1955 Punj 250 (251).

(11) Banker's right to set off extinguishes after the money in his hand has been validly assigned, or, in any case, after he has been notified of the fact that there has been an assignment. AIR 1956 Mad 570 (574).

(12) General lien held by bank does not entitle it to appropriate the fixed deposit in "either or survivor's" account towards the debt due by one of them alone. AIR 1928 Lah 316 (316) (DB).

(13) The lien contemplated under the section in favour of bank does not confer on the banker any right to bring the property to sale. It is simply a possessory lien. AIR 1955 Bom 419 (428).

(14) The banker's lien is subject to any contract to the contrary, and the existence of such a contract must be proved by one alleging it. (1896) 19 Mad 234 (236) (DB).

(15) The rights of a creditor, who accommodates the customers by storing goods, for the purchase of which he has advanced money, are higher than those

of an ordinary bailee, and he has a general lien under Section 171 of the Act, in so far that, in the former case, there is an implication, that the security shall, if necessary, be made effectual to discharge the obligation. AIR 1930 Lah 576 (577, 578) = 11 Lah 678 (DB) ** AIR 1927 Lah 408 (410) = 8 Lah 373 (DB) ** AIR 1920 Mad 664 (665) = 43 Mad 747 (DB). (Nathukottai Chetties who operate as Indian bankers in South India are entitled to exercise banker's lien under Section 171.)

3. Factor's claim. — (1) Factor is an agent entrusted with goods to be sold for principal. AIR 1926 Oudh 202 (202, 203) = 1 Luck 133 = 27 Cri LJ 328 ** AIR 1915 Mad 1001 (1003) (FB).

(2) A factor who besides selling the goods on behalf of his principal has also been advancing money to the principal on account is entitled to bring a suit for the balance due within the period of limitation prescribed by Article 85 of the Limitation Act. Article 88 of that Act has no application to the case. AIR 1915 Mad 1001 (1003) (FB).

(3) A factor who has advanced money against goods cannot sell these goods without owner's consent. But he can sue for the refund of the advance even before the goods are sold and in spite of the agreement for refunding the money advanced only from the proceeds of the sale. AIR 1920 Mad 183 (183) (DB).

(4) There is no rule of law giving a lien to the banian as against his employee nor is there any custom to that effect. (1891) 18 Cal 573 (597) = 18 Ind App 78 (PC).

(5) Secretaries and treasurers of company, who have made advances to the Company, and incurred expenses, and made disbursements on behalf of the company in the conduct of its business, are not "bankers factors . . . etc." and are not entitled to any lien on the property of the company in their possession. (1889) 13 Bom 314 (320, 321, 322).

4. Wharfinger's lien. — (1) Owners of a screwhouse who have a wharf as an accessory are not wharfingers. No general lien in their favour is created under the section. (1882) 8 Cal 312 (315).

5. Attorney's lien. — (1) Section 171 has not the effect of depriving attorneys of the passive or retaining lien which they possessed prior to the passing of the Contract Act. AIR 1934 Cal 341 (344) = 60 Cal 1442.

(2) The lien for costs possessed by an attorney over the property recovered by him is not a floating charge but only in the nature of a possessory security. Therefore in view of its very limited nature Courts have in order to protect the attorney from being deprived of the lien by any collusive arrangement between his client and the opposite party

Bailments of Pledges

172. "Pledge", "pawnor", and "pawnee" defined.—The bailment of goods as security for payment of a debt or performance of a promise is called "pledge". The bailor is in this case called the "pawnor". The bailee is called the "pawnee".

Section 171 — Note 5 (contd.)

been passing either a charging order or a payment order for preventing the opposite party from entering into any such arrangement with the client. AIR 1949 Cal 505 (507, 508) = ILR (1945) 1 Cal 430 (DB).

[See also ILR (1950) 1 Cal 96 (101). (Attorney's costs — Charging order on property recovered, even when such property is immoveable property, can be made.)]

(3) Attorney has lien for his charges upon documents, moveables, etc., coming into his hands unless it comes for specific purpose inconsistent with right of retainer. AIR 1921 Cal 67 (68) = 48 Cal 817.

(4) Orders made for enforcing or protecting the solicitor's lien are in the nature of an equitable interference by the Court. Hence, the solicitor has to act promptly and interpose his lien before the successful party by whom he was engaged can receive any payment under the decree. AIR 1959 Bom 162 (169) = 60 Bom LR 999.

(5) In India the lien which a solicitor possesses for his fees arises either under the law of England in places to which it was applied and which was not abrogated by any legislation or under the Contract Act or rules of High Court. AIR 1956 Hyd 65 (75) = ILR (1956) Hyd 79 (FB).

(6) The rule at common law that a solicitor is entitled to a lien for his costs on property recovered or preserved by his exertion has always been applied by Courts in India as well. (10) 34 Bom 484 (485). (Partnership assets in the hand of receiver appointed in partnership suit — Solicitors appearing in suit entitled to claim prior charge over creditors on the property.) ** AIR 1952 Him Pra 11 (13, 14). (Deposit made on application of party himself without any aid or exertion of solicitor — Solicitor cannot exercise any lien and retain the deposit towards his fees.)

(7) Solicitor who is discharged by his client has lien on papers entrusted to him, for his costs. The lien extends also to translations of documents made by Court translator at his expense. (1880) 4 Bom 353 (356).

(8) Mere order for costs fastens notice of solicitor's lien on third party. AIR 1927 Bom 542 (549) = 51 Bom 855 (DB).

(9) Section 73 of Civil P. C. has no application to solicitor's lien as they are not the attaching creditors. AIR 1927 Bom 542 (551) = 51 Bom 855 (DB).

(10) The principles which govern the solicitors in the matter of their lien on

property recovered or preserved by their exertion applies also to pleaders in India as they not only plead but also act as the solicitors do in England on behalf of their clients. AIR 1952 Him Pra 11 (14).

(11) Barrister, on behalf of his client, paid into Court large sum in satisfaction of decree under protest, stating that owing to mistake in decree more money was deposited. In execution of another decree, this sum was attached while being deposited in Court. The Barrister claimed lien over portion of sum deposited. Held, that the Barrister had no lien against the sum under Sections 171, 217 and 221. Rule of solicitor's equitable lien in England did not apply to case, Barrister having obtained no decree in favour of his client and there being no fruits to obtain lien on. As Barrister had parted with possession of money without making any reference to his lien for fees, amount of fees could not be regarded as having been paid in under protest. AIR 1914 Low Bur 224 (224, 225) = 8 Low Bur Rul 70 (DB).

(12) A legal practitioner cannot claim under this section any lien for general balances. AIR 1952 Him Pra 11 (14).

6. Agent's lien. — (1) As to agent's lien on principal's property, see S. 221.

SECTION 172 — SYNOPSIS

1. Pledge.
2. Mortgage and pledge.
3. Delivery of possession.
4. Hypothecation.
5. Priority.
6. Rights of pawnee.
7. Suit to redeem pledge.

1. Pledge. — (1) To constitute a valid pledge there must be (a) a contract in relation to an identified chattel to be delivered to the pledgee as security, (b) actual delivery of possession of the identified chattel in pursuance of the contract. AIR 1955 Mad 505 (509) (DB).

(2) A pledge is the delivery of goods by the pledgor to pledgee by way of security upon a contract that they shall when the debt is paid or the promise is performed, be returned or otherwise disposed of according to the direction of the pledgor. AIR 1964 Andh Pra 201 (202, 203) = (1963) 1 Andh WR 394.

(3) Profits that would accrue from immovable property cannot be pledged, as pledge can be of movable property or goods, and such profits are neither movable property nor goods. AIR 1939 Lah 15 (16) (DB).

(4) In the absence of uniform and definite usage regarding the issue of way bills and their transfer on endorsement

Section 172 — Note 1 (contd.)

as equivalent to pledge of goods the waybill cannot be treated as a document of title and the owner of goods cannot pledge the goods covered by the waybills unless the carriers are properly notified of the transfer and they agree to hold the goods as bailee for the pledgee i.e. the Bank. AIR 1968 Mys 133 (137) = (1967) 1 Mys LJ 490. (Bailment and pledge — Way bill issued by public carrier — Consignor sending original way bill through Bank for acceptance and payment of draft — No intimation to the carrier — No valid pledge in favour of Bank created.)

(5) A pledge is lost upon re-delivery of the pawn to the pawner unless the re-delivery be for a specified purpose — But even if the re-delivery be for a specified purpose, a bona fide purchaser of the property from the pawner in possession would be protected, but the pawner would in such a case be liable in conversion. AIR 1959 J and K 67 (69).

(6) The three transactions, namely, (1) the advancing of loan by the Bank, (2) the execution of the promissory note by the Firm and (3) the endorsement of the railway receipt in favour of the Bank together forming one transaction— Such a transaction was a pledge of goods covered by the railway receipt. AIR 1965 SC 1954 (1961) = (1965) 3 SCR 254. (AIR 1916 PC 7 and AIR 1934 PC 246, Rel. on.)

(7) If documents like insurance policies, bonds, promissory notes and scrips can form the subject matter of pledge, there is no reason for holding that a Savings Bank Book cannot validly be pledged. A Savings Bank Book falls within the definition of goods. The pledge of a Savings Bank Book must be held at least to stand on the same footing as pledge of a scrip unaccompanied by blank transfer. AIR 1959 J and K 67 (69).

(8) Per Tek Chand, J.:—The Contract Act of 1872 applies to all contracts in India and with regard to pawns and pledge it is a codification of the English common law. AIR 1960 Punj 98 (108) = ILR (1959) Punj 1990. (AIR 1947 Bom 217, Rel. on.)

(9) English law on pawning does not apply in India. In India pawn can be taken in though time is not fixed for repayment of loan on account of which goods are deposited as security. (1907) 6 Cri LJ 118 (119, 120) (Low Bur).

2. Mortgage and pledge.— (1) A 'pledge' or "pawn" as defined in Section 172 lies midway between a loan and a mortgage, which wholly passes the property in the thing conveyed. AIR 1918 Cal 947 (949) (DB) ** AIR 1954 Madh B 6 (7).

(2) There can be a pledge of shares in India, and there can also be a mortgage of shares. Whether it is one or the other will depend on the intention of parties

and the circumstances of each case. AIR 1956 Pat 32 (37) = 34 Pat 8 ** AIR 1960 Andh Pra 273 (277) = (1960) 1 Andh WR 234 (DB).

(3) A pledge is something between a simple lien and a mortgage. In the case of a lien there is no transfer of any interest. In the case of a mortgage, mortgagee has an absolute interest in the property subject to a right of redemption. But in the case of a pledge, the pledgee has only a special property in the pledge, while the general property therein remains in the pledgor. AIR 1959 J and K 67 (69).

(4) A pledge differs from a mortgage of movable property in important respects. A pledgee holds possession of the property for the purpose of securing to himself the advance which he had made. He has no right of foreclosure since he never had the absolute ownership at law. The pledgee has no property in the pawn but has merely a right to sell. AIR 1954 Madh B 6 (7) ** AIR 1952 Madh B 196 (198) = ILR (1952) Madh B 136 (DB) ** AIR 1964 Andh Pra 201 (205) = (1963) 1 Andh WR 394. (Loan secured on basis of transfer of shares of limited company without transfer of ownership — Transaction held a pledge and not a mortgage of movables.) ** AIR 1960 Andh Pra 273 (277) = (1960) 1 Andh WR 234 (DB).

(5) Whether a particular transaction is a mortgage of moveable property or a pledge can only be determined by reference to the intention of the parties and other surrounding circumstances. AIR 1960 Andh Pra 273 (277) = (1960) 1 Andh WR 234 (DB).

(6) Distinct right to redeem is inseparable incident of mortgage and cannot be taken away by express agreement — Pledge confers special interest in the property of right to sell if loan be not repaid. Pledgee has no right of foreclosure. In mortgage right to property is transferred to creditor. In pledge, the pledgee has no property in the pawn. Parties to pledge by special agreement can introduce a clause so that on failure to redeem within certain time pledged property is to vest in pledgee. AIR 1939 Rang 413 (415, 416).

(7) Where ornaments are delivered for the purpose that they should be held as security for repayment of loan, it is a transaction of pledge in which possession has been delivered without passing the ownership in the ornaments. It is not a transaction of mortgage of movables. AIR 1949 Nag 368 (370) = ILR (1949) Nag 243 ** (1957) 27 Com Cas 65 (68) (Punj). (Delivery of share scrips and blank transfer deeds to bank — Held pledge of shares.)

(8) A purchasing goods for B and advancing its price — B agreeing that goods would remain with A who was to be paid interest on the money advanced

Section 172 — Note 2 (contd.)

as also arhat charges — Further agreement that if goods were not disposed of by B by certain time A was entitled to sell the same and to appropriate the sale proceeds to his dues — Held that the arrangement constituted a pledge. AIR 1958 Pat 174 (176) (DB).

(9) Agreement in respect of film under production — Party obliging himself to pay amounts in a particular manner and in addition giving camera as security — Instrument held not a mortgage but a bond as well as a pledge. AIR 1970 Mad 10 (11) (SB).

3. Delivery of possession. — (1) To constitute a pledge there must be delivery to pledgee of goods and retention by him. AIR 1932 Cal 524 (528) = 59 Cal 667 (DB) ** AIR 1918 Cal 947 (949) (DB).

(2) In the case of pledge of goods delivery may not be simultaneous with money advanced. It may be actual or constructive. AIR 1932 Cal 524 (528) = 59 Cal 667 (DB) ** AIR 1968 Mad 319 (324) = (1968) 2 Mad LJ 1 (FB) ** 1964 Ker LJ 119 (120) = 1964 Ker LT 124. (Case of constructive possession.) ** AIR 1961 Mad 326 (328) = (1960) 2 Mad LJ 439 (DB). (To secure constructive possession, the essential test is whether the dominion over the goods pledged is retained and the physical possession by the pledgor is under the delegated authority of the pledgee or is independent.) ** AIR 1959 Madh Pra 309 (312) = 1960 MPLJ 725. (No actual or constructive delivery of the film to the plaintiff — There was no pledge in favour of the plaintiff.)

(3) A transfer of title is not necessary to create a pledge. Simple delivery of possession is sufficient. AIR 1953 Cal 526 (527). (Pledge of shares.)

(4) A pledge in law is neither a mortgage nor a lien and does not pass property in the goods but only passes what is described as "special" property, that is, no title to the goods passes but the pledgee is allowed to retain the thing pledged till payment of the debt and in default of payment, to sell the thing pledged so as to pass the property to the vendee. AIR 1941 Mad 394 (395, 396, 397) = ILR (1941) Mad 419. (Reversed on another point in AIR 1943 Mad 74.)

(5) When a person delivers a share certificate to another to be held by him as security there is under the law of India a valid pledge which he can enforce. AIR 1943 Mad 74 (77) = ILR (1943) Mad 115 (DB). (AIR 1941 Mad 394, Reversed.)

[But see AIR 1918 Cal 947 (949) (DB). (A mere deposit of Government securities cannot constitute a valid pledge.)]

(6) Creditor advancing money for purchase of goods, and storing them in his godowns — It is quite likely that goods

are security for advances, but such arrangement has to be proved. AIR 1928 PC 219 (220, 221).

4. Hypothecation. — (1) Apart from pledge and mortgage of immovable property mortgage of moveable property is also a recognised form of hypothecation. Such hypothecation, not accompanied by possession confers a good title upon the person in whose favour it is made and the law recognises the transaction as security and equity gives effect to it. AIR 1964 Andh Pra 201 (203) = (1963) 1 Andh WR 394 ** AIR 1966 Cal 405 (408).

(2) In the absence of fraud, there is no inherent illegality, immorality, or opposition to public policy in the non-possessory hypothecation of movables, and, therefore, a contract for such a hypothecation is a valid contract. It is a transaction which is customary throughout the country and is suited to the circumstances and business intercourse of the people. (1911) 7 Nag LR 72 (77).

(3) The method provided by S. 172 for the hypothecation of loose chattels is not the only method for creating security thereon. They may be hypothecated without transferring their possession. In such cases the only question is whether there was an intention to create a security. If so equity gives effect to it. AIR 1918 Cal 165 (166) (DB).

(4) In pledge the possession of the thing is actually delivered to the person for whose benefit the pledge is made. In hypothecation the thing pledged remains with the debtor. AIR 1960 Punj 42 (43) = 61 Pun LR 527 (DB).

(5) In a hypothecation the possession over the property is retained by the owner. It is only certain rights in that movable property that are transferred to the creditor. When the goods themselves are handed over to the creditor by way of security it becomes a pledge. AIR 1958 All 864 (865) (DB) ** AIR 1969 Mys 280 (284).

(6) Hypothecation of not only movables existing on the premises at the time, but also in respect of movables which might be subsequently acquired and brought there is valid. AIR 1933 Cal 154 (159) = 59 Cal 1372 (DB).

(7) When there was a mortgage of certain shop goods then lying on the premises, and the mortgagor undertook to keep on the premises stock to the extent of the debt replacing sold goods by new goods it is not a mere license but an equitable mortgage of the substituted goods, and there is complete assignment of after-acquired property. (1912) 6 Sind LR 97 (99, 100).

(8) The distinction between a hypothecation and a hire purchase agreement is that while the former is the species of

Section 172 — Note 4 (contd.)

a pledge where possession is transferred from the pawner to the pawnee, a hire purchase is a bailment with an option to purchase. It will be wrong to assimilate it to a hypothecation of movable property. AIR 1960 Mad 328 (330, 331).

(9) Hire purchase agreements are movable properties, and are also to be regarded as title deeds. Where a party delivers such agreement to his creditor and specifically declares that the creditor as a pledgee can retain the properties with a lien against the repayment of the debt the transaction is to be treated as an agreement to pledge moveable property. AIR 1966 Mad 177 (179) = (1966) 1 Mad LJ 6 (FB).

5. Priority. — (1) Equity governs hypothecation. Accordingly, where the question is as to the priority between two instruments of hypothecation, the ordinary rule of *qui prior est tempore potior est jure* must prevail. (1936) 40 Cal WN 625 (626).

(2) A company had a lien over shares of a member. The member pledged his shares with a third person and then entered into an agreement with the Company whereby he incurred debt. It was held that the lien of the company had a priority over the pledge of the third person. AIR 1953 Cal 526 (529).

(3) Simple mortgage of movables with power of sale — Possession not delivered — Subsequent pledge in favour of another party — Pledge valid and takes priority. AIR 1932 Cal 524 (531) = 59 Cal 667 (DB).

(4) A subsequent incumbrancer, who has got possession of hypothecated movables is entitled to priority over a prior incumbrancer, without possession, unless the prior incumbrancer proves that the subsequent incumbrancer had notice. AIR 1931 Rang 201 (201) = 9 Rang 182 (DB).

(5) A bona fide incumbrancer, without notice, who is in possession of movable property, is to be preferred to an incumbrancer whose security is of prior date. AIR 1914 Low Bur 265 (265) = 7 Low Bur Rul 336 (DB).

(6) Pledge in favour of bank 'A' — Pledgor retaining possession on behalf of 'A' bank — Subsequent pledge in favour of bank 'B' who had notice of pledge in favour of bank 'A' — Bank 'A' is entitled to priority over bank B. 1964 Ker LJ 119 (121) = 1964 Ker LT 124.

(7) Subsequent pledgee without notice of prior pledge — No priority in favour of subsequent pledgee upon rule of estoppel. AIR 1961 Mad 326 (330) = (1960) 2 Mad LJ 489 (DB).

6. Rights of pawnee. — (1) Rights of a person in whose favour a hypothecation is made of a chattel are limited strictly to actual chattel hypothecated and do not extend beyond that. So when some animals are the subject of hypothe-

cation, the young ones born, when under pledge with the pledgee, are not subject to hypothecation. AIR 1914 Lah 515 (516, 517) = 1915 Pun Re No. 10.

(2) The pledgee does not have the right of ownership. He has only the rights of possession but not that of enjoyment. A pledgee has a right of disposition which is limited to disposition of pledgee rights only and of a sale only after notice and subject to certain limitation. AIR 1964 Andh Pra 201 (203) = (1963) 1 Andh WR 394 ** AIR 1969 Delhi 313 (315) (DB).

(2-a) Where a pledge is created by delivery of share certificates the pledgee does not get a right to any dividends declared thereon unless his name is registered in the share register of the company. A bailment by way of a pledge would only clothe the creditor with rights secured under Section 176 of Contract Act. AIR 1964 Cal 470 (472) (DB).

(3) To show that a person is a pawn broker, it must be proved that he carries on the business of lending money, on the security of goods pledged to him, and that he holds himself out to lend money on such security and is in the habit of doing so. (1907) 6 Cri LJ 118 (120) (Low Bur).

(4) Where securities have been delivered with a view to cover the repayment of any overdraft by the pledgor Bank to the pledgee Bank and it is agreed that they are to be disposed of on the arising of a stipulated contingency only, then by the very fact of the delivery of the securities to the bailee the latter becomes a trustee in terms of the contract, not for all purposes, but only for the limited purpose indicated by the agreement. The pledgor in such a case only transfers his possession of the property to the pledgee who has a special interest in the property of enforcing his charge for payment of an overdraft, if any, whereas the property continues to be owned by the pledgor. If there is no overdraft, the pledgor Bank can ask for a return of securities at any time. And the securities having continued to be the property of the pledgor Bank, the pledgee Bank or its Managing Director has no right to deal with them. AIR 1956 SC 575 (582) = 1956 SCR 483 = 1956 Cri LJ 1116.

(5) A pledgee of a Savings Bank Book can effectively enforce the pledge by laying a proper action on it in a court of law although there may be some difficulty in his effectively exercising right of sale under S. 176, Contract Act as in the case of other tangible goods. AIR 1959 J and K 67 (69).

(6) Pledge of goods — Possession with the pledgee — Pledgee cannot maintain a suit for recovery of debt as well as retain the pledged property.

173. Pawnee's right of retainer.—The pawnee may retain the goods pledged not only for payment of the debt or the performance of the promise, but for the interest of the debt, and all necessary expenses incurred by him in respect of the possession or for the preservation of the goods pledged.

174. Pawnee not to retain for debt or promise other than that for which goods pledged. Presumption in case of subsequent advances.—The pawnee shall not, in the absence of a contract to that effect, retain the goods pledged for any debt or promise other than the debt or promise for which they are pledged; but such contract, in the absence of anything to the contrary, shall be presumed in regard to subsequent advances made by the pawnee.

175. Pawnee's right as to extraordinary expenses incurred.—The pawnee is entitled to receive from the pawnor extraordinary expenses incurred by him for the preservation of the goods pledged.*

[*] See S. 173 supra, for lien as to ordinary expenses.

176. Pawnee's right where pawnor makes default.—If the pawnor makes default in payment of the debt, or performance, at the stipulated time, of the promise, in respect of which the goods were pledged, the pawnee may bring a suit against the pawnor upon the debt or promise, and retain the goods pledged as a collateral security; or he may sell the thing pledged, on giving the pawnor reasonable notice of the sale.

If the proceeds of such sale are less than the amount due in respect of the debt or promise, the pawnor is still liable to pay the balance. If the proceeds of the sale are greater than the amount so due, the pawnee shall pay over the surplus to the pawnor.

Section 172 — Note 6 (contd.)

AIR 1967 SC 1322 (1326) = (1967) 2 SCR 233.

7. Suit to redeem pledge. — (1) A suit for redemption of pledged articles is not a suit for specific performance of the contract. Jurisdiction of Small Cause Court to hear such a suit is not barred. AIR 1959 Madh Pra 97 (99) = 1959 MPLJ 57 (DB) ** AIR 1962 Manipur 1 (2).

Section 173 — Note 1

(1) Section 173, Section 160 and Section 161 have to be read together, where there is no time limit to the bailments, the goods have to be returned by the bailee after the bailor pays the rent, and as a general rule it is the bailor who has to find the bailee. Unless there is a stipulation in the contract that the bailee should not leave the place where the goods were bailed without intimation to the bailor the failure by the bailee to give such intimation would not be a default of the bailee by which the goods were not returned or delivered or tendered at the proper time within the purview of Section 161 read with Sections 173 and 160. 1949 Bur LR (HC) 605 (617, 618).

(2) Pledgee in possession of goods pledged — Cannot maintain a suit for recovery of debt as well as retain the property. AIR 1967 SC 1322 (1326) = (1967) 2 SCR 233.

Section 174 — Note 1

(1) Pledge and subsequent advance raise a presumption that there is a con-

tract to hold the pledge for such advances. Where the later advance is separately secured such presumption does not arise. AIR 1928 Bom 507 (508) (DB).

SECTION 176 — SYNOPSIS

1. Scope.
2. Pawnee's right to sue.
3. Right to sell.
4. Notice of sale.
5. Para (2).
6. Limitation.

1. Scope.— (1) The rights and duties of a pledgor and a pledgee are set out clearly in Sections 176 and 177. These sections were designed to prevent any clog in the way of redemption and they cannot override these statutory provisions by mutual agreement. 1948 Bur LR (HC) 182 (185) ** AIR 1962 Manipur 1 (2).

(2) The rights of a pledgee are to sue for the moneys due while retaining the pledged articles as collateral security or to sell the articles after due notice to the pledgor. 1948 Bur LR (HC) 182 (185) ** AIR 1969 Delhi 313 (315) (DB). (Pawnee has no right to the accretions to the goods pledged in absence of contract to the contrary.) ** AIR 1969 Mys 280 (287) ** AIR 1963 Cal 132 (134) = 67 Cal WN 58 (DB) ** 1961 Jab LJ 475 (476).

(3) Rights of pledgee to sue on debt or sell pledged property are concurrent. AIR 1918 Cal 947 (949) (DB) ** AIR 1929 Bom 471 (474) = 53 Bom 819 **

Section 176 — Note 1 (contd.)

(1904) 27 Mad 528 (530) (FB) ** (1895) 22 Cal 21 (23, 24) (DB).

[But see AIR 1932 Cal 524 (532) = 59 Cal 667 (DB).]

(4) If the pawnee loses the goods pawned without default on his part, he may still recover the debt, and the loss falls on the owner. 1949 Bur LR (HC) 623 (623, 624) (DB).

(5) Section 176 and Section 177 apply equally to cases where a time for the payment of the debt has been fixed in the original agreement of hypothecation and to cases where no such time is stipulated. AIR 1958 Cal 644 (648) (DB).

(6) Section 176 by defining the personal rights of the pledgee does not in any way cut down his rights to seek any remedy he may have through Courts. AIR 1945 All 299 (302) = ILR (1945) All 373 (DB) ** AIR 1966 Andh Pra 163 (166) = (1965) 2 Andh WR 518 (DB).

2. Pawnee's right to sue. — (1) Section 176 gives, a clear right to the pawnee to institute a suit independently of the pawn. AIR 1918 Cal 947 (949) (DB).

(2) Neither absence of power to sell the goods, nor to recover the debt out of the sale proceeds bars the pawnee from suing for the debt under the contract of loan. AIR 1927 Nag 346 (347).

(3) Where a pawnee brings a suit for declaration of his right to sell the article pledged for satisfaction of his claim, the suit is one to enforce his charge upon the said article. (1895) 22 Cal 21 (23, 24) (DB) ** AIR 1929 Bom 471 (475) = 53 Bom 819.

(4) Principle, that creditor cannot recover debt for which security is given, when he cannot return it, applies when the debtor and person giving security are same. AIR 1939 Mad 915 (916).

(5) Creditor having security for debt — Security dissipated — Creditor cannot sue to recover debt — Official Assignee of the insolvent creditor is in the same position. AIR 1935 Rang 201 (202).

(6) A suit on a pledge is an administration suit. It is a suit to ascertain, and declare and to give effect to respective rights of persons having interest in specified property by the Court in its administrative jurisdiction. AIR 1945 All 299 (302) = ILR (1945) All 373 (DB).

(7) Right of pawnee to sell the goods pledged — Pawnee's duty to inform pawner when the purchaser raises a dispute regarding quality of goods — First sale being good and not annulled, the pawnee cannot resell under Section 176. AIR 1969 Pat 385 (393, 394) (DB).

(8) Pledgee cannot maintain suit for recovery of debt as well as retain pledged property. AIR 1967 SC 1322 (1325, 1326) = (1967) 2 SCR 233 ** 1962 All LJ 324 (329) (DB). (He cannot deny the pledge and still claim his money.)

3. Right to sell. — (1) The right of the pawnee to sue upon the debt or promise does not exclude or destroy his right to sell the pawn. The pawnee's rights to sue upon the debt or the promise or to sell the pawn are concurrent and not alternative rights. AIR 1963 Cal 132 (134) = 67 Cal WN 58 (DB) ** AIR 1929 Bom 471 (474) = 53 Bom 819 ** ILR (1904) 27 Mad 528 (530) (FB) ** ILR (1895) 22 Cal 21 (23, 24) (DB) [But see AIR 1932 Cal 524 (532) = 59 Cal 667 (DB).]

(2) Sale in Section 176 means the intended sale and not the sale that has been actually arranged by the pawnee. AIR 1958 Cal 644 (649) (DB).

(3) Word 'the' before word 'sale' in Sec. 176 does not mean actual sale because legislature in that event could have used the word 'actual' also in Section 176 as in Section 177. The word 'the' has got no special significance. It only refers to a sale. AIR 1963 Cal 132 (136) = 67 Cal WN 58 (DB).

(4) The provisions of the section are not, like other sections in the Act, subject to "contract to the contrary." Terms of the instrument of pledge giving an unqualified power of sale to the pledgee would be inconsistent with provisions of Section 176 and must, therefore, by virtue of Section 1 give place to the express provision of the Act. AIR 1947 Bom 217 (227, 231) = ILR (1948) Bom 1 (DB).

(5) The power of sale conferred on the pawnee is expressly for his benefit and he can exercise his discretion in favour of sale or otherwise. The mere fact that the pawnee gave a notice that he would sell the goods cannot possibly be a compelling factor for sale to be affected. AIR 1958 Punj 222 (227) = ILR (1958) Punj 1178 (DB) ** AIR 1937 Bom 26 (27).

(6) A pledgee has no right of foreclosure and cannot sell the articles till the expiration of reasonable notice to the pledgor. 1948 Bur LR (HC) 182 (187) ** AIR 1944 Pat 135 (136) = 45 Cri L Jour 633 ** AIR 1917 Lah 421 (423) (DB).

(7) A pawnee who has given a reasonable notice of sale under Section 176 can sell at any time and is not bound to sell within a reasonable time after the expiry of the period mentioned in the notice. AIR 1956 Punj 155 (156) (DB) ** AIR 1950 Trav Co 66 (70) = 1950 Trav Co LR 289 (FB) ** AIR 1958 Punj 222 (227) (DB) ** AIR 1951 Nag 264 (265) = ILR (1950) Nag 556. (Such a duty upon the pawnee cannot be implied.) ** AIR 1928 Mad

Section 176 — Note 3 (contd.)

1022 (1024) ** AIR 1960 Punj 98 (103, 104) = ILR (1959) Punj 1990 (DB). (Where on receiving notice under Section 176, the pledgor by letter seeks delay of the sale the fact that the pledgee does not immediately reply to the letter in itself is no evidence that the pledgee has withdrawn the notice to sell or has given up his right to sell, for the pledgee is not bound to sell immediately or even to reply to the pledgor's suggestion for delaying the sale.)

(8) Where the pawnor asks the pawnee to postpone the sale, he cannot afterwards turn round and say that the sale was delayed. AIR 1950 Trav Co 66 (71) = 1950 Trav Co LR 289 (FB).

(9) Where no period was fixed for the repayment of the loan in order to enforce the right of sale the pawnee should prove: (a) a demand for the amount due; (b) a default by the pawnor; (c) a notice of sale giving reasonable time to the pawnor to pay; and (d) an actual sale. AIR 1927 Lah 408 (410) = 8 Lah 373 (DB).

(10) Rights of creditor, accommodating customer by storing goods, for purchase of which he has advanced money, are higher than those of ordinary bailee. Such creditor is in a position of a pledgee and can resell goods stored by him. AIR 1930 Lah 576 (578) = 11 Lah 678 (DB).

(11) In case of an unauthorised sale by a pledgee the relief that the pledgor can seek is to file a suit for redemption by depositing the money, treating the sale as if it had never taken place, or where the suit for redemption is not filed, to ask for damages on the foot of conversion. AIR 1960 Andh Pra 273 (282) = 1960 Andh LT 66 (DB) ** AIR 1955 Pat 288 (290) = 1954 BLJR 240 (DB).

(12) The remedy of pawnor for an improper sale of pawned property is damages. Measure of damages is loss actually sustained. AIR 1937 Bom 26 (27).

(13) In case of sale on default by pledgor, pledgee has to indemnify pawnor for price of goods not accounted for compensation to be calculated at rate prevailing in market, on which remaining goods were sold. 1961 Jab LJ 475 (476).

(14) Sale by pledgee to himself is void, and amounts to conversion. AIR 1944 Pat 135 (137) = 45 Cri L Jour 633 ** AIR 1930 Mad 364 (371) (DB). (Pledgor can recover damages or the property on payment.) ** (1892) 19 Cal 322 (333, 334) = 19 Ind App 60 (PC). (Damages can be recovered by pledgor — Pledgee can resell the goods to third party.)

[But see AIR 1962 Punj 321 (323) = 64 Pun LR 500.]

(15) The abandonment of the right of sale cannot be implied, merely from the fact that the lawyer's notice issued on behalf of the pawnee long after the notice of sale makes no reference to the pawnee's right of sale but only to a suit in a Court of law to recover the amounts due. AIR 1950 Trav-Co 66 (70) = 1950 Trav-Co LR 289 (FB).

(16) Mere suit by pledgor for declaration that sale of shares by pledgee was contrary to law and did not affect his right of redemption claiming therein relief of injunction against company for restraining it from registering shares in name of purchaser is not maintainable. AIR 1960 Andh Pra 273 (282) = 1960 Andh LT 66 (DB).

(17) Sales of pledged goods by banks and return of balance to assessee — Sale by banks is not as agents of assessee but as pawnee. (1968) 21 STC 184 (185) (Mad) (DB).

(18) On default by the promisor a pledgee has right to sell the pledged thing for any amount that may be due but he cannot forfeit the pledged object. (1968) 2 Mad LJ 359 = 81 Mad LW 407 (410).

4. Notice of sale. — (1) A pledgee's power of sale under Section 176 is conditional on the notice being given to the pawnor. AIR 1950 FC 21 (28) = 1949 FCR 441 ** AIR 1966 All 134 (135) = 1965 All LJ 919. (Such notice must be clear and specific in its language and must indicate the intention of the pawnee to dispose of the security.)

(2) Notice is not necessary to make the debt due and recoverable. Notice is necessary only before the goods are sold. AIR 1933 Lah 536 (536).

(3) The provisions of the section relating to a "reasonable notice of the sale" are mandatory and supersede any contract to the contrary. AIR 1958 Cal 644 (649) (DB) ** AIR 1958 Pat 174 (176) (DB) ** AIR 1955 Pat 288 (290) (DB) ** ILR (1954) 1 Cal 220 (232) (DB) ** 1948 Bur LR (HC) 830 (836) (DB) ** AIR 1932 Cal 524 (532) = 59 Cal 667 (DB) ** AIR 1917 Lah 421 (423) (DB) ** AIR 1960 Andh Pra 273 (277, 278, 279) = 1960 Andh LT 66 (DB). (An agreement by pawnor to waive right of notice is inconsistent with provisions of Section 176.)

(4) Whether a time has been stipulated or not for the redemption of the pledged articles reasonable notice must be given to the pledgor before the sale. 1948 Bur LR (HC) 182 (186).

(5) The notice must refer to the debt for which the pledged goods are to be sold. AIR 1937 Bom 26 (27).

(6) The expression 'he may sell the thing pledged on giving reasonable notice of the sale' in Section 176 only

Section 176 — Note 4 (contd.)

means an intimation of the intention to sell and not that a sale should be arranged before hand and due notice of all details given to the pawnor. AIR 1950 Trav-Co 66 (68) = 1950 Trav-Co LR 289 (FB) ** AIR 1958 Cal 644 (649) (DB) ** AIR 1963 Cal 132 (134, 135, 136) = 67 Cal WN 58 (DB).

(7) A notice that 'failing which we shall arrange for the sale of hypothecated stock' is merely an intimation that arrangements will be made for a sale not a notice of the sale that is to be held. A notice as contemplated by law requires more definite particulars and what such particulars should be must depend upon the peculiar facts of each case. AIR 1955 Pat 288 (290) (DB)

[See however AIR 1960 Punj 98 (102) = ILR (1959) Punj 1990 (DB). (Notice stating that in case of default pledgor was going to send its representative to place where goods pledged were to sell them at market price — Notice is notice of actual sale and not only intimation of arrangement to sell.)]

(8) The reasonable notice of the sale under Section 176 does not require specification of the date, time and place of the sale. AIR 1958 Cal 644 (649) (DB) ** AIR 1950 Trav-Co 66 (69) = 1950 Trav-Co LR 289 (FB) ** AIR 1918 All 363 (364) = 40 All 322 (DB). (Fortnight's notice reasonable.) ** AIR 1963 Cal 132 (135) = 67 Cal WN 58 (DB). (Observation of Tek Chand J. in AIR 1960 Punj 98, Dissented from. The reasonableness of a notice varies from case to case. The special circumstances of some particular case may require that a reasonable notice of sale should give such particulars but onus is upon pawnor to establish that such special circumstances exist.) ** AIR 1960 Punj 98 (102, 103) = ILR (1959) Punj 1990 (DB). (Notice giving pawner six days for payment — Pawner knowing that pawnee had been pressing for clearance of account with it — Notice held not unreasonable — Fact that pledged goods were lying at distant place held irrelevant consideration in considering sufficiency of time.)

(9) Notice does not become invalid on failure to mention the specified amount payable. AIR 1943 Nag 162 (163, 164) = ILR (1943) Nag 234.

(10) No fresh notice is necessary for an adjourned sale. AIR 1932 Cal 524 (532) = 59 Cal 667 (DB).

(11) While a reasonable notice of the sale is a statutory requirement so far as the pawnor is concerned, there is no law which places a pawnor's guarantor in the same position as the pawnor himself with respect to notice.

AIR 1950 Trav-Co 66 (71, 72) = 1950 Trav-Co LR 289 (FB).

(12) Where a pledgee, before the sale of the pledged property which was shares, had consulted the pledgor who was agreeable to the transfer of the shares by the pledgee, the question of notice under Section 176 does not arise as the pledgor's consent to the proposed transfer is already obtained. AIR 1950 FC 21 (38) = 1949 FCR 441. (AIR 1947 Bom 217, Reversed.)

(13) Where no notice under Sec. 176 is given, the sale is invalid and cannot be upheld. AIR 1950 FC 21 (28) = 1949 FCR 441 ** AIR 1966 All 134 = 1965 All LJ 919. (Pawnee Bank authorised to sell securities pledged with it in case credit balance of pawnor fell below margin — Sale of securities without reasonable notice is not binding on pawnor.)

(14) If the goods are sold by the pawnee without a notice, they will be deemed to have been converted and an action for conversion of the same would lie against the pawnee. AIR 1958 Punj 222 (227) = ILR (1958) Punj 1178 ** 1948 Bur LR (HC) 830 (838, 839) (DB). (Pledgor is entitled to his property back or its full value minus the debt and the extraordinary expenses incurred by the pledgee for their preservation.)

(15) Deposit of jewels as collateral security for pronotes — Sale of jewels without proper notice — Suit on pronotes — Deduction of value of jewels on date of suit can be claimed. AIR 1933 Rang 76 (79) (DB).

(16) Notice under Section 176 cannot be implied. AIR 1966 All 134 (135) = 1965 All LJ 919.

(17) A notice which makes a demand for payment of the amount for which the goods are pledged and in default informs the pledgor that the pledgee would sell the goods is not rendered invalid by reason of the fact that it refers to another debt and demands payment thereof. AIR 1960 Punj 98 (101, 102) = ILR (1959) Punj 1990 (DB).

(18) Sale taking place about seven months after date of notice. No inference can be drawn that notice should be taken to have been withdrawn. AIR 1960 Punj 98 (103, 104) = ILR (1959) Punj 1990 (DB).

5. Para. (2).— (1) The words "such sale" in the last para. of Section 176 are significant and mean that no liability can be fastened on the pawnor for loss if any, if the pawnee does not exercise his right of sale according to Section 176. AIR 1956 Madh B 74 (75).

(2) Under Section 176, the pawnee has been given a right to sell the goods

177. Defaulting pawnor's right to redeem.—If a time is stipulated for the payment of the debt, or performance of the promise, for which the pledge is made, and the pawnor makes default in payment of the debt or performance of the promise at the stipulated time, he may redeem the goods pledged at any subsequent time before the actual sale of them;^o but he must, in that case, pay, in addition, any expenses which have arisen from his default.

[^o] For Limitation, see the Indian Limitation Act, 1963 (36 of 1963), Sch. Art. 70.

Section 176 — Note 5 (contd.)

pledged after giving a reasonable notice to the pawnor. But in case he does not himself sell the property but allows his creditor to sell it and if any loss is sustained the pawnor will not be held liable to pay the balance. AIR 1956 Madh B 74 (75).

(3) Goods of defendant company taken possession of by Bank allowing overdraft to defendant and sold — Proceeds of sale of goods being less than the amount due: Held, that the company was still liable to pay the balance. 1902 Pun Re No. 57, p. 209 (217) (DB).

6. Limitation.— (1) The period of limitation for a suit for the recovery of money secured by a pledge is three years from the date of the loan under Article 57. (1906) 30 Bom 218 (219) (DB) ** 1881 Pun Re (Civ) No. 116, page 269 (274) (FB).

(2) In a suit on pledge Article 57, Schedule II, Limitation Act, governs relief for a personal decree; Article 120 applies for the sale of pledged goods. (1895) 22 Cal 21 (24) (DB) ** (1904) 27 Mad 528 (530) (FB).

(3) Pledgee selling pledged property without pledgor's authority — Pledgee is guilty of unauthorized conversion — Pledgor is entitled to recover damages — Suit to recover damages is either governed by Article 145 or Article 115 of the Limitation Act — Article 36 has no application. AIR 1930 Mad 364 (371) (DB).

Section 177 — Note 1

(1) The rights and duties of pledgor and pledgee are set out in Sections 176 and 177 of the Act. The sections are designed to prevent any clog in the way of redemption and parties cannot override these statutory provisions by mutual agreement. 1948 Bur LR (HC) 182 (184).

(2) The provisions of the section are operative even though there is contract to the contrary. ILR (1954) 1 Cal 220 (231) (DB).

(3) Under the section pawnor has been given the right of redeeming the goods pledged, after notice and at any subsequent time before the actual sale of the goods. If no proper notice is given the pawnor cannot exercise his right of redemption. AIR 1955 Pat 288 (290) (DB).

(4) As an agreement to keep certain margin at a stipulated level in advances obtained by a constituent of a bank is a "promise" in respect of the goods pledged by him, within the meaning of Section 176 of the Act and "performance of the promise for which pledge is made" within the meaning of Section 177, application of Section 177 of the Act is attracted, even in case where entire debt is not sought to be realized. AIR 1958 Cal 644 (648, 649).

(5) Sections 176 and 177 apply equally to cases where a time for payment of the debt has been fixed in the original agreement and also to cases where no such time is stipulated. AIR 1958 Cal 644 (648, 649).

(6) Suit for redemption by pledgor without previous tender of money — Pledgee found willing to deliver property without suit — Suit should not be dismissed but pledgee should be awarded costs — But where it is found that tender of money would have been useless, say by the pledgee declaring his inability to hand over the property, the pledgor need not go through the useless ceremony of tender. AIR 1930 Mad 364 (370, 371) (DB).

(7) An action for redemption of a pledge on payment of whatever is due to the pledgee is maintainable even though the amount due was not previously tendered or paid. Such a conduct on the part of the pawnor may result in the payment of costs to the pledgee. (1949) 53 Mys HCR 73 (79) (DB).

(8) Where the pledgee sells pledged articles, without notice of sale to pawnor, the pledgee being guilty of unauthorized conversion, must pay the pawnor full value of the articles minus debt and also the extraordinary expenses incurred by him for preservation of the articles. 1948 Bur LR (HC) 830 (838) (DB).

(9) In case of unauthorised sale by pledgee, relief that pledgor can seek is to file a suit for redemption by depositing money, treating sale as if it had never taken place, or to ask for damages on foot of conversion. Mere suit for a declaration is incompetent. AIR 1960 Andh Pra 273 (282) = 1960 Andh LT 66 (DB).

(10) Right to redeem pledge can be lost by agreement. ILR (1955) 5 Raj 409 (411).

*[178. Pledge by mercantile agent.—Where a mercantile agent is, with the consent of the owner, in possession of goods or the document of title to goods, any pledge made by him, when acting in the ordinary course of business of a mercantile agent, shall be as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the pawnee acts in good faith and has not at the time of the pledge notice that the pawnor has not authority to pledge.

Explanation.—In this section, the expressions “mercantile agent” and “documents of title” shall have the meanings assigned to them in the Indian Sale of Goods Act, 1930.]

[*] Sections 178 and 178-A were substituted for the original S. 178, by the Indian Contract (Amendment) Act, 1930 (4 of 1930), S. 2.

Section 177 — Note 1 (contd.)

(11) A suit for redemption of pledged articles is not one for specific performance of contract but for delivery of specific goods. AIR 1959 Madh Pra 97 (99) = 1959 MPLJ 57 (DB).

(12) A pledge is complete when money is advanced to the pawnor and the goods pledged are delivered to the pawnee and the rights of the parties thereafter are governed by Sections 172 to 181 of Contract Act. AIR 1962 Mani 1 (2) ** AIR 1959 Madh Pra 97 (99) = 1959 MPLJ 57 (DB).

SECTION 178 — SYNOPSIS

1. Scope.
2. “Consent of the owner.”
3. Possession.
4. Goods.
5. Documents of title.
6. Pledge of documents of title.
7. “Expressly authorised.”
8. Proviso.

1. Scope.— (1) The section has been enacted in order to protect those persons who, in good faith, deal with persons whom they know to be mercantile agents, but the details of whose agency they are not and cannot be expected to be aware. AIR 1938 Rang 243 (244) = 39 Cri L Jour 784 ** AIR 1961 Mad 326 (330) = (1960) 2 Mad LJ 489 (DB). (Borrowers dealt with as owner — Section does not apply.)

(2) Even after the amendment of 1930, “regarding this section, the old rule that a person cannot give another a title,” higher than what he himself has, and which is subject to certain exceptions embodied in Sections 178 and 178-A continues to apply and the goods entrusted for safe custody cannot be the subject of valid pledge by the depositor. Section 178, which is confined to cases of mercantile agents only, does not apply to such case. AIR 1942 Mad 299 (300).

(3) Section 179 of the Act does not limit the scope of Section 178, but saves pledge to the extent of the pledgor's interest, notwithstanding the presence of invalidating conditions under Section 178. AIR 1917 Bom 152

(153) = 42 Bom 205 (DB). (Case before the amendment.)

2. “Consent of the owner.”— (1) It is immaterial in the case of a mercantile agent how the consent of the owner to the agent's possession was obtained. Consent, though secured by fraud, protects pledgee acting bona fide. AIR 1937 Rang 146 (147, 148) = 38 Cri L Jour 711 ** AIR 1934 Rang 198 (199) = 35 Cri L Jour 1375.

(2) Articles pledged with the pawn broker — Contravention of Sections 7 and 10 of the Madras Pawn Brokers Act (1943). The pledge is invalid and no relationship of pawnor and pawnee is created. Still the pawnee is entitled to safe custody of the article and cannot be taken away from him otherwise than under the provision of law. AIR 1966 Andh Pra 240 (248) = (1965) 1 An WR 233.

3. Possession.— (1) Possession required under the section is similar to that which is contemplated in Sec. 108 of the Act, that is to say, it must be juridical possession. AIR 1923 Rang 227 (229) = 1 Rang 199 (DB) ** AIR 1931 Lah 526 (526) = 12 Lah 304 = 32 Cri L Jour 960.

4. Goods.— (1) ‘Goods’ includes share certificates. AIR 1925 Bom 314 (317, 318) (DB) ** (1910) 12 Bom LR 870 (878, 879).

[But see AIR 1917 Cal 399 (401) (SB).]

5. Documents of title.— (1) Railway receipt is a document of title to goods within Section 178, Contract Act. AIR 1938 PC 52 (54) = 65 Ind App 75 = ILR (1938) Mad 360 = 32 Sind LR 313 ** AIR 1934 PC 246 (251) = 61 Ind App 416 = 58 Mad 181 ** AIR 1965 SC 1954 (1959) = (1965) 3 SCR 254 = 68 Bom LR 61 ** AIR 1959 Pat 438 (439).

[See however AIR 1964 Cal 290 (310) = 68 Cal WN 410 (DB).]

6. Pledge of documents of title.— (1) A pledge by pledging document of title is valid. AIR 1933 Mad 207 (211) = 56 Mad 177 (DB).

(2) Pledge of a share by mere deposit of the share certificate is valid. AIR 1943 Mad 74 (77) = ILR (1943) Mad 115

Section 178 — Note 6 (contd.)

(DB). (Reversing AIR 1941 Mad 394 = ILR (1941) Mad 419.) ** AIR 1965 SC 1954 (1959) = (1965) 3 SCR 254 = 68 Bom LR 61. (Pledge of goods represented by railway receipt by transferring railway receipt by owner thereof is valid.)

7. "Expressly authorised."— (1) Selling agent pledging cotton and advancing money to principal, who knew about this practice — Agent becoming insolvent — Suit by principal for delivery of cotton — Pledgee held entitled to amount advanced before delivering cotton. AIR 1917 Bom 152 (153) = 42 Bom 205 (DB).

(2) Bailment for specific purpose — Bailee selling unauthorisedly — Bailment ends and purchaser does not get good title. AIR 1922 Mad 44 (46) = 45 Mad 173 (DB).

(3) As a mercantile agent commission agent is entitled under law to pledge the goods entrusted to him for sale. 1958-1 Andh WR 36 (38).

8. Proviso. — (1) Act is done in good faith when it is done honestly; whether it is done negligently or not is immaterial. AIR 1938 Mad 545 (547) (DB) ** (1908) 30 All 165 (166, 167) (DB).

(2) Where a person was entrusted with a diamond as agent for obtaining offers for it, and if any such offer was approved by the owner, for selling it, and acting contrary to the instructions of the owner, the agent pledged it to persons who assumed that the agent was entitled to do so; Held that the pledge was valid. (1929) 31 Bom LR 414 (418).

(3) Shop-owner's employee in charge of the shop pawning articles in shop — Pawnee, receiving in good faith, is protected by Section 178. AIR 1923 Rang 227 (230) = 24 Cri L Jour 858 = 1 Rang 199 (DB).

(4) Pledge by manager of firm — Manager convicted for criminal breach of trust — Pledgee acting bona fide — Pledge, held, to be valid. AIR 1931 Lah 526 (526, 527) = 12 Lah 304 = 32 Cri L Jour 960.

(5) Pledgee advancing large sum of Rs. 19,600 — This fact alone will not establish his bona fides. (1863) 9 Moo Ind App 140 (166) (PC).

(6) Where the pawnee does not act in "good faith" within the meaning of the proviso and where circumstances are such as to raise a reasonable presumption in his mind that the agent pawning goods was acting improperly, pawnee cannot claim to hold the goods liable for a debt contracted by an un-

authorised agent. 1882 Pun Re No. 199, p. 577 (583) (DB). (Case before 1930 amendment.)

(7) Pledgee taking goods from agent of whom he knows nothing cannot be said to have acted bona fide, and if such agent has no authority to pledge, pledge is invalid. AIR 1938 Rang 243 (244, 245) = 39 Cri L Jour 784.

(8) Where A and B, not being mercantile agents within the meaning of Section 2 (9), Sale of Goods Act, deposited ornaments with C, who received them not in good faith, and all of them were accused of criminal breach of trust but C was acquitted: Held, that C was not protected under Section 178, Contract Act, and hence, was not entitled to possession of property under S. 517, Criminal P. C., although the general rule is that on acquittal property, in relation to which accused is charged, should be returned to him. AIR 1937 Sind 33 (35) = 38 Cri L Jour 382.

(9) When it is alleged that circumstances exist whereby a transferee has obtained a better title to goods or documents than the transferor possessed, the person or persons relying on such transfer should be in a position to prove the circumstances. (1938) 67 Cal L Jour 276 (276) (DB).

(10) A, a mercantile agent, pledged motor vehicles with B. One of the vehicles was left with A for display. This vehicle was improperly sold by A without B's knowledge. When on A's failure to repay the loan, B demanded return of the vehicle, A sent to him a vehicle belonging to C which was also with him for display. B caused the vehicle to be sold in auction and it was purchased by D. C filed a suit challenging the sale as mala fide and invalid. During the pendency of this suit B was informed by C by a letter that the vehicle originally pledged with him was sold away and that he was the owner of the vehicle which was sold by B. The suit was settled out of Court and the terms of the settlement were to annul the sale held by public auction under which D became the purchaser, revive the pledge and security and finally in default of redemption within a time limit vesting the vehicles in B. Held, that as at the time when B was said to have become a pledgee once again under the compromise he had full notice of C's title by reason of the contents of C's letter he could not invoke the provisions contained in Sec. 178 for sustaining the pledge over C's vehicle and that B was guilty of conversion of C's vehicle by unlawfully effecting sale of it and appropriating the proceeds thereof. AIR 1955 Mad 505 (509) (DB).

*[178-A. Pledge by person in possession under voidable contract.—When the pawnor has obtained possession of the goods pledged by him under a contract voidable under Section 19 or Section 19-A, but the contract has not been rescinded at the time of the pledge, the pawnee acquires a good title to the goods, provided he acts in good faith and without notice of the pawnor's defect of title.]

[*] See Foot-note remark (°) under S. 178.

179. Pledge where pawnor has only a limited interest.—Where a person pledges goods in which he has only a limited interest, the pledge is valid to the extent of that interest.

Section 178-A — Note 1

(1) Where certain ornaments are merely handed over to the accused for use and on their being misappropriated and pledged, the accused were convicted: Held, that the ornaments should be returned to the owner, that the pledgee could not retain them as the owner had been deprived of them by a criminal offence, and that the fact that the owner delayed to bring proceedings could not alter the fact that she was deprived of her possession of the ornaments by a criminal offence. Section 178-A was not applicable to such a case as there was no contract. AIR 1935 Rang 205 (206) = 36 Cri L Jour 1106.

(2) A person who himself is a pledgee has no title to the property pledged with him. And if such a person pledges the said property his pawnee cannot claim the benefit of Sec. 178-A. AIR 1962 Mys 48 (51) = 39 Mys LJ 982 (DB).

(3) Fraudulently taking delivery of goods from railway authorities and pledging them to Y — Y acting in good faith paying consideration to pledgor — Held, right of railway to recover goods from Y is not defeated. Section 178-A has no application as the pledgee did not enter into transaction on representation of the railway. AIR 1967 All 549 (557) = ILR (1967) 1 All 398 (DB).

Section 179 — Note 1

(1) Section 179 protects the bona fide pledgee and not the buyer. (1909) 11 Bom LR 926 (984, 985, 986).

(2) Section 179 is enabling section and must be read with Section 178. AIR 1940 Sind 177 (177) (DB).

(3) A property was pledged before the creation of trust. After the trust was created the settlor again pledged the same property representing it to be unencumbered. It was held that the settlor was entitled to compel trustees to redeem prior pledge and the subsequent pawnee was entitled to step into the settlor's shoes. AIR 1928 Mad 1201 (1206) = 42 Mad 465 (DB).

(4) Where there was a contract of sale of goods on credit and the property in goods and right to possession passed to the vendee but the vendor

retained possession and pledged the goods to a third party without notice of the vendee's interest in the goods, it was held that the pledgee obtained no right or interest under Section 179. AIR 1929 Cal 497 (506) = 56 Cal 367.

(5) Where a mortgage of moveable property is allowed by the mortgagee to remain in possession of the mortgagor as ostensible owner, and the property is again mortgaged to a third party and sold, the first mortgagee cannot recover from second mortgagee unless he proves that second mortgagee had notice of prior mortgage. AIR 1940 Sind 177 (177, 178) (DB).

(6) Under a contract entered into between A, the pledgor Bank with B, the pledgee Bank, the securities owned by A of the face value of Rs. 75,000 were to be kept by B charged with the payment of such amount upto the limit of Rs. 66,150 as might from time to time have been advanced to A under an overdraft arrangement. There was to be a charge only when there was an adverse balance against A. At all material times A had not drawn any sum from B in pursuance of the agreement. It was held that if A had as a matter of fact operated upon the overdraft amount and had drawn any sum within the limit stipulated in the contract, B would have an interest within the meaning of Section 179 pro tanto in those securities. But so long as there was no overdraft, B had no such interest as it could in its turn pledge or sub-pledge to a third party. AIR 1956 SC 575 (581, 582) = 1956 SCR 483 = 1956 Cri L Jour 1116.

(7) If, the pledgee sub-pledged to another the ornaments which the pledgor had pledged to him, the pledgee having only a limited interest in them the pledge was valid only to the extent of the interest which he himself possessed in the ornaments. He could not give to the sub-pledgee rights superior to those of his own. The only right he had in the ornaments was to retain them as security for the satisfaction of the loan which he had himself advanced. If this right of his came to an end on the satisfaction of his debt, the sub-pledgee could not claim a higher right simply because he had advanced a larger amount to the

Suits by bailees or bailors against wrong-doers

180. Suit by bailor or bailee against wrong-doer.—If a third person wrongfully deprives the bailee of the use or possession of the goods bailed, or does them any injury, the bailee is entitled to use such remedies as the owner might have used in the like case if no bailment had been made; and either the bailor or the bailee may bring a suit against a third person for such deprivation or injury.

181. Apportionment of relief or compensation obtained by such suits.—Whatever is obtained by way of relief or compensation in any such suit shall, as between the bailor and the bailee, be dealt with according to their respective interests.

CHAPTER X—AGENCY

Appointment and authority of agents

182. "Agent" and "principal" defined.—An "agent" is a person employed to do any act for another or to represent another in dealings with third persons.* The

Section 179 — Note 1 (contd.)

pledgee on the security of the ornaments. Once, therefore, the debt of the pledgee was satisfied, the original pawnor became entitled to get back the ornaments without payment of any further amount. The sub-pledgee could not fix upon him the liability for the larger amount which he had himself advanced to the pledgee. AIR 1958 All 66 (67) (DB) ** AIR 1962 Mys 48 (51) = 39 Mys LJ 982 (DB).

Section 180 — Note 1

(1) Either a bailor or bailee of a chattel may maintain an action in respect of it against a wrong-doer; the latter, by virtue of possession, the former, by virtue of his property. AIR 1916 Cal 788 (790) = 43 Cal 733 (DB) ** AIR 1965 Raj 121 (123) = 1965 Raj LW 56.

(2) Under Section 180 the bailee is entitled to maintain an action against a third party who does not claim under the bailor. As a bailee, he is not the agent of the bailor and can sue and claim the full damages for loss due to the alleged negligence of the defendant without prejudice to the rights of the bailor to adjust with the bailee amount of damages when recovered. AIR 1933 Bom 465 (467) = 58 Bom 189.

(3) Where a bailee who is in possession of goods and who is bound to deliver them to the owner at his own risk, entrusts them to a carrier, it may be inferred that the bailee has employed the carrier on his own account, and the bailee may then sue the carrier on the contract of employment. AIR 1958 Cal 730 (733).

(4) The agent who was entrusted with goods for forwarding by boat was authorised by the principal to effect insurance in respect of those goods. The agent effected insurance and

paid premia thereon and also freight. It was held that he was a bailee in respect of the goods and was entitled to sue the insurance company in his own name. AIR 1951 Bom 347 (350).

(5) Per Majority — A pledge being a bailment of goods as security for payment of a debt, under Section 180 the pledgee will have the same remedies as the owner of the goods would have against a third person for deprivation of the said goods or injury to them. AIR 1965 SC 1954 (1960, 1961) = (1965) 3 SCR 254 = 68 Bom LR 61. (A Bank if it be a pledgee though had advanced to the owner Rs. 20,000 only can maintain a suit against the railway or the recovery of the full value of the consignments amounting to Rs. 35,000).

(6) Goods fraudulently taken out of bailee's possession by person without title — Bailee can file suit for recovery of goods. AIR 1967 All 549 (557) = ILR (1967) 1 All 398 (DB).

(7) "Wrongfully deprives" — Money advanced by Bank to Sugar Company — Sugar bags pledged — Sugar bags seized under order of State Government issued under Section 3, Essential Supplies (Temporary Powers) Act, 1946 — Sugar bags sold and sale proceeds attached by Cane Commissioner for arrears of cane cess due from Sugar Company — Claim of Bank on sale proceeds in respect of its dues — Seizure of sugar and its sale being lawful remedy of Bank is only against directors of Sugar Company and not against State Government through Cane Commissioner. AIR 1963 Pat 344 (347, 348) = 1964 BLJR 309 (DB).

SECTION 182 — SYNOPSIS

1. Scope.
2. Broker.
3. Del credere agent.
4. Commission agents.

person for whom such act is done, or who is so represented, is called the "principal".

[°] Cf. The Powers of Attorney Act, 1882 (7 of 1882), Ss. 2 and 3.

Section 182 — Synopsis (contd.)

5. Pakka adatia and cutcha adatia.

6. Manager of joint Hindu family and guardian of minor.

7. Illustrative cases.

1. Scope. — (1) Definition of agent given in Section 182 is wider than in English law. It does not limit the employment to one by the principal only. AIR 1941 Cal 643 (655) (DB). (Common manager appointed under Section 95, Bengal Tenancy Act, is agent within the definition.)

(2) The rule as to agency is expressed in the maxim *qui facit per alium, facit per se*. It is founded on a contract either express or implied by which one of the parties confides to the other the management of some business to be transacted in his name or on his account and by which the other agrees to do the business and render an account of it. AIR 1957 Madh Pra 223 (223) = ILR (1957) Madh Pra 165.

(3) It is only when a person acts as representative of the other in business negotiations, that is to say, in the creation, modification or of termination of contractual obligations between that other and third persons, that he is an agent. AIR 1955 Mad 648 (650) (DB).

(4) Definition of agent given in Section 182 is very wide and embraces a servant pure and, simple. AIR 1938 Nag 254 (255).

(5) A servant is also a kind of agent. Agents are of two kinds, distinguishable as servants and independent contractors. When the agent is an independent contractor, his employer is not in general answerable for the torts either of the contractor himself or of his servants. But when the agent is a servant, his employer will answer for all torts committed in the course of the employment, whether or not the employer has obtained any benefit thereby. The distinction between a servant and an independent contractor is that the former is to obey his employer's orders from time to time and works under the supervision and direction of his employer, whereas the latter is to exercise his own discretion as to the mode and time of doing work for which he has been engaged; he is bound by his contract but not by his employer's orders. AIR 1962 Pat 384 (389) = 1962 BLJR 77 (DB).

(6) The concept of a servant may, in a sense, involve an element of agency but on that account a servant is not to be regarded as an agent and an agent

is never a servant. AIR 1967 Mad 143 (145) = (1966) 2 Mad LJ 473 (DB).

(7) Use of word "agent" in general way, loosely without specifying purpose of agency does not help to determine, as a matter of fact, whether person is agent. (1913) 14 Mad L Tim 249 (255) (DB).

(8) Person acting voluntarily for candidate in election — Consent of candidate is necessary — Consent need not be express nor is written document necessary. AIR 1959 Assam 200 (203) = 19 Ele LR 175 (DB).

(9) Unless authority to act is conferred and accepted, the mere settlement of the terms of remuneration does not constitute a contract of agency. AIR 1918 Sind 1 (3) = 12 Sind LR 93.

(10) Whatever might be the words used in the pleadings, the relationship between the parties is to be determined upon the real character of the contract between them. AIR 1933 Cal 204 (206) (DB).

[See also 1930 Mad WN 729 (746) (DB). (Question of agency is mixed question of fact and law.)]

(11) Even where the word "agent" is used, the relationship between the parties may be still of two principals contracting with each other. The actual status of the parties must be determined with reference to all the circumstances, and not merely with reference to the word used. AIR 1963 Pat 407 (410, 411) = ILR 40 Pat 950 (DB).

(12) A bare allegation of agency is not sufficient and the specific scope of the agent's power must be proved. What is material is whether the incidence of contract as disclosed by the evidence would justify a finding of agency. The mere fact that a person offers advice or writes letters to another in matters of business does not establish the relationship of agency. ILR (1965) 1 Mad 334 (DB).

(13) The relationship of principal and agent is to be determined not by name but by conduct of the parties and the purport of their dealings. (1965) 35 Com Cas 706 = 69 Cal WN 369 (376) (DB).

(14) Agency need not be created expressly by any written document and can be inferred from the circumstances and the conduct of the parties. AIR 1931 All 372 (372, 373) (DB) ** AIR 1957 Madh Pra 114 (118) = ILR (1957) Madh Pra 253 (DB) ** AIR 1951 Pat 209 (214) = 29 Pat 581 (DB) ** AIR 1950 Hyd 52 (53) = ILR (1951) Hyd 202 (DB) ** 1947 Marwar LR (Civ) 21 (22) ** AIR 1960 Bom 548 (550) = 62 Bom LR 304 (DB).

Section 182 — Note 1 (contd.)

(15) The relationship of principal and agent may be constituted either by express appointment by the principal or by implication of law or by subsequent ratification by the principal of the acts done on his behalf. The agent within the ambit of his authority deputises for his principal. Law does not ordinarily require a contract of agency to be created in writing. The agent carrying out his undertaking within the scope of his authority binds his principal as the agent's acts are deemed to be those of his principal. AIR 1962 Punj 56 (58, 59) (DB).

(16) There may not be an express agency proved. Law recognises agency by estoppel, that is to say, if a person allows another to transact with third parties on his behalf and makes them believe that that person who is transacting with third parties is doing so on his behalf then such person who allows third parties to believe that a person was acting on his behalf will be bound by the transactions entered into by the ostensible agent. AIR 1952 Hyd 79 (80) = ILR (1952) Hyd 341 (DB) ** AIR 1960 Pat 271 (275, 276) = 1959 BLJR 769.

(17) The word 'agent' does not of itself imply full authority to bind the principal, in same way that a partner can bind his co-partner. Sections 186 and 187, Contract Act, show that the authority of an agent is to be gathered from either "words" or "circumstances" and is not implied in the mere fact that he is an agent. AIR 1924 Bom 232 (233) = 48 Bom 20 (DB).

(18) A person does not become an agent on behalf of another merely because he gives him advice in matters of business. Agency is founded upon contract express or implied between the parties. (1907) 6 Cal L Jour 580 (585) (DB).

(19) Every act of agent in course of his employment on behalf of principal and within apparent scope of his authority binds principal unless agent is in fact unauthorised to do that act and person dealing with him has notice of same. AIR 1914 Cal 687 (690) (DB).

(20) Agent empowered to pledge his principal to one kind of arbitration can pledge him to another, if it arises out of same transaction. (1910) 34 Bom 13 (49) ** AIR 1925 Cal 541 (544) (DB).

(21) The word 'person' in Section 182 includes a joint family — An agent appointed by the manager of the family is the agent of the family and not of the manager. AIR 1934 All 553 (556) (DB).

(22) Where the term of an agency for sale has expired, a subsequent execution thereof by the agent is invalid unless the term has been extended.

AIR 1916 Cal 964 (969) = 43 Cal 833 (DB).

(23) The distinction between a servant and an agent is that a servant acts under the control and supervision of the master and is bound to conform to all reasonable orders given to him in the course of his work, an agent though bound to exercise his authority in accordance with all lawful instructions which may be given to him by his principal is not subject to the direct control or supervision of the principal. AIR 1956 SC 149 (153) = 1955-2 SCR 1035 = ILR (1956) 1 All 76 = 1956 Cri L Jour 322 ** AIR 1954 SC 364 (367) = 1955 SCR 393 ** AIR 1954 Hyd 156 (158) = ILR (1954) Hyd 338 (FB) ** AIR 1957 Bom 238 (238). (Cattle pound moharrir in service of Janapada Sabha remunerated by commission — Is servant of local authority within S. 14 (b-1) of C. P. and Berar Panchayats Act and not an agent.) ** AIR 1946 Mad 530 (532) = ILR (1947) Mad 170 (DB). (The difference between the relationship of master and servant and that of principal and agent is that a principal has the right to direct what work the agent has to do; but a master has the further right to direct how the work is to be done.)

(24) An agent is not a servant, but a servant is generally for some purposes his master's agent to the extent of the agency depending upon the duties or position of the servant, and in some cases an independent contractor may also be an agent. AIR 1965 Madh Pra 66 (70) = 1965 (1) Cri LJ 301 = (1965) MPLJ 179 (DB).

(25) In order to constitute the relation of agency it is essential that goods should be sold to customers introduced by the agent not on behalf of the agent but on behalf of the principal. If the goods are sold on behalf of the alleged agent and if the alleged agent is to be treated as the purchaser he ceases to be an agent and becomes a principal. AIR 1956 Cal 188 (194) (DB) ** 1955 Andh WR 83 (86).

(26) Customer giving bills to bank for collection — Relationship is that of principal and agent. AIR 1959 Punj 100 (101, 102) = 60 Pun LR 412.

(27) Agency is founded upon a contract, either express or implied, by which one of the parties confides to the other management of some business to be transacted in his name or in his account, and by which the other assumes to do the business and to render an account of it. ILR (1951) 1 Cal 82 (85).

(28) A licensee is a person to whom rights have been given by a license and when a person acts as the licensee, he acts in the exercise of those rights on his own account and not as an agent

Section 182 — Note 1 (contd.)

of another. ILR (1951) 1 Cal 420 (424)
 ** AIR 1963 Pat 216 (217) (DB).

(29) The essence of agency to sell is delivery of goods to a person, not as his own property but as the property of his principal and who is therefore liable to account for the sale proceeds. AIR 1958 Pat 414 (416) = 37 Pat 711 (DB).

(30) Goods sent by seller to buyer by V. P. P. through Post Office — Post Office became agent of the buyer for recovery of price. AIR 1959 SC 1394 (1397) = (1960) 1 SCR 401. (AIR 1957 Madh B 64, Reversed.)

(31) There is nothing in law which would prevent an agent undertaking to be an insurer of goods consigned to his care provided that there is consideration for that insurance and this consideration would have to be something outside the terms of employment at the ordinary rate. AIR 1930 Rang 332 (2) (333) = 32 Cri L Jour 149.

(32) Insurance Agent collecting premiums from the insured does not act as the agent of the insurance company — This principle, is applicable not only to life insurance but other insurance also. (1969) 1 Com LJ 153 (Cal).

(33) An agent is an intermediary who has the power to create legal relationship between the principal and third parties. A benamidar is not an agent. (1967) 10 Law Rep 756 (763).

(34) The relationship of an agency is contractual relationship. The mere fact that a person is employed to do an act for another does not make the former an agent for the latter. Nor can the name which the parties may give to a transaction be the sole criterion for holding that there is an agency or not. AIR 1959 Andh Pra 352 (355) = (1959) 1 Andh WR 44 (DB). (Reversed on another point in AIR 1965 SC 1773.)

(35) The word 'Dalal' in Gujarati meant a broker or agent and when the agreement in terms said that the applicants were appointed Dalals for sale of cloth manufactured by the company, it was impossible to hold that the applicants were not brokers or agents appointed by the company but were employees of the company. (1967) 1 Comp. LJ 92 = 8 Guj LR 345.

(36) A servant acts under the direct control and supervision of his master and is bound to conform to all reasonable orders given to him in the course of his work. An independent contractor is entirely independent of any control and merely undertakes to produce a specified result employing his own means to produce that result. Agent is not subject to direct control of his master in execution of master's instructions. Agent is not servant. Servant is for

some purposes his master's agent. Independent contractor in some cases may also be an agent. AIR 1965 Madh Pra 66 = 1965 (1) Cri LJ 301 = 1965 MPLJ 179 (DB).

(37) The relationship of principal and agent may be constituted — (a) by express appointment by the principal, or by a person duly authorised by the principal to make such appointment; (b) by implication of law, from the conduct or situation of the parties or from the necessity of the case, or (c) by subsequent ratification by the principal of acts done on his behalf.

There is nothing in the West Bengal Cement Control Act or in the various Orders promulgated under the Act which make a stockist of cement an agent of Government. All that the Act and the orders effect is to bring the stockists under the control and supervision of Government. AIR 1963 Cal 79 (81, 82, 83, 84) = 66 Cal WN 861.

(38) According to the definition in Section 182 an agent never acts on his own behalf but always on behalf of another. He either represents his principal in any transaction or dealing with a third person, or performs any act for the principal. In either case, the act of the agent will be deemed in law to be not his own but of the principal. The crucial test of the status of an agent is that his acts bind the principal. AIR 1967 All 308 (311) (DB).

(39) There is a distinction between a person employed to do an act for another and a person who does an act at the bidding of another. In the first place the act done is not that of the person employed but of him who employs him. In the second, the act is that of the person himself. Again, in the first case, the person employed is an agent of the employer; in the second, he merely acts at the request of another. Then again in the first case, under S. 222 the person is entitled to be indemnified against the consequences of all lawful acts done by him in the exercise of his authority as an agent; in the latter, he is entitled to be indemnified only if there is a contract of indemnity to this effect. AIR 1967 All 308 (312) (DB).

(40) In determining legal nature of relationship between the alleged principal and agent the use or omission of the word 'agent' is not conclusive. The Court must examine the true nature of the agreement and the subsequent dealings between the parties, and then decide whether it establishes a relationship of agency under the law. AIR 1967 All 308 (310) (DB).

(41) An agent in law may be either general or special. A general agent has authority to act for his principal in all matters, or in all matters concern-

Section 182 — Note 1 (contd.)

ing a particular trade or business or of a particular nature; or to do some act in the ordinary course in his trade, profession or business as an agent, on behalf of his principal. On the other hand a special agent has only authority to do some particular act or represent his principal in some particular transaction. AIR 1962 Punj 325 (330, 331) = 1962 (2) Cri LJ 92 = ILR (1962) 2 Punj 201 (SB).

(42) Assessee a resident of Hyderabad State appointed agent of a non-resident company of Bombay — Assessee also advancing money to the company for purchases of goods in Hyderabad — Interest paid on advances — Payment of interest does not derogate from assessee's character as agent. AIR 1960 Andh Pra 502 (505, 506) = (1960) 11 STC 705 (DB).

(43) Government of India appointing defendant as agent for purchasing paddy and not for milling the paddy — Defendant to have full responsibility for milling of such paddy — Defendant is not agent of Government for purpose of milling but is only contractor — Contract between defendant and millowner cannot be deemed to have been entered as an agent of the Government of India. AIR 1960 Pat 19 (25) = 1959 BLJR 527 (DB).

(44) It is true that in commercial usage, especially in modern contracts, the expression 'agent' or 'agency' has acquired an extended meaning; often the so-called agent is merely a buyer who has been given favourable terms in a particular area to sell the manufacturer's or supplier's goods. The use of the expression 'agency' in an agreement has therefore no special importance. (1962) 13 STC 292 (SC).

(45) Food Procurement Order and Notifications made thereunder — Mill owners appointed as licencees to buy and sell paddy and rice at rates fixed by Government — If agents of Government. AIR 1959 Andh Pra 352 (355 to 358) = (1959) 1 Andh WR 44 (DB). (Reversed on another point in AIR 1965 SC 1773.)

(46) The agent's custody can be constructive. When under his instructions, the goods are despatched to his sub-agents and the latter is having custody thereof that would be deemed to be the custody of the principal. AIR 1961 Andh Pra 143 (152) = (1960) 2 Andh WR 115 (DB).

(47) Defendant No. 1 as agent of plaintiff requesting defendant 2 to arrange for re-shipment of goods from Rangoon to Calcutta — Defendant 2 agreeing with plaintiff — Privity of contract held established between plaintiff and defendant 2 — Defendant 1 not liable for negligence of defendant 2.

AIR 1963 Cal 163 (169, 170) = 1963 Cal LJ 43.

2. Broker. — (1) A broker is the agent of the person for whom he acts. He is not entrusted with the custody and the apparent ownership of the goods, but he is to effect business on commission. AIR 1917 All 466 (468) = 39 All 81 (DB) ** AIR 1954 Nag 148 (150) = ILR (1954) Nag 355 (DB).

(2) Broker is the agent of party who first employs him. To make him agent of the other party there must be some words or conduct by which authorization to act on behalf of the party is expressed or is to be positively inferred. (1910) 8 Ind Cas 601 (603) (Low Bur).

(3) A broker is the agent, primarily and for some purposes, of the party by whom he was originally employed. He is also generally the agent of each of the two parties for whom he negotiates. But if he departs from the business of mere negotiation and making himself the agent of his undisclosed principal to sell or buy, enters into a contract of sale or purchase, he would be liable. AIR 1916 Cal 548 (550, 551) = 42 Cal 1050 (DB).

(4) The broker's duty is simply to bring the parties together, to arrange a transaction and to get the contract completed. The performance of the contract is a matter between the promisor and promisee. The broker need not look for the fulfilment of the contract for earning his remuneration. AIR 1935 Pesh 56 (56, 57) (DB) ** AIR 1930 All 545 (548) = 52 All 688 (DB) ** (1923) 38 Cal L Jour 139 (141) ** AIR 1961 Andh Pra 408 (410, 411) = 1960 Andh LT 882 (DB).

(5) Broker can claim commission if he brings about sale or even agreement to sell. (1921) 60 Ind Cas 727 (728) (Lah).

(6) To entitle a broker to his commission, he must prove either that the transaction has been completed or that if it is not, the non-completion was due to default on the part of the principal. AIR 1922 Bom 433 (434) ** AIR 1919 Low Bur 126 (127) = 10 Low Bur Rul 15.

(7) The main office of a loan broker is to bring the borrower and the lender together, and when he has done that he has done all that is necessary for him to do and earn his commission. There must be in the lender the willingness to open negotiation upon a reasonable basis. AIR 1928 Bom 270 (273) = 52 Bom 627.

(8) In the absence of a contract to the contrary brokerage is only payable on the completion of a deed of conveyance, it being the broker's duty to introduce a person willing and able to complete the purchase. AIR 1944 Sind 168 (169) = ILR (1944) Kar 42 (DB).

(9) Calcutta jute market — Brokers are liable to buyers and sellers in all "principal contracts" — In the case of

Section 182 — Note 2 (contd.)

breach of contract the broker is entitled to go to arbitration under a clause to that effect. AIR 1923 Cal 419 (422) = 50 Cal 12.

(10) The broker to earn his commission on a contract must be the direct cause in the chain of causation and not a mere preceding link out of many but for which the causa causans could not become operative. Thus property obtained by litigation is not property obtained as fruits of broker's labours. In such a case, broker's labours or efforts are not the efficient cause. The question is not one of hardship but of the actual terms of the contract of employment with the broker. AIR 1956 Cal 232 (234).

(11) A broker, when once he brings two parties together and receives his remuneration for it, has nothing more to do with the transactions between the parties. AIR 1961 Andh Pra 143 (152) = (1960) 2 Andh WR 115 (DB).

3. Del credere agent. — (1) Del credere agent is one who guarantees performance of contract in consideration of extra remuneration. He is also party to contract. A dubash is not a del credere agent for contracts entered into without his intervention. AIR 1926 Mad 544 (551) = 49 Mad 156 (DB).

(2) The certified brokers of the Bombay Native Stock and Share Brokers' Association are del credere agents of their constituents. AIR 1922 Bom 303 (315) = 46 Bom 489 (DB).

(3) A factor, when he sells goods on credit (for an additional commission called a del credere commission) and guarantees the solvency of the purchaser is known as a del credere agent. AIR 1954 Nag 148 (150) = ILR (1954) Nag 355 (DB).

(4) A delivers goods to B for re-sale in U. K. — Price fixed in contract of sale — Contract fixing the quality of goods on seller — Time made essence of the contract — B, held, was not a del credere agent of A and the contract was one of sale and not of agency. AIR 1967 SC 181 (183, 184) = (1966) Supp SCR 1.

(5) Del credere agent arranging for purchase of coal from colliery under priority certificate obtained in name of consumers under Colliery Control Order, 1945 and charging commission — Not "dealers" within Bombay Sale Tax Act but only agents. AIR 1961 SC 1106 (1107) = (1961) 2 SCR 367.

(6) Where, by a contract, the defendants expressly undertook the responsibility for paying the price of the consignments of coal to be supplied by the plaintiff to the buyer, the position of the defendants is in the eye of law, not that of mere del credere agents, and they are liable to the plaintiff for damages for breach of contract. The circumstance that the coal was supplied under the

provisions of the Colliery Control Order, 1945 will not make any difference because those provisions do not override the express terms of the contracts. The liability of the agent is for the full price of the goods supplied. AIR 1960 Pat 364 (366) = 1960 BLJR 452 (DB).

(7) Where the purchasers purchase the goods from the sole selling agent, get the bills from him, the mere fact the goods were despatched by the Company to the purchasers directly on advice of the agent does not make him a del credere agent of the Company. 1969 BLJR 680 (DB).

4. Commission agents. — (1) A person who receives goods from another as a commission agent and then sells them for him is an agent up to a certain point, that is, upto the date of the sale, and thereafter may be a debtor pure and simple. The test to know the relation is this: Has the commission agent, when he sells, authority to sell in his own name; has he authority in his own right to pass a valid title. If he has, then he is acting as a principal vis-a-vis the purchasers and not merely as an agent and, therefore, from that point on, he is a debtor of his erstwhile principal and not merely an agent. Whether this is so or not must of course depend upon the facts in each particular case. AIR 1938 Nag 254 (255) ** 1955 Andh WR 83 (86).

(2) Commission agent is not legally agent of all persons and firms, whom he occasionally transacts business for. Agency is only with reference to specific sales or purchases made under directions of principal. AIR 1918 Sind 1 (3) = 12 Sind LR 93.

(3) Per Mahajan J. — Contracts with commission agents do not follow a single pattern and the preliminary necessity in each instance is to ascertain with precision what are the express terms of the particular contract under discussion. AIR 1950 SC 15 (20) = 1950 SCR 30 = ILR (1951) 1 Cal 511.

(4) When a commission agent agrees to obtain for the principal the goods which the latter wants, the contract between them is not one of sale but of agency. AIR 1956 All 710 (713) (DB).

(5) The fact that arhat or commission is entered in the accounts is by itself no proof that the plaintiff was only a commission agent and not a principal for it is possible for a principal to charge arhat as well as to account for profit and loss. ILR (1954) 4 Raj 346 (349) (DB).

5. Pakka adatia and cutcha adatia. — (1) A pakki adat is a speculative transaction and not a wager and a pakka adatia has a right to be indemnified by the seller. AIR 1917 PC 101 (102) = 45 Ind App 29 = 42 Bom 373 ** AIR 1954 Sau 99 (102) (DB). (Pakki Adat dealings

Section 182 — Note 5 (contd.)

are legitimate mode of conducting commercial business.)

(2) Pakka adatia is something more than commission agent and very like ordinary del credere agent, receiving orders from constituents and placing them in open market; but he can allocate his principal's contracts to himself when it suits him to do so. (1913) 15 Bom LR 85 (96) ** AIR 1952 Vindh Pra 51 (56).

(3) Where there is a contract between a pakka arhatiya and a constituent, the pakka arhatiya is himself responsible to his constituent. The fact that he did or did not enter into a contract with a third party in pursuance of the order of his constituent makes no difference. For all practical purposes, the pakka arhatiya himself and his constituent act as principal parties. A contract between a pakka arhatiya on one side and his constituent on the other is a contract between them as principals and the pakka arhatiya does not act, in such cases, as an agent of his constituent. AIR 1940 All 182 (183) = ILR (1940) All 136 ** AIR 1940 Lah 195 (196). (The only claim of constituent against dukka arhatiya is for liquidated sum.) ** AIR 1937 Lah 581 (585) = ILR (1937) Lah 683 (DB).

(4) A pakka adatia can become principal to enforce any contract entrusted to him as agent by his original principal against that principal. AIR 1919 Bom 137 (137).

(5) Pakka adatia enters into contracts under instructions from his employer, principal. But constituent is not concerned with method in which his instructions are carried out. So it is open to constituents to set up plea of wagering contracts. (1913) 37 Bom 347 (350).

(6) In pakka adatia agency cases, place of payment is primarily place where constituent resides, but payment may be made in any other place if constituent so chooses. Mere fact that principal has to bear charges on account of remittance and exchange does not sufficiently show that place of payment is place whence agent remits money. Liability of pakka adatia ceases when hard cash has come into his constituent's hands. (1909) 33 Bom 364 (368) (DB).

(7) Rule of English law that payment of commission is conclusive proof of existence of agency does not equally apply to pakka adatia dealing in Bombay. (1909) 11 Bom LR 926 (943).

(8) Even where the contract purports to give an agent absolute discretion, just as pakka adatias in Bombay have discretion as to calling for margin, it is incumbent on him to show that circumstances exist for the reasonable exercise of that discretion. AIR 1927 Bom 125 (126, 127) (DB).

(9) When a cutcha adatia enters into transaction under instructions from and on behalf of his up-country constituent with a third party in Bombay, he makes privity of contract between the third party and the constituent, so that each becomes liable to the other, but also he renders himself responsible on the contract to the third party. He does not ordinarily communicate the name of his constituent to the third party, but he informs the constituent of the name of the third party. The position, therefore, as between himself and the third party is that he is agent for an unnamed principal with personal liability on himself. His remuneration consists solely of commission, and he is in no way interested in the profits or losses made by his constituent on the contracts entered into by him on his constituent's behalf. Hence a contract of cutcha adatia agency is not a wagering contract. AIR 1926 PC 119 (120) = 51 Bom 1 = 53 Ind App 241 ** AIR 1940 All 182 (183) = ILR (1940) All 136 ** AIR 1954 All 789 (794) (DB).

(10) A kutcha Arhatia acts as an agent on behalf of his constituent and never acts as a principal to him. Although the kutcha Arhatia may not communicate the name of his constituent to the third party, he informs the constituent of the name of the third party. In the case of a pukka Arhatia, the agent makes himself liable upon the contract not only to the third party, but also to his constituent and he does not inform his constituent as to the person with whom he has entered into a contract on his behalf. AIR 1950 All 352 (355).

(11) There is a marked distinction between a Kutcha and a Pakka Arhatia. The position of a Kutcha Arhatia is that he acts as an agent with personal liability on himself, so far as the third party is concerned. His remuneration consists solely of his commission and is in no way interested in the profit or loss made by his constituent. In the case of a Pakka Arhatia he is generally himself responsible to his constituent and he may act as a principal. ILR (1961) 11 Raj 390 (DB).

(12) (Per Lokur J.) — A pakka adatia is an agent of his constituent only up to a certain point only for the purposes of ascertaining and giving a correct quotation of the price. But thereafter when the transaction takes place, he ceases to be an agent and assumes towards his constituent the character of a principal, and the transaction must be regarded as a contract between principal and principal. AIR 1947 Bom 343 (345) = ILR (1947) Bom 28 (FB).

(13) Pakka adatia is a person who has been entrusted with the goods of his

Section 182 — Note 5 (contd.)

principal to dispose of to the best advantage. He has a general power to deal with them without reference to his principal. AIR 1956 Hyd 180 (185) = ILR (1956) Hyd 191 = 1956 Cri L Jour 1320.

(14) Where the constituent in the case of the pucca adatia has no voice in the action of the third party and the constituent has only to look to the pucca adatia for the performance of the contract and is liable to the pucca adatia alone the employment of the pucca adatia by the constituent is not merely collateral to the main purpose of effecting the transaction. The pucca adatia has an interest larger than that of an agent and he cannot claim commission and indemnity from the constituent on the ground of his claim being collateral to the void agreement with the third party. AIR 1951 Kutch 50 (51).

(15) A pukka adatia unlike a kutchha adatia acts as a principal in relation both to his constituent and to the opposite party with whom he deals on the instructions of his constituent. He is very like an ordinary "del credere" agent, but he is that and more. A pukka adatiya has a certain amount of discretion left to him in carrying through the transactions and in acting in a manner so as to minimise the liability for loss. He has a right in exercise of his discretion to keep a contract outstanding till due date or to cover it with a cross contract. When he receives a second order from the constituent to enter into a cross contract to cover his first order, he is not bound to carry out the second order and what he is bound to do is to inform the constituent so that he may put through his order through some other pakka adatia. AIR 1948 Nag 173 (175, 176) = ILR (1948) Nag 409 (DB).

[See however AIR 1956 Nag 164 (166) = ILR (1955) Nag 1095 (DB). (It cannot be said that a pakka adatia is in every circumstance free to disregard the second order of up-country constituent by covering up his first order.)]

(16) The relationship between a pakka adatia and his constituent is not always that of a seller and a buyer and at certain stages it is that of a principal and an agent.

Held, that the admission of the plaintiff that it agreed to do business of purchase and sale of yarn on payment of adat and dalali clearly imported the admission that the relationship between the two was of principal and agent. The purchase made by the plaintiff for the defendant must prima facie be regarded to have been made by it in its capacity as the defendant's agent. AIR 1956 Nag 164 (167) = ILR (1955) Nag 1095 (DB).

(17) The mere use of the words Pucca Arhatia by the principal is not enough to infer that the agent entered into a transaction as principal and not as agent of the principal. AIR 1960 Raj 296 (300) = ILR (1960) 10 Raj 412.

6. Manager of Joint Hindu family and guardian of minor.— (1) The managing member of a Hindu family is not an agent of the other members of the family. (1900) 22 All 307 (317, 320) (DB) ** (1903) 26 Mad 544 (553) = 30 Ind App 220 (PC).

(2) The guardian of a minor cannot be treated as the agent of the minor. (1896) 20 Bom 61 (75) (DB).

7. Illustrative cases.— (1) Railway company undertaking to carry goods from a station of its own Railway to a station on another railway — Contract is with former company which receives goods for whole distance; latter is only its agent. AIR 1939 All 649 (654).

(2) Perishable goods — Power of Railways to sell — Railway company are agents to carry, and not to sell — To give them a right to sell, circumstances must exist to put them in the position of agents of necessity for the owner — Notice to consignor or consignee before sale is essential. AIR 1963 Orissa 17 (18) = (1962) 4 Orissa JD 284.

(3) Under an arrangement between The East Bengal Railway and the East Indian Railway, one Railway acted as agent in entering into the contract of carriage of goods and so the act of the one is binding on the other. ILR (1959) 1 Cal 450 (454).

(4) A person employed to sell unredeemed articles from a pawn shop on behalf of his employer is an agent within the meaning of Section 182, although he is a servant or a shop assistant. AIR 1938 Rang 243 (244) = 39 Cri L Jour 784.

(5) A suit for account lies against a servant on a fixed salary but the nature of whose employment is that of an agent. AIR 1930 Sind 142 (143).

(6) Person authorised to purchase goods hold them and resell them — Contract held to be one of agency with right of indemnity. AIR 1923 Lah 473 (474) (DB).

(7) When a person undertook, on behalf of co-shares of land, to make an application under Section 6 of Act 11 of 1859, he became the agent of the co-sharers for that purpose. Absence of any consideration would not take away from him that character. (1878) 3 Cal 300 (304) (DB).

(8) Plaintiffs, deshmukhs of village entitled to fees and employments from revenues — Defendants, gumastas, appointed by Peshwas, making collections for plaintiff — **Held**, that defendants were to be regarded as agents for the

Section 182 — Note 7 (contd.)

plaintiff, and the mere fact that they were not appointed by the plaintiff and were not removable by him did not prevent their being his agents. AIR 1939 Bom 126 (127, 128) = ILR (1939) Bom 154 (DB).

(9) Where there is authority to send title deeds by post, the post office is the agent of the addressee; if there is no authority, the post office will be the agent of the sender. AIR 1937 Bom 39 (41) = ILR (1937) Bom 763.

(10) Contract to deliver money by particular date — Money sent by money order two days before due date — Non-receipt of money by due date — Post Office is agent of sender and not of receiver — **Held** there was breach of contract. AIR 1969 Punj 340 (341, 342).

(11) Memorandum of appeal sent through post reaching Appellate Tribunal one day late—Appeal is time barred — Post office is not agent of Appellate Tribunal. AIR 1959 Mad 386 (387) = (1959) 1 Mad LJ 287.

(12) Compromise decree directing lesser payment into Court within stipulated time in full satisfaction — In case of default decree for full amount to be executed — J. D. sending amount by money order within time — Receipt by Court after stipulated time — Condition in decree held not satisfied — Post Office not agent of payee. AIR 1960 All 747 (748) = 1960 All LJ 522.

(13) Provident fund money sent by a railway company by money order to its servant can be attached by the judgment-creditor of the servant. The post office is the agent of the addressee. AIR 1916 All 336 (336).

(14) Plaintiff's contract to supply goods to defendant — Indent requesting defendant to purchase goods on plaintiff's account and risk same on conditions stated, created agency. AIR 1927 Cal 668 (672) = 54 Cal 549.

(15) If a married couple live together and husband acts alone in dealing with joint property, he is held to act as wife's agent in respect of her interest as well as his own. But presumption is rebuttable. (1911) 10 Ind Cas 919 (920) (Low Bur).

(16) Where after the dissolution of partnership, an agreement was entered into between the partners to the effect that two of them were to collect the outstandings of the partnership as trustees, and to deposit the amount in a bank after paying off the partnership liabilities and that all the partners should share the balance equally and one of the partners sued for the rendition of accounts of the moneys realised under the agreement — **Held**, that the agreement created a modified form of relationship of principal and agent between the parties, quite apart from that

of the original agreement of partnership that had been dissolved. AIR 1931 Lah 300 (301) (DB).

(17) It is within the authority of a manager of a mine to enter into a contract binding on the owner. AIR 1938 Cal 343 (346).

(18) B, not a producer himself, entered into a contract with A for supply of goods on certain commission — **Held**, that the relationship was not one of principal and agent and the mere mention of commission is not inconsistent with such relationship as between principals. AIR 1921 PC 129 (130) = 5 Rang 1.

(19) Honorary treasurer of a subscription committee is not its agent. AIR 1914 All 22 (23) = 36 All 268 (DB).

(20) A sub-contract was entered into by a contractor undertaking some building work of a railway company with another contractor on certain percentage basis. The sub-contractor sued the railway contractor for rendition of accounts — **Held**, that under the circumstances a suit for rendition of accounts could not lie, as there was no relationship of principal and agent between the two contractors for realising money from the railway company. AIR 1930 Lah 1062 (1063).

(21) The relationship between a contractor and his sub-contractor cannot be deemed to be that of principal and agent. AIR 1959 Punj 92 (94, 95) = 60 Pun LR 444 (DB).

(22) A person contracting to purchase property and promising damages on default is not agent. AIR 1919 Mad 411 (412) (DB).

(23) Where person appoints one branch of bank as agent for him, all other branches do not become agents of the person for purposes of carrying out instructions in respect of that agency. AIR 1927 Lah 562 (564) (DB).

(24) A barrister is not technically his client's agent, but the contract between an advocate, A. S., and his client is governed by general rules of contract under Contract Act. He is a special kind of agent selected out of special class for whom agency contract is reserved by law, but nevertheless governed by law relating to agency. AIR 1934 Bom 299 (301) = 58 Bom 597 (DB).

(25) As between the sender and the addressee it is the request of the addressee that a cheque be sent by post that makes the post office the agent of the addressee. AIR 1954 SC 429 (435) ** AIR 1952 Bom 306 (309) = ILR (1953) Bom 81. (Where the post office is not nominated as agent of the receiver then by posting the letter the sender constitutes the post office his agent.) **

Section 182 — Note 7 (contd.)

AIR 1959 SC 1070 (1072, 1073) = (1959) Supp (2) SCR 868.

(26) Buyers in British India sending sale proceeds through negotiable instruments by post, on request of assessee trading in Native State — Post office acts as agent of assessee and negotiable instruments when posted are deemed to have been received by assessee in British India. (1965) 1 ITJ 884 = ILR (1965) Guj 215.

(27) Assessee at Baroda entering into agreement with Government of India at Deihi in 1942 to supply goods — Payment to be made by cheque — Held there was impliedly request by assessee to send cheque by post at Delhi — Post office was constituted agent of the assessee. **AIR 1959 SC 1160 (1165) = (1960) 1 SCR 236.**

(28) The post office must be deemed to be the agent of the party at whose instance or on whose order parcels are delivered to it. When goods are delivered to the post office at a place according to the specific directions of the buyer it must be held that the post office is acting as the buyer's agent in collecting the value of the parcels. **AIR 1957 Madh B 64 (66) = ILR (1956) Madh B 160 (DB).**

(29) It is true that, for purposes of delivering postal articles or receiving money payable therefor the post office may be the agent of the sender or the addressee but that is not the same thing as saying that, there is, in such cases, a contract between the sender and the Post Office. 1969 MPWR 100 (102) = 1969 MPLJ 184.

(30) When a person sends V. P. Parcel to another through Post Office and the Parcel is delivered to the addressee who pays the value of the parcel to the post office, the post office receives the money as agent of the sender. If the post office fails to recover the price from the addressee and delivers the goods, it is liable in damages to the sender. **AIR 1960 All 672 (681, 682).**

(31) Where the sales were sales to export licence-holders in India and not to overseas buyers direct as the sellers were obliged to follow the procedure as under the Cotton Textile (Export Control) Order, it was held that even though this was the only way in which an export could be effected that would not make the exporter the agent of the seller because by the very act of purchase the exporter became a principal and bought as such. **AIR 1958 SC 1002 (1005).**

(32) Improvement scheme — Agreement between Government and Delhi Improvement Trust under which Government land was placed at disposal

of Trust on certain terms and conditions — Trust constructing market on such land with Government funds advanced by way of loan — Trust held was constituted statutory agent of Government. **AIR 1957 SC 344 (349, 350) = 1957 SCR 1 = ILR (1957) Punj 850.**

(33) Solicitors are not, in the absence of specific authority, agents of their clients to conclude a contract for them. **AIR 1952 Nag 220 (225) = ILR (1949) Nag 581 (DB).**

(34) Relationship between a proxy and a share-holder is that of agent and principal. **AIR 1953 Mad 520 (527) = ILR (1953) Mad 966 (DB).**

(35) The position of an auctioneer is that of an agent of the vendor and until the bid is knocked down, there is no concluded contract in favour of the bidder. **AIR 1951 Mad 322 (324).**

(36) The Official Receiver is not an agent of the insolvent when he gives an acknowledgment of the insolvent's liability. Whereas in the case of a principal he is the dominating personality under whose directions and within the four corners of the authority given by him to his agent the latter has to act, in the case of an insolvent he in no way resembles the principal. **AIR 1957 Mad 1 (3) = ILR (1957) Mad 344 (DB). (AIR 1933 Bom 91, Dissented from.)**

(37) A managing director is not a clerk or a servant of the company. He is an agent of the company for carrying on its business. **AIR 1951 Punj 99 (101).**

(38) A director of a company is not necessarily the agent of the company or its shareholders. If, therefore, a director wanted to set up the case that he had acted in certain transaction not in his personal capacity but as agent he ought to raise the plea specifically in his written statement. In absence of such a specific plea he must be held to have taken the liability on himself personally and a suit against him alone is not barred by Sections 230 and 235 of the Contract Act. **AIR 1959 All 29 (31) (DB).**

(39) Directors and managing agents — Contract by — Governed by law of principal and agent — Contract binds the principal Company — Directors are in the eye of law, the agents of the company for which they act — Relationship between the two is generally that of the principal and the agent. (1963) 2 Andh WR 112.

(40) Promotor of Company is not an agent because there is no principal. **AIR 1969 Mad 462 (469).**

(41) Where a hypothecation deed shows that certain shares of a Bank and the right to the dividends on the

Section 182 — Note 7 (contd.)

same were all charged for the amount borrowed, and it was further stipulated that as long as the debt was in existence the creditor was authorised to receive directly from the Bank any dividend declared and appropriate the same towards interests, these words clearly create an agency in favour of the creditor. AIR 1957 Trav-Co 174 (175).

(41-A) Land Acquisition Officer and State Government — Relation between — Principal and Agent compared. AIR 1970 Mys 89 (93) (DB).

(42) Lease of mine to lessee — Mine sublet by lessee — Sub-lessee operating mine during existence of injunction against lessee — Sub-lessee not party to suit — Construction of agreement of sub-lease — **Held**, sub-lessee not being agent of lessee, lessee could not be held responsible for disobedience of injunction by his sub-lessee. AIR 1962 Pat 443 (445) = 1962 BLJR 614 (DB).

(43) Agent and middleman — Difference pointed out — Contract for purchase of goods from company — Company not having such goods — Company subsequently contracting with firm dealing in such goods — Contracts independent, distinct and different in terms, time and price — No direct contract or correspondence between firm and purchaser — Transaction between company and firm only in aid and benefit of purchaser — All payments for goods made only by purchaser through company — Contracts are not one composite contract — Company is not agent but only middleman. AIR 1969 Cal 496 (516) (DB).

(44) Assessee selling goods supplied by Government organisation — Using latter's cash memo and remitting sale price at intervals — Commission including house rent and light charges — **Held**, assessee was carrying on business of the organisation and was not a dealer — His position was that of an ordinary agent or an employee of the principal who was paid on commission basis. ILR (1962) Cut 51 (DB).

(45) Contract for supply of materials and execution of work with Government — Risk in transport borne by contractor till delivery of materials at work site — Insurance in joint names of contractor and Government — Contract held not of agency. ILR (1961) Cut 709 (DB).

(46) Person purchasing castor seeds in Hyderabad State areas for company in Bombay — Person is dealer within Section 18, Hyderabad General Sales Tax Act (14 of 1950) — Authority to buy on behalf of the principal not

necessary to constitute agency. (1962) 13 STC 393 (SC).

(47) Licensee under Section 3, Imports (Control) Order, 1955 issuing letter of authority to a person to import the goods — Transaction treated by parties as sale — Holder of letter of authority importing the goods and selling to licensee cannot be treated as an agent of licensee — Transaction is a sale. AIR 1964 Mad 162 (165, 166) = (1964) 2 Mad LJ 84 (DB).

(48) Bank of Madras transferring customer's amount upon customer's instructions, standing in his name at Bank's head office at London, to Karachi Branch — Bank's agency comes to an end as soon as amount is transferred — It is not under obligation to repatriate the amount from Karachi to Madras. AIR 1965 Mad 266 (274) = (1965) 2 Com LJ 37.

(49) Contract granting sole right of distribution of film between producers and distributors created relationship of principal and agent. AIR 1959 Madh Pra 309 (312) = 1960 MPLJ 725.

(50) Agreement between retailer and Government for distribution of food through fair price shop — Retailer cannot be regarded as agent of Government. AIR 1967 Cal 568 (579) = 1967 Cri LJ 1599 (FB).

(51) Right of audience before a tribunal — Right can be delegated to an agent. AIR 1967 Bom 521 (526) = 1968 Lab IC 251 = 69 Bom LR 273 (DB).

(52) Contract of service by P with X company — X was being managed by Y company under managing agency agreement — Termination of service of P by Z, who was director of X company and managing-director of X **Held**, could not be made liable either in tort for procuring breach of contract with managed company, his position in relation to managed company being that of an agent or for breach of contract, by terminating service of P. 1968 MPLJ 846 = 1969 Jab LJ 37.

(53) Even an agent can become a purchaser when an agent pays the price to the principal on his own responsibility. AIR 1967 SC 181 (185) = (1966) Supp SCR 1. ((1871) 6 Ch A 397 and (1932) 1 KB 710 and (1879) 10 Ch D 566, Foll.)

(54) Insurance companies employ different classes of agents, but nevertheless each of them can act for the company without having to derive authority by delegation. Where the first premium on the policy was collected by A and the insurance company itself, had addressed A as their agent, the Company cannot subsequently contend that A was not their agent. AIR 1959 Andh Pra 562 (564) (DB).

183. Who may employ agent.—Any person* who is of the age of majority according to the law to which he is subject, and who is of sound mind, may employ an agent.

[°] Cf. S. 11 supra; S. 5 of the Powers of Attorney Act, 1882 (7 of 1882).

184. Who may be an agent.—As between the principal and third persons, any person may become an agent, but no person who is not of the age of majority and of sound mind can become an agent, so as to be responsible to his principal according to the provisions in that behalf herein contained.

185. Consideration not necessary.—No consideration is necessary to create an agency.

Section 182 — Note 7 (contd.)

(55) Person merely signing letters purporting to emanate from Military Secretary of Ex Ruler "for the Military Secretary" — Held, he was not acting as the agent of the ex-Ruler but was performing the ministerial act of signing the letters on behalf of the Military Secretary — This could not be said to have constituted him an agent. AIR 1962 SC 73 (76) = (1962) 1 SCR 702.

(56) Dealer appointed as wholesaler under Madras Foodgrains (Procurement) Order, 1947 — Madras Foodgrains (Intensive Procurement) Order, 1950 — Relationship between dealer and Government is that of principal and agent — Government is bound to indemnify dealer. AIR 1963 Andh Pra 394 (398) = (1962) 2 Andh WR 390.

(57) A right of a principal to call upon his agent to render account is not a mere right to sue within the meaning of Section 6 (e), T. P. Act but an actionable claim which is assignable as such. (1967) 9 Law Rep 400 (407).

(58) Management of jagir assumed by State under statute prior to Constitution — Statute struck down as unconstitutional and to have no effect from commencement of Constitution and jagir returned — Relationship of principal and agent constituted from commencement of Constitution till jagir was returned. AIR 1961 Raj 143 (145, 146).

Section 183 — Note 1

(1) Minor principal is not bound by agent's acts unless agent is guardian, that too under specified circumstances. AIR 1928 Lah 854 (854).

(2) Such right is subject to certain well known exceptions — One such is when the Act to be performed is personal in character — A person has no common law right to appoint a counsel as his agent. AIR 1968 All 270 (272) = 1968 Lab IC 910 = (1969) 2 Lab LJ 607.

(3) Agent entrusted with power of management of property and with direction to pay income, after deducting expenses to principal — Not an agency coupled with interest — Principal can revoke power of attorney and lease out property to third person — Agent cannot claim title by adverse possession. (1968) 15 LR 376 = (1968) 2 Mys LJ 179.

(4) Who may employ agent — Although Section 183 prohibits minor from appointing agent, it does not prohibit guardian of minor from appointing agent for minor. AIR 1965 Mys 272 (273) = (1964) 2 Mys LJ 352 (DB).

(5) It is open to a person to employ an agent for being represented before a tribunal though the procedure governing the right of representation before the tribunal may deny to a particular agent the right of audience. AIR 1967 Bom 521 (526) = 69 Bom LR 273 (DB).

* Section 184 — Note 1

(1) Minor can be agent of a principal, who is competent to contract. AIR 1928 Lah 854 (854, 855) ** AIR 1918 Lah 269 (270) (DB).

(2) Minor agent is not responsible for loss caused by his guardian. AIR 1917 Nag 97 (98).

(3) Person knowingly appointing minors as his agents — Contract subsisting for some time — Person cannot subsequently say that the contract is void, being made by minors. (1902) 4 Bom LR 627 (629).

Section 185 — Note 1

(1) No consideration is necessary to create agency. AIR 1929 Lah 182 (185) (DB).

(2) Suit by pleader for recovery of legal remuneration — Defendant pleading specific contract to work without accepting remuneration — Defendant failing to prove such agreement in writing as contemplated under Section 25. Held, plaintiff could not be deprived of his legal remuneration—Provisions of S. 185 were not attracted. AIR 1965 Andh Pra 409 (410) = (1965) 2 Andh WR 78.

(3) Contract of Agency — Insurance Agent collecting premiums from the insured does not act as the agent of the insurance company — This principle is applicable not only to life insurance but other insurance also — Policy covering risk for fire due to riot or strike not renewed before renewal date — Subsequent renewal by paying premium to the extent it covered risk by fire — Policy issued by mistake for the entire risk of fire arising due to riot also — Denial of liability by Insurer — Insured plaintiff alleging payment of short premium as due to representation of agent — In the absence of evidence

186. Agent's authority may be expressed or implied.—The authority of an agent may be expressed or implied.*

[*] See, however, the Indian Registration Act, 1908 (16 of 1908), S. 33. See also the Code of Civil Procedure, 1908 (Act 5 of 1908), Sch. I, Order III, Rule 4; Customs Act, 1962 (52 of 1962), S. 147 (1).

187. Definitions of express and implied authority.—An authority is said to be express when it is given by words spoken or written. An authority is said to be implied when it is to be inferred from the circumstances of the case; and things spoken or written, or the ordinary course of dealing, may be accounted circumstances of the case.

Illustration

A owns a shop in Serampore, living himself in Calcutta, and visiting the shop occasionally. The shop is managed by B, and he is in the habit of ordering goods from C in the name of A for the purposes of the shop, and of paying for them out of A's funds with A's knowledge. B has an implied authority from A to order goods from C in the name of A for the purposes of the shop.

Section 185 — Note 1 (contd.)

that such agent had authority from the insurer to reduce the premium, plaintiff could not rely on collection by agent as the act of insurer. (1969) 1 Comp LJ 153 (Cal).

Section 186 — Note 1

(1) Section 186 provides that the authority of an agent may be expressed or implied. In cases where the authority is not expressed, the question whether an agent had or had not authority to act in a particular matter on behalf of the principal is to be decided according to the circumstances of each case. AIR 1935 Oudh 170 (173) (DB).

(2) The relationship of principal and agent need not be expressly constituted but can be brought about by implication of law on a particular situation arising or from the necessity of a case. AIR 1955 SC 441 (445).

(3) A written document is not necessary to create a contract of agency. Such a contract may be spelt out or inferred from the circumstances and conduct of the parties including correspondence between them. AIR 1957 Trav-Co 179 (182) = ILR (1955) Trav-Co 1200.

(4) Person realising rent and giving it to landlord — He impliedly acts for landlord as agent. Madh BLJ 1955 HCR 561 (562).

(5) Commander having power to sell salvage in 202 and 404 area delegating his power to officer in charge of 202 area — Delegated powers must be taken to relate solely to materials in 202 area unless the order otherwise provided impliedly or expressly. AIR 1947 Cal 307 (311) (DB).

(6) Statement by person, who has acted outside his authority, that he was acting within it, does not give an authorisation to his unauthorised acts. AIR 1947 Cal 307 (311, 312) (DB).

(7) Advocate's power to compromise suit or confess judgment is implied in

every wakalatnama unless expressly excluded. AIR 1968 Ker 213 (214) = 1968 Ker LT 1 (FB).

(8) Agent carrying on business — Authority to purchase goods on credit — Secretary of Co-operative Store authorised under bye-laws to carry on business on sound line has implied authority to purchase goods on credit — Society bound by action of Secretary. AIR 1964 Ker 176 (176, 177, 179) = 1963 Ker LT 522.

(9) Coal consigned by colliery to company on orders and sanction by Deputy Coal Commissioner (Distribution) under Colliery Control Order, 1945 which was then in force — Refusal of company to take delivery — Railway suing Company for demurrage — Held Colliery acted as agent of Company. AIR 1969 SC 193 (197) = (1969) 1 SCJ 340.

(10) If the money had been borrowed and used for the benefit of the principal, either in paying debt or its legitimate business, the principal cannot repudiate its liability to repay the debt on the ground that the agents had no authority from the Company to borrow. 1962 MPC 411 = 1962 Jab LJ 1112.

(11) Agent permitted to compromise a suit on behalf of principal — The power does not entitle agent to refer a case to arbitration. AIR 1969 Andh Pra 211 (212).

SECTION 187

1. Implied authority.— (1) Transaction within the authority of agent is valid whether beneficial to principal or not. AIR 1915 PC 121 (124) = 8 Low Bur Rul 536 = 43 Cal 527 = 43 Ind App 48.

(2) The test for determining whether a person is acting as an agent of another person is whether he is purporting to enter into the transaction on behalf of his principal, that is, whether he is acting in a representative capacity. AIR 1962 Pat 140 (145) (DB).

Section 187 — Note 1 (contd.)

(3) Agent cannot bind his principal by doing acts which are not specifically included in the power of agency, nor are necessary for the declared purposes of the power. (1893) 1893 App Cas 170 (179) (PC).

(4) Where an act purporting to be done under a power of attorney is challenged as being in excess of the authority conferred by the power, it is necessary to show that on a fair construction of the whole instrument the authority in question is to be found within the four corners of the instrument, either in express terms or by necessary implication. AIR 1938 Mad 966 (969) (DB).

(5) A servant ordered to do particular class of acts can bind his master by act in that class done in course of service and for his master's benefit. AIR 1927 Rang 44 (45).

(6) Authority to merely write letters on behalf of principal does not imply authority to acknowledge debt. AIR 1924 All 855 (855) = 46 All 892 (DB).

(7) The common manager on behalf of the Patnidar appointed under S. 95 of Bihar Tenancy Act, has no power to give release to the under-tenure-holder, unless the manager has requisite authority empowering him to do so. AIR 1957 Pat 706 (709) (DB).

(8) Where goods purchased by a person are received by another and dealt with by him, it is a sufficient inference in law that the former is an agent for the latter. AIR 1928 Cal 863 (864) (DB).

(9) A Nattukottai Chettiar agent has an implied authority to pledge credit of firm. AIR 1915 PC 121 (123, 124) = 8 Low Bur Rul 536 = 43 Cal 527 = 43 Ind App 48.

(10) When an agent with wide powers contracts debts and the principal does not repudiate them, the latter is bound to pay them. AIR 1916 Pat 57 (58) (DB).

(11) When a power of attorney confers a power to sell and there are no words limiting the power, a power to clarify title and to settle disputes, in so far as it is necessary for effecting a sale would be implied. AIR 1948 Oudh 54 (61) = 22 Luck 93 (DB).

(12) Authority for negotiating and completing sale for specified price within particular time includes authority to enter into contract for sale. AIR 1946 Mad 42 (44) = ILR (1946) Mad 465 (DB).

[See however AIR 1959 Bom 452 (453) = 59 Bom LR 1071 (DB).]

(13) An authority to sell implies authority to settle terms of sale. AIR 1925 Mad 227 (227).

(14) Agent carrying on business — Authority to purchase goods on credit — Secretary of Co-operative Store autho-

ried under bylaws to carry on business on sound line has implied authority to purchase goods on credit — Society bound by action of Secretary. AIR 1964 Kerala 176 = 1963 Ker LT 522.

(15) A general authority to sell house does not imply authority to settle price and arrange for the sale without any further reference to the principal. An authority to sell does not imply an authority to receive purchase money. (1910) 20 Mad LJ 479 (483, 491, 494) (DB).

(16) Authority to procure purchase does not imply authority to sell. AIR 1923 Cal 57 (58) (DB).

(17) When the authorities effected a settlement between the various communal parties to avoid serious trouble resulting out of their disputes, the question whether the agreement was entered into by the leaders in a representative capacity so as to bind others who did not sign the deed, must be determined on the attitude of those others whom the leaders were supposed to represent. AIR 1929 All 519 (520) (DB).

(18) Where a person wrongfully converts goods and receives the amount, the owner of the goods may either sue in tort or may waive the tort and recover the proceeds in an action for money had and received. This action is based on an implied contract of agency the defendant being fictitiously assumed to have rightfully received the money as the plaintiff's agent, and to have failed to pay it over to his principal. AIR 1953 Madh B 38 (39).

(19) Where it was sought to prove that D had an implied authority to settle a lease on behalf of B, a shebait, and where the lower Court found that D was acting as if he was the real shebait, it was held that the finding was insufficient to prove implied authority. It was necessary to find that D had been authorized to do some work of this class to which the contract belonged. If this authority to settle the lease could be inferred from the facts and circumstances, it would have been more than enough; or if it could be established that he had authority generally to make all settlements, that also would have been sufficient; or if the settlement of this lease was necessary in order to do an act which D was authorised to do, that also would have sufficed. But in the absence of any such proof the authority cannot be held to be proved so as to bind the principal. AIR 1933 Cal 109 (113) = 60 Cal 111 (DB).

(20) Bank going into liquidation — Depositor's liability in respect of withdrawals effected by another person on his behalf — Implied authority cannot be inferred — Particulars must be furnished. AIR 1963 Orissa 42 (44) = ILR (1962) Cut 554 (DB).

188. Extent of agent's authority.—An agent having an authority to do an act has authority to do every lawful thing which is necessary in order to do such act.

An agent having an authority to carry on a business has authority to do every lawful thing necessary for the purpose, or usually done in the course, of conducting such business.

Illustrations

(a) A is employed by B, residing in London, to recover at Bombay a debt due to B. A may adopt any legal process necessary for the purpose of recovering the debt, and may give a valid discharge for the same.

(b) A constitutes B his agent to carry on his business of a ship-builder. B may purchase timber and other materials, and hire workmen, for the purpose of carrying on the business.

Section 187 (contd.)

2. Husband and wife. — (1) The liability of a husband for his wife's debts depends on the principles of agency, and he can only be liable when it can be shown that he has expressly or impliedly sanctioned what the wife has done. ('87) 9 All 147 (155) (DB) ** ('99) 1899 Pun Re No. 63, p. 277 (282) (DB) ** ('81) 3 All 122 (124) (DB).

(2) There is implied authority when wife manages the family affairs. AIR 1936 All 393 (395, 396) ** AIR 1936 All 869 (870) ** AIR 1929 Lah 18 (19).

(3) Wife's implied authority to pledge the credit of her husband for necessities is not taken away or diminished by reason of her husband's insanity. AIR 1933 Mad 686 (688) = 56 Mad 964 (DB).

(4) Where husband and wife are separate by consent, husband can be absolved from the liability to pay wife's debts on proving the agreement of making allowance to her and that allowance was so paid to her. AIR 1929 Lah 18 (19).

(5) The person who deals with a married woman must plead and prove in what capacity she purported to enter into contract with him: and state clearly whether the suit against her was as an agent for her husband or as a principal on her own account. The plaintiff's remedy is alternative and cannot be made available against both the spouses. AIR 1947 Nag 84 (85) = ILR (1947) Nag 154. (Express allegation of contract with wife — Consent or authority of husband not stated — Held, wife acted as principal and not as agent of husband.)

SECTION 188 — SYNOPSIS

1. Extent of agent's authority.
2. "Lawful".
3. Agent carrying on business.
4. Power of attorney.
5. Authority to borrow.
6. Authority to collect debts.
7. Authority to receive payments.
8. Authority to purchase.
9. Authority to sell.
10. Broker.

11. Estate agent.
12. Counsel.
13. Solicitor.
14. Public agent.
15. Power to carry on litigation.

1. Extent of agent's authority. — (1) The authority of every agent whether express or implied is confined within the limits of the powers of his principal and an agent of a corporation or an incorporated company cannot have any authority express or implied to do any act on behalf of the corporation or company which is ultra vires of the powers of the company. AIR 1952 Punj 263 (264).

(2) It is not necessary that the principal, to be liable should benefit by the unauthorised act of the agent. All that is required is that the agent should hold himself out as having such authority and his principal by his conduct induce the third party to reasonable belief that he is authorised to do the act he does. (1949) 53 Cal WN (1 DR) 93 (97) (DB).

(3) Where a document executed jointly by two persons creating equal liability for both is altered by one of them acting as agent of another whereby the liability is reduced equally for both of them such an alteration must be regarded as unsubstantial and not otherwise than beneficial to the surety. The alteration does not save the surety from liability arising under it as it has not been altered in such a manner as to change its nature. AIR 1963 SC 746 (754) = (1963) Supp 1 SCR 63.

(4) The mere fact that the act falls within the scope of the usual or apparent authority of an agent will not bind another person as his principal when the act itself was unauthorised and not ratified by the latter, and the third party was dealing with the agent treating him as principal himself and not as an agent. AIR 1958 Bom 445 (450) = ILR (1958) Bom 1035.

(5) Before a purchase made by a civil servant can bind the State, it should be established that the purchase was authorised by the State or the purchase is an

Section 188 — Note 1 (contd.)

act which belongs to a class of acts within the actual or apparent authority of the civil servant. 1962 Mys LJ (Supp) 527.

(6) An agent contracting on behalf of known principal is not prevented from restricting his own personal liability for acts of principal or the agents or servants of the principal. AIR 1953 Cal 547 (548) = ILR (1952) 1 Cal 347 (DB).

(7) An acknowledgment by a legal practitioner is an acknowledgment by duly authorised agent on behalf of his client and is binding on him. (1967) 2 Andh WR 429.

(8) Agent who has authority to receive goods for his principal has implied authority to sign an acknowledgment of balance due by the principal. 1910 Pun LR No. 136, p. 373 (378) = 1910 Pun Re No. 55 (DB).

(9) A company is responsible for all the acts done by its directors even though unauthorised by it, provided such acts are within the apparent authority of the directors and not ultra vires of the company. AIR 1932 All 141 (145) = 53 All 1009 (DB).

(10) The principal will not normally be liable for the unauthorised criminal acts of the agent or for the other acts done by him in excess of his authority. AIR 1955 Trav-Co 83 (84) = 1955 Cri L Jour 845 (DB).

(11) The agent is not liable to liquidate the debts of the principal unless a trust is created by principal in favour of his agent on that behalf. There is no liability attached to a firm as the agent of its constituents to pay the latter's debts including municipal taxes. AIR 1953 Nag 188 (188).

(12) Consent of an agent would be as effective as the consent of the owner himself. AIR 1954 SC 181 (185) = 1954 SCR 391.

(13) Limitation on agent's authority — Not binding against third persons unless they are made aware of it. AIR 1962 Pat 384 (387, 388, 389) = 1962 BLJR 77 (DB).

(14) Agent having authority to take delivery only — Railway cannot re-book goods on application of such person — Amounts to irregularity on the part of the railway servants. AIR 1959 Pat 337 (341) = ILR 37 Pat 1355 (DB).

(15) If the insurer allows his agent to collect monies and issue to the payer due receipts for the amounts so collected he must be deemed to have held out his agent as a person authorised to collect. Where the printed form of contract contains terms of agency to the effect that an agent is not entitled to collect any premium or debts payable to the Insurance Company such terms do not hinder the company from authorising the agents to collect.

Further, the agent's authority to receive payments from the policy holders may also be an implied one. AIR 1959 Andh Pra 562 (563, 565) (DB).

(16) Risk note issued by agent of Insurance Company in discharge of his duty — Risk note was binding on Insurance Company. AIR 1966 All 385 (388) = 37 Com Cas 369 (DB).

(17) Implied authority of agent — Extent of — Agent having authority to take delivery of goods and to sell them at any price he chooses — Presumption as to implied authority. AIR 1965 All 34 (35, 36).

(18) Contract of service by P with X company — X was being managed by company under managing agency agreement — Termination of service of P by Z who was director of X company and managing director of Y — Held, Z could not be made liable either in tort for procuring breach of contract with managed company, his position in relation to managed company being that of an agent or for breach of contract, by terminating service of P. 1968 MPLJ 846 = 1969 Jab LJ 37 (DB).

(19) Agent having interest in the property of principal — Can maintain action for protection of it. (1966) 36 Com Cas 224 (Punj).

(20) Bank going into liquidation — Depositor's liability in respect of withdrawals effected by another person on his behalf — Existence of implied authority cannot be inferred — Particulars must be furnished. AIR 1963 Orissa 42 (44) = ILR (1962) Cut 554 (DB).

(21) Railway administration cannot enter into contract for benefit of third person. AIR 1966 Guj 6 (14) = (1964) 5 Guj LR 879 (DB).

2. "Lawful". — (1) The true construction and meaning of the term 'lawful' in Section 188 is that what the agent does must not be against public policy or for any other reason illegal. (1949) 53 Cal WN (1 DR) 93 (97) (DB).

3. Agent carrying on business. — (1) Every agent who is authorised to conduct a particular business has implied authority to do whatever is incidental to the ordinary conduct of such business and whatever is necessary for the proper and effective performance of his duties but not to do anything outside the ordinary scope of his employment and duties. (1905) 1 Cal L Jour 199 (202, 203, 204) (DB) ** (1909) 3 Sind LR 164 (166).

(2) Agent carrying on business — Authority to purchase goods on credit — Secretary of co-operative store authorised under by-laws to carry on business on sound line has implied authority to purchase goods on credit — Society bound by action of secretary. AIR 1964 Kerala 176 = 1963 Ker LT 522.

(3) Where a munim is actually looking after the business of the principal, he

Section 188 — Note 3 (contd.)

buys and sells goods, he receives monies and gives money, a third person dealing with him will have every reason to believe that he has the authority that munims in a similar business usually have. AIR 1956 Hyd 131 (132) = ILR (1956) Hyd 477 (DB).

(4) When the manager of press, who had authority to do all acts necessary for the management of the press, borrows money to the knowledge of the principal and spends for the purposes of the press, the principal is liable. An agent has authority to do all acts impliedly necessary to the successful management of the business. AIR 1927 Oudh 44 (45) = 2 Luck 253 (DB).

(5) Power enabling agent to carry on business of firm does not entitle him to sue for dissolution of firm. AIR 1914 Low Bur 191 (2) (192) (DB).

(6) Agent ordinarily cannot bind his principal by reference to arbitration but where according to custom of business agent has such power, principal will be bound. (1909) 3 Sind LR 5 (6) ** AIR 1930 Rang 332 (333) = 32 Cri L Jour 149.

(7) An authority is generally construed in case of doubt according to the usual course of dealing in business to which it relates, partly because this may be presumed to be the real intention and partly because the third person may attribute to the agent such authority as agents in the like business usually have. Where a party admitted that sometime himself and sometimes his Munim worked in the shop, it was held Munim had the authority to receive money and pass valid receipt. Madh BLJ 1954 HCR 140 (140, 141).

(8) Where a common manager appointed on behalf of Patnidar under Sec. 95 of Bihar Tenancy Act was not specially empowered to give release to an under-tenure-holder, it was held that the release was beyond the competence of the common manager and legally invalid. AIR 1957 Pat 706 (709).

(9) If power of attorney does not authorise agent to carry on business except with limitations, any act done by him in excess of such power will not bind principal. AIR 1918 Mad 706 (707) (DB).

(10) Where agent was authorised by power-of-attorney to direct, superintend, manage and control business of defendants and there was stipulation to the effect that agent was not to enter into speculations in "gunnies, opium, shares or exchange." Held, that contract for purchase of sugar was outside scope of prohibition, that words "as carried on by defendants in Singapore and elsewhere" were merely descriptive and not limiting articles of agent's business and that mere imprudence of act did not render act unauthorised. (1912) 39 Cal 568 (577, 578)

(DB) ** (1911) 10 Ind Cas 895 (897) (Cal).

(11) Landlord appointing Tahsildar to manage agricultural lands — Tahsildar letting out lands on bhag for proper cultivation — Transaction within scope of Tahsildar's authority — Implied holding out by landlord — Landlord bound by Tahsildar's acts. AIR 1962 Orissa 164 (166, 167) = ILR (1962) Cut 564 (DB).

(12) Scope — Act done in the usual way of business of the kind — Partner entering into transaction of purchase of goods in his own name — Firm, not bound — The mere fact that the act falls within the scope of usual or apparent authority of an agent will not bind another person as his principal when the act itself was unauthorised and not ratified by the latter, and the third party was dealing with the agent treating him as principal himself and not as an agent. AIR 1958 Bom 445 (448, 450) = 1958 Cri LJ 722.

(13) Managing Director of company having by Articles of Association full power to enter into contract — Managing Director entering into contract — Condition that contract was to be confirmed by Board of Directors — Condition would not make the contract void ab initio, on account of failure of Managing Director to get the confirmation — Contract being within scope of authority of the Managing Director, was valid. (1960) 1 Assam LR 255.

4. Power of attorney.— (1) Where an act purporting to be done under a power-of-attorney is challenged as being in excess of the authority conferred by the power, it is necessary to show that on a fair construction of the whole instrument, the authority in question is to be found within the four corners of the instrument either in express terms or by necessary implication. The limits of necessary implication are indicated by Section 188, Contract Act. AIR 1938 Mad 966 (969) (DB).

(2) Where authority is conferred by special power, any act in excess of it will not bind principal. In such cases terms of power should be construed strictly. AIR 1917 Pat 234 (238) = 2 Pat L Jour 600 (DB).

(3) According to Section 188, power-of-attorney should be construed strictly. Such construction does not disable attorney from exercising all powers incidental to execution of powers expressly enforced on him or from exercising powers necessarily implied, and termed 'medium powers'. (1912) 23 Mad L Jour 595 (598) (DB).

(4) Power of attorney must be strictly construed as giving only such authority as they confer expressly or by necessary implication. Power to compromise does not entitle agent to refer a case to arbitration. AIR 1969 Andh Pra 211 (212).

Section 188 — Note 4 (contd.)

(5) Whenever the very act of the agent is authorised by the terms of the power, it is binding on the constituent, as to all persons dealing in good faith with the agent; such persons are not bound to enquire into facts aliunde. The apparent authority is the real authority. 1893 App Cas 170 (180) (PC).

(6) Person having authority to represent another on basis of power of attorney — His statement held was one to be statement of an agent in course of business and admissible in a criminal case against principal. AIR 1962 SC 1821 (1855) = (1962) 2 Cri LJ 805 = (1963) 1 SCR 253.

(7) Where a person was appointed as agent under a power-of-attorney for the purpose of selling certain property of the principal and the power-of-attorney also provided for other purposes and the words conferring powers for the other purposes were quite general. Held, that the governing object of the power was the dealing with or disposing of the property by sale and the other purposes for which the power was executed must therefore, be read as ancillary to this object. Even the general words conferring these powers must be so construed as to restrict them to what may be required for the performance by the agent of his duty to sell. AIR 1948 Oudh 54 (61) = 22 Luck 93 (DB).

(8) Power-of-attorney in suit empowers a person to file appeal and to take out execution and conduct all proceedings arising out of the litigation — Such person is competent to apply in execution for mesne profits. AIR 1933 Lah 876 (878).

(9) When general terms "to commence and prosecute all such legal and other proceedings deemed to be fit" followed special powers in a power-of-attorney, it was held that such words should be construed as limited to what is necessary for the exercise of the special powers, and as enlarging these powers only when necessary for carrying out the purpose for which the authority was given. AIR 1950 Bom 130 (136).

(10) Where an agent compromises a suit in excess of the powers conferred upon him by the power-of-attorney the act will not bind the principal. AIR 1914 Lah 112 (113) = 1914 Pun Re No. 96 (DB).

5. Authority to borrow. — (1) The general provisions of Sections 187 and 188 of Contract Act would authorise an agent to borrow money if necessary. But such provisions are subject to modifications in particular cases, specially where transactions do not prove anything in favour of an implied authority to borrow. When an agent had no such implied authority to borrow and the principal did not subsequently ratify the act of

borrowing, the principal cannot be made liable. (1906) 33 Cal 343 (347, 348) (DB).

(2) Agent has no power to borrow when expressly prohibited in power-of-attorney. AIR 1932 Nag 27 (28) = 27 Nag LR 324.

(3) The agent of a firm can sign a promissory note on behalf of the firm. AIR 1957 Mad 8 (10) (DB).

(4) When agent having no authority to borrow money does so and such borrowing is neither justified by necessity nor it is in the usual course of his business, the principal is not liable. AIR 1938 Mad 966 (969) (DB).

[See also (1906) 33 Cal 343 (347, 348) (DB).]

(5) Where in money lending business an agent is expressly authorised to borrow and lend money to clients, such authority implies authority to pledge principal's credit for borrowing. AIR 1915 PC 121 (123, 124) = 43 Ind App 48 = 43 Cal 527 = 8 Low Bur Rul 536.

(6) An agent has implied authority to pledge the credit of his principal for what is necessary to the successful management of the business and, as usual, an agent in charge of a business has implied authority to bind his principal by raising a loan for the purposes thereof, only if his act is necessary or is usual in the management of the particular business or is justified by an emergency. AIR 1927 Oudh 44 (45) = 2 Luck 253 (DB).

6. Authority to collect debts. — (1) Agent authorised only to collect debts cannot realise their value or any part of it by selling them. AIR 1919 Mad 957 (959) = 41 Mad 923 (DB).

(2) Power-of-attorney given to agent to collect outstandings includes also power to collect debts due under decrees, obtained even before date of power. AIR 1914 Mad 632 (633).

7. Authority to receive payments. — (1) Where an agent is authorised to receive money it might be presumed that he had the authority to do every lawful act which was necessary in connection with that e. g., accepting money in payment of a particular instalment or waiving the default made in paying an overdue instalment. AIR 1917 Oudh 235 (236) (DB).

(2) The authority to collect the bills or receive payments in connection with them does not ipso facto signify that the power to collect those bills no longer remained with the holder or drawer of the bills. AIR 1954 Assam 23 (25) = ILR (1953) 5 Assam 115 (DB).

(3) Where an agent is authorised to receive payment due to the principal and the amounts were neither transferred nor assigned to him the agent has no authority to institute suit for its recovery. AIR 1939 All 623 (626).

Section 188 — Note 7 (contd.)

(4) Authority of agent — Agent purporting to collect money on behalf of principal — Amounts to collection by principal — Principal can show that collection by agent was in his individual capacity. AIR 1961 Mad 438 (441, 442) = 74 Mad LW 145 (DB).

(5) A care-taker is only an agent — Possession of care-taker is possession of principal. AIR 1969 Ker 214 (217) = 1968 Ker LJ 738.

8. Authority to purchase. — (1) A commission agent purchasing goods for merchant and consigning them by ship and insuring them under instructions from merchant has insurable interest in goods and can recover money under policy of insurance in case of loss of goods. (1912) 36 Bom 484 (488, 489).

(2) Where goods were purchased on credit and payment of interest was contemplated, the agreement to pay reasonable interest by the agent will be binding on the principal. AIR 1915 Mad 1162 (1163).

(3) Where A agrees to serve as an agent of the Government for the purchase of paddy and rice, the relation of agent and principal will exist between him and the Government by implication for the ancillary purpose of purchasing gunny bags for storage and supply of the grains. AIR 1957 Orissa 228 (229) = ILR (1957) Cut 428.

9. Authority to sell. — (1) When an agent is authorised to negotiate and complete a sale for a specified price within a particular time, it gives him authority to enter into a contract for sale whether it be for immovable or movable property. AIR 1946 Mad 42 (44) = ILR (1946) Mad 465 (DB).

(2) An authority to sell for cash will enable the donee of the power to sell not merely for prompt payment of cash but also for deferred payment. The only condition appended to the authority is that the sale must be for the best price — An authority to sell must certainly include an authority to agree to sell also. AIR 1953 Trav-Co 161 (164) (DB).

(3) Where a person is authorised to sell salvage lying in particular area the effecting of such sale within his authority does not give a mandate to him to act outside his authority and sell salvage lying in a different area. AIR 1947 Cal 307 (311) (DB).

(4) A consignee who is not the owner of the goods but only a commission agent for the sale of the goods is entitled to bring in a suit for loss in respect of damage caused to the goods in transit. AIR 1956 All 338 (341) = ILR (1956) 1 All 526 (FB).

(5) Obiter: — It is doubtful whether a seller can in law act as the agent of the buyer for the purpose of taking actual delivery of the goods sold. AIR

1960 All 62 (67) = (1960) 11 STC 34 = 1959 All LJ 545 (DB).

(6) The plaintiffs sold some cotton bales to defendants. One X was the agent of the plaintiffs for the sale of the bales. The defendants did not pay the price of the goods in cash. But instead there was a havala entry in their account books in favour of the creditor of X.

Held, that though X was authorised to receive payment from the defendants as the law requires that payment must be made in cash unless otherwise directed by the principal, the defendants had to show that the payment of the price was made in cash or that the plaintiffs had authorised the defendants to make payment otherwise. In the absence of such proof the havala entry unless it was ratified by the plaintiffs could not bind them. The liability of the defendants could not be regarded as discharged. AIR 1959 Bom 309 (313) = 60 Bom LR 898 (DB).

(7) Where in a case in which the property is put into the hands of the agent to dispose of for the owner and the agent accepts the employment, and it may be expends money and time in endeavouring to carry it out, it may be implied that the principal will not withdraw the authority he has given after the agents has incurred substantial outlay. 1968 MPLJ 510 = 1968 Jab LJ 609 (DB).

10. Broker. — (1) A broker is also in the position of an agent and it is his duty in ordinary course of business to negotiate and make contracts for sale and purchase of goods and other property of which he is not entrusted with the possession or control. The authority of such an agent, therefore, does not extend to all matters relating to the transaction so as to bind the principal. Where there is no express authority, the authority of an agent, not entrusted with the custody of the goods, does not go to the extent of receiving payments on behalf of the principal, specially where the principal is a disclosed principal. In such cases there must be an express authority to receive payment of the price: nor can the agent, of his own accord, alter the material terms of the contract without the knowledge of the principal. ILR (1956) 8 Assam 268 (275).

(2) The position of a broker is that of an agent. When a man is authorised to do a certain act, it must be presumed necessarily that he has been authorised to do all such acts which must be performed to complete the transaction. AIR 1951 Hyd 47 (47) = ILR (1951) Hyd 440.

(3) Stock broker is bound to retain equivalent number of shares and not necessarily specific shares purchased for his client. AIR 1938 PC 23 (24).

189. Agent's authority in an emergency.*—An agent has authority, in an emergency, to do all such acts for the purpose of protecting his principal from loss as would be done by a person of ordinary prudence, in his own case, under similar circumstances.

Illustrations

(a) An agent for sale may have goods repaired if it be necessary.

(b) A consigns provisions to B at Calcutta, with directions to send them immediately to C, at Cuttack. B may sell the provisions at Calcutta, if they will not bear the journey to Cuttack without spoiling.

[*] See S. 214 *infra*, for agent's duty to communicate with his principal.

Section 188 — Note 10 (contd.)

(4) If a broker is authorised to effect contract on behalf of his principal and the contract is completed by the broker such contract is binding on the principal. AIR 1962 Punj 56 (58, 59) (DB).

11. Estate agent.— (1) House or estate agent is in a different position from a broker at the stock exchange owing to the peculiarities of the property with which he is to deal, which does not pass by a short instrument as stock and shares do but has to be transferred after investigation of title as to which various special stipulations which might be of particular concern to the owner may have to be inserted in a concluded contract relating to such property. The parties, therefore, do not ordinarily contemplate that the agent should have the authority to complete the transaction in such cases. AIR 1950 SC 15 (17) = 1950 SCR 30 = ILR (1951) 1 Cal 511.

12. Counsel.— (1) The counsel, whether he be barrister, advocate or a pleader, has inherent powers to compromise without the authority or consent of the client unless his powers in this behalf have been expressly countermanded. ILR (1954) Hyd 694 (709).

(2) Without the express authority of the client, a pleader cannot compromise his case. ('98) 21 Mad 274 (277) (DB).

[See also AIR 1914 Lah 112 (113) = 1914 Pun Re No. 96 (DB).]

(3) An act of the agent is in law an act of the party — Offer to be bound by special oath — Offer can be made by counsel and need not come from party himself. 1964 Jab LJ 51.

13. Solicitor.— (1) A solicitor has no implied authority as such to receive payment of mortgage debt though he may be authorised to receive interest. He cannot enter into agreement to release portion of mortgaged property from lien. Nor can he, where he is authorised to receive payment, receive cheque instead of cash. (1909) 10 Cal L Jour 150 (171) (DB).

(2) Solicitors are not, in the absence of specific authority, agents of their clients to conclude a contract for them. AIR 1952 Nag 220 (225) = ILR (1949) Nag 581.

14. Public agent.— (1) The consideration applicable to the cases of a pri-

vate principal and agent will not hold good in cases of a public officer doing duty under Government. AIR 1953 Trav. Co 392 (393).

(2) In case of public agents, the Government or other public authority is not bound unless it manifestly appears that the agent is acting within the scope of his authority or he is held out as having the authority to do the act or is employed in his capacity as public agent to make the declaration or representation for the Government. AIR 1947 Mad 74 (76).

15. Power to carry on litigation.— (1) When a litigation is carried on by a person in the name of an agent, the agent can certainly continue to carry the litigation till the last stage. But the principal can step in at any time to carry on the litigation in his own name. AIR 1954 Cal 615 (617) = ILR (1956) 1 Cal 493 (DB).

(2) An agent who has some interest in property can maintain an action to protect that interest even if it is a qualified interest. AIR 1950 Pat 222 (226).

Section 189 — Note 1

(1) The authority of the so-called agent under Section 189 is an authority which the law has granted to person who was acting, not as an agent *ex contractu*, so far as that particular transaction was concerned, but outside the scope of his employment by the principal. Status, and not contract, is the determining factor in such a case. 1949 Bur LR (SC) 64 (70).

(2) Agents are ordinarily bound to carry out principal's instructions in all respects. If, however, goods are perishable or perishing, agent is entitled to deviate from his instructions as to time or place at which they are to be sold. AIR 1940 Lah 412 (415) (DB).

(3) Agent expressly prohibited from disposing principal's property — Agent in possession of wreckage of launch belonging to principal — Agent having no means available of communicating with principal as to what should be done in respect of it — Agent held came within definition of agent within Section 189. 1949 Bur LR (SC) 64 (71).

(4) Agent purchasing certain goods for the principal and intimating that in default to remit the purchase price, the

Sub-Agents

190. When agent cannot delegate.—An agent cannot lawfully employ another to perform acts which he has expressly or impliedly undertaken to perform personally, unless by the ordinary custom of trade a sub-agent may, or, from the nature of the agency, a sub-agent must, be employed.

191. "Sub-agent" defined.—A "sub-agent" is a person employed by, and acting under the control of, the original agent in the business of the agency.

192. Representation of principal by sub-agent properly appointed.—Where a sub-agent is properly* appointed, the principal is, so far as regards third persons,

Section 189 — Note 1 (contd.)

goods would be sold — Principal failing to remit purchase money in time — Agent held had implied authority to sell the goods at the market value and be reimbursed for the loss. AIR 1927 Lah 493 (494) (DB).

(5) Express instructions to ship "Soonest" at New York — Impossibility to avoid delay at New York — Goods cannot be shipped at another port without promisee's previous consent as there was ample time to obtain such consent. AIR 1925 Cal 609 (611) (DB).

(6) In emergency, bailee has same power to act as agent under Section 189, Contract Act, and in cases of difficulty he is under same duty as has been cast upon agent under Section 214 of Act which makes it incumbent on agent to use all reasonable diligence in communicating with his principal and in seeking to obtain his instructions. AIR 1933 All 158 (159) (DB).

(7) Change of polling station — Requirement of previous approval of Election Commission — Change proposed on eve of polling day — Change approved by Election Commission, on polling day — Approval received by Returning Officer next day — Change shown necessitated by case of urgency — Change held not without legal authority. AIR 1966 Madh Pra 255 (261) = 1966 MPLJ 77 (DB).

Section 190 — Note 1

(1) As a general rule an agent cannot without authority from his principal devolve upon another obligations to the principal which he has himself undertaken to personally fulfil. But in special circumstances, it is permissible for the agent to appoint a substitute who would be responsible to the principal in the same way as the agent himself. Such a substitute is not a sub-agent but an agent of the principal. AIR 1939 All 188 (189).

(2) Authority to appoint sub-agent may be presumed from facts and the nature of the agency. AIR 1923 Rang 84 (85) = 11 Low Bur Rul 326 (DB).

Section 191 — Note 1

(1) Agent and sub-agent — A while writing letters to B about sales or about steps being taken by him in regard to disposal of B's goods sent to him almost

invariably sending copies of these letters to C — Held that though this fact by itself might not establish conclusively that C was B's agent and A was sub-agent it probalised the fact. AIR 1961 Andh Pra 143 (147) = 1960 Andh LT 524 (DB).

(2) Where a constituent of a Bank draws a bill for collection at a place where the bank has neither a branch nor any agent and appoints therefore at the same time an agent of his own, the collection of money by such agent would not bind the Bank as the said agent is in no sense a sub-agent of the Bank, and on default by the agent the constituent cannot claim back the bill amount from the Bank. AIR 1961 Andh Pra 346 (350) (DB).

(3) 'X' purchased flowers from 'A' for sale in another State. In Railway receipt 'X' was shown both as consignor and consignee. 'X' asked 'A' to send railway receipt to 'B' who was supposed to sell flowers on behalf of 'X' if 'B' had not stood surety for the liability of 'X' to 'A'. B did not become an agent of 'A' but only a substituted agent. AIR 1966 Pat 61 (64) = 1965 BLJR 367 (DB).

(4) A petitioner gave Treasury bills to his Bank for collection but the Bank passed them on to another Bank for collection. The other Bank collected the bills from treasury before it went into liquidation. The liquidator and the petitioners came to an understanding that petitioner should receive only fifty per cent of his dues as a preferential claim—Held that the relationship between the petitioner and the first bank were those of principal and agent while the bank in liquidation was only a sub-agent. AIR 1959 Punj 100 (102) = 60 Pun LR 412.

Section 192 — Note 1

(1) There is no privity of contract between the principal and the sub-agent. AIR 1915 Mad 509 (513) (DB) ** AIR 1952 Punj 172 (174) = ILR (1952) Punj 189 (DB).

(2) Authority to appoint sub-agents does not discharge agent's liability to principal for acts of sub-agent, nor creates a privity between principal and sub-agent nor brings the case under Section 194 i.e. procuring an agent. AIR 1930 Sind 247 (250, 251) = 25 Sind LR

represented by the sub-agent, and is bound by and responsible for his acts, as if he were an agent originally appointed by the principal.

Agent's responsibility for sub-agent.—The agent is responsible to the principal for the acts of the sub-agent.

Sub-agent's responsibility.—The sub-agent is responsible for his acts to the agent, but not to the principal, except in case of fraud or wilful wrong.

[°] See Ss. 190 and 194.

193. Agent's responsibility for sub-agent appointed without authority.—Where an agent, without having authority to do so, has appointed a person to act as a sub-agent, the agent stands towards such person in the relation of a principal to an agent, and is responsible for his acts both to the principal and to third persons; the principal is not represented by or responsible for the acts of the person so employed, nor is that person responsible to the principal.

194. Relation between principal and person duly appointed by agent to act in business of agency.—Where an agent, holding an express or implied authority

Section 192 — Note 1 (contd.)

28 (DB) ** AIR 1961 Andh Pra 143 (151) = 1960 Andh LT 524 (DB).

(3) Every agent who employs a sub-agent is liable to the principal for money received by the sub-agent to the principal's use, and is responsible to the principal for the negligence and other breaches of duty of the sub-agent in the course of his employment. AIR 1930 PC 274 (275) ** AIR 1917 Bom 19 (31) (DB).

(4) Principal cannot sue sub-agent for accounts unless he can prove fraud or wrong doing by the sub-agent. AIR 1938 Cal 12 (12) = ILR (1937) 2 Cal 124 (DB).

(5) Bania employed by agent for sale of goods selling such goods in good faith and duly accounting therefor to the agent — He cannot thereafter be held accountable to the principal. (1891) 18 Cal 573 (614, 615) = 18 Ind App 78 (PC).

(6) Receiver to an estate appointing tahsildar — Tahsildar may be regarded as sub-agent liable to Receiver and not to the principal. (1908) 8 Cal LJ 114 (115) (DB).

(7) It is open to a person to contract out of his liability under Section 192. AIR 1952 Punj 172 (175) = ILR (1952) Punj 189 (DB).

(8) A in foreign country remitting money through its bank in foreign country to person in India — Contract contemplating appointment of sub-agent — Indian branch of Bank instructing another Bank to make payment to payee after observing certain formalities as to due identification, etc. — There was held no privity of contract between A and the Bank making payment — Latter was held not liable to A even if negligence of its servants was proved. AIR 1952 Punj 172 (174) = ILR (1952) Punj 189 (DB).

(9) If a person is initially appointed as agent and if he engages his own sub-agent for carrying through certain trans-

actions, the mere circumstances that the sub-agent corresponded not with his employer but with the main principal does not divest the main agent of his character as such. AIR 1961 Andh Pra 143 (150) = 1960 Andh LT 524 (DB). (60 ER 428; AIR 1930 PC 274, Rel. on.)

(10) The agent's custody can be constructive. When under his instructions the goods are despatched to his sub-agent and the latter is having custody thereof that would be deemed to be the custody of the principal. AIR 1961 Andh Pra 143 (152) = 1960 Andh LT 524 (DB).

(11) A sub-agent is responsible only to his principal namely the agent but not to the principal. But the position is different if he is guilty of fraud or wilful wrong. This is not only on the general principles but by reason of third paragraph of Section 192. AIR 1961 Andh Pra 143 (153) = 1960 Andh LT 524 (DB).

(12) Bank transmitting constituent's bill for collection under his instructions to his agent at place where Bank has no branch or agent — Agent not sub-agent of Bank — Bank not liable for collection by agent. AIR 1961 Andh Pra 346 (350) (DB).

(13) The sub-agent is responsible for his acts to the agent, but not to the principal except in case of fraud or wilful wrong — Even if it be held that negligence on the part of the sub-agent is a 'wilful wrong' the right of recourse to the sub-agent does not exclude the principal's normal right of recourse to his agent — In fact, the total effect of Section 192 is to give an option to the principal where a fraud or wilful wrong is committed by the sub-agent. AIR 1963 Cal 163 (172) = 1963 Cal LJ 43.

Section 194 — Note 1

(1) The true test to determine whether the person appointed by the agent authorised in that behalf to perform part of the business of agency is a substituted

to name another person to act for the principal in the business of the agency, has named another person accordingly, such person is not a sub-agent, but an agent of the principal for such part of the business of the agency as is entrusted to him.

Illustrations

(a) A directs B, his solicitor, to sell his estate by auction, and to employ an auctioneer for the purpose. B names C, an auctioneer, to conduct the sale. C is not a sub-agent, but is A's agent for the conduct of the sale.

(b) A authorizes B, a merchant in Calcutta, to recover the moneys due to A from C and Co. B instructs D, a solicitor, to take legal proceedings against C and Co. for the recovery of the money. D is not a sub-agent, but its solicitor for A.

Section 194 — Note 1 (contd.)

agent of the principal or the sub-agent of the agent is to see if there is a privity of contract between the principal and the person so appointed, and the test to be applied is the same whether the case falls within Section 194 or whether the person so appointed is nominee of the principal, although there is difference in the obligation undertaken by the agent. AIR 1930 Cal 10 (14, 15) = 56 Cal 686
** AIR 1958 Punj 159 (162) = ILR (1958) Punj 1115.

(2) Plaintiff who was owner of houses appointed a banking concern to lease out his houses. In the course of the correspondence, plaintiff wrote to bank's agent thus: "In any case you need not enquire from me about renting the cottages. You have full authority to accept anything". The banking concern appointed defendant as agent on behalf of plaintiff to rent the houses: Held that the plaintiff had given very wide powers to the banking concern and the power to appoint an agent under these circumstances might well be inferred. A banking concern usually is not expected to go about in search of tenants and plaintiff must have known that other agencies would have to be employed in order to find suitable tenants for the houses. Under these circumstances the bank had authority to appoint defendant as agent and the latter was accountable to plaintiff. AIR 1939 All 188 (189).

(3) Where a person appoints one branch of a bank as his agent for the purchase of certain goods and that branch instructs another branch of the same bank to pay for and take delivery of the goods for such person the latter branch becomes a substituted agent of the person and is bound to carry out all the instructions of the principal in respect of the transaction. The Court cannot take judicial notice of a mercantile custom at variance with the statutory rights of a party to the contract when it has been neither pleaded nor proved. AIR 1929 Lah 536 (538) (DB). (AIR 1927 Lah 562, Reversed.)

(4) English mortgage — Mortgagor granting power-of-attorney to mortgagee to collect rents as mortgagor's agent — Power-of-attorney giving authority to mortgagee to appoint substitute — Sub-

stitute so appointed is agent of mortgagor and not of mortgagee. AIR 1936 Pat 211 (217) = 14 Pat 560 (DB).

(5) Where A, a Commission agent of B, employed C to carry on forward transaction business on behalf of B and B accepted the transactions as well as the profits thereof, C is an agent of B for that part of the business of the agency as was entrusted to C and privity of contract arises between B and C as principal and substitute. AIR 1958 SC 269 (272) = 1958 SCR 937 = ILR (1958) Punj 731.

(6) Goods consigned from Quetta in Pakistan to New Delhi in India— Goods carried by Pakistan Railway and Indian Railway — No treaty between two countries regarding liability for loss of goods in case of through traffic — Suit by consignee for compensation for non-delivery at New Delhi against Dominion of India. In the situation the authority in the Receiving Railway as an agent must necessarily be implied, to appoint forwarding railway to act for the consignor and the forwarding railway would be an agent of the consignor. AIR 1960 SC 233 (297) = (1960) 2 SCR 75.

(7) The difference between the relations of master and servant and of principal and agent is that a principal has the right to direct what work the agent has to do; but a master has the further right to direct how the work is to be done. An agent has to be distinguished on the one hand from a servant and on the other from an independent contractor. A servant acts under the direct control and supervision of his master. An agent though bound to exercise his authority in accordance with all lawful instructions which may be given to him from time to time by his principal, is not subject in its exercise to the direct control or supervision of the principal. AIR 1960 SC 1269 (1271, 1272) = (1960) 3 SCR 546.

(8) Section 194 embodies the theory of what is generally known as substituted agency. What this section envisages is an agent nominating another person to act for the principal in the business of the agency with the knowledge and consent of the principal. The naming of the person does not amount to delegation of the duties of the principal. In such a

195. Agent's duty in naming such person.—In selecting such agent for his principal, an agent is bound to exercise the same amount of discretion as a man of ordinary prudence would exercise in his own case; and, if he does this, he is not responsible to the principal for the acts or negligence of the agent so selected.

Illustrations

(a) A instructs B, a merchant, to buy a ship for him. B employs a ship-surveyor of good reputation to choose a ship for A. The surveyor makes the choice negligently and the ship turns out to be unseaworthy and is lost. B is not, but the surveyor is, responsible to A.

(b) A consigns goods to B, a merchant, for sale. B, in due course, employs an auctioneer in good credit to sell the goods of A, and allows the auctioneer to receive the proceeds of the sale. The auctioneer afterwards becomes insolvent without having accounted for the proceeds. B is not responsible to A for the proceeds.

Section 194 — Note 1 (contd.)

case, direct relations are established between the principal and the person nominated and the latter becomes an agent substituted for the person who was authorised to nominate another. 8 Ch D 286, Rel. on. The mere fact however that the principal had accepted the terms on which the sub-agent would sell the goods and advance money against goods would not ipso facto put an end to the relations between the principal and the agent. AIR 1961 Andh Pra 143 (152) = 1960 Andh LT 524 (DB).

(9) Defendant No. 1 as agent of plaintiff requesting defendant 2 to arrange for reshipment of goods from Rangoon to Calcutta — Defendant 2 agreeing with plaintiff to do so — Defendant 2 held to be nominee of plaintiff — Privity of contract held established between plaintiff and defendant 2 — Defendant 1 not liable for negligence of defendant 2. AIR 1963 Cal 163 (169, 170, 171) = 1963 Cal LJ 43.

(10) Plaintiff purchasing flowers from 'A' for sale in another State — Plaintiff shown as both consignor and consignee in railway receipts — Export permit also in his name — 'A', acting as commission agent for export, naming 'B' in another State for selling flowers of plaintiff on commission and under plaintiff's instructions and sending railway receipts to 'B' for taking delivery of flowers — Held that though named by 'A', 'B' was not sub-agent of 'A' but substituted agent and as he had not also agreed to stand surety for plaintiff's liability to 'A', was accountable to plaintiff alone for sale proceeds — Subsequent correspondence between 'A' and 'B' cannot alter contractual relationship thus established. AIR 1966 Pat 61 = 1965 BLJR 367 (DB). (First Appeal No. 475 of 1954 (Pat), Reversed.)

(11) P. N. Bank, sued B. D. Co. for recovery of money on basis of an overdraft account. Defendant company pleaded that only Rs. 1,700 were due to the Bank after adjusting and obtaining credit on account of a hundi and railway

receipt handed over to the Bank for collection from certain firm through M Bank. This claim of the defendant was in the nature of a set off.

Held, that the position of the M Bank was that of the sub-agent appointed under the authority of the defendant firm, but there was no privity of contract between them. (2) That the P. N. Bank was guilty of negligence in dealing with the business of collecting the draft through the M Bank. (3) That the banker was bound to do not only what was legally imperative but also what was prudent in the interests of his customer. The onus of proving the absence of negligence is on the banker. (4) that the Bank had to make compensation to the defendant only in respect of the direct consequences of its neglect. AIR 1960 Punj 590 (593, 594, 595) = 62 Pun LR 720 (DB).

(12) Plaintiff, an importer of free wheels of cycles from New York through Punjab National Bank — National City Bank of New York employed to effectuate transaction of import — Letter of credit issued accordingly — Privity of contract established — Latter bank, held assumed position of agent. AIR 1966 Punj 303 (308) (DB).

Section 195 — Note 1

(1) It cannot be said that as the agent is responsible to the principal for negligence in the relation of a substituted agent, his hands would be tied as soon as he made the nomination and cannot revoke it although he may later discover that the person appointed by him was unworthy of his choice. Section 195 itself implies the power of revocation in an agent in the case of a substituted person. AIR 1944 Bom 76 (85).

(2) Where an agent selects a competent person as a sub-agent to do a particular business, the former is not responsible to the principal for the negligence of the agent so selected. (1909) 3 Sind LR 191 (194).

(3) Defendant No. 1 as agent of plaintiff requesting defendant 2 to arrange for

Ratification

196. Right of person as to acts done for him without his authority. Effect of ratification.—Where acts are done by one person on behalf of another, but without his knowledge or authority, he may elect to ratify or to disown such acts. If he ratify them, the same effects will follow as if they had been performed by his authority.

Section 195 — Note 1 (contd.)

re-shipment of goods from Rangoon to Calcutta — Defendant 2 agreeing with plaintiff to do so — Defendant 2 held to be nominee of plaintiff — Privity of contract held established between plaintiff and defendant 2 — Defendant 1 not liable for negligence of defendant 2. AIR 1963 Cal 163 (169, 170, 171) = 1963 Cal LJ 43.

SECTION 196 — SYNOPSIS

1. Ratification — Essentials of.
2. Acts done without authority.
3. Ratification — Effect of.
4. Ratification by quondam minor.
5. Acts which cannot be ratified.

1. Ratification — Essentials of. — (1) The first essential to the doctrine of ratification, with its necessary consequence of relating back, is that the agent shall not be acting for himself, but shall be intending to bind a named or ascertainable principal. AIR 1936 PC 193 (197) ** AIR 1936 Cal 87 (92) (DB) ** AIR 1927 Mad 805 (811). (Man can ratify that which purported to be done for him, but cannot ratify thing done for somebody else.) ** AIR 1917 Mad 250 (253) (DB) ** (1908) 35 Cal 420 (429) = 35 Ind App 48 (PC) ** (1908) 8 Cal LJ 458 (467) (DB) ** (1881-82) 6 Bom 463 (466) (DB).

(2) Ratification in the proper sense of the term is applicable only to acts done on behalf of the person who ratifies. (1908) 8 Cal LJ 458 (467) ** ILR (1967) 3 Mad 80 (DB) ** 1962 All LJ 678 ** AIR 1960 Pat 19 (25) = 1959 BLJR 527.

(3) Section 196 refers to contracts which have been entered into by persons on behalf of others without their knowledge or authority but not to contracts which have been expressly forbidden either by those persons who are alleged to have ratified them later or by law. AIR 1939 Mad 957 (960) = ILR (1939) Mad 928 (DB) ** 1966 Raj LW 500 = ILR (1967) 17 Raj 483. (Municipal Board cannot be held responsible for the act of the chairman which is not part of the duty of the Board.)

(4) Effective ratification necessarily involves knowledge of all the material facts on the part of him who ratifies. AIR 1930 PC 278 (281) ** 1958-2 Andh WR 134 (148) ** AIR 1957 All 311 (316) ** AIR 1948 Oudh 54 (75) = 22 Luck 93 (DB) ** AIR 1936 Cal 87 (92) (DB) ** AIR 1930 Oudh 312 (314) = 6 Luck 19 (DB) ** AIR 1927 Mad 478 (485) (DB). (Full knowledge of facts must be proved.) ** AIR 1915 Cal 54 (58)

(DB) ** (1964) 68 Cal WN 786. (No full knowledge on the part of principal.) ** 1962 All LJ 678 ** 1959 Andh LT 39 = (1958) 2 Andh WR 134.

(5) The ratification, in order to be effective, can only be by an authority that is in existence on the day the transaction was entered into and it should also be competent to ratify. AIR 1960 Andh Pra 340 (342) = ILR (1959) Andh Pra 1272 (DB).

(6) In order to ratify something it is necessary that that thing must exist. AIR 1926 Cal 1215 (1217) (DB).

(7) It is possible for the act of an agent done within time to be subsequently ratified by the principal. AIR 1934 Pat 290 (292) (DB).

(8) A principal cannot ratify a transaction in part and repudiate it in part. AIR 1915 Cal 54 (58) (DB) ** AIR 1924 Pat 25 (27).

(9) In determining whether the principal ratified an act of the agent the question is not what the principal intended to do but what he did. That is, his acts are conclusive evidence of his intention. AIR 1927 Mad 478 (483) (DB).

(10) An option of ratification is capable of being exercised within a reasonable time of the act purported to be ratified and not after the expiry of the period for which the option was open. AIR 1939 Mad 957 (960) = ILR (1939) Mad 928 (DB).

(11) There can be no ratification of a contract unless it is communicated to the other side or that subsequent actions show an approbation of the contract. AIR 1938 Nag 482 (482) = ILR (1940) Nag 29 (DB) ** AIR 1954 Nag 357 (359) = ILR (1954) Nag 558 (DB).

(12) Ratification is different from consent. Consent is an express or implied agreement to waive the right to avoid an act and precedes the transaction. Ratification is subsequent in point of time to the transaction which is voidable. AIR 1927 Nag 180 (182).

(13) Agent fraudulently drawing bill of exchange on behalf of principal — Bills dishonoured — Agent acting within scope of his authority — Act of agent ratified by principal — No collusion between payee and agent — Principal is liable — It is not the business of the bank in whose favour the bill was drawn to enquire about the motive of the agent, as long as he had authority to draw the bill. AIR 1963 Andh Pra 348 (351, 352) = (1963) 1 Andh WR 180 (DB).

Section 196 — Note 1 (contd.)

(14) Ratification of order of authority which is improperly constituted — Does not amount to ratifying authority passing the order as original order under powers vested in it by statute — If there is exercise of power by agent in excess of scope of his agency, ratifications thereof be made by principal, but where appointment of agent is invalid there can be no question of ratification of any act purporting to have been done by such agent. AIR 1967 Andh Pra 291 = (1968) 1 Andh LT 165 (DB).

(15) Agent for sale — Defendant not paying in cash — Havala entry in favour of creditor of agent — Such entry unless it was ratified by the principal would not bind them — Liability of defendant could not be regarded as discharged. AIR 1959 Bom 309 = 60 Bom LR 898 (DB).

(16) Change of polling station on grounds of urgency — Change approved by Election Commission on polling day — Change held not without legal authority. AIR 1966 Madh Pra 255 (261) = 1966 MPLJ 77 (DB).

(17) A promoter is not an agent or trustee of an unborn corporation; he has no representative status so to speak and cannot bind the corporation by any act. ILR (1967) 3 Mad 80 (DB).

(18) Person taking house on rent for starting hospital for women. Held, principal (i.e. hospital) being undisclosed and not being legal body in absence of registration, person was personally liable for rent under Section 230 — Not even any subsequent ratification by the company, when it comes into existence, can relieve the personal liability of the agent. AIR 1963 Pat 131.

(19) Contract entered into by Government Official not complying with provisions of Section 175 (3), Government of India Act (1935) — Subsequently Government agreeing to accept goods at reduced rate from the contractor in pursuance of terms of contract and entering into arbitration with him dragging on for a long time — Arbitrators not objecting on ground of non-compliance with Section 175 (3) — Such objection raised after a very long time — Facts held amounted to ratification of the contract — Plea of ratification held involved not only question of law but also question of fact — Plea not raised — Defect of non-compliance with Section 175 (3) held not cured by reason of ratification. AIR 1961 Punj 5 (7) = 63 Pun LR 186.

2. Acts done without authority. — (1) In order to establish a case of ratification, it is essential that the party ratifying should be conscious that an act beyond the authority of the agent had been done, and further after notice of that fact, the party consciously by an overt act agreed to be bound by it or by acquiescence in the situation arising.

thereafter allowed the business to continue. In either event, consciousness of the act done by the agent without authority must be proved, and, secondly, it should be proved that, after notice of such unauthorized act the principal adopted the transaction. AIR 1936 Bom 62 (69) = 60 Bom 326 (DB).

(2) An act done by an agent of the Government, though in excess of his authority can be ratified by the Government and on being ratified is equivalent to previous authority. ('59) 7 Moo Ind App 476 (539, 540) (PC) ** AIR 1914 Mad 174 (190) = 38 Mad 997 (DB) ** (1861) 8 Moo Ind App 529 (554) (PC) ** ILR (1954) Trav-Co 453 (457).

[See also AIR 1957 Cal 617 (622).]

(3) Where goods were illegally seized by Prohibition Sub-Inspector and sold by the District Prohibition Officer, such sale cannot be treated as an act of the Government ratifying the seizure. It is only an act done in the ordinary course of the discharge of the duties prescribed under the statute. AIR 1957 Mad 190 (191).

(4) By affirming or accepting the validity of a transaction made by the limited owner, a particular reversioner may preclude himself from challenging the same. AIR 1956 Cal 211 (213) (DB).

(5) When a dispute was referred to arbitration by an unauthorised agent and the principal was aware of the arbitration proceedings and ratified the agent's action, he cannot question the validity of the award later. (1897) 24 Cal 469 (472) (DB).

(6) Where a dispute was referred to arbitration by one of the partners without the authority of other partners, such reference is not illegal if ratified by other partners. AIR 1952 Punj 234 (236) ** AIR 1949 East Punj 46 (47).

[See also (1963) Raj LW 114. (Reference of dispute by one of partners of firm to arbitration — Other partner appearing before arbitrators on three out of thirty days fixed for hearing and that too for presenting certain documents. It cannot be said that he submitted to the jurisdiction of arbitrators — Arbitrator not making it clear that he was making award against non-referring partner. Inaction of such partner does not make award binding on him.) ** AIR 1959 Punj 617 = 61 Pun LR 767 (FB). (A reference to arbitration through Court under Section 21, Arbitration Act, by one partner alone, cannot, be legalised by subsequent acquiescence and ratification by other partners.)]

(7) Where a submission to arbitration was unauthorised and was not ratified by all the partners of the firm, the award based on such reference will not bind one of the partners who has ratified the unauthorised submission. AIR

Section 196 — Note 2 (contd.)

1948 Sind 79 (83) = ILR (1947) Kar 206.

(8) A mortgage executed by a general agent holding a power-of-attorney, which did not authorise him to execute mortgages is operative if acted upon and ratified by the principal. AIR 1922 All 197 (199) = 44 All 77 (DB).

(9) Where an act of an agent done in excess of his authority is ratified by the principal, the personal liability of the agent to the principal ceases. AIR 1927 Mad 478 (482) (DB).

(10) The principal might not have authorised or ratified a transaction entered into by his agent but still he would become answerable to the extent of the benefit derived by him under the transaction. AIR 1930 Nag 42 (42). (Unauthorised borrowing applied to pay off principal's legal debt.) ** AIR 1937 Lah 570 (571). (Money received through wrongful or unauthorised act of agent — Principal benefiting by the money becomes jointly liable with agent to restore it.)

3. Ratification — Effect of. — (1) Ratification is in law equivalent to previous authority. AIR 1943 PC 66 (68) = 70 Ind App 50 = ILR (1944) Mad 1 = ILR (1943) Kar (PC) 77 ** AIR 1927 Mad 805 (811).

(2) Ratification relates back to the time of inception of the transaction and has a complete retroactive efficacy. AIR 1936 Cal 87 (92) (DB) ** AIR 1934 Pat 290 (292) (DB) ** AIR 1968 Delhi 292 = (1968) 70 Pun LR (D) 148.

(3) Since an act done by a person not authorised to do it can be ratified, it follows that such act is not void but voidable. If it is not ratified, it will become void; but if it is ratified, it is validated. AIR 1938 All 369 (373) = ILR (1938) All 614 (DB).

(4) Though an unauthorised act of an agent binds the principal because the principal, though undisclosed, has ratified it, it cannot be said that a person is bound by the act of another with whom a third party deals as principal though that act is in fact unauthorised and is not ratified by that person, merely on the ground that the act falls within the scope of the usual or apparent authority of the other. AIR 1958 Bom 445 (450) = ILR (1958) Bom 1035.

(5) Ratification once deliberately made upon full knowledge of all the material circumstances becomes at once obligatory and cannot afterwards be revoked or recalled. AIR 1914 Mad 174 (189, 190) = 38 Mad 997 (DB).

(6) Mere ex post facto submission not amounting to ratification does not amount to estoppel. AIR 1919 Oudh 95 (97) (DB).

4. Ratification by quondam minor. —

(1) In order that an act may amount to

a ratification, there must be after majority and after the late minor has acquired full knowledge of the nature and effect of the transaction, some promise or other act, which shows an internal acknowledgment of his liability in respect of the act done on his behalf during minority. Where, therefore, a person, two months after attaining majority, renews the promissory note executed by the late agent of his mother guardian and such agent at the time of the renewal is in the employ of the person in whose favour the promissory note is executed, it cannot be said that the act of the minor amounted to a ratification of the act of his mother guardian and the plaintiff must prove that there was a legal necessity. AIR 1935 Nag 127 (128) = 31 Nag LR 243 ** AIR 1938 Nag 68 (72) (DB).

(2) As a general rule, a person or a body of persons not competent to authorize an act cannot give it validity by ratifying it. Where the minor was not in a position to give authority at the date when the acts were performed for the reason that a minor cannot contract or perform other legal acts based on a contract, he cannot subsequently ratify these acts. Subsequent acknowledgments by minor on attaining majority do not amount to ratification of acknowledgment given by his de facto guardian during his minority. AIR 1948 Nag 293 (295) = ILR (1947) Nag 710 (DB).

(3) The question of ratification in minors' cases can arise only with respect to the actions of guardians. Such actions are ordinarily binding until set aside by the minor on attaining majority or by someone on his behalf before that. Therefore, on the minor's attaining majority if he does not repudiate the actions of his guardian within a reasonable time or if he elects to ratify them, he is bound by his election. AIR 1937 Nag 390 (391) = ILR (1937) Nag 458.

(4) In order to ratify the transaction of a lease by guardian, it would not be enough to show that the rent was received by the am-mukhetar unless it was further shown that the am-mukhtear was given the power not only to collect rent from tenants but also for ratifying contracts which his master could avoid. AIR 1927 Cal 796 (800) (DB).

(5) Sale deed by minor's guardian — Minor on attaining majority ratifying that transaction by deed — Latter deed does not require registration. AIR 1943 Nag 263 (264) = ILR (1943) Nag 574.

(6) Where minor's property was mortgaged by the guardian for his own good and not for minor's benefit, there can be no ratification. AIR 1940 Pat 661 (662) (DB).

(7) Any action by a person who is not a guardian of the minor and who has no authority to act on behalf of the

197. Ratification may be expressed or implied.—Ratification may be expressed or may be implied in the conduct of the person on whose behalf the acts are done.

Illustrations

(a) A, without authority buys goods for B. Afterwards B Sells them to C on his own account; B's conduct implies a ratification of the purchase made for him by A.

(b) A, without B's authority, lends B's money to C. Afterwards, B accepts* interest on the money from C. B's conduct implies a ratification of the loan.

[*] That is to say 'knowingly accepts'—see S. 198.

Section 196 — Note 4 (contd.)

minor, is incapable of ratification. AIR 1937 Nag 390 (391) = ILR (1937) Nag 458.

5. Acts which cannot be ratified. —

(1) A void agreement cannot be ratified. AIR 1943 Bom 362 (364) ** AIR 1937 Nag 390 (391) = ILR (1937) Nag 458 ** AIR 1930 Cal 748 (749). (Void lease against minor.) ** AIR 1930 Oudh 312 (314) = 6 Luck 19 (DB) ** AIR 1929 Cal 612 (613) (DB). (Void lease.) ** AIR 1929 Cal 50 (54) = 55 Cal 841 (DB) ** AIR 1927 Nag 214 (215) ** AIR 1924 Nag 338 (343) ** (1899) 9 Mad LJ 104 (105) (DB) ** 1968 MPLJ 425 = 1969 Jao LJ 304 (DB) ** 1968 Raj LW 356 ** AIR 1965 Mys 244 = (1964) 2 Mys LJ 451 (DB). (Appointment of Tahsildars has to be by Government and not by Divisional Commissioner — Power of appointment cannot be delegated to subordinate — Appointment by subordinate is void ab initio — It cannot be ratified by Government.) ** AIR 1965 Pat 144 (153) = 1965 BLJR 252 (DB) ** AIR 1962 Pat 336 = ILR 41 Pat 292 (FB). (Non-compliance with contract is void and cannot be ratified by Government — Goods delivered in pursuance of void contract — Conditions of Section 70 complied with — Government liable to compensate.)

(2) A contract made without complying with Sections 67 and 68, Calcutta Municipal Act, 3 of 1923, is null and void and cannot be ratified. AIR 1953 Cal 18 (23).

(3) The manager of a joint Hindu Family is not its agent in the strict sense. An alienation without necessity by the manager being void at its inception cannot be validated by ratification by the members of the family subsequently. (1912) 35 Mad 177 (180) (DB) ** AIR 1961 Mad 405 (407) = 74 Mad LW 16.

[But see AIR 1957 Bom 280 (288) = ILR (1958) Bom 667.]

(4) Official Receiver is not agent of Court and an unauthorised sale by him cannot be ratified by Court. AIR 1927 Mad 1 (2) = 50 Mad 135 (FB) ** AIR 1953 Mad 860 (862) (DB).

(5) Where one of the partners sells the firm property to a person in his own right and not on behalf of the other partner or the firm and subsequently, the second partner also sells the same property to other person, there can be no ratification under Section 196 by the

second partner of the sale by the first. AIR 1940 All 453 (454) = ILR (1940) All 674 (DB).

(6) A company cannot ratify or adopt a contract entered by a person on its behalf before incorporation though it may enter into a new contract embodying the terms of the old one or adopting the old one. AIR 1923 Lah 100 (101).

(7) Where a valid resolution was passed by persons without authority, it can be ratified by the persons with requisite authority by adopting it. But if the very making and passing of the resolution is illegal ratification cannot validate it. AIR 1956 Bom 537 (545) = ILR (1956) Bom 619 (DB).

(8) A verbal agreement made by a Government officer though it may not be in conformity with Article 299 (1) of the Constitution is not void and can be ratified. (1954) 58 Cal WN 1066 (1074).

[But see ILR (1950) 2 Cal 431 (439). (Case decided with reference to S. 175, Government of India Act.)]

Section 197 — Note 1

(1) Ratification may be express or implied. AIR 1943 PC 66 (68) = 70 Ind App 50 = ILR (1944) Mad 1 = ILR (1944) Kar (PC) 77 ** AIR 1960 Raj 92 (96) = 1960 Raj LW 44 (DB) ** AIR 1963 Cal 456. (Contract with Government signed by officer not having authority — Not void — Contract is enforceable against the officer — Ratification by conduct of Government — Arbitration clause in contract modified Government taking part in proceedings — Ratification implied.) ** AIR 1963 Mad 140 = 75 Mad LW 633. (Contract for supply of goods to Government — Person signing on behalf of Government not authorised by rules — Government not bound — Payment for some of goods supplied does not amount to ratification.)

(2) Express ratification unless communicated to other party is incomplete and is liable to be revoked. AIR 1914 Mad 174 (180) = 38 Mad 997 (DB).

(3) Absence of notice by principal of his dissent to agent's unauthorised act within reasonable time raises presumption of ratification. AIR 1919 Mad 343 (344) (DB).

(4) Ratification can be implied from the principal's silence or acquiescence. AIR 1916 Mad 1133 (1136) (DB) ** AIR 1952 Punj 234 (236) ** AIR 1949 East Punj 46 (47) ** AIR 1930 Mad 476 (478) **

198. Knowledge requisite for valid ratification.—No valid ratification can be made by a person whose knowledge of the facts of the case is materially defective.

Section 197 — Note 1 (contd.)

AIR 1915 Mad 859 (862) (DB). (Loan advanced by agent beyond authority — Principal's acquiescence and interference in mode of collection absolves agent from personal liability.)

[See also AIR 1943 Oudh 174 (175). (Tenant readmitted by proprietor's agent without authority — Inaction by proprietor does not amount to acquiescence.)]

(5) Ratification by a long course of conduct is as effective as one by formal declaration. AIR 1914 Mad 174 (190) = 38 Mad 997 (DB).

(6) A mere ex post facto submission to what has taken place is no ratification of it. AIR 1919 Oudh 95 (97) (DB).

(7) Where an agent enters into a transaction not authorised by his principal, if the agent fully and frankly discloses what he has done and the principal takes no objection or abstains from pressing his objection after hearing the agent's explanations, ratification may readily be presumed. AIR 1919 Mad 343 (344) (DB).

(8) Ratification cannot be inferred from mere omission to repudiate in terms of an unauthorised transaction. AIR 1919 Mad 652 (653) (DB).

(9) Where the supposed ratification relates to acts as to which there is no pretence of any prior authority, the circumstances of the alleged ratification must be such as to warrant the clear inference that the principal was adopting the supposed agent's acts, whatever they were or however culpable they were. AIR 1927 Mad 478 (485) (SB) ** AIR 1936 Cal 87 (92) (DB).

(10) Acts relied upon as proving ratification must be inconsistent with denial of liability. AIR 1917 Nag 104 (104).

(11) When an agent, contrary to instructions, makes advances against security, the principal may realise the security and hold the agent liable for the balance. Such intermeddling will not amount to ratification. AIR 1919 Mad 343 (348) (DB) ** AIR 1927 Mad 478 (482, 483, 486) (FB).

(12) Where an agent's authority to mortgage his principal's property is not established but it is proved that the principal was aware that the mortgage had been effected by his agent, and it is also proved that the money raised by the mortgage was received by the principal, the mortgagee would be entitled in equity to recover the mortgage debt from the principal. 1913 Pun LR No. 11, p. 33 (40) = 1913 Pun Re No. 33 (DB).

(13) Where gumastah of landlord accepted rent from transferee of a jote

and landlord failed to show that gumastah acted beyond scope of his authority, held, that facts constituted sufficient recognition of transferee by landlord. (1911) 15 Cal WN 953 (955, 956) (DB).

(14) Implied ratification — Officer having no authority entering into works contracts — Work done to property of which the Government is not the owner — Government sanctioning work for certain limited purposes — Government cannot be said to have ratified the act of the officer for which it would be held liable. AIR 1959 Bom 56 (59, 60) = 1958 Nag LJ 142. (Reversed on another point in AIR 1963 SC 1516.)

(15) Contract entered into by Government official not complying with provisions of Section 175 (3), Government of India Act (1935) — Subsequently Government agreeing to accept goods at reduced rate from the contractor in pursuance of terms of contract and entering into arbitration with him dragging on for a long time — Arbitrators not objecting on ground of non-compliance with Section 175 (3) — Such objection raised after a very long time — Facts held amounted to ratification of the contract — Plea of ratification held involved not only question of law but also question of fact — Plea not raised — Defect of non-compliance with Section 175 (3), held not cured by reason of ratification. AIR 1961 Punj 5 = 63 Pun LR 186.

Section 198 — Note 1

(1) Ratification to be good in law must be made with full knowledge of the facts which invalidate the transaction. AIR 1957 All 311 (316) ** ILR (1967) 3 Mad 80 (DB).

(2) There can be no valid ratification when the knowledge of the person making it regarding the facts of the case is materially defective. AIR 1948 Nag 293 (296) = ILR (1947) Nag 710 (DB) ** 1948 Bur LR (HC) 684 (689) ** AIR 1965 Pat 144 (153) = 1965 BLJR 242 (DB). (Ratification of illegal act — Transfer of mining lease-hold interest in contravention of Rule 37, Mining Concession Rules, 1960, is illegal — Government's acceptance of statutory charges from transferee without knowledge about illegality of transfer does not amount to ratification of transfer.) ** 1960 BLJR 105 = ILR (1959) 38 Pat 1160.

(3) There can be no ratification without an intention to ratify and there can be no intention to ratify an illegal act without knowledge of the illegality. AIR 1948 Oudh 54 (75) = 22 Luck 93.

(4) P entrusted money with his agent firm to be invested in other firms. But the agent without his knowledge invested the money in its own business. On the

199. Effect of ratifying unauthorized act forming part of a transaction.—A person ratifying any unauthorized act done on his behalf ratifies the whole of the transaction of which such act formed a part.

200. Ratification of unauthorized act cannot injure third person.—An act done by one person on behalf of another, without such other person's authority, which, if done with authority, would have the effect of subjecting a third person to damages, or of terminating any right or interest of a third person, cannot, by ratification, be made to have such effect.

Illustrations

(a) A, not being authorized thereto by B, demands, on behalf of B, the delivery of a chattel, the property of B, from C, who is in possession of it. This demand cannot be ratified by B so as to make C liable for damages for his refusal to deliver.

(b) A holds a lease from B, terminable on three months' notice. C, an unauthorized person, gives notice of termination to A. The notice cannot be ratified by B, so as to be binding on A.

Section 198 — Note 1 (contd.)

insolvency of the agent firm P claimed preferential treatment on the ground that the money was held as a trust. Agent's contention that P ratified its transactions was rejected, for P never had full knowledge of the facts. AIR 1937 PC 296 (297, 298) = 64 Ind App 343 = ILR (1938) Mad 91 = 31 Sind LR 678.

(5) Where the manager of a joint Hindu family mortgaged family property not for the benefit of the family and subsequently other members agreed to ratify the mortgage, but the agreement was not communicated to the mortgagee, it was held that the mortgage was not ratified. AIR 1938 Nag 482 (483) = ILR (1940) Nag 29 (DB).

(6) The mere fact that the minor executed a promissory note on attaining majority does not import that he intended to acknowledge liability for an old debt, or a knowledge that the person who executed a prior acknowledgment on his behalf had no authority to do so. AIR 1948 Nag 293 (296) = ILR (1947) Nag 710 (DB).

(7) Agent fraudulently drawing bill of exchange on behalf of principal — Bill dishonoured — Agent acting within scope of his authority — Act of agent ratified by principal — No collusion between payee and agent — Principal is liable — It is not the business of the bank in whose favour the bill was drawn to enquire about the motive of the agent as long as he had authority to draw the bill. AIR 1963 Andh Pra 348 = (1963) 1 Andh WR 180 (DB).

Section 199 — Note 1

(1) If the principal adopts a contract made by his agent, he is bound to adopt it cum onere or not at all. He cannot take the benefit of it without bearing its burden. He must adopt the whole contract or repudiate it altogether. (1913) 40 Cal 335 (340) (DB).

(2) Contract for supply of goods to Government — Person signing on behalf

of Government not authorised by rules — Government not bound — Payment for some of goods supplied does not amount to ratification. AIR 1963 Mad 140 = 75 Mad LW 633.

(3) Government servant entering into contract on behalf of Government — Unauthorised provision inserted in contract — No ratification by Government — Provision is not binding on Government. AIR 1962 Orissa 117 = (1961) 3 Orissa JD 289 (DB).

Section 200 — Note 1

(1) The provisions of the Contract Act relating to agency are not meant to be exhaustive. Neither Section 200, Contract Act, nor the other provisions relating to ratification affect the general principle of law of agency that the general rule as to ratification would not apply when it would affect the rights of other parties. AIR 1941 Mad 6 (16) (DB).

(2) There can be no ratification by a person who at the time of ratification could not have done the act himself even though he had the power to do it when the original act unauthorised by him was done. (1903) 27 Bom 515 (531) (DB).

(3) When one of the partners sells the firm property to a person in his own right and not on behalf of the other partner or the firm and subsequently the second partner also sells the same property to other person; ratification by second partner of sale by first would prejudicially affect rights of former's vendee. AIR 1940 All 453 (454) = ILR (1940) All 674 (DB).

(4) Notice to quit given by one of two joint Receivers on behalf of both without the authority of the other is not valid and cannot be rendered so by subsequent ratification by the other. AIR 1917 Cal 621 (624) (SB).

(5) Granting of melcharth by a person who is entitled to deal with mortgaged property is not void and the same can be ratified by a person having authority to make such a grant. AIR 1924 Mad 245 (246, 247) (DB).

Revocation of Authority

201. Termination of agency.—An agency is terminated* by the principal revoking his authority; or by the agent renouncing the business of the agency; or by the business of the agency being completed; or by either the principal or agent dying or becoming of unsound mind; or by the principal being adjudicated an insolvent under the provisions of any Act for the time being in force for the relief of insolvent debtors.

[*] Two other modes of terminating agency are: (1) where the subject-matter of agency ceases to exist (See S. 56); and (2) where the principal's power over the subject-matter comes to an end. Cf. Powers of Attorney Act, 1882, S. 3.

Section 200 — Note 1 (contd.)

(6) Either a power in a promoter to represent or commit the unborn corporation or a power in the company subsequently to ratify the act cannot be spelt out by Sections 196 to 200 of the Act. ILR (1967) 3 Mad 80 (DB).

SECTION 201 — SYNOPSIS

1. Termination of agency.
2. Revocation.
3. Completion of business.
4. Death of principal or agent.
5. Unsoundness of mind.
6. Insolvency.

1. **Termination of agency.**— (1) Section 201 is not exhaustive. It does not mention all the circumstances in which an agency can be terminated. The section is really illustrative and the question whether in particular circumstances an agency can be deemed to have terminated will have to be decided upon the general principles of law. AIR 1951 Nag 313 (314) = ILR (1951) Nag 90 * AIR 1968 Cal 492 = 68 ITR 310 (DB) ** 1966 Ker LJ 487 (DB).

(2) A firm is an artificial person and upon dissolution it ceases to exist. Therefore, a contract of agency entered into by a firm would stand terminated upon its dissolution. AIR 1951 Nag 313 (314) = ILR (1951) Nag 90.

(3) Termination of agency is question of fact depending on usage and terms of contract. It does not necessarily terminate on the return of the agent from the foreign place to which he was sent. AIR 1917 Mad 398 (398) (DB).

(3-A) In all indefinite merchantile or commercial contracts, the question whether the relationship of principal and agent can be terminated by a reasonable notice or only by mutual consent, is one of construction, subject to the rules of law. There is no general rule of performance. AIR 1969 Mad 423 (425) = (1969) 1 Mad LJ 605.

(4) In case of an agency for fixed period if the agent is allowed to continue as an agent even after expiry of the fixed period, the agency is not terminated upon the expiry of the period but continues on the basis of old agreement. There is no creation of fresh

agency. AIR 1917 Mad 455 (455, 456) (DB).

(5) Once the Court takes charge of the property in a suit by the appointment of a Receiver or otherwise, rights of management or service which other persons may possess by virtue of any contract with the original owners will cease. But this is not an absolute rule of law but will depend upon the circumstances of each case. AIR 1936 Mad 980 (982) (DB).

(6) Where the agent of the original owner is appointed as the Receiver and he works as an agent of his master notwithstanding his appointment as receiver, his agency does not cease. AIR 1936 Mad 980 (983, 984) (DB).

(7) Power-of-attorney executed by a certificated guardian in favour of a person to act for the minor can terminate only under this section or under other relevant sections of the Act and not merely by attainment of majority by the minor. AIR 1946 All 1 (2, 3) = ILR (1945) All 882 (DB).

(8) Counter-claim and set off — Distinction — Counter-claim maintainable only if defendant is entitled to bring independent action for same relief — Suit by principal against agent for rendition of accounts — Counter claim by Agent asking for accounts in respect of an anterior contract of agency separate from suit contract on the ground that earlier principal was plaintiff's mother whose property plaintiff had inherited — Counter-claim not maintainable as agent cannot sue principal for accounts except under exceptional circumstances which were held to be non-existent — Agency held not continuous. AIR 1965 Andh Pra 18 = (1964) 1 Andh WR 194.

(9) In the absence of anything to show that the power of attorney agent has done anything to free himself from the obligation to act as an agent under the existing power the presumption would be that he acted as an agent of the principal, i.e., the plaintiff, and there was relationship of landlord and tenant between the plaintiff and the defendant. AIR 1961 Assam 13 (14) = ILR (1958) 10 Assam 34 (DB).

(10) The original special provision of the Negotiable Instruments Act which

Section 201 — Note 1 (contd.)

enables an endorsee to sue on the instrument on the foot of an endorsement, creates an exception to the ordinary law of agency, and the principle adumbrated in the Indian Contract Act is so far as Agency, in general is concerned and in particular Section 201, thereto, cannot be telescoped into this enactment so as to interpret its intendment. AIR 1968 Mad 260 (262) = (1969) 2 MLJ 148.

2. Revocation.— (1) Agency, unless it is for a fixed term continues and can be terminated at principal's pleasure — Agency is personal. AIR 1943 Sind 197 (203) = ILR (1943) Kar 49 (DB).

(2) A, B and C jointly advancing loan to S — Three-fourth loan contributed by B and C — Estate of S taken over by Haisiyat Court — A filing claim for outstanding debt — Claim accepted — B and C filing suit for declaration that they were entitled to receive three-fourth amount — Held there was express revocation of authority of A to realise share of B and C by the suit for declaration. ILR (1952) 2 Raj 459 (469).

(3) An agency is determined when the agent ceases to represent the principal, though his liability in respect of acts done by him as agent may continue and hence where, in obedience to a telegram sent to him by his principal, an agent hands over the charge to another, his agency terminates that very day as his authority is revoked. AIR 1916 Mad 281 (282) = 39 Mad 376 (DB).

(4) Where a letter of agency to purchase was immediately followed by a telegram revoking the order, the telegram operated as revocation of order contained in the letter. (1900) 24 Bom 403 (406) (DB).

(5) An agency is terminated by the dismissal of the agent and if the agent continues to be in possession of the principal's house after the dismissal, it cannot be treated as the possession of the principal. AIR 1928 Nag 284 (286) = 24 Nag LR 148 = 29 Cri L Jour 902.

(6) Agent entrusted with power of management of property and with direction to pay income, after deducting expenses to principal — Not an agency coupled with interest — Principal can revoke power of attorney and lease out property to third person — Agent cannot claim title by adverse possession. 15 LR 376 = (1968) 2 Mys LJ 179.

3. Completion of business.— (1) The agency of an agent for sale of goods does not terminate on the sale of goods but continues until he pays to the principal all sums received on his account. (1890) 12 All 541 (545) (DB) ** (1899) 26 Cal 715 (724).

(2) Agency of Bank collecting moneys and sending drafts terminates on des-

patching drafts. AIR 1915 Lah 214 (215) = 1915 Pun Re No. 79 (DB) ** (1950) 54 Cal WN 747 (748).

(3) A banker employed to collect and remit money is under a fiduciary obligation to account for and to pay the money to his principal according to directions. Ordinarily, the agency does not terminate on collection but continues until payment. If in the absence of any instruction from the principal the banker remits the draft, the principal may accept the draft as a conditional payment. If the draft is honoured and the money is paid, the business of the agency is completed; if not, the original obligation of the banker to pay the money is revived and the agency continues. The parties may agree that the banker may use the money collected for his own purposes under an obligation to repay an equivalent to the principal instead of remitting the money to the principal in cash. So soon as the banker, becomes entitled to use the money as his own, a debt is created and the fiduciary obligation and the agency terminate. AIR 1955 Cal 91 (91).

(4) If the banker is employed to collect money and to issue a draft for the amount collected, the business of the agency terminates as soon as the draft is issued. By the express direction of the principal, the banker then may issue the draft in lieu of making payment in cash. By the issue of the draft, in such circumstances, the banker accounts for the money collected to the satisfaction of the principal. The fiduciary obligation to account for and to pay the amount collected ceases and henceforth the banker is under an obligation to honour and pay the draft according to the tenor thereof. If the banker issues a draft contrary to instructions or in the absence of instructions or does not issue a draft at all, the agency continues until the money collected is paid to the principal. The issue of a draft in the absence of such instructions does not terminate the agency simply because the draft is said to be issued in the ordinary course of business. AIR 1955 Cal 91 (91).

(5) In case of bills, cheques, etc., entrusted to a banker for collection, the banker acts as an agent of the person who entrusts such bills for collection and as soon as a banker has disbursed the money so received by him, as the collecting agent of his customer, in accordance with his instructions, the business of the agency must be deemed to have concluded and the agency terminated. AIR 1949 East Punj 88 (90) = ILR (1948) East Punj 191.

(6) A vakil may be bound or entitled to act for his client in a suit even after decree without a fresh vakilpatra. (1883) 7 Bom 518 (519).

202. Termination of agency where agent has an interest in subject-matter.—Where the agent has himself an interest in the property which forms the

Section 201 — Note 3 (contd.)

(7) Once an agency is terminated any claim arising thereafter will only be an ordinary claim and not a trust or preferential claim. If, however, the claim arose before the agency is terminated, it is a trust claim payable preferentially. So, when a customer gives specific instruction to his Bank to collect Bills and remit the proceeds by Demand Draft, it creates an agency and the agency continues to exist till the instructions are carried out. Once the instructions are carried out, the agency comes to an end on the completion of the business by sending the Demand Draft to the customer. Thereafter, the relationship between the customer and the Bank is that of creditor and debtor. AIR 1967 Bom 279 = 68 Bom LR 500.

(8) Bank collecting money from customer of plaintiff and remitting amount to plaintiff by draft — Draft dishonoured for want of sufficient credit of the bank — Bank going into liquidation — Plaintiff is entitled to rank as preferential creditor — Fiduciary relationship between Bank and Plaintiff held did not end upon sending draft. AIR 1962 Punj 121 (125) = ILR (1962) 1 Punj 747 (DB).

4. Death of principal or agent. — (1) Under the section an agency is terminated by either the principal or agent dying. AIR 1922 Cal 53 (54) (DB) ** AIR 1933 Lah 876 (878). (Power given by decree-holder to execute decree ceases on his death and fresh power from legal representatives is necessary to execute the decree.)

(2) Payment made by an agent after the death of his principal cannot give a fresh starting point for limitation. 1880 Pun Re No. 78, p. 175 (176) (DB).

(3) Agency created by two principals of the firm jointly does not terminate on the insolvency of one of them where the firm itself continues to exist. AIR 1937 Nag 314 (316) = ILR (1937) Nag 28. (Case arising before the Partnership Act of 1932.)

(4) Where there are two or more principals and they are joint and several and one of them dies, the agency terminates only as regards the representatives of the deceased principal, but it continues as regards the surviving principals. AIR 1936 Cal 650 (652, 653) ** AIR 1917 Cal 436 (440) (DB).

(5) Where a power of attorney has been executed by several principals in favour of a person, and one of the principals having distinct interest in the subject-matter of the power of attorney dies, the death of principal terminates the power of attorney. AIR 1938 Mad 542 (544, 545).

(6) Where two principals appoint an agent to take charge of some matter in which they are jointly interested, the death of one of them terminates the authority of the agent, not merely as regards the deceased but also as regards the surviving principal. AIR 1917 Cal 436 (441) (DB).

(7) Agent appointed by karta of joint family is agent of family and not of karta and as such agency does not cease on death of karta. AIR 1934 All 553 (556) (DB).

(8) Where two or more agents are employed for a business, on the death of one of them, the contract of agency terminates only so far as the deceased is concerned, but not as regards the surviving agents. AIR 1917 Cal 52 (62) (FB) ** (1913) 17 Cal L Jour 201 (204) (DB).

(9) Section 201 will not become applicable merely because the servant employed by a master was performing some of the duties of an agent, so as to terminate the agency upon death of any one of them. AIR 1954 Orissa 241 (242, 243).

5. Unsoundness of mind. — (1) Power given to attorney terminates on principal's insanity. AIR 1940 PC 211 (214) = 1941 Rang LR 355.

6. Insolvency. — (1) The question of termination of agency on insolvency of one of the principals, who jointly with the other created the agency, is to be determined with reference to the true intention of the parties and the attending circumstances. AIR 1937 Nag 314 (316) = ILR (1937) Nag 28.

(2) Agent having general power to do all acts besides carrying on trade — Power does not terminate on presentation of petition in bankruptcy — He can defend on behalf of the principal. AIR 1916 Mad 144 (147) = 39 Mad 693 (DB).

Section 202 — Note 1

(1) Junior member of a Malabar tarwad who has been given power-of-attorney by the karnavan to collect rents of the tarwad property has an interest in the property within Section 202. AIR 1932 Mad 70 (71).

(2) Agent having interest in subject-matter of agency — Agency cannot be revoked. AIR 1964 All 441 (441, 442) (DB). (Reversed on another point in AIR 1969 SC 73.) ** AIR 1968 Mad 333 = [1968] 2 Mad LJ 74 ** ILR (1967) 3 Mad 161.

(3) The mere arrangement that an agent's salary be paid from the rent he collected does not give the agent any interest in the property. (1881) 5 Bom 253 (256) (DB).

(4) Where a contract was to the effect that the consignee shall have authority

subject-matter of the agency, the agency cannot, in the absence of an express contract, be terminated to the prejudice of such interest.

Illustrations

(a) A gives authority to B to sell A's land, and to pay himself, out of the proceeds, the debts due to him from A. A cannot revoke his authority, nor can it be terminated by his insanity or death.

(b) A consigns 1,000 bales of cotton to B, who has made advances to him on such cotton, and desires B to sell the cotton, and to repay himself, out of the price, the amount of his own advances. A cannot revoke this authority, nor is it terminated by his insanity or death.

Section 202 — Note 1 (contd.)

to sell the goods at his discretion, and repay himself the advance out of the proceeds, drawing on the consignor in the event of a shortfall, the consignee had an interest within the meaning of Section 202 and the authority to sell could not be revoked to the prejudice of such interest except in accordance with an express contract reserving such power to the consignor. ('97) 20 Mad 97 (105, 106) (DB).

(5) Mortgage by deposit of title-deeds — Mortgagee put into possession to realise profits and appropriate the same towards interest — Mortgagee is one having an interest in the agency and it cannot be terminated before repayment of loan. AIR 1919 Low Bur 145 (146) = 9 Low Bur Rul 172 (DB).

(6) Where the authority of an agent is given for the purpose of effectuating any security or of protecting or securing any interest of the agent, it is irrevocable during the subsistence of such security or interest. The primary object of the power-of-attorney was to recover on behalf of the principal the fruits of his decree. It contained incidentally a provision for the employment of the agent, in order to realise that decree. It provided that his remuneration was to be one-half of the proceeds. It contained an indemnity clause against any out-of-pocket expenses which the agent was entitled also to recover from the amount of the decree. But the power-of-attorney was not for the purpose of protecting or securing any interest of the agent. That part of the agreement was purely incidental. Held, that the agency was not one coupled with interest under Section 202 of the Contract Act. AIR 1946 Mad 9 (10) = ILR (1946) Mad 121 (DB).

(7) Agent for sale of goods entitled to retain part of the sale-proceeds in lieu of remuneration has no interest in the goods within Section 202. AIR 1932 Nag 34 (35, 36) = 27 Nag LR 378.

(8) Section 202 makes no departure from English law — Agency in plaintiff's favour wherein he has individual interest — Court will not grant injunction to restrain defendant from preventing

plaintiff in acting as agent, when it would involve specific enforcement of contract, which cannot be so enforced. AIR 1944 Bom 76 (85, 86).

(9) The principle of Section 202, Contract Act, applies only to cases, where authority is given for the purpose of being a security or a part of the security, and not to cases where the interest of the donee arises afterwards and incidentally; in such cases, there is no authority, coupled with an interest but an independent authority, and an interest subsequently arising. AIR 1938 Mad 542 (545).

(10) Agency created by an ordinary power-of-attorney for the management of an endowment can be revoked even though the endowment is made for the spiritual benefit of the person creating the endowment and the members of the family including the agent for such spiritual benefit cannot amount to an interest within the meaning of Section 202. AIR 1930 Mad 231 (233) (DB).

(11) Where A under a document agreed that the debts raised by B for her (A) were to be realized out of the collections made by him (B) from certain estate, that in substance amounts to an allocation of the funds to be appropriated towards the repayment of the debts, and all the elements that are necessary to constitute an agency of an irrevocable character are present in that document, even though that may not be described as such. The right accrues to B on the very date when the document is executed. AIR 1956 Pat 233 (237, 238) (DB).

(12) Mortgagee exercising power of sale is not authorised by Section 69 (3) and (4), T. P. Act to purchase property for himself, either directly or indirectly — To such case Sections 215 and 202, Contract Act, have no application. 1948 Bur LR (HC) 148 (155, 157) (DB).

(13) Power of attorney in favour of Bank to execute decree — Execution by Bank — Objections to maintainability of application by Bank and to jurisdiction of Court — Objections entertainable at appellate stage having been based on legal grounds — Power of attorney, not revocable. AIR 1969 SC 73

203. When principal may revoke agent's authority.—The principal may, save as is otherwise provided by the last preceding section, revoke the authority given to his agent at any time before the authority has been exercised so as to bind the principal.

204. Revocation where authority has been partly exercised.—The principal cannot revoke the authority given to his agent after the authority has been partly exercised so far as regards such acts and obligations as arise from acts already done in the agency.

Illustrations

(a) A authorizes B to buy 1,000 bales of cotton on account of A, and to pay for it out of A's moneys remaining in B's hands. B buys 1,000 bales of cotton in his own name, so as to make himself personally liable for the price. A cannot revoke B's authority so far as regards payment for the cotton.

(b) A authorizes B to buy 1,000 bales of cotton on account of A, and to pay for it out of A's moneys remaining in B's hands. B buys 1,000 bales of cotton in A's name, and so as not to render himself personally liable for the price. A can revoke B's authority to pay for the cotton.

Section 202 — Note 1 (contd.)

= (1968) 2 SCJ 851 ** AIR 1968 Mad 50
= (1967) 2 Mad LJ 515 (FB).

(14) Where under a mortgage deed certain shares of a Bank and the right to the dividend on the same were all charged in favour of the mortgagee, and the mortgagee was further authorised to receive directly from the Bank any dividend declared, appropriating the same towards interest due on the mortgage, it was held that an agency contemplated by Section 202 was created in favour of the mortgagee and is not liable to be terminated by the principal alone. AIR 1957 Trav-Co 174 (175, 176).

(15) Where reversioners executed a power of attorney in favour of a stranger authorising him to conduct a suit on their behalf and providing that when the property, the subject-matter of the suit, would be recovered he would be entitled to certain share in it, it was held that such authority was not coupled with interest and hence Section 202 did not apply. AIR 1938 Mad 542 (545).

(16) Agent entrusted with power of management of property and with direction to pay income, after deducting expenses to principal — Not an agency coupled with interest — Principal can revoke power of attorney and lease out property to third person — Agent cannot claim title by adverse possession. (1968) 15 LR 376 = (1968) 2 Mys LJ 179.

Section 203 — Note 1

(1) Instructions received by plaintiff by letter to buy cotton as agent to X — Telegram revoking authority sent after receipt by plaintiff of letter — No action taken in pursuance of the authority by letter by plaintiff till receipt of telegram — Held, that the telegram revoked the authority. (1900) 24 Bom 403 (406) (DB).

(2) Where authority is conferred on an agent by two or more principals

jointly, the authority may be revoked by one, and it is sufficient if the notice of revocation is given by one of the principals. (1913) 18 Cal L Jour 621 (626, 627) (DB).

(3) Where the agent is authorised or directed by his principal to pay to a third person money existing in his hands to the use of the principal, and he expressly contracts with such third person to pay him, or to hold the money on his behalf or for his use, he is personally liable to pay such third person. AIR 1935 Mad 115 (116) (DB).

(4) Where authority was given to an agent to execute a decree and when the principal found that agent was delaying execution he revoked the authority given to the agent — Held, that under Section 203 the authority given to the agent was validly revoked. AIR 1921 Mad 599 (603) = 44 Mad 919 (FB).

(5) The relationship brought about between the shareholder of a company and his proxy is that of a principal and agent and is created by contract. Consequently unless the right of revocation of proxy is expressly excluded by the Articles of Association, the right is governed by the general law of contract of agency. AIR 1952 Mad 515 (521) = ILR (1952) Mad 218 (DB).

(6) The principal has the right to have his counsel to conduct his litigation, notwithstanding the fact that the agency in question is irrevocable or not. The agent is engaged as means to an end. AIR 1968 Mad 333 = (1968) 2 Mad LJ 74.

Section 204 — Note 1

(1) The relationship brought about between the shareholder of a company and his proxy is that of a principal and agent and is created by contract. Consequently unless the right of revocation of proxy is expressly excluded by the Articles of Association, the right is govern-

205. Compensation for revocation by principal, or renunciation by agent.—Where there is an express or implied contract that the agency should be continued for any period of time, the principal must make compensation* to the agent, or the agent to the principal, as the case may be, for any previous revocation or renunciation of the agency without sufficient cause.

[*] As to measure of compensation, see S. 73 supra.

206. Notice of revocation or renunciation.—Reasonable notice must be given of such revocation or renunciation; otherwise the damage thereby resulting to the principal or the agent, as the case may be, must be made good to the one by the other.

Section 204 — Note 1 (contd.)

ed by the general law of contract of agency. AIR 1952 Mad 515 (521) = ILR (1952) Mad 218 (DB).

(2) The power to revoke an authority given to an agent, after the authority has been partially exercised, has been recognised by Section 204. The revocation cannot have the effect of invalidating acts and obligations already done in the exercise of that authority as an agent. AIR 1952 Mad 515 (524) = ILR (1952) Mad 218 (DB).

(3) A endorsed a pro-note in favour of his bank and delivered it to them. Later on he sent a letter to the Bank through B asking them to collect the money due under the note and pay it to B and also relinquishing his right, title and interest in the note. The bank when the letter was produced by B and at his request advanced him some money against the note. Subsequently A revoked his previous instruction and demanded the amount due under the note. It was held that A was not entitled to revoke his instructions after the bank had acted upon his instructions to its detriment. AIR 1956 Punj 78 (79) = ILR (1955) Punj 200.

(4) Sections 202 to 204 of the Act and the illustrations thereto make it clear that the power of sale conferred upon the mortgagee is an agency coupled with interest and therefrom cannot be revoked so as to nullify the effects of the act done by the agent, the mortgagee, to secure his interests. ILR (1967) 3 Mad 161.

Section 205 — Note 1

(1) Agent terminating his agency before the fixed period without sufficient cause must compensate principal. AIR 1915 Sind 30 (32) = 9 Sind LR 77 (DB).

(2) An agreement provided that the respondent was to be the agent of the appellants for a period of one season certain; with an option to continue for two seasons more, and "that said agent shall not during the continuance of this agreement purchase second-hand clothing from any other dealer except from the principals; nor shall he during the continuance of this agreement act as agent for any other rival trader or traders" — Held, there was a clear con-

tract between the parties that the respondent was to be employed as the agent for the appellants for a particular period and that the latter were not at liberty to revoke the contract. If the latter were at liberty during the period the contract was in force to, or not to, supply goods to the respondent, the whole contract becomes meaningless and it is futile to describe the respondent as the agent of the appellants. AIR 1922 Sind 25 (26, 27, 29) = 15 Sind LR 140 (DB).

(3) Under Section 205, in the absence of any contract, the period of time to be implied depends on the particular circumstances of the case. (1904) 8 Cal WN 831 (837).

(4) Principal company appointed another company as managing agents for fixed term in view of latter's commercial reputation — Subsequently agent's reputation completely lost and principal suffering by its association — Held, there was sufficient cause for principal to terminate managing agency before fixed period. AIR 1929 All 87 (94) (DB).

(5) The right to vote by proxy is a contractual right. The restriction on the power to vote by proxy when created is absolute. But the power of revocation is an incident of the contract of agency and unless excluded under the articles of association, exists. AIR 1952 Mad 515 (523) = ILR (1952) Mad 218 (DB).

(6) The liability to pay compensation arises only when the agency is terminated without sufficient cause. 1966 Ker LJ 487 (DB).

(7) Agreement of agency — Trader appointed selling agent of medicines — Trader though not holding whole-saler's licence at time of agreement obtaining licence subsequently — Agreement is not void — Termination of agency by trader before expiry of stipulated period — Suit for damages is maintainable. AIR 1970 Bom 128 (131) (DB).

Section 206 — Note 1

(1) What the section means to say is that when there is no express or implied contract that the agency should continue for any fixed period, reasonable notice must be given of the revocation or renunciation of the agency etc.

207. Revocation and renunciation may be expressed or implied.—Revocation and renunciation may be expressed or may be implied in the conduct of the principal or agent respectively.

Illustration

A empowers B to let A's house. Afterwards A lets it himself. This is an implied revocation of B's authority.

208. When a termination of agent's authority takes effect as to agent, and as to third persons.—The termination of the authority of an agent does not, so far as regards the agent, take effect before it becomes known to him, or, so far as regards third persons, before it becomes known to them.

Illustrations

(a) A directs B to sell goods for him, and agrees to give B five per cent commission on the price fetched by the goods. A afterwards, by letter, revokes B's authority. B after the letter is sent, but before he receives it, sells the goods for 100 rupees. The sale is binding on A, and B is entitled to five rupees as his commission.

(b) A, at Madras, by letter, directs B to sell for him some cotton lying in a warehouse in Bombay, and afterwards, by letter, revokes his authority to sell, and directs B to send the cotton to Madras. B, after receiving the second letter, enters into a contract with C, who knows of the first letter, but not of the second, for the sale to him of the cotton. C pays B the money, with which B absconds. C's payment is good as against A.

(c) A directs B, his agent, to pay certain money to C. A dies, and D takes out probate to his will. B, after A's death, but before hearing of it, pays the money to C. The payment is good as against D, the executor.

Section 206 — Note 1 (contd.)

If the phrase "such revocation or renunciation" is to be taken as referring back to Section 205, it makes no meaning of the section. AIR 1931 Cal 676 (678, 679) = 58 Cal 1153 (SB).

(2) In determining the reasonableness of the notice a very important element to be taken into consideration is the nature of the employment. In cases of an exceptional nature such as when a chief agency of an insurance company which had done good business ranging over 47 years, is to be terminated, two years' notice is reasonable. AIR 1944 Bom 166 (169, 170) = ILR (1944) Bom 637 (DB).

(3) When there is no stipulation as to the duration of the agency the agency can be terminated by reasonable notice. AIR 1946 PC 6 (9) = 72 Ind App 315 = ILR (1946) Bom 159 = ILR (1946) Kar (PC) 2.

(4) The effect of want of notice to the agent does not invalidate the revocation or termination of his authority but makes the principal liable for any damage that results to the agent by reason of such want of notice. AIR 1952 Mad 515 (524) = ILR (1952) Mad 218 (DB).

(5) Termination of agency inequitable or working unjust hardship on agent — Reasonable notice is necessary. AIR 1969 Mad 423 (425) = (1969) 1 MLJ 605.

Section 207 — Note 1

(1) The doctrine of implied revocation or renunciation cannot be invoked

in a case when the decree-holder had in the course of execution, assigned his rights to his pleader, as the assignment does not entitle him without the permission of the Court to take control of the execution proceedings. AIR 1940 Bom 210 (212) = ILR (1940) Bom 370 (DB).

Section 208 — Note 1

(1) Where a person appoints agent to admit execution of document, and revokes authority before registration, document registered under such circumstances is valid, if revocation is not known either to grantee of document or to registering Officer. (1903) 30 Cal 265 (274) ** AIR 1934 Rang 104 (104) (DB).

(2) Husband acting as agent of Burmese Buddhist wife in first of series of transactions — Unless authority is expressly revoked to the knowledge of other party to the transaction he would be presumed to have acted as agent for his wife in subsequent transactions. AIR 1934 Rang 341 (342).

(3) 'Gumasta' managing business of X — X dies about March 1903, 'gumasta' not knowing of it — In June 'gumasta' wrote a letter to his principal, acknowledging certain money retained by him on his behalf — In May 1906 plaintiffs, who had dealings with X brought a suit to recover monies of X, lying with 'gumasta' — Plea of bar of limitation, there being no acknowledgment of any debt — Held that, till X's death came to be known to him the 'gumasta' conti-

209. Agent's duty on termination of agency by principal's death or insanity.—When an agency is terminated by the principal dying or becoming of unsound mind, the agent is bound to take, on behalf of the representatives of his late principal, all reasonable steps for the protection and preservation of the interests entrusted to him.

210. Termination of sub-agent's authority.—The termination of the authority of an agent causes the termination (subject to the rules herein contained regarding the termination of an agent's authority) of the authority of all sub-agents appointed by him.

Agent's duty to principal

211. Agent's duty in conducting principal's business.—An agent is bound to conduct the business of his principal according to the directions given by the principal, or, in the absence of any such directions, according to the custom which prevails in doing business of the same kind at the place where the agent conducts such business. When the agent acts otherwise, if any loss be sustained, he must make it good to his principal, and, if any profit accrues, he must account for it.*

Illustrations.

(a) A, an agent engaged in carrying on for B a business, in which it is the custom to invest from time to time, at interest, the moneys which may be in hand, omits to make such investment. A must make good to B the interest usually obtained by such investments.

(b) B, a broker, in whose business it is not the custom to sell on credit, sells goods of A on credit to C, whose credit at the time was very high. C, before payment, becomes insolvent. B must make good the loss to A.

[*] But see Section 189 supra.

Section 208 — Note 1 (contd.)

nued to be X's agent and hence letter of June 1903 was a valid acknowledgment. (1911) 35 Bom 302 (306) (DB).

(4) So far as third parties are concerned the termination of a contract of agency will take effect only from the time the third party obtained knowledge of it. AIR 1951 Nag 313 (314) = ILR (1951) Nag 90 ** AIR 1962 Pat 384 = 1962 BLJR 77 (DB). (Extent of agent's authority — Limitation on agent's authority — Not binding against third persons unless they are made aware of it.) ** AIR 1970 Mad 76 (77, 78).

(5) Express or actual notice of revocation of agent's authority is not necessary in the case of third person. It is sufficient to establish that the person had knowledge of the revocation of the agent's authority. (1913) 18 Cal L Jour 621 (626, 627) (DB).

(6) In order to attract the provisions of Section 208 it is necessary for the third party to prove that he was unaware of the termination of authority of the agent. The burden of proving this fact is on him. 1954 All L Jour 580 (582).

(7) Agent appointed to sell house, employing auctioneers for the purpose — Before sale, authority of agent revoked — Public not informed of same — Subsequent sale is valid. 1874 Pun Re (Civ) No. 63, p. 210 (211) (DB)

(8) Payment made to an agent after knowing the termination of the agency

cannot bind the principal. AIR 1955 Nag 202 (203) = ILR (1955) Nag 977.

Section 209 — Note 1

(1) Entering into a contract by the agent for the supply of molasses in order to keep a distillery going is a reasonable step for the protection and preservation of the interests of the representatives entrusted to the agent. AIR 1921 Lah 48 (50, 51) (DB).

(2) Section 209 does not cover transfer of bank's property by accountant on the death of Managing Director. AIR 1942 Oudh 417 (421) = 18 Luck 110 (DB).

Section 210 — Note 1

(1) Guardian — Extent of authority — Sons attaining majority — Mother's powers as guardian come to an end — Alienations after sons' majority on authority given by mother — Do not confer any title — Limits of agent's authority — The principle underlying Section 210 that the authority of the sub-agent comes to an end when the authority of the agent is terminated equally applies to the case. (1963) 76 Mad LW 794.

SECTION 211 — SYNOPSIS

1. Duty to follow directions of principal.
2. Duty to follow custom.
3. Fidelity to principal.
4. Pucca Adatia and Kuccha Adatia.
5. Remedies of principal.
6. Extent of agent's liability.

Section 211 (contd.)

1. Duty to follow directions of principal. — (1) Agent is bound to carry out his principal's directions. Even if sub-agents are appointed, agent is bound to act as prudent man. AIR 1930 Lah 974 (975, 976) (DB).

(2) Agent infringing principal's directions cannot hold principal liable for non-fulfilment of contract. AIR 1925 Lah 332 (332).

(3) Agent, whether he acts as gratuitous agent or not, negligently omitting to comply with principal's instructions is guilty of gross negligence and is responsible for any loss caused to principal. AIR 1931 Lah 302 (306).

[See also ILR (1963) Bom 583 (585).]

(4) Where an agent exceeds instructions given to him and acts, he cannot escape liability hiding under any fault on the part of his principal. AIR 1925 Lah 332 (332).

(5) Where loss sustained by the principal is due to disregard on the part of the agent of directions issued to him regarding the conduct of business, even though such disregard may have been due to nothing worse than negligence or over-confidence in the honesty of others, such misconduct on the part of an agent is clearly actionable. AIR 1950 Orissa 241 (244) = ILR (1950) Cut 174 (DB).

(6) Where a party directs a Bank to collect certain amount on his behalf and send it to him and there is no direction to send it by a cheque or draft, it is the duty of the Bank as agent of the party to use care in sending the amount. AIR 1960 Cal 475 (476, 477) (DB).

(7) Per Coutts-Trotter C. J. — When an agent uses money entrusted to him for other purpose than that for which it is entrusted to him, he stands in the position of trustee in respect to that money. AIR 1927 Mad 478 (481) (DB).

(8) British Indian rupees were substituted for Baroda Babashai rupees. Government undertook to accept genuine Babashai rupees at rate of 100 British Indian for 130 Babashai. Defendant shroffs who were employed at treasuries to scrutinize coins and to pass only genuine Babashai passed Shikkai coins as genuine Babashais and mint officers kept and used these Shikkai for Government. Secretary of State sued defendants for damages for loss caused to Government. It was held that the defendant's contract implied a term that if he passed any other coin as Babashai and Government suffered loss, he should make it good. (1911) 35 Bom 12 (16, 17, 18, 19) (DB).

(9) A sub-agent who is also a financier or even an agent who advances money against goods could purchase the goods with the consent and approval

of the principal but it is essential that either they should be offered for sale by the principal to the agent or the offer made by the agent for purchasing the goods should be accepted by the principal. Without either of the two conditions the agent or the sub-agent could not acquire any title to the goods. AIR 1961 Andh Pra 143 (153, 154) = 1960 Andh LT 524 (DB).

(10) Post Office Act (1898), Sections 44 and 48 — Rules, under Section 43, Rule 297 — Money order amount in course of transmission in hands of postal authorities — Payee has no attachable interest — Privity of contract exists between remitter and postal authorities. (1962) 3 Guj LR 987.

(11) As an agent the Pucca Adatia is bound to carry out the directions of his constituent and is always liable to render accounts to his constituent on demand, as provided in the Contract Act. AIR 1967 Raj 151 (158).

(12) Sale of pawned goods by pawnee — Purchaser raising dispute regarding quality of goods — It becomes duty of pawnee to use all reasonable diligence in communicating to pawner seeking their instructions. AIR 1969 Pat 385 (392, 393).

2. Duty to follow custom. — (1) Agent mixing up the principal's goods for sale with others goods in accordance with mercantile usage is not liable to the principal for loss. AIR 1929 Lah 591 (592) (DB).

(2) Where plaintiff purchased goods on behalf of defendants and sold them without being authorised to do so by the defendants, it was held, that in the absence of a mercantile custom authorising the plaintiff's actions, he will be liable for the losses sustained by the defendants by the unauthorised sale. AIR 1929 Lah 666 (667) (DB).

(3) Agent instructed by telegram to purchase gold — No time and price intimated — Agent must act immediately according to business custom — Agent making purchase on date next to receipt of telegram — Principal suffering loss — Agent is liable in damages — Measure of damages is difference in prices prevailing on these two dates. 1960 Raj LW 29 = ILR (1959) 9 Raj 938.

3. Fidelity to principal. — (1) Neglect of duty by an agent does not cease to be such by repetition, and if there be any doctrine of lulling to sleep, it must depend upon and can only be another way of expressing estoppel or ratification. AIR 1930 PC 278 (281).

(2) Under agreement two of the five brothers agreed to manage joint property for five years for improvement and upkeep of estate. Held, that relationship of principal and agent was created by agreement and that managers were

Section 211 — Note 3 (contd.)

under legal duty to exercise reasonable care and diligence in management of estate. AIR 1916 Cal 593 (594) (DB).

(3) Agent who while acting as agent deals as principal without knowledge of other contracting party acts contrary to Sections 211-214. Onus of proof lies on agent to show that transaction is not disadvantageous to principal. AIR 1935 Sind 38 (43) (DB).

(4) Agent, while acting on behalf of the principal joining a combination of speculators and artificially inflating the rate and then settling on the basis of these rates, acts in flagrant breach of his duty to his principal as the agent is in a fiduciary position towards his principal and cannot make any secret profits or do any act in which his personal interest may conflict with his duty to the principal. AIR 1928 Lah 196 (200) = 9 Lah 7 (DB).

(5) Agent to collect rents though not entitled to sue is liable for damages if by his negligence he does not bring to the notice of the principal that certain arrears would be barred. Such a claim for damages for laches can be included in a suit for accounts by principal against agent. AIR 1919 Cal 423 (424) (DB).

(6) Commission agent to sell and purchase for principal cannot deal with himself under fictitious name without principal's knowledge. Principal can repudiate such transactions as there is conflict between agent's duty and personal interest. Principal is bound where no such conflict exists and also if there is trade usage to that effect. But such usage is to be strictly pleaded and proved. AIR 1917 Sind 5 (9, 10) = 10 Sind LR 86.

4. Pukka Adatia and Kuccha Adatia.—

(1) The distinction between kaccha arhita and pukka arhita properly so called, is that the former is a general type of agent while the latter is of a special type pledging his credit and for certain purposes acting as the principal. This English counterpart is a *del credere* agent. AIR 1952 Vindh Pra 51 (56).

(2) The incidents of a pakka adat may be stated thus: Firstly, the pakka adatiya can, in dealing with third parties on behalf of his constituent, use his own name, secondly, he is not an agent of his constituent in all respects but is in certain respects, a person employed for profit; thirdly, there being necessarily no privity of contract between the constituent on the one side and the third party on the other, to whom his name is not disclosed, the pakka adatiya is, as it were, a guarantor to both, on the one hand, that delivery should, on due date be given, and

on the other hand, it should be taken at the price at which the order was accepted, or the party concerned will pay up the difference in price. AIR 1961 Madh Pra 57 (60) = 1960 MPLJ 1217 (DB).

(3) A Pakka Adatia is entitled to substitute his own goods towards the contract made for the principal and buy the principal's goods on his personal account. Even when the transactions are made with third parties, they are recorded in the banker's own name and there is no privity of contract established between the actual contracting parties. In other words, the Adatiya figures as principal to principal and is responsible to both the contracting parties. In order to prove a transaction entered into by the principal with the Pakka Adatiya, the latter is not bound to prove the corresponding transactions entered into with third parties. AIR 1957 Madh Pra 194 (195, 196) ** AIR 1950 East Punj 92 (102, 103) = ILR (1949) East Punj 547 (FB) ** 1957 MPC 657 (658) ** AIR 1967 SC 986 (990) = 1967 Cri LJ 946 = (1967) 1 SCR 138.

(4) It may be that, if the pukka adatia carries out the instructions issued by the constituent even without receipt of goods he may have certain rights in law against the constituent. But mere fact that consignee is a 'pukka Adatia' does not entitle him to institute suit for damages, unless he shows that the goods represented by the railway receipt had been transferred to him as owner or any interest therein had been created in his favour. AIR 1966 Guj 6 (15) = (1964) 5 Guj LR 879 (DB).

(5) Pukka Adatia who could not make any profits due to stringent market conditions is not responsible to the principal for profits. AIR 1927 All 617 (618) (DB).

(6) Pukka Adatiya entering into *teji* mandi contract on behalf of up-country constituent is not bound, without further instructions from constituent, to exercise option on his behalf on due date and to enter into requisite cross contract, in absence of course of dealing between parties to that effect. AIR 1939 Bom 225 (227).

(7) A share broker can re-sell the shares as soon as he finds that the constituent clearly intends not to honour the agreement on the *walida* day. The only conditions are that the anticipatory breach should be clearly set out; and the fact and the circumstances of resale should be notified to the constituent. AIR 1961 Madh Pra 57 (61) = 1960 MPLJ 1217 (DB).

(8) It is the duty of the Kaccha Adatiya to tell the defendant as to from

212. Skill and diligence required from agent.—An agent is bound to conduct the business of the agency with as much skill as is generally possessed by persons engaged in similar business, unless the principal has notice of his want of skill. The agent is always bound to act with reasonable diligence, and to use such skill as he possesses; and to make compensation to his principal in respect of the direct consequences of his own neglect, want of skill or misconduct, but not in respect

Section 211 — Note 4 (contd.)

whom the purchases had been made and to whom the sales had been made. He ought to prove also as to what amount he actually paid to the sellers and what amount he received from the purchasers in the defendant's account. AIR 1958 Raj 255 (256).

5. Remedies of principal.— (1) There is nothing in Section 231 which would prevent a principal from seeking his remedy under Section 211, if he can bring his case under that section. AIR 1934 Cal 721 (722) = 61 Cal 504 (DB).

(2) Where an agent fails in his duty towards the principal, the remedies of the principal against the agent are: (1) to recover damages for want of skill and care and for disregard of the terms of the mandate; (2) to obtain an account and payment of secret and illicit profits which have come to the hands of the agent as an agent and finally the principal's right to resist the agent's claims for commission and for indemnity against liability incurred as mandatory by showing that the agent has acted as a principal himself and not merely as an agent. Where the agent has made secret or illicit profits, the contract with the third party would not be rendered void. But the principal can recover the illicit gain from the agent. This and the other two remedies are available to the principal under the ordinary law of contract and where agent happens to be a public servant, the contract itself would not be binding on the principal if there is contravention of the provisions contained in Section 175 (3) of the Government of India Act, 1935, which now corresponds to Article 299 of the Constitution. AIR 1955 Assam 33 (45) (DB) ** AIR 1947 Bom 135 (139) = ILR (1947) Bom 378.

6. Extent of agent's liability.— (1) The measure of damages, in a case where an agent sells goods below the price fixed by his principal, is the loss which the principal sustains by the sale and if he has not sustained any loss, the principal can only ask for nominal damages. (1896) 20 Bom 633 (635) (DB).

(2) It is essential to a cause of action that the act complained of should be the real or effective cause of the injury or loss sustained. The measure of damages in an action by a principal against his agent for negligence or any other breach of duty by

the agent in course of the agency is the loss actually sustained by the principal, provided that it was the natural and probable consequence of the breach or such loss as in the particular circumstances the agent might reasonably have expected to result from such negligence or breach of duty. AIR 1963 Cal 163 (176, 177) = 1963 Cal LJ 43.

(3) The liability imposed upon an agent by Section 211 to make good the loss when he had not acted according to the direction of the principal is in cases where the loss is the direct result of the failure to carry out the directions of the principal. In other words, the loss must be due to the disobedience to comply with the dictates of the principal. The measure of damages in such cases is only the actual loss. ILR (1963) 1 Ker 195.

(4) When agent failed to insure goods in violation of agreement and goods were destroyed by fire, it was held that the agent was liable to pay the principal damages by reason of his breach of duty. AIR 1951 SC 144 (150) = 1950 SCR 979.

(5) Contract Act as to law of agency is not exhaustive — Agent making mistake can rectify his mistake so long as principal is not affected — Agent selling by mistake at loss principal's shares of company can rectify his mistake by purchasing fresh shares of company and keeping them for benefit of principal. AIR 1926 Oudh 576 (577, 578) = 2 Luck 198 (DB).

Section 212 — Note 1

(1) Under Section 212 the agent is always bound to act with reasonable diligence and to use such skill as he possesses and to make compensation to his principal in respect of the direct consequences of his own neglect. AIR 1958 J and K 25 (27).

(2) An agent is to be distinguished on the one hand from a servant, and on the other, from an independent contractor. An agent, though, bound to exercise his authority in accordance with all lawful instructions which may be given to him from time to time by his principal, is not subject in its exercise to the direct control or supervision of the principal. An agent, as such, is not a servant but a servant is generally for some purposes his master's agent the extent of the agency depending upon the duties or position of the servant and in some cases an independent contractor may

of loss or damage which are directly or remotely caused by such neglect, want of skill or misconduct.

Illustrations.

(a) A, a merchant in Calcutta, has an agent, B, in London, to whom a sum of money is paid on A's account, with orders to remit. B retains the money for a considerable time. A, in consequence of not receiving the money, becomes insolvent. B is liable for the money and interest from the day on which it ought to have been paid, according to the usual rate, and for any further direct loss—as e.g., by variation of rate of exchange—but not further.

(b) A, an agent for the sale of goods, having authority to sell on credit, sells to B on credit, without making the proper and usual inquiries as to the solvency of B. B, at the time of such sale is insolvent. A must make compensation to his principal in respect of any loss thereby sustained.

(c) A, an insurance broker employed by B to effect an insurance on a ship, omits to see that the usual clauses are inserted in the policy. The ship is afterwards lost. In consequence of the omission of the clauses nothing can be recovered from the underwriters. A is bound to make good the loss to B.

(d) A, a merchant in England, directs B, his agent at Bombay, who accepts the agency, to send him 100 bales of cotton by a certain ship. B, having it in his power to send the cotton, omits to do so. The ship arrives safely in England. Soon after her arrival the price of cotton rises. B is bound to make good to A the profit which he might have made by the 100 bales of cotton at the time the ship arrived, but not any profit he might have made by the subsequent rise.

Section 212 — Note 1 (contd.)

also be an agent. AIR 1965 Madh Pra 66 (70) = (1965) 1 Cri LJ 301 = (1965) MPLJ 179 (DB).

(3) Deed — Construction — Language of agency used in loose manner — Effect — Relationship between parties — Whether of principal and agent or of buyer and seller — Distinctive test — The seller remains the owner of the property until the property in the goods passes to the buyer. As between agent and a principal the property in the goods vests in the principal and the risk remains with him though the agent must take proper care of the same as a bailee — Agreement in question held as one between buyer and seller. ILR (1961) Cut 331 (337-338).

(4) It is agent's obligation to use all reasonable diligence in the interest of his customer. The banker must act with good faith and without negligence. AIR 1960 Punj 590 (593) = 62 Pun LR 720 (DB).

(5) Misconduct and negligence on part of agent — Agent's liability for loss — Measure of damages corresponds to actual loss sustained by principal provided that it was the natural and probable consequence of the breach or it was such a loss as in the particular circumstances the agent might have reasonably expected to result from such negligence or breach of duty. AIR 1963 Cal 163 (177) = 1963 Cal LJ 43 ** AIR 1960 Punj 590 (594) = 62 Pun LR 720 (DB).

(6) Principal is entitled to sue his agent for damages for loss caused to

him by negligence of agent, but if agent proves that he used reasonable skill and diligence, which persons of common prudence are accustomed to use about their own business affairs, he cannot be made liable because agent cannot ordinarily be deemed insurer for any loss which could not have been prevented by exercise of reasonable skill and diligence. Paramount and vital principle of all agencies is good faith and loyalty to principal; if agent establishes this, he cannot be held liable. (1911) 13 Cal L Jour 165 (181) (DB).

(7) Principal's rights are to recover damages for want of skill and care and disregard of mandate or to obtain account and payment of secret and illicit profits or to resist agent's claim for commission and indemnity by showing he acted as principal. AIR 1947 Bom 135 (139) = ILR (1947) Bom 378 ** AIR 1955 Assam 33 (45) (DB).

(8) When agents did not insure goods as directed and collected the premiums from the principal for the insurance, and goods were destroyed by fire, the loss sustained by the principal was held to be directly arising from the negligence and misconduct of the agent. AIR 1951 SC 144 (148) = 1950 SCR 979.

(9) Reasonableness as between agent and principal depends upon usual course of conduct and trade custom. Agent accustomed to send goods by rail uninsured is not liable for loss due to non-insurance. AIR 1925 Mad 46 (48).

213. Agent's accounts.—An agent is bound to render proper accounts to his principal on demand.

Section 212 — Note 1 (contd.)

(10) Agent exercising reasonable skill and diligence is not responsible for loss caused due to an error of judgment. AIR 1915 Sind 30 (31) = 9 Sind LR 77 (DB).

(11) Where the shipping documents which were not in strict conformity with the mandate contained in the letter of credit were accepted by the bank and made payment, it was held that the accepting banker acted negligently in honouring the draft against defective documents and so it could not be said that he acted in good faith so as to be indemnified for the loss. AIR 1966 Punj 303 (309) (DB).

(12) Principal and agent — Plaintiff purchasing through defendants' agency — Directions to defendants after purchase to despatch the goods to a particular place — Goods sent to a wrong place — Defendants are liable in damages if negligence is proved. (1910) 7 All L Jour 732 (733, 734).

(13) Liability to make compensation — A's claim against B for recovery of his share of sale proceeds of property in Ceylon — Disabilities under Ceylon Exchange Contract Act — B, held not liable to pay A's share in rupees in India. AIR 1965 Mad 314 (315) = 77 Mad LW 626 (DB).

(14) Agent who was instructed to send goods by railway sent them in open trucks at owner's risk. The goods were destroyed. It was held that the agent was negligent and liable for the same. AIR 1930 Lah 280 (280) = 11 Lah 227 (DB).

(15) Where a commission agent, authorised to realise moneys on behalf of the principal, collected as much as he could from a merchant who had also dealings with the principal, giving credit for the balance and the merchant became an insolvent: Held, that the agent did not fail in any way to exercise due prudence and was not guilty of any negligence. AIR 1933 Lah 841 (842) (DB).

(16) If the loss sustained by the principal is due to the agent's negligence or his overconfidence in the honesty of others, such misconduct on the part of the agent is actionable. AIR 1950 Orissa 241 (244) = ILR (1950) Cut 174 (DB).

(17) An expert with special skill engaged for reward to perform a particular job, is bound to exercise his skill in the performance of the job and not rely on the statement of others. (1909) 13 Cal WN 59 (61).

(18) The standard applied to architects and engineers in England is not to be followed in India with regard to

supervisors of buildings. Their liability to the employer is measured in the light of the agreement between them. AIR 1926 Cal 988 (989) (DB).

(19) Plaintiffs, grain dealers at Hathras, ordering defendants, agents at Karachi, to purchase goods — Plaintiffs paid some money and defendants despatched goods by rail — Railway receipt delayed and plaintiffs not able to receive goods — Defendants instructing carriers not to deliver goods till their money was paid — Plaintiffs, in the meanwhile, paying defendants — Carrier's refusal to deliver goods to plaintiffs, in view of instructions — Fall in price of goods resulting in loss to plaintiffs — Suit for compensation — Held, that this was a proper case for relief under Section 212. (1912) 34 All 49 (53) (DB).

(20) The relation of a banker and customer is, as far as the passing of a forged cheque is concerned, that of an agent and principal. It requires the agent banker to use skill and prudence required in the ordinary course of business to identify the signature of the customer and detect imitations and make payment in good faith and without negligence. Otherwise the customer is entitled to recover the amount of the forged cheque from the bank. AIR 1954 Mad 1001 (1005).

(21) Where the defendant bank was employed by the plaintiff for collecting the price of goods sold to a third party, and the plaintiff suffered a loss due to the negligence of the defendant in presenting the draft sent by the plaintiff after a considerable delay, it was held that the plaintiff could only claim damages from the defendant for the loss caused by his negligence but could not recover the price of the goods from him. AIR 1958 J and K 25 (27).

SECTION 213 — SYNOPSIS

1. Agent's duty to account.
2. Legal representatives of agent, liability of.
3. Suit for accounts.
4. Suit by agent.

1. Agent's duty to account.— (1) The right of a principal to have an account taken in equity rests upon the trust and confidence reposed in the agent and it is the duty of every agent to render just and true account of his agency to the principal. AIR 1956 Madh B 77 (79) (DB).

(2) If the agent purports to act as such and in that capacity enters into a transaction on behalf of the principal he will have to render an account to the principal if the latter chooses to require him to give an account on the footing of his being an agent. AIR

Section 213 — Note 1 (contd.)

1961 Andh Pra 143 (153) = 1960 Andh LT 524 (DB).

(3) N as contractor of Government — R taking a sub-contract from N — N agreed that he would pay 90 per cent. of the bill presented by R to him every month whether he received money from Government or not—Government increased the rates of contract considerably and paid N at increased rates — R also claiming at the increased rate — **Held** there was no relationship of principal and agent between N and R — In the absence of privity of contract between R and Government R had nothing to recover from Government and therefore he could not appoint N as his agent to recover anything from the Government — Hence R could not require N to account even on that basis. AIR 1959 Punj 92 (93) = 60 Pun LR 444 (DB).

(4) A right of a principal to call upon his agent to render account is not a mere right to sue within the meaning of Section 6 (6) of the T. P. Act but an actionable claim which is assignable as such. (1967) 9 Law Rep 400 (407).

(5) An agent will not discharge himself from the duty of accounting, by merely delivering to his employer a set of written accounts without attending to explain them, and without producing vouchers by which the items of disbursements are supported. AIR 1925 Cal 1069 (1071) = 52 Cal 766 (DB) ** ('81) 6 Cal 754 (756) (DB) ** (1911) 15 Cal WN 930 (939) (DB) ** (1969) 1 MLJ 557 = 82 Mad LW 379 ** (1965) 2 MLJ 207 = (1965) 78 Mad LW 418 ** AIR 1961 Raj 143 (144, 145) = 1961 Raj LW 572 ** 1959 MPC 222.

(6) Rendition of accounts means submitting and explaining them and paying balance found due from agent upon taking accounts. 1912 Pun LR No. 59, p. 197 (207) = 1912 Pun Re No. 1 ** AIR 1916 Cal 680 (684) = 43 Cal 248 (DB) ** AIR 1917 Cal 156 (157) (DB).

(7) Where no matter appears to have been in controversy, merely by the principal not signifying anything with regard to the account submitted, this additional duty cannot be deemed to be still hanging over the head of the agent for an unconscionable length of time. (1969) 1 MLJ 557 = 82 Mad LW 379.

(8) If an agent receives money on his principal's behalf under an illegal or void contract, the agent must account to principal for the money so received and cannot set up the illegality of the contract as a justification for withholding payment — Per Hidayatullah J., Kaushalendraro J. contra. AIR 1954 Nag 306 (313) = ILR (1954) Nag 514.

(9) Principal writing "seen" on account books: **Held**, this was not by

itself sufficient to prove that agent has rendered accounts. AIR 1934 All 553 (556) (DB).

(10) Principal is entitled to final account between himself and agent on termination of agency and agent can rely upon casual accounts settled between themselves as being prima facie correct. (1912) 13 Ind Cas 642 (642) (DB) (All).

(11) If illegal gratifications are given by agent he must, in account suit, show that they reached their destination and when account is being taken, no item can be passed without voucher or clear account of facts. (1909) 13 Cal WN 212 (216, 217) (DB).

(12) Agent, suspected of misappropriation, kept under supervision is still agent and liable to account for realisations during such period. AIR 1942 Pat 108 (111) (DB).

(13) Where an agent who is entrusted with the principal's money for being employed in a specified manner, makes use of the money for other purposes, the agent's liability in respect of such money is that of a trustee. AIR 1927 Mad 478 (481) (DB).

(14) Where money is advanced to an agent for work to be done on the understanding that a bill is to be sent subsequently, agent must account for the money. AIR 1921 Mad 609 (609) (DB).

(15) When a person acting as agent used to take money from the principal's chest and put it to his own use, he was held to be liable for money which was found deficit on taking accounts. (1909) 31 All 429 (438, 439) (DB).

(16) Audit of company's account does not preclude it from calling upon agents for rendition. AIR 1918 Lah 218 (219) = 1917 Pun Re No. 86 (DB).

(17) When an agent is appointed by more than one principal, he is liable to them jointly. He is not bound to account separately to any one of them and if he does so, he is not absolved from his liability to the others. AIR 1933 Lah 93 (94).

(18) Section 213, Contract Act, imposes the duty "on demand" by the principal. If anything, these words suggest that the demand should be made on the agent at his place of business. AIR 1940 Mad 588 (589) ** AIR 1932 Bom 42 (44).

(19) Agent is liable for interest for moneys retained after demand. AIR 1918 Mad 606 (606) (DB).

(20) An agent does not owe the same duty to the guarantor which he owes to the principal in the matter of proving the transaction. The agent is not bound to prove the transaction to the guarantor, but he has got to prove the

Section 213 — Note 1 (contd.)

amount of the liability for which the surety stood guarantee. AIR 1941 Bom 108 (113) = ILR (1941) Bom 273.

(21) A pakka adatiya does, for certain purposes, act as a principal in relation to his constituent and he also acts as a principal in carrying through the orders of his constituent. This does not, however, in every case absolve the "pakka adatiya" from the liability to account. That would depend upon the particular character in which he acted and on the terms of his employment. There need not be a special agreement about accountability. That may be the legal effect of the terms of the agreement between the parties. 1947 Nag L Jour 533 (539).

(22) Pucca adatia — Relationship between pucca adatia and his constituent is a dual one. The statutory provisions of the Contract Act defining the rights and obligations of an agent vis-a-vis the principal, will continue to apply to him with full force. As an agent he is always liable to render accounts to his constituent on demand. Making good the loss or accounting for profit does not make any difference about the duty to render accounts. AIR 1967 Raj 151 (158) = 1967 Raj LW 87.

(23) A pacca arhatia not being bound to enter into contract with third parties is absolved from liability to account on the stringent duty of an ordinary agent. He is not liable to disclose his covering contracts or to account for the profit or loss made by him out of those covering contracts. AIR 1950 East Punj 92 (103) = ILR (1949) East Punj 547 (FB).

2. Legal representatives of agent, liability of.— (1) After the death of an agent, his estate in the hands of his legal representatives continues to be liable to the principal for sums found due on account from the deceased agent. But the legal representative cannot be called upon to render account in the technical forensic sense in which the agent himself would be liable in an ordinary suit for rendition of accounts. In a suit for accounts filed by the principal against the deceased agent's legal representative, the burden of proof primarily lies upon the plaintiff and it is for the Court to take an account on such materials as are laid before it by the parties and determine what amount, if any, was due to the plaintiff from his deceased agent. AIR 1945 Bom 21 (23) ** (1912) 16 Cal L Jour 282 (284 to 287) (DB).

(2) Legal representative of agent is bound to furnish accounts and is liable for money found due on account which come to his hands. (1912) 16 Cal L Jour 288 (292, 293) (DB).

(3) Legal representative of deceased agent is liable to the extent of the assets of the agent in his hands for negligence or misfeasance of the agent. (1913) 17 Cal WN 5 (8) = 16 Cal L Jour 282 (DB).

(4) The death of the agent pending a suit for accounts against him does not exonerate his legal representatives from liability. Only the plaintiff would have to advance strict proof of the monies collected by the agent and not accounted for and a decree for the amount due should be passed against the assets of the deceased agent. AIR 1918 Cal 276 (277) (DB).

(5) A suit brought against an agent for rendition of accounts can be continued against the legal representatives of the agent. AIR 1950 East Punj 250 (251) ** AIR 1951 Cal 182 (190).

(6) In a suit for accounts by principal against agent and after his death his heirs the agent is liable to account not only for sums actually received by him but also those which he has failed to collect. AIR 1921 Mad 407 (408) = 44 Mad 214 (DB).

(7) Liability of an agent is personal and the deceased agent's legal representatives cannot be required to render accounts in the same sense in which the agent himself might have been called upon to do. AIR 1950 Dacca 13 (2) (15).

(8) A suit for accounts pure and simple without any claim for any specific sum of money against the legal representatives of a deceased agent is not maintainable. AIR 1951 Cal 182 (190).

3. Suit for accounts.— (1) A suit for accounts is founded on the right of the plaintiff to receive an accounting from the other party; such a right can only arise if the parties are in a fiduciary relationship to each other. AIR 1938 Nag 254 (255).

(2) Section 213 of Contract Act gives a right to the principal to demand accounts from the agent. This is a statutory right and cannot be defeated by saying that the principal should sue for specific amount. Thus a suit for account by the principal against the agent is maintainable, though the suit is not for specific amount. (1964) 66 Punj LR 453. (AIR 1933 Sind 247 and AIR 1941 Oudh 622, Dist.)

(3) Suit for money found due on an account being taken and a suit for rendering an account cannot be distinguished. (1912) 16 Cal WN 1042 (1044) (DB).

(4) Under Section 213, Contract Act, every principal has a statutory right to claim accounts from his agent; this right is, however, subject to one qualification, namely, that if the accounts between the principal and agent are settled or stated, there is no right to

Section 213 — Note 3 (contd.)

claim accounts any longer. AIR 1947 Bom 135 (136, 138) = ILR (1947) Bom 378 ** (1969) 1 MLJ 557 = 82 Mad LW 379 ** (1964) 77 MLW 458 (2).

(5) An agent is liable to render accounts to his principal but the principal cannot pick up some items in the accounts and file a suit for recovery of the amounts covered by those items as if they are amounts due and payable by the agent to the principal. The suit should be in the form of a suit for accounts. 78 Mad LW 418 = (1965) 2 Mad LJ 207.

(6) It is true that as between a principal and an agent, the only suit which the law generally permits is a suit for general accounts and a principal ought not to be allowed to select and single out capriciously certain items out of the business of agency and seek relief therefor. But this rule that a suit for general accounts alone would lie would not apply to a case in which the agent had rendered accounts but the principal takes exception to certain specific items. ('64) 77 Mad LW 458 (2).

(7) Settlement of account necessarily involves consideration of credit as well as debt entries — Accounts sent containing only debit entries and not credit entries — Though debit entries are accepted as correct that would not amount to settlement of accounts. AIR 1966 Andh Pra 256 (259).

(8) An unsigned account sent by one party to another which the latter accepts becomes an account stated which furnishes a cause of action for instituting a suit even though there are other unsettled accounts remaining between the parties. 1965 Raj LW 523 (527) = ILR (1965) 15 Raj 1023.

(9) It is not open to any principal who has got all the accounts of his agent in his possession, to employ the machinery of the Court for examining his accounts on the off-chance of making his agent liable for any sum which on such examination may be found due from him. AIR 1929 Cal 418 (421) (DB).

(10) In a suit by the principal for profits made by the agent, the onus of proving that no profits were made lies on the agent where he pleads non-receipt of any profits. 1901 Pun Re (Civ) No. 46, p. 152 (154).

(11) A suit by a principal for accounts because the defendant, his agent, has not rendered any account is different from a suit in which a principal alleges that the defendant, his agent has rendered accounts but prays to have them re-opened or to surcharge and falsify them on the ground of fraud or material error. In the former, if agency is established a prelimi-

nary decree for accounts must follow as a matter of course, if account has not been already rendered. In the 2nd class of cases, the fraud must be specifically alleged and proved if the accounts are to be re-opened on the ground of fraud and if the principal seeks to surcharge and falsify, the particular grounds of such relief must be specifically stated and substantial errors pointed out. (1910) 13 Cal L Jour 165 (173).

(12) Where a single item complained of was a fraudulent item, the proper order to make was to open the accounts altogether, but where the item complained of is not a fraudulent item, and the accounts are of some years' standing, the proper order is only to give liberty to surcharge and falsify. If the impeached accounts contain errors of considerable extent both in number and amount, whether caused by mistake or fraud, the Court will order such accounts to be opened and will not merely give liberty to surcharge and falsify. But if a fiduciary relation exists between the parties, then the Court would make a similar order if such accounts are shown to contain less number of errors, or if they contain any fraudulent entries. AIR 1956 Madh B 77 (79) (DB) ** AIR 1948 All 138 (140) = ILR (1947) All 424.

(13) Where the plaintiff's instructions to defendant who was a commission agent, to reship goods to India were not carried out and accounts were not rendered to him, in a suit for rendition of accounts it was held that plaintiff's relief was by way of damages. AIR 1933 Sind 247 (250) (DB).

(14) A decree can be passed in favour of an agent in a suit brought by principal for rendition of accounts. But it cannot be laid down that a decree must be passed in favour of the defendant. AIR 1938 Lah 723 (724).

(15) A suit for account lies against a servant on a fixed salary but the nature of whose employment is that of an agent. AIR 1930 Sind 142 (143).

(16) Co-sharer zamindars appointing Naib — Naib, after payment of revenue etc., to remit realised amount according to shares of co-sharers, to render accounts and explain accounts to co-sharers according to their shares — Suit by one co-sharer for accounts after dismissing Naib — Other co-sharers impleaded as defendants on their refusal to join as plaintiffs — Principals held were joint and several principals — Joint and several accounting not to be objected — Suit as framed held maintainable. AIR 1949 Cal 656 (657).

(17) In law, a "pakka Arhatia" is not an agent but a principal. No suit by the

Section 213 — Note 3 (contd.)

constituent therefore lies against him for rendition of account. AIR 1948 Lah 14 (16).

(18) Where a principal files a suit against an agent for settlement of accounts the suit should refer to all the dealings of the agent as an agent of the principal. But it is open to a Pakka Adatia, that is a commission agent, to file a suit against his principal in respect of the moneys due to him in respect of any of the transactions. Such a suit is maintainable although it does not include all the transactions between the parties. AIR 1962 Guj 68 (70, 71) = (1962) 3 Guj LR 418 (DB).

(19) When the relationship of agency was established, the determination of the actual liability in any particular amount should be as a result of an order to take an account, that is to say, a preliminary decree would be the proper one to pass in a suit for accounts. But it would be different if the case of the agent was that an account had already been furnished and accepted. (1969) 1 MLJ 557 = 82 Mad LW 379.

(20) Suit against agent for moneys collected by him — Starting point of limitation is the date of the termination of agency. AIR 1968 Raj 14 (17) = 1967 Raj LW 570 (DB).

(21) Suit for accounts against agent — Set off — Claim of agent in respect of losses incurred by him in transactions put through by agent's branch at some other place on behalf of principal — Agent has right to equitable set off to the extent of losses by him: AIR 1966 Raj 229 (230) = 1965 Raj LW 346.

(22) Accounts — Transactions between parties not of the nature of agency but of outright sale — No evidence of fraud, mistake or any other sufficient equitable ground — Finality of the accounts cannot be reopened. AIR 1967 SC 181 (188) = (1966) Supp SCR 1.

4. Suit by agent.— (1) This section lays down that agent is bound to render accounts to his principal, but it is nowhere laid down in the Act that it is the duty of principal to render account to agent. 1899 Pun Re (Civ) No. 60, p. 267 (268) (DB) ** AIR 1925 Lah 100 (100) ** AIR 1927 Lah 701 (702). (Must sue for specific amount.) ** AIR 1937 Cal 359 (360) = ILR (1937) 2 Cal 259 (DB) ** AIR 1937 Sind 51 (53, 54) = 30 Sind LR 371 (DB).

(2) As the right of a principal to have an account from his agent is founded on the statute, i.e., Section 213, Contract Act, a suit by principal would always lie. But that does not warrant the unqualified proposition that a suit by an agent for an account against his principal can never lie. AIR

1954 Nag 300 (304) = ILR (1954) Nag 435 (DB).

(3) Where it is equitable from the particular circumstances and the relations of the parties that one should account to the other, a suit for an account by the agent will lie. AIR 1937 Sind 51 (53, 54) = 30 Sind LR 371 (DB) ** AIR 1933 Lah 483 (484) = AIR 1967 Andh Pra 109 (111) = (1966) 1 Andh WR 423 ** AIR 1965 Andh Pra 18 (19, 20) = (1964) 1 Andh WR 194. (Such exceptional circumstances would exist where the agent is unable to know the amount due to him without examining the accounts which are in the possession of his principal and which he is not able to get at, or where his remuneration depends upon the extent of the dealings entered into between his principal and third parties of which he is not aware.) ** AIR 1960 Punj 15 (15, 16). (Agent not in position to know state of accounts — He can maintain suit for rendition of accounts at his place of business.) ** AIR 1960 Punj 607 (607, 608) = (1961) 31 Com Cas (Ins) 27 ** AIR 1960 Andh Pra 13 (14) = (1959) 1 Andh WR 384 ** AIR 1959 All 546 (550) (DB). (It should be made clear that the exceptional circumstance of the agent not being able to claim a specific sum without the principal's accounts being gone into exists.)

(4) Though an agent has no statutory right for an account from his principal, nevertheless there may be special circumstances rendering it equitable that the Principal should account to the agent. Such a case may arise where all the accounts are in the possession of the Principal and the agent does not possess accounts to enable him to determine his claims for commission against his principal. The right of the agent may also arise in an exceptional circumstance where his remuneration depends on the extent of dealings which are not known to him or where he cannot be aware of the extent of the amount due to him unless the accounts of his principal are gone into. AIR 1967 SC 333 (336) = (1966) Supp SCR 38.

(5) Where A worked as an agent for B, a book-seller, on commission basis, canvassing in certain area for the sale of B's books and did not know how many books were sold through his efforts as he could not keep any accounts of the transactions entitling him to the commission, and those accounts were admittedly kept by B.

Held, that in these circumstances A could maintain an action for accounts against his principal B. AIR 1954 Nag 300 (304) = ILR (1954) Nag 435 (DB).

(6) If the principal undertakes to supply certain goods to his agents for

214. Agent's duty to communicate with principal.—It is the duty of an agent, in cases of difficulty,* to use all reasonable diligence in communicating with his principal, and in seeking to obtain his instructions.

[*] See, however, S. 189 supra.

215. Right of principal when agent deals, on his own account, in business of agency without principal's consent.—If an agent deals on his own account in the business of the agency, without first obtaining the consent of his principal and acquainting him with all material circumstances which have come to his own knowledge on the subject, the principal may repudiate the transaction, if the case shows either that any material fact has been dishonestly concealed from him by the agent, or that the dealings of the agent have been disadvantageous to him.

Illustrations

(a) A directs B to sell A's estate. B buys the estate for himself in the name of C. A, on discovering that B has bought the estate for himself, may repudiate the sale, if he can show that B has dishonestly concealed any material fact, or that the sale has been disadvantageous to him.

(b) A directs B to sell A's estate. B, on looking over the estate before selling it, finds a mine on the estate which is unknown to A. B informs A that he wishes to buy the estate for himself, but conceals the discovery of the mine. A allows B to buy in ignorance of the existence of the mine. A, on discovering that B knew of the mine at the time he bought the estate, may either repudiate or adopt the sale at his option.

Section 213 — Note 4 (contd.)

the purpose of selling the goods supplied and charges certain fee from the agent for carrying on the business for and on behalf of the principal, during the subsistence of the contract of agency and if the principal has failed to supply the goods during a particular period, the agent may have a right to sue for accounts at the close of the contract of the agency, but he cannot ask for the refund of specific amount of the fee paid by him as an agent for the non-supply of the goods for a period during the continuance of the contract. AIR 1959 Assam 75 (89, 90).

(7) Where the accounts are complicated and the amount due cannot be ascertained without going into accounts, the agent can sue for accounts. AIR 1955 Punj 143 (144) ** AIR 1957 Trav-Co 264 (265).

[But see AIR 1946 All 489 (492).]

(8) There is nothing in law which prevents an agent from suing his principal for specific sums of money due to him, as commission for specific work done by him. AIR 1957 Mad 21 (21) ** AIR 1965 Andh Pra 18 (19, 20) = (1964) 1 Andh WR 194 ** ILR (1962) Cut 617.

Section 214 — Note 1

(1) Principal is bound by the knowledge of the agent, if it is on material point and such that the agent was bound to communicate to the principal. AIR 1950 Bom 76 (79) (DB). (Broker selling shares in open market — Knowledge of broker as to the name of purchaser cannot be imputed to principal — Case is different in case of sale by private treaty.)

(2) Agent unauthorised to buy or sell at best rates cannot defer carrying out the order until he has communicated the rate of the day to the principal and received his sanction. AIR 1918 Sind 1 (5) = 12 Sind LR 93.

(3) Sale of pawned goods by pawnee — Purchaser raising dispute regarding quality of goods — Duty under section arises — Pawnee must treat himself as agent of pawner. AIR 1969 Pat 385 (393) (DB).

Section 215 — Note 1

(1) An agent cannot, without the knowledge and consent of his principal, be allowed to make any profit out of the matter of his agency beyond his proper remuneration as agent. (1902) 26 Bom 689 (702) (DB).

(2) Where there is conflict between duty and interest, the servant or agent must disclose any understanding, likely to result in gain to him, arrived at between the servant or agent and a third person who enters into a contract with the master or principal, otherwise such a secret bargain being a fraud on the master or principal will entitle him to rescind the contract with such third person. AIR 1929 All 87 (94) (DB).

(3) In order to set aside transaction by agent dealing on his own account, it is necessary that agent should have concealed material fact dishonestly or that the dealing should have been in fact to disadvantage of the principal. By law of England, however, if an agent, without disclosing the fact that he is the person dealing himself, deals with his principal, principal on discovering that fact can have transaction

216. Principal's right to benefit gained by agent dealing on his own account in business of agency.—If an agent, without the knowledge of his principal, deals in the business of the agency on his own account instead of on account of his principal, the principal is entitled to claim from the agent any benefit which may have resulted to him from the transaction.

Illustration

A directs B, his agent, to buy a certain house for him. B tells A it cannot be bought, and buys the house for himself. A may, on discovering that B has bought the house, compel him to sell it to A at the price he gave for it.

Section 215 — Note 1 (contd.)

set aside. AIR 1922 Mad 497 (498) = 45 Mad 1005 (DB).

(4) A transaction which necessarily puts the agent's duty in conflict with the interest of his principal must be presumed to be disadvantageous to principal who is not informed of the fact. AIR 1935 Sind 38 (44) (DB).

(5) Disadvantage to principal does not mean a mere possibility. Disadvantage is a question of fact depending on the facts of each case and no presumption arises. AIR 1927 Sind 195 (196) = 22 Sind LR 409.

(6) If agent appointed to sell principal's goods for fixed price, buys them himself without previous consent of latter, principal may either repudiate transaction according to Section 216 or affirm it. If he affirms, he will be liable to pay to agent such charges as are only incidents of transaction of purchase; but not charges annexed by terms of contract to agency. (1910) 34 Bom 292 (307) (DB).

(7) When agent uses his debt due to his principal to obtain property for himself he realises that debt on principal's behalf and is liable to account for same. AIR 1914 All 351 (351) (DB).

(8) Agent employed to raise a loan on behalf of principal cannot lend his own monies without the knowledge of the principal. Such a contract is not void but only voidable at the option of the principal. AIR 1928 Cal 727 (728) (DB).

(9) When agent joins secret combination to make personal profit for himself he is guilty of breach of duty. AIR 1928 Lah 196 (200) = 9 Lah 7 (DB).

(10) Where the plaintiff company were managing agents of the defendant's company to which the former supplied goods, the plaintiff company was held not entitled to make any profit on the goods supplied to their principal, the defendant company. AIR 1914 Low Bur 205 (206) = 8 Low Bur Rul 102 (DB).

(11) When an agent acts as principal in a contract without the knowledge of the party whose agent he is, he forfeits his right to remuneration from that party under the agency agreement. ILR (1937) 1 Cal 757 (761) ** (1870) 7 Bom HCR 90 (95).

(12) Section 236 applies only where one person enters into a transaction with another on the basis that that other is an agent for a third person, and does not apply where an agent deals on his own account. In such a case, the principal may repudiate the transaction under Section 215. AIR 1918 Mad 568 (568, 569) (DB).

(13) Principal is bound by the knowledge of the agent if it is on a material point and such that agent was bound to communicate to the principal. AIR 1950 Bom 76 (79) (DB).

(14) A mortgagee who exercises the power of sale under Section 69 (3) and (4), Transfer of Property Act, acts in his own right and not as the agent of the mortgagors. Sections 215 and 202, Contract Act, have no application to such a case. 1948 Bur LR (HC) 148 (156).

(15) A kept his shares with respective blank-transfer deeds in possession of K — K had full authority from A to sell, dispose of or in any way deal with them — K was the mercantile agent of A — The shares were kept with D by K — D sold these shares to various persons who purchased them without notice of defect in the title of D — Held A was negligent in leaving the shares with blank transfer deeds or allowing them to remain in possession of D and that act of negligence was the proximate cause — A was estopped from denying the title of purchasers. AIR 1965 Cal 355 (363).

(16) Sale of pawned goods by pawnee — Quality of goods disputed by purchaser — Section is attracted. AIR 1969 Pat 385 (393) (DB).

Section 216 — Note 1

(1) The section imposes a penalty on the agent who converts himself into a principal, without due disclosure to the principal. The operation of the section in no way depends upon the principal having suffered in any manner. This is so because the agent holds a fiduciary position and if he makes some profits in that capacity he should make good the same to the principal, even if the agent has spent his own money in the transaction. AIR 1955 Assam 177 (182).

(2) An agent is bound not only not to injure the interest of his principal but also to further them. He should not place himself in a position where his

217. Agent's right of retainer out of sums received on principal's account.—
An agent may retain, out of any sums received on account of the principal in the business of the agency, all moneys due to himself in respect of advances made or expenses properly incurred by him in conducting such business, and also such remuneration as may be payable to him for acting as agent.

Section 216 — Note 1 (contd.)

interests might be adverse to that of the principal. AIR 1919 All 440 (444) = 41 All 635 (DB).

(3) A principal has inter alia, a right as against the agent who fails in his duty, to obtain an account and payment of secret and illicit profits which have come to the hands of the agent as an agent. AIR 1947 Bom 135 (139) = ILR (1947) Bom 378 ** AIR 1955 Assam 33 (45) (DB).

(4) Partnership of A and B entering into contract with Government — B by his act and conduct leading the Government to cancel the contract and giving it to B — Contract which B secured in his own name must be held to be for the benefit of the partnership — If the contract was given to B for lesser amount, it was B who brought about the situation and therefore, would be liable for the same on account of his fraudulent conduct as such. AIR 1966 Bom 111 (111, 112) = 67 Bom LR 357.

(5) When a person is an agent for others, all profits and advantages made by him in the business beyond his ordinary compensation are to be for the benefit of the employers. ('93) 16 Mad 238 (266) (DB).

(6) Where an agent sells his own goods to the principal converting himself into a principal in respect of the sale, without disclosing the true position to the principal, then the principal is entitled to claim from the agent any benefit which may have resulted to the agent from the transaction. AIR 1934 Bom 86 (87, 88) (DB).

(7) Principal can have a decree for an account of profits of property outside British India purchased by an agent at a sale in execution of a mortgage decree passed in favour of his principal but he is not entitled to a mandatory injunction directing the agent to execute a reconveyance to the principal. AIR 1916 Mad 1133 (1136) (DB).

(8) First mortgagee in possession of mortgaged property and authorised to collect profits in lieu of mortgage money — Second mortgagee selling property in exercise of his power of sale under the mortgage and first mortgagee purchasing same and obtaining fresh lease of land owned by second mortgagee on which mortgaged property stands — First mortgagee cannot be said to be agent of mortgagor in the purchase and mortgagor cannot take benefit of same nor is the mortgagor entitled to the benefit of assignment of a subsequent mortgage. AIR

1929 Rang 140 (143, 144) = 7 Rang 61 (DB).

(9) Property purchased in Court auction by agent acting on his own account contrary to principal's directions — Principal cannot ratify so as to derive benefit as it was not an act done in the course of the agency. AIR 1917 Mad 252 (253) (DB).

(10) No broker, unless specially authorised, is entitled to get commission from both sides. AIR 1933 Rang 184 (184).

(11) Section 216 is merely enabling and confers upon principal right to claim from his agent benefit of transaction to which agency business related where agent, without knowledge of principal has dealt with business on his own account, instead of on account of latter. Principal is free to exercise that right or not. (1910) 34 Bom 292 (303, 304) (DB).

(12) Agent entrusted with principal's moneys to be employed in a specified manner — Agent making use of these moneys for other purposes — Agent's liability in respect of such moneys is that of a trustee. AIR 1927 Mad 478 (481) (DB).

Section 217 — Note 1

(1) The agent is entitled to a lien or retainer upon monies of his principal which are in his hands, for all expenses properly incurred. In such cases there is no question of limitation. AIR 1923 Rang 84 (86) = 11 Low Bur Rul 326 (DB).

(2) The right of retainer and lien conferred on the agent does not make the amount received by the agent on behalf of the principal any the less the property of the principal. The principal is the full owner and his complete control over his properties in the hands of the agent is subject only to the latter's statutory right of retainer and lien. AIR 1953 SC 140 (143) = 1953 SCR 520.

(3) An agent who has received monies on behalf of his principal is accountable to the latter for the payment thereof and he is under a legal obligation to do so subject of course, to the provisions of Section 217 and Section 221. This obligation on the part of the agent subsists even if the monies received by him are the fruit of a void or an illegal contract. AIR 1960 Raj 296 (302) = ILR (1960) 10 Raj 412.

(4) The word 'business' in Section 217 must mean a continuing business or the same business as that for which agent had been agent before. Hence, an agent cannot retain sums received on account of his principal in one business, on account of remuneration due to him for

218. Agent's duty to pay sums received for principal.—Subject to such deductions, the agent is bound to pay to his principal all sums received on his account.

Section 217 — Note 1 (contd.)

acting in another agency. 1885 Pun Re No. 49, pp. 97 (99) (DB). (Pleader realizing decretal amount for client in one suit — He cannot retain amount as fees in another suit.) ** (1910) 33 Mad 255 (256) (DB). (Pleader realizing money for his client in one cause — Money cannot be retained as fees in another cause.)

(5) A pleader was entrusted with certain shares in his private capacity for being sold but appropriated sale proceeds to fees due to himself: **Held**, that he had no right to pay himself for his fees out of sale proceeds of shares irrespective of his client's wishes. He had no lien or right of retainer under S. 217 or Section 221. (1912) 13 Cri L Jour 513 (517-520) = 5 Sind LR 222 (DB).

(6) Where the amount of the promissory note was not an amount advanced by way of loan but an amount which, at the request of his client the pleader disbursed for out-fees in the suit in which he was retained as vakil it was held that independently of the promissory note, the pleader was entitled to recover the out-fees advanced by him and under Section 217 of the Contract Act, he was entitled to retain the same out of the sums received by him to the credit of his client. (1904) 27 Mad 512 (517) (DB).

(7) Order under Section 185, Companies Act, 1913, against managing agent — Managing agent should be allowed to retain such amounts as he is entitled to under Section 217 or the terms of the managing agency agreement or the Articles of Association. AIR 1937 Mad 401 (402) (DB).

Section 218 — Note 1

(1) Any person acting in the character of an agent, when he collects money professing to receive it on behalf of his principal is bound to render a proper account to the principal. The fact that master could not have enforced the payment does not enable the agent to keep it for his own use. (1903) 30 Cal 1011 (1014) (DB).

(2) When a person wrongfully converted the goods of another person and received the amount the owner of the goods may sue for the recovery of the money on the basis of an implied contract of agency, the defendant being fictitiously assumed to have rightfully received the money as the plaintiff's agent and to have failed to pay it over to the principal. AIR 1953 Madh B 38 (39).

(3) An agent recovering money on behalf of his principal under an illegal or void contract must account to the principal for the money so received. He cannot set up the illegality of the contract as a justification for withholding

payment in an action by the principal when the illegality had been waived by other contracting party by paying the money. (1903) 25 All 639 (641) (DB) ** AIR 1960 Bom 548 (551) = 62 Bom LR 304 (DB) ** AIR 1960 Raj 296 (302) = ILR (1960) 10 Raj 412.

(4) If an agent in the course of the agency transactions commits a crime he cannot be made liable to pay the profits of such crime to the principal. 1957-2 Andh WR 226 (232).

(5) The principal can sue for accounts the sub-agent appointed by him for collecting rents, though the sub-agent was to pay over the collections to the agent. AIR 1927 Cal 917 (918) (DB).

(6) When a Hindu father incurs liability to pay a debt as an agent of another, the son becomes liable to pay it. The liability of the son arises at the same time as that of the father. The son is not absolved from such liability by the mere fact that the father subsequently misappropriated the sum or made himself criminally answerable. (1909) 19 Mad L Jour 759 (759) (DB).

(7) The suit properties were agreed to be sold to the plaintiff for the purposes of discharging certain debt due by the family of the defendants, but as there was some delay in completing the sale transaction the plaintiff was requested to pay off the creditors even before the execution of the sale-deed and he was assured that the amount so paid might be adjusted towards the sale price and that if the plaintiff had to pay to the creditors anything in excess of the sale price the same would be made good to him with interest. The plaintiff managed to get a transfer of the documents held by the creditors on payment of smaller amount than was actually due under those documents and he claimed that he was entitled to get the benefit of the remission given by those creditors: **Held**, that in making disbursements out of the agreed sale price the plaintiff was only acting as the agent of the defendants and he was not entitled to retain for his own benefit any remission that he obtained from the creditors. AIR 1937 Mad 810 (810) (DB).

(8) A party took up a contract with military authorities and deposited security money in a recognised Bank, according to rules. The Bank went into liquidation and the money was lost. The Bank was held to be agent of the military authorities and liable to make up the loss. AIR 1932 Lah 34 (36) (DB).

(9) Principal also a banker under another name — Agent having deposit in the Bank — Suit by principal for sale proceeds in agent's hands — Agent can

219. When agent's remuneration becomes due.—In the absence of any special contract, payment for the performance of any act is not due to the agent until the completion of such act; but an agent may detain moneys received by him on account of goods sold, although the whole of the goods consigned to him for sale may not have been sold, or although the sale may not be actually complete.

Section 218 — Note 1 (contd.)

set off amount deposited. AIR 1921 PC 103 (104).

(10) Plaintiffs entering into forward transaction through defendants as commission agents — Transaction covered by cross-contract prior to due date under first transaction — Rights and liabilities of parties (plaintiffs and defendants) become crystallised on date of second cross-contract — Defendants cannot be heard to say that because due date under prior transaction had not arrived, plaintiffs cannot claim profits earned. AIR 1960 Raj 296 (303) = ILR (1960) 10 Raj 412.

Section 219 — Note 1

(1) A broker's duty is to simply bring the parties together, arrange a transaction and to get the contract completed. The performance of that contract is a matter between the promisor and the promisee and the due fulfilment of the conditions is not the sine qua non for the earning of the commission. AIR 1935 Pesh 56 (57) (DB) ** AIR 1928 Bom 270 (273) = 52 Bom 627.

(2) Contracts with commission agents can fall in three classes, viz., (1) in which the agent is promised a commission by his principal if he succeeds in introducing to his principal a person who makes an adequate offer usually an offer of not less than the stipulated amount; (2) in which the property is put into the hands of the agent to dispose of for the owner and the agent accepts the employment, and, it may be, expends money and time in endeavouring to carry it out; (3) where the agent is promised his commission only upon completion of the transaction which he has endeavoured to bring about between the offerer and his principal. AIR 1959 All 29 (31) (DB).

(3) Broker employed to sell is entitled to his commission when sale is completed in favour of purchaser found by broker though actual negotiations or completion of sale did not take place through direct intervention of broker. AIR 1930 All 545 (548) = 52 All 688 (DB) ** ILR (1953) Madh B 331 (337, 338).

(4) A broker, to be entitled to his commission, must prove either that the transaction has been completed or that the non-completion was due to default of the principal. AIR 1922 Bom 433 (434) ** AIR 1934 Bom 158 (160) ** ILR (1951) Mys 178 (183).

(5) Broker engaged to purchase house — Brokerage is payable only on completion of conveyance in absence of

agreement. AIR 1944 Sind 168 (169) = ILR (1944) Kar 42 (DB).

(6) Broker who has negotiated a contract is entitled to his commission, even though a modification of its term is made by the parties. (1896) 20 Bom 124 (128) (DB).

(7) Where one party is employed by another to do a certain act, the real test to determine whether he is entitled to commission is to see whether the party so employed has done that act or not. AIR 1928 Bom 270 (273) = 52 Bom 627.

(8) When agent is employed for commission to sell certain property and agent succeeds in finding purchaser but principal declines to sell, agent is entitled to reasonable remuneration for his work and labour. (1912) 15 Cal L Jour 312 (320, 321) ** (1910) 8 Mad L Tim 40 (46).

(9) Where the parties have made an express contract for remuneration, the amount of remuneration and the conditions under which it will become payable must be ascertained by reference to the terms of that contract; no implied contract can be set up to add to or vary such terms. If, therefore, the broker had complied with the terms of the contract and fulfilled his part of it, he was entitled to the entire amount payable to him under the contract. Evidence about compensation or actual loss was in the circumstances entirely unnecessary and his suit cannot fail for want of it. AIR 1959 All 29 (30, 31) (DB).

(10) An agent has no right to receive remuneration from his principal unless there is a contract express or implied to that effect. In order to entitle the agent to receive his remuneration he must have carried out that which he bargained to do, and all conditions imposed by the contract must have been fulfilled. Section 219, Contract Act, does not prevent the parties from contracting that the payment will not be due until some event takes place. AIR 1959 Andh Pra 370 (373) (DB).

(11) Where the remuneration of an agent is payable upon the performance by him of a definite undertaking, he is entitled to be paid as soon as he has substantially done all that he undertook to do, even if the principal acquires no benefit from his services, except where there is an express agreement or special custom to the contrary. (1912) 15 Cal LJ 40 (44, 45) (DB) ** AIR 1950 SC 15

Section 219 — Note 1 (contd.)

(18) = ILR (1951) 1 Cal 511 = 1950 SCR 30.

(12) The principle of quantum meruit does not apply to agreement limiting commission to goods delivered. AIR 1927 Bom 225 (227).

(13) Where a contract is merely to procure a loan by the agent for the principal and the latter procures the same but only on certain conditions which the principal does not assent to, the agent will not be entitled to any commission, the terms of the contract being simply to procure a loan without any condition whatever. (1912) 15 Cal LJ 40 (47) (DB).

[See however AIR 1928 Bom 270 (273) = 52 Bom 627. (Agent engaged to procure loan on security of immovable property — Agent procuring a lender — Principal borrowing money from same lender through another agent — Former agent is entitled to commission.)]

(14) Where an agent introduces a customer to his principal and the latter undertakes to pay him a fixed commission "after the satisfactory expiry and conclusion of the business," the payment is to be made on the completion of the contract, which takes place after the goods have been delivered and the buyer has paid the price. AIR 1944 Mad 546 (547, 548) = ILR (1945) Mad 338 (DB).

[See also ILR (1951) Mys 178 (183). (Test applied is whether the agent's act is the effective cause of the sale.)]

(15) Where there are separate outstanding transactions with different provisions as to deposit and margin and the Pakha Adatia makes demand for margin money with reference to all outstanding transactions, he cannot close these transactions on non-compliance with demand. AIR 1941 Bom 211 (217) = ILR (1941) Bom 441.

(16) Insurance agent — Contract entitling agent to commission on completed business i.e., such business as is accepted by company and on which the first year's premium has been received in full — Insurance policy effected substantially through efforts of agent though its technical completion such as signing of policy, was actually brought about by another person: Held that the agent was entitled to commission on such policy. (1942) 23 Pat LT 318 (320, 321) (DB).

(17) Agent is entitled to a commission on the whole lot bargained for though a part of goods is not supplied to his principal. (1950) 3 Sau LR 120 (124) (DB).

(18) Prima facie, the right of an agent to commission ceases on the termination of his employment except in cases in which the whole of the work necessary to earn the commission has been done by the agent before his employment ceases. Where, therefore, a good

deal of work has to be done by the agent to prevent policies from lapsing and the payment of renewal premiums does not follow automatically from the original issue of the policy, the agent is not entitled to commission on renewal premiums on termination of his agency. AIR 1946 PC 6 (9) = 72 Ind App 315 = ILR (1946) Bom 159 = ILR (1946) Kar (PC) 2.

(19) Insurance company appointing P as chief agent for 10 years — Due to financial crisis, company's business ran as "closed fund" and taken over by new company — Old company held not bound to continue business for 10 years — Whole contract depended on company being able to run for the entire period — If agency terminated, upon company stopping work for bona fide reasons no breach of contract is committed — Agent held not entitled to damages for being prevented from earning remuneration. AIR 1946 Mad 20 (23, 25).

(20) Commission agent employed to sell — Commission to be paid on completion of sale before certain date — Term as to capacity of principal to complete sale can be implied — Non-completion of sale due to inability of principal to produce necessary papers — Subsequent completion of sale after production of papers, but beyond stipulated time — Agent held entitled to damages for being prevented to earn his commission by default of principal in not producing papers within stipulated time. (1949) 84 Cal LJ 214 (234, 235).

[See ILR (1951) Mys 178 (182).]

(21) If there be no agreement as to remuneration between the parties and one is made to work under another for remuneration, the principles by which Court would be governed would be analogous to those which regulate assessment of remuneration for services as between principal and agent. (1954) 94 Cal LJ 203 (216) (DB).

(22) In a suit by a broker for commission, if it is proved that he had acted as broker, he is entitled to commission; and even if he fails to produce evidence to show the rate of commission, a reasonable amount ought to be awarded to him as such commission. AIR 1933 Lah 784 (784).

(23) When an agreement entered into by a pucca adatia with a third party is void, he cannot claim any commission from his constituent on the ground that the agreement under which he was appointed was collateral to the agreement which is void. AIR 1951 Kutch 50 (51, 52).

(24) Managing Agents of Company paid commission after yearly accounts, every year — Transfer of Managing

220. Agent not entitled to remuneration for business misconducted.—An agent who is guilty of misconduct in the business of the agency* is not entitled to any remuneration in respect of that part of the business which he has misconducted.

Illustrations

(a) A employs B to recover 1,00,000 rupees from C, and to lay it out on good security. B recovers 1,00,000 rupees and lays out 90,000 rupees on good security, but lays out 10,000 rupees on security which he ought to have known to be bad, whereby A loses 2,000 rupees. B is entitled to remuneration for recovering the 1,00,000 rupees and for investing the 90,000 rupees. He is not entitled to any remuneration for investing the 10,000 rupees, and he must make good the 2,000 rupees to B.

(b) A employs B to recover 1,000 rupees from C. Through B's misconduct the money is not recovered. B is entitled to no remuneration for his services, and must make good the loss.

[°] See Sections 195, 211-214, and 218 supra.

221. Agent's lien on principal's property.—In the absence of any contract to the contrary, an agent is entitled to retain* goods, papers and other property, whether movable or immovable, of the principal received by him, until the amount due to himself for commission, disbursements and services in respect of the same has been paid or accounted for to him.

[°] As to cases when an agent has a general lien, see S. 170 supra: see also Ss. 217 and 219.

Section 219 — Note 1 (contd.)

Agency in the middle of chargeable year — Income for period of year before date of transfer does not accrue to transferor — Income accrues at the end of year. AIR 1954 SC 470 (482) = 1955 SCR 313.

Section 220 — Note 1

(1) Forfeiture of commission or remuneration is the result of the misconduct of the agent and not of loss arising therefrom. Agent's claim to remuneration will be affected even though he is willing to make good the loss. AIR 1940 Mad 299 (301) (DB).

(2) Agent representing himself to be the principal which fact is not known to the latter — Former cannot claim from the latter remuneration as agent. ILR (1937) 1 Cal 757 (761).

(3) Where the vendee is not completing sale due to vendor's defective title, he (vendee) need not pay the brokerage. AIR 1925 Sind 220 (221) (DB).

(4) Whether the agent has been guilty of misconduct has to be decided in each case on its own facts and circumstances. Hence, when the undertaking between the principal and his agent is that the agent will sell either to a third party or to himself and that in either case he is to get the commission, the agent cannot be held to have been guilty of misconduct, by selling to himself. He has not thus brought himself within the mischief of Section 220. (1956) 60 Cal WN 853 (854, 856) (DB).

(5) The principle underlying this section is that a principal is entitled to have an honest person as his agent and not a person whose actions are calculated to prejudice his interest and it is only an

honest agent who is entitled to commission. AIR 1961 Andh Pra 143 (157) = 1960 Andh LT 524 (DB). (AIR 1940 Mad 299, Rel. on.)

Section 221 — Note 1

(1) Agent's lien to commission is restricted to certain specific property or things. He is not in the position of a mortgagee who can remain in possession until he is paid. (1928) 110 Ind Cas 23 (25) (DB) (Oudh).

(2) Agent holding property for special purpose — Property cannot be subjected to lien inconsistent with such purpose. AIR 1933 Sind 235 (238).

(3) Agent incurring expenditure before winding up order of the company — Unless the agreement between the company and the agent excludes the operation of this section, the Court has no authority under Section 149 of the Companies Act, to deprive him of the right to be in possession. (1908) 31 Mad 123 (124) (DB).

(4) The lien of the agent extends only to retention of the property till his dues are paid. He cannot sell the property without principal's consent and satisfy his lien. AIR 1926 Lah 94 (95) ** AIR 1929 Lah 666 (667) (DB) ** AIR 1957 Madh B 20 (22) (DB).

(5) An agent, pure and simple, may not be justified in selling his principal's goods without his authority; but where he has spent money from his pocket in purchasing the goods on behalf of the principal he is in the position of a tacit pledgee and can recover as much of his outlay as possible by selling the goods which are in his custody. AIR 1928 Lah 747 (750) (DB) ** AIR 1957 Madh B 20 (22) (DB).

Principal's Duty to Agent

222. Agent to be indemnified against consequences of lawful acts.—The employer of an agent is bound to indemnify him against the consequences of all lawful acts done by such agent in exercise of the authority conferred upon him.

Illustrations

(a) B, at Singapore, under instructions from A of Calcutta, contracts with C to deliver certain goods to him. A does not send the goods to B, and C sues B for breach of contract. B informs A of the suit, and A authorizes him to defend the suit. B defends the suit, and is compelled to pay damages and costs, and incurs expenses. A is liable to B for such damages, costs and expenses.

Section 221 — Note 1 (contd.)

(6) Agent for collection of rent spending the rent from one property for the benefit of estate and willing to pay balance — Salary due to him— **Held**, as agent he was entitled to retain the balance till his salary was paid. AIR 1935 All 922 (922, 923) = 37 Cri LJ 308.

(7) Agent for purchaser delivering goods to the railway company with request to treat the latter as consignor and consignee — **Held**, he lost the lien over the property so delivered. AIR 1930 Sind 130 (133).

(8) If agent pays for the goods purchased for the principal and the property has vested in the principal the agent has a lien on the property. If the property is lost in transit under circumstances beyond control the agent loses his lien — His right to recover the money from the principal is not lost. AIR 1964 Andh Pra 17 (20) = ILR (1962) Andh Pra 431 (DB).

(9) Sums advanced and expended by the agents do not come within the meaning of "disbursements and services in respect of" in Section 221 so as to entitle them to a lien over the property of the principal. (1889) 13 Bom 314 (322).

(10) When an agent by contracting renders himself personally liable for the price of goods, the property in the goods vests in the agent, and his rights with respect to them are identical with those of the principal, enabling him to resell or stop in transit, if the principal does not act according to Section 222. AIR 1929 Bom 260 (261) (DB).

(11) The right of retainer and lien conferred on the agent does not make the amount received by the agent on behalf of the principal any the less the property of principal. The principal is the full owner and has complete control over his properties in the hands of the agent subject only to the latter's statutory right of retainer and lien. Where, therefore, the entire sale proceeds arising out of goods sent by a foreign Association are received by its agent in India, they are received on behalf of the Association and belong to it subject to the rights of the agent. AIR 1953 SC 140 (143) = 1953 SCR 520.

[See also AIR 1960 Raj 296 (302) = ILR (1960) 10 Raj 412.]

(12) The right of the agent's lien on the principal's property is restricted to the goods in respect of which the commission was earned, disbursements made or service rendered. The scope of the agent's lien is not vast enough to include his right to retain even those goods, papers and other property of the principal which were the subject of different and separate transactions in the absence of a contract to that effect. AIR 1953 Pepsu 113 (115) (DB).

(13) Where A is directed by B to redeem the mortgage executed by B and to repay himself by selling the property, he is entitled to remain in possession of the property until he is paid the amount spent by him in redeeming the mortgage. 1955-1 Mad LJ 399 (401).

(14) Commission agent — Purchase of goods on behalf of his principal with his own money — Rights of, are analogous to that of unpaid seller — Right of lien and resale are available to commission agents. AIR 1963 Raj 212 (218) = 1963 Raj LW 195. (Case under Sale of Goods Act, S. 46.)

(15) An executor of a trust property who had spent his own monies on behalf of the estate can claim a right of retainer and lien upon it if he is in possession of the estate. AIR 1916 Mad 720 (725) = 39 Mad 365 (DB).

(16) The possessory lien of an agent attaches only to goods in respect of which the principal has a right against a third person to create a lien and such a lien is subject to all the rights and equities of a third person available against the principal. (1909) 36 Cal 713 (723) (DB).

(17) Agent's lien is lost by his parting with possession. If goods are lost in transit due to circumstances beyond the control of the parties, the agent loses his lien as an agent and the principal loses his property in the goods. If the loss of price of goods is paid by agent as money-lender the principal is liable to pay. AIR 1950 Pat 481 (483) (DB).

Section 222 — Note 1

(1) Agent is entitled to reimbursement and indemnity by his principal when he acts within scope of directions. (1921) 3 Lah LJ 141 (144) (DB) ** AIR 1928 Lah 196 (201) = 9 Lah 7 (DB).

(b) B, a broker at Calcutta, by the orders of A, a merchant there, contracts with C for the purchase of 10 casks of oil for A. Afterwards A refuses to receive the oil, and C sues B. B informs A, who repudiates the contract altogether. B defends, but unsuccessfully, and has to pay damages and costs and incurs expenses. A is liable to B for such damages, costs and expenses.

Section 222 — Note 1 (contd.)

(Agent making unauthorised settlement is not entitled to indemnity.) ** AIR 1953 Pepsu 113 (115). (Commission agent making payments to others would be entitled to reimbursement to the extent to which such payments are shown to be made on behalf of the principal.) ** AIR 1923 Lah 473 (474) (DB). (A to buy goods for B and sell them on his behalf under his instructions — A is an agent entitled to indemnity.) ** 1913 Pun LR No. 206, p. 693 (694) (DB). (Commission agent — Principal not bound to pay for boarding and lodging charges in the absence of express stipulation — Things belonging to principal left by agent in hotel — Principal can recover them without paying the hotel bills of agent.) ** AIR 1963 Andh Pra 394 (399) = (1962) 2 Andh WR 390. (Dealer appointed as wholesaler under Madras Foodgrains (Procurement) Order, 1947 — Madras Foodgrains (Intensive Procurement) Order, 1950 — Relationship between dealer and Government is that of principal and agent — Government is bound to indemnify dealer.) ** AIR 1961 Assam 64 (68) = (1960) 1 Assam LR 96.

(2) Loss of goods in transit — Agent having lien on goods purchased and booked on behalf of principal for money advanced by him to principal — Liability for loss is on principal. AIR 1964 Andh Pra 17 (20) (DB).

(3) The agent's right to indemnity arises and becomes enforceable immediately on his incurring the liability and it is in no manner dependent upon his discharging the same as well. ILR (1945) 1 Cal 565 (585) ** AIR 1948 Nag 173 (175) = ILR (1948) Nag 409 (DB) ** AIR 1936 Nag 37 (40) = 31 Nag LR 154. (Agent executing sarkat to adatiya undertaking to pay loss from contract is entitled to be indemnified by the principal.)

(4) Suit for accounts against agent — Set off — Claim of agent in respect of losses incurred by him in transactions put through by agent's branch at some other place on behalf of principal — Agent has right to equitable set off to the extent of losses incurred by him. AIR 1966 Raj 229 (230) = 1965 Raj LW 346.

(5) Without actual proof of loss agent cannot claim indemnity. AIR 1935 Sind 38 (41) (DB).

(6) A purchasing goods from B — B directing his agent C to deliver goods to A — C refuses to deliver — B has no remedy against C though C may be liable

to A for his default under some other agreement. AIR 1967 All 308 (309).

(7) Where a commission agent acting under a contract with the buyer bought and shipped on account and risk of the buyer and the goods were lost because of the outbreak of war while they were in transit it was held that consistent with the principles of Section 222 the agents were not to be saddled with the loss. AIR 1919 Mad 483 (484, 485) = 41 Mad 1060 (DB).

(8) Arbitration Act (1940), S. 30 — Contract for purchasing ghee required by Army personnel — Payment stipulated at specified charges — Arbitrators cannot award compensation to the agent under Section 222, Contract Act for additional expenses incurred on account of abnormal rise in prices. Because the claim made by the agents was not for indemnity for acts lawfully done by them but was a claim for charges incurred by them in excess of those stipulated. AIR 1960 SC 588 (595) = (1960) 2 SCR 793.
Lawful acts.

(9) It is an essential condition to enable an agent to claim compensation under Section 222, Contract Act, that the agent's act shall be lawful. It is not sufficient that his acts are innocent and performed in good faith. AIR 1947 Cal 157 (158).

[See also AIR 1959 Raj 153 (2) (155) = 1959 Raj LW 219 (DB).]

(10) The question as to whether an agent is entitled to indemnity depends upon whether the contract was merely void or unlawful. In the latter case there can be no indemnity while in the former indemnity may be claimed. AIR 1953 Bom 98 (100).

(11) Forward contract in linseed prohibited by law — Contract is illegal — Suit for recovery of amount of losses suffered by plaintiff in such transactions entered into as agent of defendant is not maintainable. Section 222 cannot be invoked in such cases. Such cases are to be distinguished where the wagering contract is a collateral one or when the rights of parties stand altered by a novation. AIR 1963 Madh Pra 323 (328, 329) = 1963 MPLJ 325 (DB).

(12) Agents who engage to defraud principal forfeit their right to indemnity in respect of fraudulent transactions. Where securities deposited by principal with agents are fraudulently disposed of by agents, disposal amounts to conversion; and principal on each occasion on which shares were sold has right to damages for conversion measured by value of shares at the date of conversion.

228. Agent to be indemnified against consequences of acts done in good faith.—Where one person employs another to do an act, and the agent does the

Section 222 — Note 1 (contd.)

Where not knowing of conversion principal receives from wrongdoer and retains goods converted or their equivalent, he must give credit for value of what he has received. AIR 1938 PC 23 (25).

(13) In a 'badni' transaction if the debt owed to the agent is less than the sum lost by him, on account of his principal and the matter is settled by debit and credit, plus payment of cash by agent, the agent can recover both the amount adjusted by credit and debit, and paid in cash. But if there is no cash payment the agent cannot recover. In such a case the agent's liability to the third party is neither "enforced liability" nor is there a cash payment. 1908 Pun Re No. 79, p. 366 (371) (FB) ** AIR 1928 Lah 420 (422) (DB).

(14) Agent can recover moneys paid for principal even on wagering contracts. AIR 1932 Lah 356 (358) = 13 Lah 766 (DB) ** (1911) 33 All 219 (221, 222) (DB).

(15) Suit on agreement collateral to wagering transaction is maintainable — Suit by broker for commission in respect of wagering transaction is maintainable. AIR 1961 Raj 52 = ILR (1960) 10 Raj 1304 (DB).

(16) An agent in a wagering contract is not liable to third parties as there is no legal liability. So he cannot claim indemnity unless he has made actual payment to third parties in such contracts. AIR 1951 Nag 392 (393) = ILR (1951) Nag 487.

(17) Where an agent sued for indemnity for losses sustained by him in the purchase and sale of bullion in the forward market on behalf of the principal, the principal's plea that contract was of wagering nature and illegal under Defence of India Rules was rejected on the ground that the right to indemnity was an incident of the contract of agency and a matter which was collateral to the matter prohibited by the rules was not hit by the rules. AIR 1954 SC 500 (502) = 1955 SCR 439.

(18) Contract within prohibition of Order — Suit by agent claiming indemnity against principal for loss which agent suffered in carrying out directions of principal — Right to indemnity is founded on Section 222, Contract Act — Right is incident of contract of agency and was not hit by order of prohibition — Matter is collateral to the forward contract and is enforceable. AIR 1961 Raj 52 (59) = ILR (1960) 10 Raj 1304 (DB).
Limitation.

(19) Agent sustaining losses in his agency has right, as direct consequence

of agency contract, to be recouped by his principal in respect of such losses and suit to enforce that right is governed by Article 83 of Limitation Act. AIR 1914 Lah 407 (408) = 1915 Pun Re No. 23 (DB) ** AIR 1932 Bom 25 (30) (DB). (Suit by commission agent to recover losses incurred on behalf of constituents is governed by Art. 83 and not Article 65 of Limitation Act — Agent allocating cross-contracts to himself — He can be said to be damnified on the date of such contracts — If contracts are entered into with others loss cannot necessarily be said to have arisen on the day of the contracts.)

(20) Principal's liability to indemnify agent is one under contract within meaning of Article 83, Limitation Act. AIR 1944 Cal 302 (302) = ILR (1944) 2 Cal 283 (DB) ** AIR 1965 J and K 43 (47, 48) = 1964 Kash LJ 319 (DB). (For considering point of limitation competency of person issuing letter of appointment is not to be taken into consideration.)

(21) Suit by an agent against principal for recovery of money spent for principal — Article 83, Limitation Act applies. AIR 1959 Raj 153 (2) (155) = 1959 Raj LW 219 (DB).

(22) The agent is not entitled to wait till the termination of the agency to make a claim under Section 222. Time begins to run from the time the claim materialises and not from termination of the agency. (1911) 34 Mad 167 (172) (DB).

(23) Where commission agent purchases goods for his principal and on the principal refusing to accept some goods, the agent resells them, suit for damages is governed by Article 85 and not by Article 61 of the Limitation Act. AIR 1932 Bom 593 (594).

Section 223 — Note 1

(1) In a suit for accounts by the principal against the agent an agent is entitled to deduct moneys authorisedly expended by him for unlawful purposes, though he may not succeed in a suit to recover the amount so expended. AIR 1926 Sind 40 (41) = 20 Sind LR 100.

(2) Plaintiff appointed by Government as wholesale dealer—Plaintiff purchasing goods for Government with his money — Retail dealers not lifting the goods — The contract between the Government not in accordance with Section 175 (3) Government of India Act 1935 — Held the plaintiff must be said to have acted as the agent of the defendant in good faith. Upon the terms of the Order and the

act in good faith,* the employer is liable to indemnify the agent against the consequences of that act, though it causes an injury to the rights of third persons.

Illustrations

(a) A, a decree-holder and entitled to execution of B's goods, requires the officer of the Court to seize certain goods, representing them to be the goods of B. The officer seizes the goods, and is sued by C, the true owner of the goods. A is liable to indemnify the officer for the sum which he is compelled to pay to C, in consequence of obeying A's directions.

(b) B, at the request of A, sells goods in the possession of A, but which A had no right to dispose of. B does not know this, and hands over the proceeds of the sale to A. Afterwards C, the true owner of the goods, sues B and recovers the value of the goods and costs. A is liable to indemnify B for what he has been compelled to pay to C and for B's own expenses.

[*] See S. 52 of the Indian Penal Code 1860 (45 of 1860). The term would seem to imply such care and caution as under circumstances are proper and would also imply absence of fraud and unfair dealing.

224. Non-liability of employer of agent to do a criminal act.—Where one person employs another to do an act which is criminal, the employer is not liable to the agent, either upon an express or an implied promise, to indemnify him against the consequences of that Act.*

Illustrations

(a) A employs B to beat C, and agrees to indemnify him against all consequences of the act. B thereupon beats C, and has to pay damages to C for so doing. A is not liable to indemnify B for those damages.

(b) B, the proprietor of a newspaper, publishes, at A's request, a libel upon C in the paper, and A agrees to indemnify B against the consequences of the publication, and all costs and damages of any action in respect thereof. B is sued by C and has to pay damages, and also incurs expenses. A is not liable to B upon the indemnity.

[*] See Section 24.

225. Compensation to agent for injury caused by principal's neglect.—The principal must make compensation to his agent in respect of injury* caused to such agent by the principal's neglect or want of skill.

Illustration

A employs B as a bricklayer in building a house, and puts up the scaffolding himself. The scaffolding is unskillfully put up, and B is in consequence hurt. A must make compensation to B.

[*] Cf. the Indian Fatal Accidents Act, 1855 (13 of 1855).

Section 223 — Note 1 (contd.)

licence, there was an implied contract to indemnify the agent against all losses and liabilities incurred by him in consequence of his bona fide acting as the agent of Government. The plaintiffs were, therefore, entitled to the refund claimed by them with interest from the date of suit till realisation. AIR 1961 Assam 64 (68) = (1960) 1 Assam LR 96.

Section 224 — Note 1

(1) As a general rule, a master is not criminally liable for the acts of his servant. But where the provisions of a statute prohibit an act or enforce a duty in such words as to make the prohibition

or the duty absolute, the master will be liable if the servant infringes those provisions. Mens rea is not the essence of the contravention of Rule 9 (a) of the Octroi Rules of Waraseoni Municipal Committee. 1960 Jab LJ 614 = 1960 MPLJ 536.

Section 225 — Note 1

(1) A pucca adatiya is entitled to recover from his principal the amount of liabilities which he had suffered while settling the dealings which he had carried out in accordance with his principal's instructions irrespective of whether he had discharged those liabilities or not. AIR 1948 Nag 173 (176) = ILR (1948) Nag 409 (DB).

Effect of Agency on Contracts with Third Persons

226. Enforcement and consequences of agent's contracts.—Contracts entered into through an agent, and obligations arising from acts done by an agent, may be enforced in the same manner, and will have the same legal consequences, as if the contracts had been entered into and the acts done by principal in person.

Illustrations

(a) A buys goods from B, knowing that he is an agent for their sale, but not knowing who is the principal. B's principal is the person entitled to claim from A the price of the goods, and A cannot, in a suit by the principal, set off against that claim a debt due to himself from B.

(b) A, being B's agent with authority to receive money on his behalf, receives from C a sum of money due to B. C is discharged of his obligation to pay the sum in question to B.

SECTION 226 — SYNOPSIS

1. Principal's liability for acts of agent.

2. Acts in excess of agents' authority.

3. Agents' unauthorised acts.

4. Negligence of agent.

1. Principal's liability for acts of agent.

— (1) Principal is bound by the act of his agent with all its results. (1909) 36 Cal 840 (853, 854, 855) = 36 Ind App 85 (PC).

(2) Payment to agent is payment to principal. 1912 Pun LR No. 36, p. 115 (116).

(3) Representation by agent is as effectual for the purposes of estoppel as one made by principal. AIR 1931 Mad 647 (649).

(4) If a person, acting as agent of his co-sharers under power of attorney, contracts debt by writing handnote, then all co-sharers are liable for money. (1910) 11 Cal LJ 236 (241, 242) (DB).

(5) Where an agent signed a promissory note on behalf of a Mahant and utilised the money so got for his (Mahant's) personal purposes, the Mahant is liable personally for the loan. AIR 1934 Pat 435 (437, 438) (DB).

(6) A military contractor, according to rules, deposited a certain sum in the bank by way of security. The bank issued a deposit certificate in the name of the military authorities. The bank subsequently went into liquidation: Held, that the bank had become an agent to the military authorities, and on its failure to pay, the military authorities were liable to pay. AIR 1932 Lah 34 (36) (DB) ** AIR 1936 Pesh 148 (148).

(7) Manager of mine can make contract binding on owner. AIR 1938 Cal 343 (346).

(8) When Station Master having power to accept or refuse bailment of goods, accepts bailment, Railway company is responsible for consequences. AIR 1923 All 71 (73) (DB).

(9) To bind the Secretary of State by contract, there must be deed executed on his behalf and in his name by proper

authority. AIR 1936 Bom 19 (21) = 60 Bom 42 (DB).

(10) An agent having power to sell on behalf of another need not necessarily recite such authority or disclose the same either in body or at the signature. The question of agency is one of intention to be gathered from the terms of contract and the surrounding circumstances. AIR 1920 Oudh 105 (109) = 23 Oudh Cas 353.

(11) A consignor of goods is bound by a risk note signed by a person who actually delivered the goods to the Railway Company. AIR 1924 Pat 315 (317).

(12) Payment made to person who is not creditor's agent for realizing money due to creditor from third parties as debts, is not valid. (1910) 7 Ind Cas 530 (530) = 1910 Pun WR No. 89.

(13) One of several joint debtors cannot be agent of their creditor so far as joint-debtors are concerned and payment to that debtor is not payment to creditor. (1911) 11 Ind Cas 864 (864) (Low Bur).

(14) Right of support from adjoining soil affected by trench dug by contractor for the defendant — Defendant is liable for the act of contractor. (1893) 17 Bom 307 (311).

(15) The plaintiff did work in the construction of defendant's building through a certain firm, who were acting as defendant's agents. No payment was made for the work done by the plaintiff though the firm submitted the final bill containing the amount due to the plaintiff. His work was got examined by a different engineer according to whose fresh estimate a lower amount was offered: Held, that the defendant was liable to pay according to the bill of the firm who were his agents and who were acting according to the duty imposed upon them. AIR 1928 Oudh 89 (91) (DB).

(16) Agent cannot sue or be sued in respect of sale to him on behalf of principal. (1913) 25 Mad LJ 32 (32) (DB).

(17) Suit to recover profits, promised to be paid just after sale of land itself,

Section 226 — Note 1 (contd.)

is to be brought against vendor and not against his agent. (1909) 2 Ind Cas 262 (262) (DB) (All).

(18) When loans were advanced on bonds to the vakils of zamindar for the zamindari, it was held that the zamindar is liable to repay. (1966) 5 Suth WR 72 (74) ** 1962 Jab LJ 1112 (1115, 1116) = 1962 MPC 411 (DB).

(19) Goods were consigned from Pakistan to be delivered in India. Pakistan Railway carried the goods to the border and an Indian Railway received them. It was the consignor who paid the Indian Railway. In a suit for damages, it was held that the Pakistan Railway made the contract with the Indian Railway as an agent of the consignor for delivery of goods to consignee and the consignor can therefore enforce the contract against the Indian Railway. AIR 1955 Cal 264 (265) (DB).

(20) In regard to the claim for the recovery of the amount paid as earnest money in respect of a contract even an undisclosed principal can sue. AIR 1955 Punj 189 (190) (DB).

(21) Authority of agent to bind the principal must be determined from facts of each case. AIR 1917 Pat 512 (513).

(22) Compromise with authorised attorney of paradanashin lady is valid. 1939 Oudh WN 1068 (1074) (DB).

(23) Compromises by a few self-constituted leaders, or even the leaders chosen by the officials, cannot bind an entire community. AIR 1931 All 341 (346) = 53 All 484.

(24) Liability of the principal upon a contract made on his behalf is not affected by the bare fact of the agent's personal liability and the credit given to the agent by the other contracting party. AIR 1952 Vindh Pra 51 (56).

(25) The liability of the principal and the agent when concurrent is alternate. The person contracting with the agent can sue either the agent or the principal. If, however, he sues the agent to judgment he cannot afterwards bring a second action against the principal even though the judgment is unsatisfied and the plaintiff had no knowledge of the existence of the principal. ILR (1951) 1 Cal 82 (85, 86).

(26) Where a person purchases certain goods from A an Adatia with the knowledge that they belong to B then A becomes liable to pay the full value of the goods to B and cannot make any adjustment of the amount payable to him towards what A may owe him. A can discharge his liability by a payment to B but only by a payment of the full amount in cash or perhaps by cheque. AIR 1954 Nag 60 (61) = ILR (1953) Nag 843.

(27) A certain bank went into liquidation and the Official Liquidator took misfeasance proceedings against the de-

fendants who were the director and the manager and in the course of those proceedings, the defendants effected a compromise with the Official Liquidator by which they undertook among other things "to adjust or satisfy any claim" of one of the depositors of the bank among others and to indemnify the Official Liquidator against any such claim. A decree was passed in the terms of the compromise. The defendants having made default in satisfying the claim of the depositor, he instituted a suit against the defendants: **Held**, that the Official Liquidator who entered into a compromise with the defendants was representing all the depositors, creditors and share-holders of the bank acting as their agent. It could not be argued therefore that the plaintiff was a perfect stranger to the agreement and did not come within the ambit of the well-recognized exception based either on the ground that he claimed through a party to the contract or on that of agency, even if it be not possible to hold that an express or implied trust was created in his favour. The suit was therefore maintainable. AIR 1940 Lah 471 (473).

(28) Where a parcel clerk accepting a consignment of fireworks under mistake as a parcel to be despatched by passenger train, on subsequently discovering the mistake, did not despatch it at all even by goods train, it was held that the Railway Company was liable in damages for loss caused thereby. AIR 1922 All 324 (330) = 43 All 623 (DB).

(29) Contract of service by P with X company — X was being managed by Y company under managing agency agreement — Termination of service of P by Z, who was director of X company and managing director of Y — **Held**, Z could not be made liable either in tort for procuring breach of contract with managed company, his position in relation to managed company being that of an agent or for breach of contract, by terminating service of P. 1968 MPLJ 846 = 1969 Jab LJ 37.

(30) Master and servant — Relationship — Distinction between servant and independent contractor — Liability of master for wrongful acts of his servant — Agent an independent contractor — Employer is not in general liable — However when agent is a servant he is liable for all loss committed in the course of the employment. AIR 1962 Pat 384 (389) = 1962 BLJR 77 (DB).

(31) Complaint filed by Municipal prosecutor on authority of resolution of Municipal Corporation — Complainant is Municipal Corporation. AIR 1970 SC 7 (9) = 1970 Cri LJ 1 = 1969 SCD 719. (1966 Cri LJ 734 (Punj), **Reversed**.)

(32) The opening of an account at a particular branch of a Bank connotes reciprocal obligations cir-

Section 226 — Note 1 (contd.)

cumscripted by the fact that the account was opened at that branch. In the absence of an express contract to the contrary there is an implied contract in such cases, which carries with it the duty of the Bank to pay the customer only at the branch where the account is kept subject to instructions to transfer the amount elsewhere. If the obligation to transfer is frustrated by local legislation or Governmental action of the country where the account is kept, the remaining implied obligation to pay at the branch or office where the account is kept cannot be substituted automatically by an unconditional obligation of the principal to pay elsewhere by resorting to S. 226. AIR 1970 All 108 = (1968) 2 Com LJ 352.

2. Acts in excess of agent's authority.—

(1) The authority conferred by a power of attorney must be adhered strictly, and if the authority is exceeded the third party will be unable to make the principal liable. AIR 1916 Sind 37 (42) = 10 Sind LR 72.

(2) Where an agent enters into a contract fraudulently for his own advantage and against the interests of the principal, the principal is bound only if the persons dealing with the agents act in good faith. AIR 1916 Sind 37 (44) = 10 Sind LR 72.

(3) Act of agent in excess of power of attorney does not bind principal. AIR 1918 Mad 706 (707) (DB).

(4) Person dealing with agent, whose authority he knows to be limited, deals at his risk and if agent exceeds his authority, principal is not liable. (1910) 14 Cal WN 381 (388) (PC).

(5) Where agent of landlord has no authority to incur pecuniary liability on his behalf, no personal decree can be passed against landlord. (1912) 16 Ind Cas 999 (1000) (Oudh).

(6) Where agricultural tenancy was created by the zamindar's agent without authority there is no valid tenancy so as to bind the zamindar. AIR 1943 Oudh 174 (175).

(7) Station master who accepted goods at concession rates which were not applicable to that case was acting without authority and his employer is not bound by his act. AIR 1916 All 306 (307).

(8) When defendant's agent undertook gratuitously to carry plaintiff's goods only to oblige the plaintiff and the goods were damaged in transit, it was held that the defendant was not liable as the goods were carried not within the business of the agency. ILR (1957) 7 Raj 784 (787).

(9) Where the master is sought to be made liable for the transactions of the servant, the person claiming against the principal must show that the act done was within the scope of the authority or ostensible

authority held or exercised by the agent and this can be shown by practice as well as a written instrument. AIR 1937 Pat 526 (527, 528).

(10) In the absence of custom or authority of principal, payment to broker is no payment to principal. AIR 1917 Cal 818 (821) (DB).

(11) When the conveyance of a woman's property was executed by her son and husband alleging that they are her agents but the woman's name was never mentioned in the deed and the husband and son did not sign the deed as anybody's agent, it was held that they were not her agents and the conveyance will not bind her. (1911) 12 Ind Cas 206 (207) (Low Bur).

3. Agent's unauthorised acts. — (1) Principal is liable to extent of benefit received in unauthorised transactions. AIR 1916 Mad 1025 (1027) (DB).

(2) Agent borrowing for principal without authority — Money going into principal's coffers — Law implies promise to pay. AIR 1936 Bom 62 (66) = 60 Bom 326.

(3) Where agent signs pro-note for business belonging to minor, holder must be fixed with notice of the contents of power of attorney under which agent acts and of the extent of his authority and of the fact that business belonged to minor. (1912) 35 Mad 692 (699, 700) (DB).

(4) Defendant's branch firm at Cawnpore was managed by munim from 1897 to 1911 who entered into forward contracts in name of defendant with plaintiff and they were entered in books at Cawnpore but no goods were ever actually delivered. Adjustment of accounts was made in 1908 and balance was found due to defendant. After 1908 no forward contracts were entered in accounts though munim carried on transactions with plaintiff who did not know that munim was acting in his own behalf. Defendant asked plaintiff for information about goods bought and sold through them. They supplied same some days after demand and brought suit for balance due on contracts: Held that defendant was bound by transaction entered into by munim both before and after 1908 upto 1911. But transactions being only for differences were wagering ones and hence could not be enforced. AIR 1914 Bom 142 (144) = 39 Bom 1 (DB).

4. Negligence of agent. — (1) A drew a bill in favour of B on C and gave it to B's agent. B's agent had asked A for a bill drawn on himself and not on C but kept the bill without ascertaining its nature for some time. In the meantime C became insolvent: Held that assuming that both parties were under a mistake as to the bill, B could not recover the amount of the bill from A as his agent

227. Principal how far bound, when agent exceeds authority.—When an agent does more than he is authorized to do, and when the part of what he does, which is within his authority, can be separated from the part which is beyond his authority, so much only of what he does as is within his authority is binding as between him and his principal.*

Illustration

A, being owner of a ship and cargo, authorizes B to procure an insurance for 4,000 rupees on the ship. B procures a policy for 4,000 rupees on the ship, and another for the like sum on the cargo. A is bound to pay the premium for the policy on the ship, but not the premium for the policy on the cargo.

[°] As between principal and third parties, see S. 237.

228. Principal not bound when excess of agent's authority is not separable.—Where an agent does more than he is authorized to do, and what he does beyond the scope of his authority cannot be separated from what is within it, the principal is not bound to recognize the transaction.*

Illustration

A authorises B to buy 500 sheep for him. B buys 500 sheep and 200 lambs for one sum of 6,000 rupees. A may repudiate the whole transaction.

[°] See Section 237, *infra*.

229. Consequences of notice given to agent.—Any notice given to or information obtained by the agent, provided it be given or obtained in the course of the business transacted by him for the principal, shall, as between the principal

Section 226 — Note 4 (contd.)

had been guilty of gross negligence in taking the bill and keeping it without ascertaining its nature. (1882) 4 All 334 (337) (DB).

(2) Negligence of contractors and engineers — Liability of the Municipality as principal for the wrongs of its agent is joint and several with the agent. The injured party may sue either or both of them. AIR 1969 Bom 127 (139, 140) = 70 Bom LR 554 (DB).

Section 227 — Note 1

(1) Agent authorised to stand surety for one person only — Agent standing surety also for two more persons — Authorised act separable from unauthorised act — Principal's liability is restricted to authorized act only. AIR 1937 Rang 499 (501) (DB).

(2) Ordinary law of agency does not apply to public agents and Government is not bound by the unauthorised acts of its officers. Its liability will be to the extent of power given to such officers. ILR (1954) Trav-Co 453 (457) ** 1962 Mys LJ (Supp) 527.

(3) Private agent — Principal terminating lease and distinctly instructing agent to take possession — Direction to agent puts an end to his power of collecting rent — Subsequent acceptance of rent by agent would not bind principal. AIR 1947 Mad 74 (76).

(4) Agent having authority to take delivery only — Railway cannot re-book goods on application of such person. AIR 1959 Pat 337 (341) = ILR 37 Pat 1355 (DB).

(5) Goods sold — Price paid by buyer to broker — Buyer failing to show that broker was authorised to receive pay-

ment — Payment to broker is not payment to seller. AIR 1963 Cal 464 (466).

Section 228 — Note 1

(1) Authority to buy cotton at a particular time — Contract to buy it at a different time: **Held**, contract does not bind the principal. (1871) 8 Bom HCR 19 (22).

(2) Partner authorised to draw bill to the extent of certain amount drawing bill to a larger amount without firm's knowledge — Firm is not liable even to the authorised extent. (1873) 10 Bom HCR 319 (322, 323).

(3) Agent of co-sharers granting a perpetual lease of land — Such transfer is clearly beyond the scope of his authority: **Held**, transfer does not bind co-sharers. (1889) 2 CPLR 103 (104).

(4) Lambardar transferring absolute occupancy without specific authority from landlord — Custom prevailing under which such transfers were made: **Held**, landlord was bound by the transfer. (1895) 8 CPLR 41 (42, 43).

(5) Agent entering into compromise of doubtful rights with regard to certain property of his principal, major portion of property found not under dispute as to principal's title — Agent has no authority to enter into compromise — Various portions of compromise not separable — Whole compromise fails and parties must be relegated to position they would have occupied but for compromise. AIR 1948 Oudh 54 (75) = 22 Luck 93 (DB).

Section 229 — Note 1

(1) An agent fully represents his principal in dealing with other persons, and knowledge acquired by him while acting within the scope of his agency must be

and third parties, have the same legal consequences as if it had been given to or obtained by the principal.

Illustrations

(a) A is employed by B to buy from C certain goods, of which C is the apparent owner, and buys them accordingly. In the course of the treaty for the sale, A learns that the goods really belonged to D, but B is ignorant of that fact. B is not entitled to set off a debt owing to him from C against the price of the goods.

(b) A is employed by B to buy from C goods of which C is the apparent owner. A was, before he was so employed, a servant of C, and then learnt that the goods really belonged to D, but B is ignorant of that fact. In spite of the knowledge of his agent, B may set off against the price of the goods a debt owing to him from C.

230. Agent cannot personally enforce, nor be bound by, contracts on behalf of principal.—In the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them.

Section 229 — Note 1 (contd.)

held to be the knowledge of his principal. (1900) 3 Oudh Cas 55 (59) ** AIR 1927 Sind 24 (25) ** AIR 1921 Sind 121 (124) = 16 Sind LR 235. (Bill of lading signed by broker -- Particular condition in it material to the business -- Principals are bound even though they have not read them or even knew that such conditions existed.) ** AIR 1929 Lah 500 (502). (Co-vendees in position of principal and agent to each other -- Notice to one is notice to other except where agent acts fraudulently.) ** AIR 1915 Lah 385 (386) (DB) ** (1903) 25 All 1 (17) = 29 Ind App 203 (PC). (Notice given to Mukhtyar binds his client.)

(2) Knowledge on part of agent prior to his employment is not information obtained in course of business as to impute notice to principal. AIR 1925 Nag 398 (401).

(3) Constructive notice of fact which agent knows cannot be imputed to principal when it was not to the interest of agent to disclose to principal and which agent did not in fact disclose. AIR 1919 PC 20 (24) = 46 Ind App 250 = 44 Bom 139 ** AIR 1929 Cal 497 (499) = 56 Cal 367. (Member of pledgor firm also member of advisory committee of pledgee bank -- Insufficient to impute notice to bank of pledgor's fraud.) ** (1913) 37 Bom 122 (137) = 40 Ind App 1 (PC). (Pledge by person not entitled to the goods -- One of the managers of bank advancing money in partnership or collusion with the pledgor -- Held, his knowledge cannot be imputed to the bank. (1910) 12 Bom LR 316, Reversed.) ** (1875) 12 Bom HCR 262 (266).

(4) Knowledge of principal officers is imputed to bank and they are more than mere agents of it -- Their acts and conduct are sufficient to raise plea of estoppel against bank. AIR 1930 Rang 265 (268, 269) = 8 Rang 223 (DB).

(5) If agent, acting on his principal's behalf in some transaction in which his knowledge would otherwise be imputed to his principal, takes part in any fraud

or misfeasance against principal the principal is not bound by agent's knowledge of fraud. (1912) 36 Bom 564 (585).

(6) Agent, who did not enquire if mortgagor had interest in property mortgaged, imputes knowledge to principal (mortgagee) of fictitious entry of property in the deed. AIR 1914 PC 67 (70) = 41 Ind App 110 = 41 Cal 972.

(7) Insurance -- Life insurance -- Proposal form signed by assured containing false statement -- Proposal form filled in by insurance agent himself without authority to that effect from company -- Knowledge of agent as to untrue statement cannot be imputed to company so as to amount to waiver of breach of warranty -- Policy held void. AIR 1962 Cal 625 (635) = 66 Cal WN 774.

(8) Application to set aside abatement -- Knowledge of or information to the solicitor of death of opposite party in another proceeding -- Knowledge cannot be attributed to the plaintiff or appellant by invoking the doctrine of constructive notice. (1967) 71 Cal WN 31.

(9) Manager and accountant of company colluding together in execution of rent note -- Practice of fraud on company -- Agent's knowledge not knowledge of company under Section 229. ILR (1958) Bom 334 = 60 Bom LR 782.

SECTION 230 -- SYNOPSIS

1. Scope.
2. Agent having interest in the contract.
3. Contract to the contrary.
4. Principal resident abroad.
5. Undisclosed principal.
6. Where principal cannot be sued.

1. Scope. — (1) An agent is not entitled to personally enforce nor is he bound by a contract entered into by him on behalf of a disclosed principal in the absence of a contract to that effect. AIR 1919 Pat 143 (143) ** AIR 1914 Mad 97 (98) ** (1882) 6 Bom 326 (362, 363) ** AIR 1952 Vindh Pra 51 (56) ** 1961 Jab LJ 91.

Presumption of contract to contrary.

Such a contract shall be presumed to exist in the following cases :—

- (1) where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad;
- (2) where the agent does not disclose the name of his principal;*
- (3) where the principal, though disclosed, cannot be sued.

[*] See Section 236 also.

Section 230 — Note 1 (contd.)

(2) Where the bought and sold notes clearly indicate that the appellant was acting for the disclosed principal, the fact that he (the agent) did not add the relevant description to his signature, or used the word 'we' in the operative portion of the letters would not materially alter the fact spoken to by the notes. The letters must be presumed to be consistent with the notes; and so it would be unreasonable to attach undue importance to the signature and to the use of the relevant words 'we' and 'you'. AIR 1962 SC 538 (543, 544, 546) = 1962 Supp (1) SCR 81.

(3) Where an elder brother signed a contract in his own name mortgaging his sister's property but the body of document described him as authorised agent, he was not personally liable. AIR 1938 Mad 146 (147).

(4) Defendant who was an organiser of the company received deposit from plaintiff promising to appoint the latter a selling agent of the company. Company went into liquidation. Held, that defendant received deposit as agent and so cannot be sued for refund of the same. 1942 Nag LJ 515 (517, 518) (DB).

(5) It is quite a common thing for a broker to act for both the parties in the sale of produce, and if he does not exceed the limits of his authority, he incurs no personal liability. (1910) 8 Mad LT 353 (354).

(6) The fact that the agent agrees to pay the principal for the goods supplied by the principal and not paid for by the purchaser will not entitle him to sue the purchaser, when the order was not placed through the agent. And the fact the purchaser made him believe that he will be paid will not override the provisions of S. 230. AIR 1937 Lah 607 (608).

(7) Payment of money by agent which purchaser is legally bound to pay — Suit for reimbursement by agent — S. 230 has no application as the suit is not by the plaintiff as an agent to enforce the contract entered into by him on behalf of the principal. (1967) 2 Mys LJ 499 = 12 Law Rep 423.

(8) Where the principal sends goods to his agent and consigns them to railway but they are not delivered to agent, the agent has no locus standi to sue railway for damages, for railway receipt

sent to him by principal does not confer upon him the ownership of the goods. AIR 1929 Lah 590 (590).

(9) When a railway receipt is issued by railway administration on consignment of goods there is no tripartite contract between the railway administration, the consignor and consignee. The consignee, unless he is the owner of the goods consigned, is only an agent of the consignor to receive the goods and so cannot sue the railway administration for damages. AIR 1957 Bom 276 (280) = ILR (1957) Bom 647.

(10) Plaintiff on the request of a party A purchased and sent goods to the defendants. The defendants appropriated the goods for themselves and wrote to the plaintiff that they will pay him in a few days. A was declared insolvent. Plaintiff sued the defendant for the price of the goods. It was held that the defendants were only agents of A and had no personal liability. AIR 1917 Lah 404 (405) (DB).

(11) Ordinarily speaking, the words "pacca arhtia" convey that the so-called agent is acting as a principal on behalf of the person with whom he buys or sells the commodities in question. There can, therefore, be no question of the application of Section 230, Contract Act. AIR 1938 Lah 253 (254) (DB).

(12) On a contract both principal and agent cannot be sued in the same suit. AIR 1952 Cal 859 (861).

(13) Promise enforceable against principal cannot be enforced against agent. AIR 1927 Mad 1102 (1103).

(14) Where an agent disclosed his principal and signed a promissory note as the agent of that principal, the agent is not liable for the debt personally. AIR 1957 Orissa 86 (89) = ILR (1956) Cut 393.

(15) When a party contracted to act as common carriers over their own transport system and transport goods over other transport systems as the agent of such other systems, it was held that they were not liable as agents of other systems. AIR 1949 Assam 25 (27).

(16) Where the plaint merely discloses a contract between the plaintiffs and the agent of a disclosed principal, the agent cannot be sued. Where there is a matter of doubt as to the liability of the agent or the principal in a contract, the usual course is to sue both defendants alleging

Section 230 — Note 1 (contd.)

that the principal was the principal to the contract and, in the alternative, suing the agent for breach of warranty of authority. AIR 1934 Pat 269 (270) (DB).

(17) When a purchaser wants return of deposit made to an auctioneer on a consideration which had failed, he is not seeking to enforce the contract against the agent. He is not relying on the contract at all. The suit is for money had and received. Section 230 has no application. AIR 1942 All 90 (94).

(18) Personal liability of auctioneer — Auctioneer forfeiting earnest money on default by purchaser to pay balance — Transaction of sale falling through by earlier sale by seller in favour of third party — No agreement for forfeiture of earnest money — Suit by purchaser only for refund of money — Auctioneer is stake holder and is bound to refund money had and received — Seller not liable — Section 230, not applicable. AIR 1965 All 533 (535) = ILR (1965) 1 All 773 (DB).

(19) 'Claiming under the party' in Section 34, Arbitration Act (1940) includes agent of party entering into contract under Section 230 — Mere employee of contracting party not included. AIR 1962 Cal 177 (179).

(20) Ordinarily, an agent contracting in the name of his principal and not in his own name is not entitled to sue nor can he be sued on such contracts. But the question, whether an agent, apart from the cases specially mentioned in Section 230, is personally liable, depends on the intention of the parties and the contract between the principal and the agent. AIR 1961 Pat 107 (112).

(21) Agent, who is — Person merely signing letters purporting to emanate from Military Secretary of Ex-Ruler "for the Military Secretary" — **Held**, he was not acting as the agent of the ex-Ruler but was performing the ministerial act of signing the letters on behalf of the Military Secretary — This could not be said to have constituted him an agent. AIR 1962 SC 73 (76) = (1962) 1 SCR 702.

(22) Section 230 of the Contract Act or the principles on which it is based show that an agent cannot inter alia personally enforce a contract when there is a contract to the contrary and when the principal's name is disclosed by the agent. Where the terms of the bill of lading show the contract to the contrary and also the non-disclosure of the name of the principal, the agent can enforce a contract of carriage of goods by sea. AIR 1959 Cal 479 (489) (DB).

(23) Auctioneers of property signing agreement of sale in their own name without qualification — Auctioneers must be understood to contract personally and not as agents. (1961) 65 Cal WN 881.

(24) Vendee holding power of attorney from H. E. H. the Nizam — Vendee held personally located as vendee — His capacity has to be ascertained from the sale deed. AIR 1966 Andh Pra 361 (365) = (1966) 2 Andh WR 121.

2. Agent having interest in the contract.

— (1) An agent having an interest in the contract may sue in his own name, he being virtually a principal to the extent of his interest in the contract. AIR 1938 Lah 673 (674) (DB) ** AIR 1929 Oudh 417 (418) = 5 Luck 201 (DB) ** AIR 1925 Bom 547 (558) ** AIR 1920 Lah 196 (197) ** (1901) 24 Mad 130 (135, 136) (DB).

(2) Transaction by one of directors of company — Suit on — Plea that it was on behalf of principal not raised in written statement — Suit against him personally held not barred. AIR 1959 All 29 (30).

(3) Though an auctioneer is classified as an agent, the nature of his duties invest him with certain rights which differentiate him from an ordinary agent. In his capacity as an auctioneer he has an interest in the goods entrusted to him for auction sale. He has a lien upon them for the charges and advances. His custody of the goods is not the bare custody of an ordinary agent, but he, by virtue of the auction of the principal's goods, acquires a special property in the goods which are in his possession for the purpose of the auction sale. He can, therefore, sue in his own name for the value of goods sold at an auction-sale. AIR 1926 Sind 6 (7) = 20 Sind LR 287.

(4) Partner — Borrowing power — Liability of firm — Partner can bind firm — Section 230, Contract Act not applicable. (1965) 67 Pun LR 12.

3. Contract to the contrary. — (1) The three cases mentioned in Section 230 in which contract to that effect may be presumed are by no means exhaustive. AIR 1929 Oudh 417 (418) = 5 Luck 201 (DB).

(2) The question whether an agent, who has made a contract on behalf of his principal, is to be taken to have contracted personally, or merely on behalf of his principal, and, if personally, what is the extent of his liability on the contract, depends on what appears to have been the intention of the parties to be deduced from the nature and terms of the particular contract and the surrounding circumstances. AIR 1941 Cal 643 (652) (DB) ** ILR (1951) 1 Cal 82 (85).

(3) The latter part of Section 230 says that in certain cases a contract to the effect that the agent shall be personally liable shall be presumed. The case in which, though disclosing the name and identity of the principal, the agent who contracts personally is not one of them, but there being a specific contract to that effect there is no need for any presumption. ILR (1945) 1 Cal 565 (571).

Section 230 — Note 3 (contd.)

(4) The agent who may be sued under Section 230 (3) is not sued on the basis of the agreement alone. He is no party to the agreement. Because he fails to enter in the contract in such a way that the principal could be bound by it he is sued as a substitute. The liability is more statutory than contractual. AIR 1955 Assam 86 (95) (DB).

(5) Man who is agent and describes himself as such, may still be contracting in his personal capacity but the mere fact that he fails to specify his capacity as an agent in signing a contract does not raise any such presumption when the terms of the contract itself are clearly to the contrary. AIR 1920 Lah 484 (485) (DB).

(6) When a contract was entered by a person on behalf of a syndicate and later it was proved that the syndicate was only an assumed name of that person it was held that he may be made liable personally. 1957 Ker L Tim 925 (926).

(7) An agent who contracts in his own name does not cease to be contractually bound because it is proved that the other party knew when the contract was made that he was acting as agent. So the agreement which is made in his name does not cease in that event to contain the names of contracting parties. In such a case, the agent as well as the principal can sue on the agreement. 54 Cal WN 770 (776) (PC).

(8) Where there is nothing in the agreement raising implication that agent purports to render himself personally liable, the use of the word 'agent' negatives personal responsibility. AIR 1930 Bom 569 (572).

(9) Where the "principal contract" form is employed, the custom accepting the incident of broker's responsibility ob- disclosed. The contract on the face of tains even though the names are in fact it being between the buyers and the unnamed sellers and the language adapted accordingly, there is a good custom entitling the brokers to enforce the contract. AIR 1923 Cal 419 (421, 422) = 50 Cal 12.

(10) Evidence of a custom in the gunny market in Calcutta whereby brokers are made personally liable though they had no principals is admissible. Sections 230 and 236 do not apply to such case. AIR 1917 Cal 587 (588).

(11) If on the face of a contract an agent appears to be personally liable, he cannot escape his liability by evidence of disclosure of principal's name apart from the contract. (1880) 5 Cal 71 (79, 80).

(12) Under the agreed usage of the market the broker was liable to deliver to the buyer rubber coupons without disclosing the principal and the buyer was liable to pay the price to the broker. The

broker may sue for damages for breach of promise to pay. AIR 1946 PC 63 (65).

(13) Every agent who undertakes personal responsibility for payment is personally liable and can be sued in his own name on the contract, unless the other contracting party elects to give exclusive credit to the principal. AIR 1952 Vindh Pra 51 (56).

(14) The opening words of Section 230 make it quite clear that there may be a contract to the effect that an agent is personally liable and in a case of non-disclosure of contract an inference will be drawn to that effect making both principal and agent liable. (1961) 65 Cal WN 504 (533) (DB).

4. Principal resident abroad. — (1) Presumption in Section 230 (1) is a rebuttable presumption. The fact that the principal is abroad does not absolve the personal liability of the agent if the other contracting party looked to him alone for performance. (1922) 67 Ind Cas 157 (158) (DB) (Lah).

(2) Where corporate company is resident abroad, it must be presumed that agent is personally liable under contract of sale entered into with third party. But this presumption of law can be rebutted, when the foreign principal himself is, in writing, made the contracting party and contract is made directly in his name. (1904) 27 Mad 315 (333) (DB).

(3) Where plaintiff entered into a contract direct with the foreign merchant, the defendant only acting as a post office in the matter, the latter is not personally liable under the contract though he would be if he acted as agent for the foreign merchant. AIR 1923 Lah 296 (297) (DB).

(4) Where plaintiffs' indent was not accepted by the defendants, commission agents, but by a merchant residing abroad and the defendants did not undertake any primary liability, held, that Section 230 (1) of the Act was not applicable to the case and the plaintiffs were not entitled to sue the defendants for any claim regarding their indent. 1905 Pun LR No. 138, p. 488 (489).

(5) Agent of foreign State is personally liable for contracts entered into on behalf of principal where the contracts do not come under S. 86, Civil P. C. and permission to sue need not be applied for. AIR 1928 Sind 189 (190).

(6) For the personal liability of the home agent to accrue, it must be shown that he entered into the contract by or on behalf of his principal, by signing on behalf of his principal, or in some other way proving the fact that the contract was one between the merchant here and the home agent on behalf of a foreign principal. Where the contract is between two principals in form and substance, the inconvenience of suing the

Section 230 — Note 4 (contd.)

foreign principal here, the fact that the merchant ordering the goods, might not have looked to the credit of performance of the foreign principal but of the home agent, etc. would be extraneous and irrelevant. In such a context, Section 230 itself would not apply, and hence the liability under sub-section (1) of Section 230 would not arise. This will be a question of fact in each case. AIR 1960 Mad 452 (455) (DB).

(7) Plaintiff agreeing to purchase goods from firm situate in United States through agent in India and paying money in advance — Agreement however exonerating agent for breach of contract **Held**, agent was not liable for damages for breach of contract but was liable in respect of the advance paid by plaintiff. AIR 1964 Mad 113 (114, 115) (DB).

5. Undisclosed principal.— (1) When an agent does not disclose the name of his principal, the agent would be personally liable. AIR 1932 Nag 27 (28) = 27 Nag LR 324.

(2) Where a contract for the sale of shares between brokers did not refer to the existence of principals nor to the fact that the contract was signed as agents on behalf of some others, the parties can sue in their own name in respect of the contract. AIR 1948 Mad 216 (217).

(3) An agent while entering into a contract of charter-party mentioned the name of the ship and its registration number. **Held**, that though he did not disclose the name of the principal, benefit of Section 230 could not be given. The ship's name and number was sufficient indication of the identity of the principal. The essential point is the knowledge and not the declaration. (1881) 5 Bom 584 (589).

(4) Where one party to a contract knows that the other is only acting as an agent for a person known to him, a formal disclosure of the principal is unnecessary to make the principal liable. (1922) 65 Ind Cas 473 (474) (DB) (Lah).

[See also AIR 1933 Sind 34 (35) = 26 Sind LR 85 (DB). (It is not necessary that an agent should have disclosed himself as an agent in the contract to enable the agent to prove that contracts entered into in his name were entered into on the principal's behalf.)]

(5) A principal cannot be said to disclose himself if the other party gets knowledge about him not from the principal himself but from some other source. AIR 1929 Bom 177 (178) = 53 Bom 110 (DB).

(6) Where an agent does not disclose the name of his principal, the presumption is that he contracts to be held personally liable as well. Such a presumption, however, is rebutted where the agent signs the contract expressly as

"Agent and Manager." AIR 1925 Oudh 641 (641, 642).

[See also AIR 1929 PC 254 (255, 256).]

(7) Where an agent does not disclose the name of the principal, he is personally responsible for the result of any fraud or wrong committed. So much of the money as is necessary to compensate for the loss caused thereby must be refunded, though the amount has been paid over to his principal. ('97-01) 2 Upp Bur Rul 341 (344).

(8) Agent entering into a contract on behalf of a principal who is disclosed but who is a minor is not personally liable on the contract to the third party. AIR 1930 Oudh 312 (314) = 6 Luck 19 (DB).

(9) Presumption under Section 230 will not arise when broker brings his principal vendor face to face with purchaser. But where purchaser has been making payments only to broker and does not know the name of vendor, broker can sue purchaser for balance of purchase money. AIR 1929 Nag 170 (171) = 25 Nag LR 81.

(10) A broker who gives to the buyer a note in the form "bought by your order and for your account from our principal" is not an agent of the undisclosed principal for sale to make him liable under Section 230. AIR 1916 Cal 548 (550) = 42 Cal 1050 (DB).

(11) Plaintiff entered into contract as principal, and sued as a principal — Plea that he was an agent not taken by defendant at an early stage but after evidence of plaintiff — **Held**, that even if the plaintiff was an agent he could sue in his individual capacity under Section 230. 1881 Pun Re No. 64, p. 148 (149) (DB).

(12) Where defendant, as manager of Banaili Raj, got some work done by the plaintiff and name of Raja was not disclosed — **Held**, defendant was not personally liable to plaintiff for work done by him for the Raj. AIR 1914 All 253 (254) (DB).

(13) When in a court-auction a property is sold, the auction-purchaser is one party to the contract, but the other party to the contract is not the judgment-debtor or the decree-holder but the Court itself. In selling property in court-auction, the Court acts under the statutory powers given to it by the Civil P. C. and not as the agent of any party and the contract that is made, when the bid is accepted and confirmed by the Court, is one between the Court on the one side and the auction-purchaser, whose bid is accepted, on the other, and therefore before cl. (2) of Section 230, Contract Act, can be excluded, it must be alleged and proved by the party wishing to take advantage of Section 230, Clause (1) that when making the bid or before doing so he had informed the Court or the Court-officer

Section 230 — Note 5 (contd.)

conducting the sale that he was making the bid only as the agent of some named third party. It would then be open to the Court-officer, the Nazir, either to accept his bids or decline them, if he is not fully satisfied that he had a proper power of attorney to make the bid. Where the auction-purchaser is accepted by the Court as agent, he is liable personally for deficit on re-sale. AIR 1924 Mad 476 (477) (DB).

(14) The person liable is one whose name appears on the face of the bill. No other person can be held liable under a bill unless it is clearly indicated on the face of the instrument that an agent is acting in his behalf. AIR 1937 Pat 428 (429).

(15) A rented a house from B for a school. B sued A to recover possession of the house and arrears of rent. A contended that he was merely a secretary acting for a society in London which ran the school and was not personally liable: **Held**, that on the form of the contract and from receipts passed it could not be inferred that the contract was made on anybody's personal credit except that of A. (1898) 22 Bom 754 (756, 757).

(16) Agent cannot sue in his own name unless the name of principal is undisclosed — Same rule applies to counter claim. AIR 1951 All 596 (598) (DB).

(17) An agent of an undisclosed principal is entitled to bring a suit personally to enforce the contract made on behalf of the principal. AIR 1955 Punj 189 (190) (DB) ** (1912) 39 Cal 802 (807) (DB).

(18) Auctioneer is entitled to maintain a suit for the recovery of the price of goods sold against purchaser at auction. 1884 Pun Re No. 86, p. 241 (242).

(19) The form of a sold note was as follows: "Sold this day by order and for account of G, to my principal, G. P. Notes for Rs. 20,000 at Rs. 98-11-0." The note was endorsed "X for principal". **Held**, there was nothing in the note to rebut the personal liability of the person. (1890) 17 Cal 449 (454) (DB).

(20) Where the managing members of an ancestral trading firm enter into a contract, without disclosing the names of the other members, it is competent for them to sue on the contract without impleading the undisclosed members of the firm. The managing members are in the position of agents for undisclosed principals. (1905) 27 All 361 (362, 363) (DB) ** (1910) 32 All 183 (186) (DB) ** AIR 1938 Mad 739 (740) (DB).

(21) Where a person had taken a house on rent for the purpose of starting a hospital for women, the principal, i.e., hospital, not having come into existence, he had entered into the contract on behalf of an undisclosed principal. He would, therefore be personally liable

under the contract. AIR 1963 Pat 131 (135).

6. Where principal cannot be sued. — (1) Where the liability of the principal and the agent is concurrent, it is not joint, or joint and several, but is alternate. The person contracting with an agent can elect either and once he sues the agent he is precluded to sue the principal. ILR (1951) 1 Cal 82 (86).

(2) A person sued an unregistered union of employees and a member of the said union as the person who signed the contract on behalf of the union. **Held**, that under the law an unincorporated body could not be sued as such for recovery of a debt or on a contract. Only those persons who signed the contracts on behalf of the union and those who adopted them could be sued. Other persons who were members of an unincorporated body could not be proceeded against. AIR 1943 Mad 530 (530, 531).

(3) When a Government officer entered into a contract on behalf of the Government but the contract was not in the proper form prescribed by the statute, the principal, the Government, cannot be sued due to the technical defect. AIR 1954 SC 236 (243) = 1954 SCR 817.

(4) Clause 3 of Section 230 is not applicable to a case where a contract is entered into by an unincorporated society. It is not that an unincorporated society cannot be sued at all, but that it cannot be sued except in the name of all the members. 1891 Pun Re No. 15 p. 93 (99, 101) (DB).

(5) Contract with Government signed by officer not having authority — Not void — Contract is enforceable against the officer — Ratification by conduct of Government — Effect — Arbitration clause in contract modified — Government taking part in proceedings — Ratification implied. AIR 1963 Cal 456 (459).

(6) **Held**, on facts, that several letters addressed by Government to employee concerned and payment to him of salaries and allowance was enough to show that Government had duly ratified contract of employment under Section 230 (3) of Contract Act and hence contract was enforceable. AIR 1967 Cal 461 (463, 464) = (1969) 1 Lab LJ 290 (DB).

(7) Contract not in strict compliance with Section 175 (3), Government of India Act (1935) — Not enforceable against Government but binding upon officer making it under S. 230 (3). AIR 1962 Pat 372 (375) = 1962 BLJR 480 (DB).

(8) Government of India Act (1935), Section 175 (3) — Contract not expressed to be made by Governor-General — It is not binding on the Union of India — Arbitration Clause contained therein is not binding — Section 230 (3), Contract Act not applicable. AIR 1959 Cal 287 (289, 290) (DB).

231. Rights of parties to a contract made by agent not disclosed.—If an agent makes a contract with a person who neither knows, nor has reason to suspect, that he is an agent, his principal may require the performance of the contract; but the other contracting party has, as against the principal, the same rights as he would have had as against the agent if the agent had been principal.

If the principal discloses himself before the contract is completed, the other contracting party may refuse to fulfil the contract, if he can show that, if he had known who was the principal in the contract, or if he had known that the agent was not a principal, he would not have entered into the contract.

Section 231 — Note 1

(1) Section 231 deals with the rights (a) of the principal and (b) of the third party in cases when the contract is entered into by the agent without disclosing the principal — The first clause refers to the general case and the rule is that the third party shall have, as against the undisclosed principal the same rights which he would have against the agent if the agent had been the principal. The second clause deals with the particular case where the principal discloses himself before the contract is completed. The second clause should be read as governed by the first clause. (1908) 32 Bom 356 (361, 362) (DB).

(2) Even where a railway receipt is granted in the name of servant or agent, the real owner of the goods can claim for their value if lost. (1926) 92 Ind Cas 1007 (1008) (All).

(3) Undisclosed principal selling goods through agent can enforce purchaser to pay purchase money. 1909 Pun Re No. 71, p. 230 (236) (DB).

(4) Except in special cases, the general rule of law is that the principal can enforce the contract entered into by his agent with a third party even though the agent had not disclosed the name of the principal. This principle is embodied in Section 231 of the Contract Act which lays down that the principal can enforce the contract even when the third person neither knows nor has reason to suspect that the person with whom he entered into contract was an agent. AIR 1968 Raj 81 (83) = 1968 Raj LW 62.

(5) If one partner enters into a contract in his own name still if he is acting as the agent of the firm, his co-partners will be in the position of undisclosed principals. They can be sued on the contract and may join as plaintiffs in suing. (1908) 10 Bom LR 306 (311) ** AIR 1928 Cal 57 (59) ** AIR 1925 Cal 29 (31) (DB) ** (1908) 31 Mad 45 (46) (DB).

(6) A railway company entered into a contract with a person in the belief that he was the only person interested in the contract. They did not know that he had another partner. Subsequently the person who contracted with the company died. The defendant partner sued the company claiming payments and amounts due to the firm under one of the con-

tracts. **Held**, that the right to claim performance rested with the deceased partner during his life time and that the dormant partner could not sue the contracting party after the death of the partner entering the contract. (1908) 10 Bom LR 306 (313).

(7) Business done by a commission agent in his own name though for the benefit of an undisclosed principal, who is liable to indemnify the commission agent against loss, is not business done by such undisclosed principal through the agent, but business done by the agent. AIR 1929 Sind 24 (26) = 23 Sind LR 229.

(8) An agent contracting in his own name without mentioning the agency can sue and be sued upon the contract. AIR 1915 Mad 509 (516) (DB).

(9) Under Section 231 a principal can, as against the agent, claim the full benefit of the contract entered into by the agent in his own name and as against the party contracting with the agent, the principal is bound by the equities arising between the agent and the contracting party. AIR 1915 Mad 509 (511) (DB).

(10) A simple creditor can derive no advantage out of the circumstance that an agent is held out as the owner of the property. It is only a person who has obtained any sale, pledge, mortgage or other disposition for value of the property from the agent whom he believed to be the principal that can derive any advantage from such holding out. 1936 Mad-WN 1015 (1016) (DB).

(11) Where principal can bring his case under Section 211, Section 231 does not debar him from seeking his remedy under that section — Contract for undisclosed principal — Breach by reason of agent's default — Principal can proceed only against other contracting party under Section 231 and not against agent. AIR 1934 Cal 721 (722) = 61 Cal 504 (DB).

(12) An agent entered into a contract in his own name with a third party, brought a suit against him for damages for breach of the terms of the contract and successfully obtained a decree. The principal brought a suit against the agent subsequently for declaration of title to the decree — **Held**, that the suit was not maintainable because the principal might have adopted the contract made by his

232. Performance of contract with agent supposed to be principal.—Where one man makes a contract with another, neither knowing nor having reasonable ground to suspect that the other is an agent, the principal, if he requires the performance of the contract, can only obtain such performance subject to the rights and obligations subsisting between the agent and the other party to the contract.

Illustration

A, who owes 500 rupees to B, sells 1,000 rupees' worth of rice to B. A is acting as agent for C in the transaction, but B has no knowledge nor reasonable ground of suspicion that such is the case. C cannot compel B to take the rice without allowing him to set off A's debt.

233. Right of person dealing with agent personally liable.—In cases where the agent is personally liable, a person dealing with him may hold either him or his principal, or both of them, liable.

Illustration

A enters into a contract with B to sell him 100 bales of cotton, and afterwards discovers that B was acting as agent for C. A may sue either B or C, or both, for the price of the cotton.

Section 231 — Note 1 (contd.)

agent and sued on it or he might have either commenced the action himself or intervened at any stage in the action begun by his agent. (1913) 40 Cal 335 (340, 341) (DB).

(13) The words "discloses himself" in Section 231 must be construed strictly. The third party's right to repudiate the contract arises only where the principal himself makes the disclosure; it cannot arise when the disclosure is made by some other person or the information reaches him from other person. (1908) 32 Bom 356 (363) (DB).

(14) Unlike a Kucha Arhatia who acts as an agent on behalf of his principal and brings about a privity of contract between him and the third parties with whom he enters into contracts on his behalf the pucca arhatia deals with the constituent as a principal and becomes personally liable to perform his contracts with him. Similarly, the constituent has to look to him alone for the performance of the contracts. AIR 1950 All 352 (355).

(15) The second paragraph of S. 231 has to be read in the context of the first paragraph of Section 231 and the expression 'if the principal disclosed himself before the contract is completed' in paragraph 2, must be read in the context where the agent made the contract with a person who did not know or had reason to suspect that he was an agent. AIR 1960 Cal 752 (760, 761) = ILR (1961) 1 Cal 799 (DB).

Section 232 — Note 1

(1) An undisclosed principal has a general right to enforce a contract entered into by his agent. Under S. 232, this general right of the principal to require performance is subject to the rights and obligations that existed between the agent and the other contract-

ing party. Thus, Section 232 is to be read as a qualification of the first portion of para. 1 of Section 231. (1879-80) 4 Bom 447 (455).

Section 233 — Note 1

(1) Upon a contract entered into by an agent on behalf of his principal both the principal and the agent are jointly liable to the promisee (1958) 71 Mad LW 50 (2) (54). (Money borrowed on behalf of principal.)

(2) Person managing business as agent of his father — Father is liable for the money borrowed for the business. (1958) 71 Mad LW 50 (2).

(3) Section 233 enacts substantive law, laying down who shall be held liable and not adjective law, defining the procedure by which the liability may be enforced. AIR 1917 Bom 268 (270, 271).

(4) Section 233 cannot be construed as meaning only that the plaintiff might sue both the principal and the agent in the alternative, but that he cannot get judgment against both of them jointly for the amount sued for. AIR 1939 Mad 520 (523) = ILR (1939) Mad 282 (DB) ** AIR 1926 Oudh 41 (42) ** AIR 1917 Bom 268 (271) ** AIR 1952 Vindh Pra 51 (57).

[But see AIR 1926 Mad 1213 (1213) = 49 Mad 900. (Liability is not joint but alternative.)]

(5) If an agent expressly contracts in his own name, he cannot escape liability on his contract though by Section 233 the other party might elect to hold his principal liable also or in the alternative. ILR (1945) 1 Cal 565 (571) ** AIR 1931 Sind 4 (5, 6) = 25 Sind LR 91 (DB) ** AIR 1920 Upp Bur 30 (31) = 3 Upp Bur Rul 217 ** (1881-82) 6 Bom 326 (357, 358).

[See also AIR 1928 Bom 516 (517) = 52 Bom 640 (DB). (Hundi signed by a

234. Consequence of inducing agent or principal to act on belief that principal or agent will be held exclusively liable.—When a person who has made a contract with an agent induces the agent to act upon the belief that the principal only will be held liable, or induces the principal to act upon the belief that the agent only will be held liable, he cannot afterwards hold liable the agent or principal respectively.

235. Liability of pretended agent.—A person untruly representing himself to be the authorized agent of another,* and thereby inducing a third person to deal with him as such agent, is liable, if his alleged employer does not ratify his acts, to make compensation to the other in respect of any loss or damage which he has incurred by so dealing.

[*] See Section 208 supra.

Section 233 — Note 1 (contd.)

certain person — It is not open either by way of claim or defence to show that the signatory was in reality acting for an undisclosed principal.)]

(6) A person who has made a contract with an agent may, if and when he pleases, look directly to the principal unless he has waived that right by express terms of the contract. This right exists whether the person was or was not aware when he made the contract, that the person with whom he was dealing was an agent only. (1891) 18 Cal 31 (36) (FB) ** (1881-82) 6 Bom 326 (353, 357).

(7) A plaintiff who has a right to sue both an agent and his principal under S. 233 is not competent, after he has sued one of them to judgment, to sue the other in a second suit. AIR 1917 Bom 268 (273) ** AIR 1936 Bom 344 (350) = 60 Bom 954 (DB) ** (1887) 9 All 681 (688, 689) (DB).

(8) Creditor sued agent of his debtor alleging that the agent had made himself personally liable for the debt. Suit was dismissed on the ground that the creditor gave credit to the principal. Held that suit of creditor against the principal was not barred by the proceedings. (1884) 7 Mad 392 (396) (DB).

(9) Debtor paid money to creditor's agent who failed to credit it. In the suit by the creditor debtor remained ex parte and suit was decreed. Debtor paid money and sued for the recovery of money paid to the agent. Held, he could not succeed, as he did not raise the plea of discharge in the former suit. AIR 1923 Mad 551 (552).

(10) Del credere agent — Agent expressly undertaking to pay price of goods — Agent's position is not that of del credere agent — Goods intercepted under Control Order by Government authority and price paid to agent — Liability of agent is not limited to the amount which he received from such authority but he is liable for the full price of the goods supplied. AIR 1960 Pat 364 (366) = 1960 BLJR 452 (DB).

(11) Where because of non-disclosure of a contract between the principal and agent an inference can be drawn that

the agent is personally liable both the principal and agent can be sued. ('61) 65 Cal WN 504 (533) (DB).

Section 234 — Note 1

(1) The principal is always liable on a contract made on his behalf by his agent, whether, or not there is a contract which fastens the liability on the agent also, and that liability does not cease except when there is an election or some form of estoppel by the contracting party. To enable the principal (or the agent) to claim exemption from liability two essential conditions must be satisfied: Firstly, the contracting party should have induced a belief in one of them that he is going to hold the other alone liable; secondly, this belief should have resulted in a course of action which would not have happened otherwise. AIR 1952 Vindh Pra 51 (56).

(2) Where in a contract of sale of goods by A to C through A's agent B, C sends a notice to B alleging that B had represented to him that the contract would be by sample and that B would be held responsible for any loss if the goods were not according to the sample, without making A liable, C cannot subsequently make A liable for any loss caused to him. AIR 1950 Orissa 42 (46) = ILR (1949) 1 Cut 453 (DB).

Section 235 — Note 1

(1) There is no distinction in principle between the case of a man who represents that he has authority from another when he has no authority whatever, and the case of a man who represents that he has certain authority from another when he has authority of another description. In neither case can the man who makes the representation be said to be the authorised agent of the other with reference to the matter on which he has no authority. Section 235 of the Contract Act is intended to apply to both classes of cases. (1912) 34 All 168 (171) (DB).

(2) Defendant placing orders through R falsely representing himself to be plaintiff's agent and making payments through him — Facts do not constitute implied contract of indemnity — Defendant how-

236. Person falsely contracting as agent not entitled to performance.—A person with whom a contract has been entered into in the character of agent,* is not entitled to require the performance of it, if he was in reality acting, not as agent, but on his own account.

[*] See Section 230 (2).

Section 235 — Note 1 (contd.)

ever, can proceed against R under S. 235 of the Contract Act. AIR 1967 Andh Pra 145 (147) = (1966) 2 Andh WR 214.

(3) The representation that he has authority to act as agent may not be fraudulent; all that is required is that it was untrue. AIR 1938 Cal 151 (156, 157) = ILR (1938) 1 Cal 463 (DB) ** (1910) 8 Mad LT 353 (353) ** AIR 1963 Raj 84 (85) = 1962 Raj LW 687.

(4) An untrue representation of agency under this section need not necessarily be made in express and literal words; it may be conveyed by any words spoken or written combined with acts and omissions which would induce another person into the belief that he has such authority — The untrue representation must be one of fact and not merely of law — The fact that he made the representation under the belief that he had such authority does not affect his liability under this section except in cases where he would be prosecuted under Section 208. (1904) 17 CPLR 67 (71, 72).

(5) The words "if his alleged principal does not ratify his acts" in Section 235 appear to indicate a named principal. AIR 1933 Sind 207 (209).

(6) The measure of damages must be what benefit the other party would have had from the contract if the representation had been true. AIR 1938 Cal 151 (156, 157) = ILR (1938) 1 Cal 463 (DB).

(7) A person who borrows representing himself to be the agent, without authority, must recoup the creditor. AIR 1930 Mad 439 (440).

(8) Muhammadan son who is not agent of his father mortgaging father's land — Section 235 applies and not S. 230. AIR 1934 Pesh 49 (49, 50).

(9) When a person, representing another as his agent purchased goods on his behalf and the principal repudiated the liability, it was held agent alone is liable. AIR 1924 Oudh 184 (185).

(10) Section 235 will not apply to cases in which there is no evidence to show that the agent made any untrue representation as to the extent of his authority. AIR 1957 Orissa 86 (89) = ILR (1956) Cut 393.

(11) A person was provisionally appointed as teacher by the secretary of school — At the next meeting of the Committee, it recognized him as one of the staff but owing to financial stringency it decided to dispense with his services from August — **Held**, that the secretary would not be personally liable to pay the compensation, for the case was not

covered by Section 235, Contract Act. AIR 1929 Cal 289 (289).

(12) Under a charter-party when a person untruly represents himself to be the authorised agent of the master to enter into contracts on his behalf he is personally liable for damages to the other party, and he is not liable for a greater amount than could have been recovered from the alleged principal and the fact that the master or principal is also liable would not make any difference in the liability of the agent. (1883) 7 Bom 51 (66).

(13) Transaction by one of directors of company — Suit on — Plea that it was on behalf of principal not raised in written statement — Suit against him personally held not barred by Sections 230 and 235. AIR 1959 All 29 (30).

(14) Suit for recovery of money borrowed by agent — Money borrowed by agent on behalf of disclosed principal — No personal liability undertaken by agent — Misrepresentation or fraud not alleged by plaintiff — No decree can be passed against agent. 1964 Raj LW 5 = ILR (1963) 13 Raj 1150 (1153, 1154).

Section 236 — Note 1

(1) Section 236 deals with dispute between two persons one of whom is a falsely professed agent of third party and it does not apply where dispute is between principal and his agent. (1910) 34 Bom 292 (304).

(2) The question whether a selling agent has disqualified himself for the brokerage commission by buying the goods himself does not fall to be decided under S. 236. (1956) 60 Cal WN 853 (854) (DB). (**Held**, that as the terms of the agency contract did not limit the agent to sell only to third parties and not to himself he was not guilty of any misconduct in buying himself and hence was not disqualified by Section 220 from getting the commission.)

(3) Person with whom contract is made as agent, when he is not so, cannot sue under Section 236. (1912) 39 Cal 802 (809) (DB) ** (1907) 34 Cal 628 (633).

(4) Section 236 applies to contract when agent purports to act for a named principal as well as when he purports to act for undisclosed principal. AIR 1933 Sind 207 (208, 209).

(5) A defendant to a suit for damages for a breach of contract cannot succeed in the claim that the suit is barred under Section 236 where all that he has alleged in defence is that the plaintiff had acted as an agent for an undisclosed principal and not that he had entered

237. Liability of principal inducing belief that agent's unauthorized acts were authorized.—When an agent has, without authority, done acts or incurred obligations to third persons on behalf of his principal, the principal is bound by such acts or obligations, if he has by his words or conduct induced such third persons to believe that such acts and obligations were within the scope of the agent's authority.

Illustrations

(a) A consigns goods to B for sale, and gives him instructions not to sell under a fixed price. C, being ignorant of B's instructions, enters into a contract with B to buy the goods at a price lower than the reserved price. A is bound by the contract.

(b) A entrusts B with negotiable instruments endorsed in blank. B sells them to C in violation of private orders from A. The sale is good.

Section 236 — Note 1 (cont'd.)

into the contract as the principal while falsely representing himself to be an agent. AIR 1955 Punj 189 (190) (DB).

(6) The section does not enact that the contract is void in circumstances mentioned in the section. It only provides that the alleged agent cannot require its performance. Being therefore, enforceable by one of the parties and not enforceable by the other, it is a voidable contract under Section 2 (1) of Contract Act. AIR 1933 Sind 207 (208, 209).

Section 237 — Note 1

(1) Unless the relationship of principal and agent is proved to exist between the parties, Section 237, Contract Act, can have no application. AIR 1937 All 255 (257). (Person entrusted with property for safe custody unauthorisedly pledging it — Owner not bound by pledge.) ** AIR 1931 Cal 423 (424, 425) = 58 Cal 17.

(2) A person who deals with an agent whose authority he knows to be limited does so at his peril, in the sense that should the agent be found to have exceeded the authority the principal cannot be made responsible. (1910) 14 Cal WN 381 (387, 389) (PC) ** AIR 1948 Oudh 54 (60) = 22 Luck 93 ** AIR 1937 Sind 151 (152) (DB).

(3) If a person allows another to act on his behalf with other parties and makes them believe that the other person is acting on his behalf, he will be bound by the transactions entered into by the ostensible agent. AIR 1952 Hyd 79 (80) = ILR (1952) Hyd 341 ** (1951) 88 Cal L Jour 52 (57) (FC). (Pardanashin lady — Husband held out as the only means of communication between herself and her attorney — Wrong instructions by husband to attorney — She cannot repudiate it.) ** (1949) 53 Cal WN (1DR) 93 (97) (DB). (Bank by indicating by course of conduct that its secretary had power to borrow in excess of limit prescribed by bye-laws — Bank would be bound by debt even if it had not benefited from the borrowing.) ** AIR 1929 Lah 822 (823) (DB). (Owner authorising auctioneer to sell house at certain price — Sale binds him even if it had been made for a lower price.) ** AIR 1922 All

324 (330) = 43 All 623 (DB). (Parcel clerk of railway not sending parcel by mistake — Railway liable.) ** AIR 1914 All 238 (241) = 36 All 416 (DB). (Limited company — Share-holders inducing public to believe that a certain firm were their agents and allowing its manager to sign hundies on behalf of company — Company liable for sums due on the hundies.)

(4) In order that principle of "holding out" should apply to act done by agent and relied upon to bind principal, it must be an act of that particular class of acts which he has general authority on behalf of his principal to do. But if agent be held out as having limited authority to do on behalf of his principal, acts of particular class, then principal is not bound by an act done outside that authority. (1910) 14 Cal WN 381 (387, 389) (PC).

(5) In order to bind one with the transaction entered into on his behalf by another there must be evidence from which an implied authority in the other to enter into the transaction can be inferred. There must be evidence either of facts and circumstances from which such authority can be inferred or of a general authority granted to the person entering into the transaction which is wide enough to cover the transaction or which shows that the transaction was necessary to enable him to do something which he was authorised to do. Mere general evidence showing the nature of the work done by him in connection with the estate of the one who is sought to be bound is not sufficient to attract the operation of Section 237. AIR 1933 Cal 109 (113) = 60 Cal 111 (DB).

(6) In order that a person may be bound by an unratified conduct of an agent without real authority it must appear that his supposed authority was ostensible to the other contracting party, and relied on by him when he made his contract. The onus of proving that he relied on such conduct of the principal in making the contract is on the party who alleges such conduct. ILR (1951) 1 Cal 420 (426).

(7) The right of a third party against the principal on the contract of his agent

238. Effect, on agreement, of misrepresentation or fraud by agent.—Misrepresentations made, or frauds committed, by agents acting in the course of their business for their principals, have the same effect on agreements made by such agents as if such misrepresentations or frauds had been made or committed by the principals; but misrepresentations made, or frauds committed, by agents, in matters which do not fall within their authority, do not affect their principals.

Illustrations

(a) A, being B's agent for the sale of goods, induces C to buy them by a misrepresentation, which he was not authorized by B to make. The contract is voidable, as between B and C, at the option of C.

(b) A, the captain of B's ship, signs bills of lading without having received on board the goods mentioned therein. The bills of lading are void as between B and the pretended consignor.

Section 237 — Note 1 (contd.)

though made in excess of agent's actual authority, is nevertheless to be enforced when the evidence shows that the contracting party has been led into honest belief in the existence of the authority to the extent apparent to him. Where an agent, acting within the scope of his implied authority, commits a fraud for his own benefit, the principal is liable to the party defrauded. AIR 1945 Nag 121 (127) = ILR (1945) Nag 204 (DB).

(8) In the absence of an allegation or proof that principal either by his words or conduct induced a third person that the acts done or obligations incurred were within the scope of the agent's authority, Section 237 will not apply. AIR 1957 Orissa 86 (89) = ILR (1956) Cut 393 ** 1969 BLJR 593 (610) = 1969 Pat LJR 156 (DB).

(9) Where the principal did not by any negligent or improper act, allow agent to be apparently invested with authority beyond or greater than the limited authority which the customer knew him to possess there could not be any estoppel as against the principal in respect of any of the steps in the transaction whereby the customer was deceived by the agent acting beyond his authority. (1910) 14 Cal WN 381 (387, 389) (PC).

(10) The dismissed clerk of the co-operative society who at the relevant period was also functioning as the cashier, was held out by the society as a person competent to receive payments from members and hence Section 237 of the Contract Act (9 of 1872) dealing with the scope of an agent's authority, is applicable to the case and the payments made to the clerk would bind the society. AIR 1963 Mad 105 (106) = (1962) 2 Mad LJ 407.

(11) Price paid by buyer to broker — Buyer failing to show that broker was authorized to receive payment — Payment to broker is not payment to seller. AIR 1963 Cal 464 (466).

(12) Agent authorised to purchase goods from the plaintiff for the principal — Agent purchasing goods on credit and

misappropriating the cash given by the principal for such purchase — Principal held liable to pay for the goods, as the plaintiff had no reason to believe that the agent was not acting within the scope of his authority in making the purchase on credit for the principal — The fact that the principal never opened credit account with the plaintiff held not to absolve his liability. AIR 1967 All 382 (384) = ILR (1967) 1 All 124.

[See however 1959 Raj LW 98 = ILR (1959) 9 Raj 147.]

(13) Agent borrowing on behalf of principal — Principal using money, is liable to repay the loan. 1962 Jab LJ 1112 (1115, 1116) = 1962 MPC 411 (DB).

Section 238 — Note 1

(1) Principal is liable for agent's fraud, acting within the scope of his authority. AIR 1924 Nag 79 (79) ** AIR 1945 Nag 121 (127) = ILR (1945) Nag 204 (DB) ** AIR 1967 All 382 (384) = ILR (1967) 1 All 124.

(2) The principal is liable for the fraud of his agent acting within the scope of his authority whether the fraud is committed for the benefit of the principal or for the benefit of the agent. AIR 1945 Nag 121 (127) = ILR (1945) Nag 204 (DB) ** AIR 1923 Cal 157 (160) = 58 Cal 258 (DB).

(3) Agent entering into contract on behalf of principal with third party — Fraud and misappropriation by agent — Principal does not escape liability on contract. 1963 Ker LT 428 = 1963 Ker LJ 273.

(4) Agent bought war bonds; forged principal's endorsements in his own favour and pledged with bank. Held, latter cannot hold them against principal. AIR 1921 Sind 172 (174) = 15 Sind LR 93.

(5) The condition of mind of the agent cannot be imputed to principal, who is not criminally liable therefor; but where particular intent or state of mind is not the essence of offence, agent's act or omission makes principal criminally liable though he was not aware of it or even

CHAPTER XI OF PARTNERSHIP

[Repealed by the Indian Partnership Act, 1932 (9 of 1932), S. 73 and Sch. II.]

SCHEDULE ENACTMENTS REPEALED

[Repealed by the Repealing and Amending Act, 1914 (10 of 1914), S. 3 and Sch. II.]

[THE] CONVERTS' MARRIAGE DISSOLUTION ACT, 1866 (ACT XXI OF 1866)

[The text of the Act printed here is as on 31-3-1970]

CONTENTS

PREAMBLE

SECTIONS

1. Short title.
2. [Repealed.]
3. Interpretation-clause.
 "Husband."
 "Wife."
 "Personal law."
 "Month" and "Year."
4. When convert deserted by his wife may sue for conjugal society.
5. When convert deserted by her husband may sue.

Section 238 — Note 1 (contd.)
when act is done against his orders. AIR 1916 Cal 431 (443) = 42 Cal 1094 = 17 Cri L Jour 13 (DB).

(6) A selling house to B — B paying certain amount in cash and executing pronote for balance — Suit by A on pronote — B denying liability on ground of fraud; alleging that, C, who acted as agent of A had represented to him that there was another purchaser L in the field who was prepared to pay higher price and that B would profit by reselling house, that after completion of sale information supplied was found to be false — C acting as commission agent for A to sell house — C, having no express authority to give any information about house — Case held not to come within Section 238. Contract Act. AIR 1942 All 341 (343) (DB).

(7) There may be cases, outside the scope of the provisions of Section 238, in which a fraud or misrepresentation, practised or made by an agent, may invalidate an agreement, entered into by the principal. AIR 1942 All 341 (344) (DB).

(8) An agent guilty of fraud, duress or any wrong cannot be permitted to escape personal liability on the ground that it was his principal and not himself who was benefited by such fraud or wrong. The intention of the legislature in enacting Section 238 was not to lead

6. Court in which suit shall be brought.
7. Suit to be commenced by verified petition.
8. On service of petition, citation to respondent.
9. Form of citation.
10. Service of citation.
11. Penalty on respondent not obeying citation.
12. Points to be proved on appearance of petitioner.
13. First interrogation of respondent.

to any such result. AIR 1955 Hyd 150 (152) = ILR (1955) Hyd 362 (DB).

(9) Bank renting out safe deposit locker to client — Manager fraudulently opening locker and misappropriating valuables put in them — Bank held liable. AIR 1962 Punj 534 (536, 537, 538) = ILR (1962) 1 Punj 566 (DB).

(10) Fraudulent declaration by officers of State while acting in discharge of statutory duties — Liability of State — Revenue auction sale — Property sold in execution of mortgage decree attached for revenue sale and its delivery to auction purchaser objected by Government pleader — Proclamation for Revenue sale by Tahsildar mentioning that defaulter had equity of redemption — Auction purchaser in revenue sale not entitled to recover damages from State — Knowledge of Government pleader about execution sale cannot be imputed to Tahsildar — State not liable. AIR 1964 Ker 109 (112, 113) = 1964 Ker LT 102.

(11) Fraud by agent against principal in execution of document — Right of principal to rectification of document — Agents knowledge cannot be held to knowledge of principal. ILR (1958) Bom 334 = (1958) 60 Bom LR 782.

SECTIONS 239 to 266 — Repealed by Indian Partnership Act.

SCHEDULE — Repealed by Amending Act (X of 1914).

14. Interrogations by Judge may be public or private.
15. Procedure when female respondent refuses to cohabit with petitioner. Adjournment for a year. Interview.
16. Procedure on expiration of adjournment. Interrogation of respondent. Decree.
17. Decree in case of male respondent refusing to cohabit on grounds of petitioner's change of religion. Proviso.
18. Decree if respondent so refuse in case of unconsummated marriage, either party being impubes at time of marriage.
19. Liberty to parties to marry again.
20. Judge to order commission to issue for examination of exempted persons.
21. Proof of marriage and desertion or repudiation of petitioner in consequence of conversion.
22. Civil Procedure Code applied.
23. Dismissal of suit if either party under age required by Act, or if parties cohabiting, or respondent willing to cohabit.
24. Revival of suit after such dismissal.
25. Petitioner's cruelty or adultery to bar suit.
26. Male petitioner's cohabitation with one of several wives to bar suit.
27. Dissolution of marriage not to affect status or right of children.
28. Power to Court to award alimony.
29. No appeal under Act; but Judge may state case raising question whether conversion has dissolved marriage.
30. Case to state necessary facts and documents, and suit to be stayed.
31. Case to be decided by three Judges.
32. High Court may refer case to Judge for additions or alterations.
33. High Court may decide question raised, and Judge shall dispose of case accordingly.
34. Saving of Roman Catholic marriages.
35. Extent of Act.

FIRST SCHEDULE.— FORM OF PETITION.

SECOND SCHEDULE — FORM OF CITATION IN ORDINARY CASES.

THIRD SCHEDULE.— FORM OF CITATION IN CASE OF RESPONDENT EXEMPT FROM APPEARANCE IN COURT.

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION

—Amended by Act 48 of 1959.

—Adapted by A. O. 1937; A. C. A. O. 1948; A. L. O. 1950; 2 A. L. O. 1956.

—Extended by Acts 14 of 1874; 15 of 1874; 4 of 1941; 59 of 1949; 30 of 1950; 68 of 1956; 26 of 1968 and by Regulations 3 of 1872; 3 of 1899; Reg. 6 of 1963.

——in Bombay by Bom. Act 4 of 1950.

——in Punjab by Punj. Act 5 of 1950.

—Repealed (in part) by Acts 7 of 1870; 16 of 1874; 12 of 1891; 10 of 1914.

——in Bellary District by Mysore Act 14 of 1955.

COGNATE ACTS AND PROVISIONS

- (1) Indian Divorce Act, 4 of 1869.
- (2) Foreign Marriage Act, 33 of 1969.
- (3) Indian Matrimonial Causes (War Marriages) Act, 40 of 1948.
- (4) Special Marriage Act, 43 of 1954, Ss. 24 to 30.
- (5) Indian Christian Marriage Act, 15 of 1872.

**[THE] †[* * °] CONVERTS' MARRIAGE DISSOLUTION ACT, 1866
(ACT XXI OF 1866)***

[2nd April, 1866.]

An Act to legalise, under certain circumstances, the dissolution of marriages of †[* * °] Converts to Christianity.

Preamble.—Whereas it is expedient to legalize, under certain circumstances, the dissolution of marriages of †[* * °] Converts to Christianity deserted or

repudiated on religious grounds by their wives or husbands; It is enacted as follows:—

[°] For Statement of Objects and Reasons, see Gaz. of India, 1865, p. 59; for the Report of the Select Committee, see Gaz. of Ind., 1866, p. 163; and for discussions on the Bill, see Gazette of India, 1865, Supplement, p. 5 and Gazette of India, 1866, Supplement, p. 201.

This Act has been declared to be in force in all the provinces of India, except the Scheduled Districts, by S. 3 of the Laws Local Extent Act, 1874 (15 of 1874).

It has been declared, by notification under S. 3(a) of the Scheduled Districts Act, 1874 (14 of 1874), to be in force in the following Scheduled Districts:—

West Jalpaiguri (West Bengal)—see Gaz. of Ind., 1881, Pt. I, p. 74.

The District of Darjiling (West Bengal)—see Gaz. of Ind., 1886, Pt. I, p. 500.

The Districts of Hazaribagh, Lohardaga (Now the Ranchi District) (Now all in Bihar State)—Calcutta Gaz., 1899, Pt. I, p. 44.

and Manbhum, Pargana Dhalbhum and the Kolhan in the District of Singhbhum (Bihar State)—see Calcutta Gazette, 1881, Pt. I, p. 504.

Porhat Estate in Singhbhum District (Bihar)—See Gaz. of Ind., 1897, Pt. I, p. 1059.

Scheduled District in Ganjam (Orissa) and Vizagapatnam (Andhra Pradesh)—See Gaz. of Ind., 1898, Pt. I, p. 870.

Scheduled portion of Mirzapur District (in Uttar Pradesh)—see Gaz. of India, 1879, Pt. I, p. 383.

Jaunsar Bawar (in Uttar Pradesh now)—see Gaz. of Ind., 1879, Pt. I, p. 382.

Assam (except the North Lushai Hills)—see Gaz. of Ind., 1879, Pt. I, p. 299.

District of Lahaul (Now in Himachal Pradesh)—see Gaz. of Ind., 1886, Pt. I, p. 301.

It has been extended by notification under S. 5 of the same Act to the following Scheduled Districts:—

Kumaon and Garhwal (Uttar Pradesh)—see Gaz. of Ind., 1876, Pt. I, p. 606.

Tarai of the Province of Agra (now forming part of Uttar Pradesh State)—see Gaz. of Ind., 1876, Pt. I, p. 505.

The Act has been extended to Berar by the Berar Laws Act, 1941 (4 of 1941), (Berar now forms part of the State of Maharashtra) and has been declared in force in the Santhal Parganas by the Santhal Parganas Settlement Regulation, 1872 (3 of 1872) (as amended by Regulation (3 of 1899). Santhal Parganas form part of the State of Bihar now.

It has been extended to the new Provinces and merged States by the Merged States (Laws) Act, 1949 (59 of 1949), S. 3 (1-1-1950) and to the Union Territories of Tripura and Vindhya Pradesh by the Union Territories (Laws) Act, 1950 (30 of 1950), S. 3 (16-4-1950). Vindhya Pradesh now forms part of the State of Madhya Pradesh—see Act 37 of 1956, S. 9(1)(e). It has not been extended to the Union Territory of Manipur, vide Act 30 of 1950, S. 3(2-A) and Schedule (Part A) (as amended by Act 68 of 1956).

The Act has now been extended to the Union Territories of—

(1) Dadra and Nagar Haveli, by Reg. 6 of 1963 (w.e.f. 1-7-1965);

(2) Pondicherry, by Act 26 of 1968, S. 3 and Schedule Part I (w.e.f. 18-12-1968).

The Act has also been extended to States merged in the State of Bombay—see Bom. Act 4 of 1950 and in the State of Punjab—see Punjab Act 5 of 1950.

[†] The word "Native" was omitted by A. L. O., 1950.

1. **Short title.**—This Act may be cited as the **°[° ° °] CONVERTS' MARRIAGE DISSOLUTION ACT, 1866.**

[°] The word "Native" was omitted by A. L. O., 1950.

Section 1 — Note 1

(1) The petitioner and the respondent married while professing the Hindu faith. After their marriage they both became converts to Christianity. The petitioner subsequently applied for dis-

solution of the marriage on the ground of his wife's adultery. Held that the petitioner was entitled to a dissolution according to the provisions of Indian Divorce Act and this Act does not apply. (1891) 18 Cal 252 (254) (SB).

2. Commencement of Act. [Repealed by the Repealing Act, 1874 (16 of 1874), S. 1 and Schedule I.]

STATE AMENDMENT

Pondicherry:

After Section 1, insert the following:—

"2. Nothing contained in this Act shall apply to Saving the Renoncants of the Union Territory of Pondicherry." — Act 26 of 1968, Section 3 (i) and Schedule, Part I.

3. Interpretation-clause.—In this Act—

"Husband."

"[* * *] husband" shall mean a married man domiciled in †[India,] who shall have completed the age of sixteen years, and shall not be a Christian, a Muhammadan nor a Jew;

"Wife."

"[* * *] wife" shall mean a married woman domiciled in †[India], who shall have completed the age of thirteen years, and shall not be a Christian, a Muhammadan nor a Jewess;

"Personal law."

"‡[Personal law]" shall mean any law or custom having the force of law, of any persons domiciled in †[India] other than Christians, Muhammadans and Jews;

"Month" and "year".

"Month" and "year" shall respectively mean month and year according to the British calendar.

§[* * * * *]

[*] The word "Native" was omitted by A. L. O., 1950.

[†] Substituted by A. L. O., 1950, for "the Provinces" which had been substituted for "British India" by A. C. A. O., 1948.

[‡] Substituted for "Native Law" by A. L. O., 1950.

[§] The paragraph relating to "Number" was repealed by the Repealing and Amending Act, 1914 (10 of 1914), S. 3 and Schedule II, and the definition of "High Court" was repealed by A. O., 1937.

4. When convert deserted by his wife may sue for conjugal society.—If a [* * *] husband change his religion for Christianity, and if in consequence of such change his [* * *] wife, for the space of six continuous months, desert or repudiate him, he may sue her for conjugal society.

[*] The word "Native" was omitted by A. L. O., 1950.

5. When convert deserted by her husband may sue.—If a [* * *] wife change her religion for Christianity, and if in consequence of such change her [* * *] husband, for the space of six continuous months, desert or repudiate her, she may sue him for conjugal society.

[*] The word "Native" was omitted by A. L. O., 1950.

6. Court in which suit shall be brought.—If the respondent, at the time of commencement of such suit, reside within the local limits of the ordinary original civil jurisdiction of any of the High Courts of Judicature, the suit shall be commenced in such Court; otherwise it shall be commenced in the principal Civil

Section 4 — Note 1

(1) The conversion to Christianity of one of two married Hindu spouses does not dissolve marriage. The Act provides for means to obtain dissolution of the marriage by application to the Court first of all for restitution of conjugal rights and then after the lapse of a year for dissolution of the marriage, if conjugal rights are refused, otherwise, the conversion of one of the two

spouses has no effect on the existing marriage. AIR 1924 Mad 18 (18) = 46 Mad 839 (FB) ** (1891) 18 Cal 252 (254) (SB).

Section 6 — Note 1

(1) The principal Court of Original Jurisdiction of the District within the meaning of Section 6 of the Converts' Marriage Dissolution Act is the Court of the Deputy Commissioner. 1871 Pun. Re No. 44, p. 100 (101) (DB).

Court of original jurisdiction of the district in which the defendant shall reside at the commencement of the suit.

7. Suit to be commenced by verified petition.—The suit shall be commenced by a petition in the form in the First Schedule to this Act, or as near thereto as the circumstances of the case will allow.

The statements made in the petition shall be verified by the petitioner in the manner required by law for the verification of plaints; and the petition "[* * *]" may be amended by permission of the Court.

[*] The words "shall bear a stamp of two rupees, and" were repealed by the Court-fees Act, 1870 (7 of 1870), S. 2, Sch. III, Pt. II.

8. On service of petition, citation to respondent.—A copy of the petition shall be served upon the respondent, and the Court shall thereupon issue a citation under the seal of the Court signed by the Judge.

9. Form of citation.—In ordinary cases the citation shall be in the form in the Second Schedule to this Act, or as near thereto as the circumstances of the case will allow.

But where the respondent is exempt by law from personal appearance in Court, or where the Judge shall so direct, the citation shall be in the form in the Third Schedule to this Act, or as near thereto as the circumstances of the case will allow.

10. Service of citation.—A copy of the citation sealed with the seal of the Court shall be served on the respondent; and the provisions of the Code of Civil Procedure as to the service and endorsement of summonses shall apply mutatis mutandis, to citations under this Act.

11. Penalty on respondent not obeying citation.—If the respondent shall not obey such citation, and comply with every other requirement made upon her or him under the provisions of this Act, she or he shall be liable to punishment under Section 174 of the Indian Penal Code.

12. Points to be proved on appearance of petitioner.—On the day fixed in the citation the petitioner shall appear in Court, and the following points shall be proved:—

- (1) the identity of the parties;
- (2) the marriage between the petitioner and the respondent;
- (3) that the male party to the suit has completed the age of sixteen years, and that the female party to the suit has completed the age of thirteen years;
- (4) the desertion or repudiation of the petitioner by the respondent;
- (5) that such desertion or repudiation was in consequence of the petitioner's change of religion;
- (6) and that such desertion or repudiation had continued for the six months immediately before the commencement of the suit.

13. First interrogation of respondent.—The respondent, if such points be proved to the satisfaction of the Judge, shall thereupon be asked whether she or he refuses to cohabit with the petitioner, and, if so, what is the ground of such refusal.

In ordinary cases such interrogation and every other interrogation prescribed by this Act shall be made by the Judge, but when the respondent is exempt by law from personal appearance in Court, or when the Judge shall, in his discretion, excuse the respondent from such appearance, the interrogations shall be made by Commissioners acting under such commission as hereinafter mentioned.

14. Interrogations by Judge may be public or private.—Every interrogation mentioned in this Act and made by the Judge may, at the discretion of the Judge, take place in open Court or in his private room.

If any such interrogation take place in open Court, the Judge may, so long as it shall continue, exclude from the Court all such persons as he shall think fit to exclude.

15. Procedure when female respondent refuses to cohabit with petitioner. Adjournment for a year. Interview.—If the respondent be a female, and in answer to the interrogatories of the Judge or Commissioners, as the case may be, shall refuse to cohabit with the petitioner, the Judge, if upon consideration of the respondent's answers and of the facts which may have been proved by the petitioner he shall be of opinion that the ground for such refusal is the petitioner's change of religion, shall make an order adjourning the case for a year, and directing that, in the interim, the parties shall, at such place and time as he shall deem convenient, have an interview of such length as the Judge shall direct, and in the presence of such person or persons (who may be a female or females) as the Judge shall select, with the view of ascertaining whether or not the respondent freely and voluntarily persists in such refusal.

16. Procedure on expiration of adjournment—Interrogation of respondent.—At the expiration of such adjournment the petitioner shall again appear in Court and shall prove that the said desertion or repudiation had continued up to the time last hereinbefore referred to; and if the points mentioned in Section 12 and this section of this Act shall be proved to the satisfaction of the Judge, and if the respondent on being interrogated by the Judge or Commissioners, as the case may be, again refuse to cohabit with the petitioner, the respondent shall be taken to have finally deserted or repudiated the petitioner.

Decree.

and the Judge shall, by a decree under his hand and sealed with the seal of his Court, declare that the marriage between the parties is dissolved.

17. Decree in case of male respondent refusing to cohabit on grounds of petitioner's change of religion.—If the respondent be a male, and in answer to the interrogatories of the Judge or Commissioners, as the case may be, shall refuse to cohabit with the petitioner, the Judge, if upon consideration of the respondent's answers and of the facts which may have been proved by the petitioner, he shall be of opinion that the ground for such refusal is the petitioner's change of religion, shall adjourn the case for a year.

At the expiration of such adjournment, the petitioner shall again appear in Court; and if the respondent on being interrogated by the Judge or Commissioners, as the case may be, again refuse to cohabit with the petitioner, the Judge shall thereupon pass such a decree as last aforesaid:

Proviso.

Provided that if the petitioner shall so desire (but not otherwise), the proceedings in the suit, *mutatis mutandis*, be the same as in the case of a female respondent.

18. Decree if respondent so refuse in case of unconsummated marriage, either party being impubes at time of marriage.—Notwithstanding anything hereinbefore contained, if it shall appear at any stage of the suit that both or either of the parties had not attained puberty at the date of their marriage, and that such marriage has not been consummated; and if, in answer to the interrogatories made pursuant to Section 13 of this Act, the respondent shall refuse to cohabit with the petitioner and allege, as the ground for such refusal, that the petitioner has changed his or her religion, the Judge shall thereupon pass such a decree as last aforesaid.

19. Liberty to parties to marry again.—When any decree dissolving a marriage shall have been passed under the provisions of this Act, it shall be lawful for the respective parties thereto to marry again as if the prior marriage had been dissolved by death, and the issue of any such remarriage shall be legitimate, any **[personal law]* to the contrary notwithstanding:

Provided always that no minister of religion shall be compelled to solemnize the marriage of any person whose former marriage may have been dissolved under this Act, or shall be liable to any suit or penalty for refusing to solemnize the marriage of any such person.

[°] Substituted for "Native Law" by A. L. O., 1950.

20. Judge to order commission to issue for examination of exempted persons.—In suits instituted under this Act, the Judge shall order a commission to issue to such persons, whether males or females or both, as he shall think fit, for the examination on interrogatories or otherwise of any persons so exempt as aforesaid.

The provisions of the Code of Civil Procedure shall, so far as practicable, apply to commissions issued under this section.

21. Proof of marriage and desertion or repudiation of petitioner in consequence of conversion.—At any stage of a suit instituted under this Act, cohabitation as man and wife shall be sufficient presumptive evidence of the marriage of the parties, and proof of the respondent's refusal or voluntary neglect to cohabit with the petitioner, after his or her change of religion and after knowledge thereof by the respondent, shall be sufficient evidence of the respondent's desertion or repudiation of the petitioner, and shall also be sufficient evidence that such desertion or repudiation was in consequence of the petitioner's change of religion, unless some other sufficient cause for such desertion or repudiation be proved by the respondent.

22. Civil Procedure Code applied.—The provisions of the Code of Civil Procedure as to the summoning and examination of witnesses shall apply in suits instituted under this Act.

23. Dismissal of suit if either party under age required by Act, or if parties cohabiting, or respondent willing to cohabit.—If at any stage of the suit it be proved that the male party to the suit is or was at the institution thereof under the age of sixteen years, or that the female party to the suit is or was at the same time under the age of thirteen years, or that the petitioner and the respondent are cohabiting as man and wife, or if the Court is satisfied by the evidence adduced that the respondent is ready and willing so to cohabit with the petitioner, the Court shall pass a decree dismissing the suit and stating the ground of such dismissal.

24. Revival of suit after such dismissal.—If at any time within twelve months after a decree dismissing the suit upon any of the grounds mentioned in the last preceding section, the respondent again desert or repudiate the petitioner upon the ground of his or her change of religion, the suit may be revived by summoning the respondent; and upon proof of the former decree and of such renewed repudiation or desertion, the suit shall recommence at the stage at which it had arrived immediately before the passing of such decree; and, after the proofs, interrogations, interview and adjournment which may then be requisite under the provisions hereinbefore contained, the Judge shall pass a decree of the nature mentioned in Section 16 of this Act.

25. Petitioner's cruelty or adultery to bar suit.—If at any stage of the suit it be proved that the respondent has deserted or repudiated the petitioner solely or partly in consequence of the petitioner's cruelty or adultery, the Court shall pass a decree dismissing the suit and stating the ground of such dismissal.

A suit dismissed under this section shall not be revived.

26. Male petitioner's cohabitation with one of several wives to bar suit.—If the petitioner, being a male, has at the time of the institution of the suit two or more wives, he shall make them all respondents; and if at any stage of the suit it be proved that he is cohabiting with one of such wives as man and wife, or that

any one of such wives is ready and willing so to cohabit with him, the Court shall pass a decree dismissing the suit and stating the ground of such dismissal.

The provisions as to revival contained in Section 24 of this Act shall apply, *mutatis mutandis*, to a suit dismissed under this section.

27. Dissolution of marriage not to affect status or right of children.—A dissolution of marriage under the provisions of this Act shall not operate to deprive the respondent's children (if any) by the petitioner of their status as legitimate children, or of any right or interest which they would have had, according to the **[personal law]* applicable to them, by way of maintenance, inheritance, or otherwise, in case the marriage had not been so dissolved as aforesaid.

[*] Substituted for "Native law" by A. L. O., 1950.

28. Power to Court to award alimony.—If a suit be commenced under the provisions of this Act, and it appears to the Court that the wife has not sufficient separate property to enable her to maintain herself suitably to her station in life and to prosecute or defend the suit, the Court may, pending the suit, order the husband to furnish the wife with sufficient funds to enable her to prosecute or defend the suit, and also for her maintenance pending the suit.

If the suit be brought by a husband against a wife, the Court may by the decree order the husband to make such allowance to his wife for her maintenance during the remainder of her life as the Court shall think just, and having regard to the condition and station in life of the parties.

Any allowance so ordered shall cease from the time of any subsequent marriage of the wife.

29. No appeal under Act; but Judge may state case raising question whether conversion has dissolved marriage.—No appeal shall lie against any order or decree made or passed by any Court in any suit instituted under this Act; but if, at any stage of the suit, the respondent shall allege by way of defence that the marriage between the parties has been dissolved by the conversion of the petitioner, and that consequently the petitioner is not a **[° ° °]* husband or a **[° ° °]* wife (as the case may be) within the meaning of this Act, the Judge, if he shall entertain any doubt as to the validity of such defence, shall, either of his own motion or on the application of the respondent, state the case and submit it with his own opinion thereon for the decision of the High Court.

[*] The word "Native" was omitted by the A. L. O., 1950.

30. Case to state necessary facts and documents, and suit to be stayed.—Every such case shall concisely set forth such facts and documents as may be necessary to enable the High Court to decide the questions raised thereby, and the suit shall be stayed until the judgment of such Court shall have been received as hereinafter provided.

31. Case to be decided by three Judges.—Every such case shall be decided by at least three Judges of the High Court, if such Court be the High Court at any of the presidency towns; and the petitioner and respondent may appear and be heard in the High Court in person or by advocate or vakil.

32. High Court may refer case to Judge for additions or alterations.—If the High Court shall not be satisfied that the statements contained in the case are sufficient to enable it to determine the questions raised thereby, the High Court may refer the case back to the Judge by whom it was stated, to make such additions thereto or alterations therein as the High Court may direct in that behalf.

33. High Court may decide question raised, and Judge shall dispose of case accordingly.—It shall be lawful for the High Court, upon the hearing of any such case, to decide the questions raised thereby, and to deliver its judgment thereon containing the grounds on which such decision is founded;

34. **Saving of Roman Catholic marriages.**—Nothing contained in this Act [* * *] shall be taken to render invalid any marriage of a †[* * *] convert to Roman Catholicism if celebrated in accordance with the rules, rites, ceremonies and customs of the Roman Catholic Church †[* * *].

[†] The word "Native" omitted by the A. L. O., 1950.

[†] The words "and no Clergyman of such Church shall be liable to any suit or penalty under the provisions of either of the two Acts last hereinbefore mentioned, for solemnizing any such marriage" were repealed by the Repealing Act, 1874 (16 of 1874), S. 1 and Schedule.

[*] Substituted for the former S. 35, by A. C. A. O., 1948.

[†] Substituted for "all the Provinces of India," by A. L. O., 1950.

[†] Substituted by the Miscellaneous Personal Laws (Extension) Act, 1959 (48 of 1959), Section 3 and Sch. I (w. e. f. 1-2-1960).

(See Section 7)

FORM OF PETITION

Stamp
[* * *]

1. That your petitioner was born on or about the _____ day of _____ 18 .

2. That your petitioner was on the _____ day of _____ in the year 18____
lawfully married to C. D. at _____.

3. That the said C. D. is now of the age of _____ years or thereabouts.

4. That after his said marriage, your petitioner lived and cohabited with his said wife at aforesaid until the day of 18 .

5. That previous to the day of 18 your petitioner changed his religion for Christianity, and that on such day he was baptised and became a member of the Church of .

6. That on the day of 18 [at least six months prior to the date of the petition], the said C. D. deserted your petitioner, and has not since resumed cohabitation with him.

7. That such desertion was in consequence of your petitioner's said change of religion.

8. That there is no collusion nor connivance between your petitioner and the said C. D.

Your petitioner therefore prays that Your Honour will order the said C. D. to live and cohabit with your petitioner, or declare that your petitioner's marriage is dissolved.
A. B.

FORM OF VERIFICATION

I. A. B., the petitioner named in the above petition, do declare that what is stated therein is true to the best of my information and belief.

[*] The words "Rs. two" printed below the word "Stamp" were repealed by the Amending Act, 1891 (12 of 1891), S. 2 and Schedule I.

THE SECOND SCHEDULE

(See Section 9)

FORM OF CITATION IN ORDINARY CASES

To C. D. of

Whereas A. B. of , claiming to have been lawfully married to you, the said C. D., has filed his [or her] petition against you in the Civil Court of alleging that you, the said C. D., have deserted him [or her] for six months in consequence of his [or her] having changed his [or her] religion for Christianity and praying that, unless you consent to live and cohabit with him [or her], it may be declared that his [or her] marriage is dissolved: Now this is to command you that, at the expiration of days [at least one month] from the date of the service of this on you, you do appear in the said Court then and there to make answer to the said petition, a copy whereof, sealed with the seal of the said Court, is herewith served upon you.

And take notice that in default of your so appearing, you will be liable to punishment under Section 174 of the Indian Penal Code.

Dated the day of 18 .

(Signed) E. F.,

Judge of the Civil Court of

(Indorsement to be made after service)

This citation was duly served by G. H. on the within-named C. D. of at on the day of 18 .

(Signed) G. H.

THE THIRD SCHEDULE

(See Section 9)

FORM OF CITATION IN CASE OF RESPONDENT EXEMPT FROM APPEARANCE IN COURT

To C. D. of

Whereas A. B. of , claiming to have been lawfully married to you, the said C. D., has filed his [or her] petition against you in the Civil Court of , alleging that you, the said C. D., have deserted him [or her] for six months in consequence of his [or her] having changed his [or her] religion for Christianity, and praying that, unless you consent to cohabit with him [or her], it may be declared that his [or her] marriage is dissolved: Now this is to command you that, at the expiration of days [at least one month] from the service of this on you, you do hold yourself in readiness to answer and do answer such interrogatories as may be put to you by Commissioners duly authorised in that behalf under a commission issued by this Court, in reference to the said petition, a copy whereof, sealed with the seal of the said Court, is herewith served upon you.

And take notice that, in default of your so holding yourself in readiness and answering such interrogatories you will be liable to punishment under Section 174 of the Indian Penal Code.

Dated the day of 18 .

(Signed) E. F.,

Judge of the Civil Court of .

(Indorsement to be made after service)

This citation was duly served by G. H. on the within-named C. D. of

at on the day of 18 .

(Signed) G. H.

[THE] COOCH-BEHAR (ASSIMILATION OF LAWS) ACT, 1950 (ACT LXVII OF 1950)

[The text of the Act herein printed is as on 31-3-70.]

STATEMENT OF OBJECTS AND REASONS

"With effect from the 1st January, 1950, the former Indian State of Cooch-Bihar has been merged into and constituted a district of West Bengal by the States' Merger (West Bengal) Order, 1949. This merger, however, did not by itself effect any change in the body of laws to which the former Indian State of Cooch-Bihar was subject before the commencement of the Order. Consequently, the laws in force in Cooch-Bihar continue to be the same as before, that is, either the laws of the former State of Cooch-Bihar or the laws applied by Orders made under the Extra-Provincial Jurisdiction Act, 1947, after the date on which the administration was taken over and before the 1st January, 1950. This position is highly unsatisfactory and it

is obviously desirable to assimilate the laws in force in Cooch-Bihar to the laws in force in the rest of West Bengal. Hence, this Bill.

2. This Bill covers matters relating to the Union and Concurrent Lists. It is clear that a complete assimilation of laws can only be effected by simultaneous legislation by the Centre and the State of West Bengal. It is also desirable that the Central Act and the State Act should come into force on the same day. Necessary steps are being taken in this behalf and the Government of West Bengal will be requested to bring their corresponding legislation into force on the 'appointed Day'."

—Gaz. of Ind. 12-8-1950, Part II-Sec. 2, p. 301.

[THE] COOCH-BEHAR (ASSIMILATION OF LAWS) ACT, 1950 (ACT LXVII OF 1950)*

[7th December, 1950.]

An Act to assimilate certain laws in force in Cooch-Bihar to the laws in force in the rest of West Bengal.

BE it enacted by Parliament as follows :—

[*] For Statement of Objects and Reasons, see Gaz. of India, 12-8-1950, Part II-Section 2, page 301.

1. Short title and commencement.—(1) This Act may be called THE COOCH-BEHAR (ASSIMILATION OF LAWS) ACT, 1950.

(2) It shall come into force on such date* as the Central Government may, by notification in the Official Gazette, appoint.

[*] The Act came into force on 1-1-1951; See Gaz. of Ind., 30-12-1950, Part II-Section 3, page 1109.

2. Interpretation.—In this Act,—

(a) "appointed day" means the date appointed under sub-section (2) of Section 1 for the coming into force of this Act;

(b) "Cooch-Bihar" means the merged territory of Cooch-Bihar in the State of West Bengal;

(c) "law" means so much of any Act, Ordinance, Regulation, Rule, Order or Bye-law as relates to any of the matters enumerated in Lists I and III in the Seventh Schedule to the Constitution.

3. Assimilation of laws.—(1) Save as provided in sub-section (2), all laws which immediately before the appointed day extend to, or are in force in, the State of West Bengal, but do not extend to, or are not in force in, Cooch-Bihar shall, as from that day, extend to, or as the case may be, come into force in, Cooch-Bihar; and all laws which, immediately before the appointed day, are in force in Cooch-Bihar, but not in the rest of West Bengal, shall on that day cease to be in force in Cooch-Bihar, except as respects things done or omitted to be done before that day.

(2) Notwithstanding anything contained in sub-section (1), the Muslim Personal Law (Shariat) Application Act, 1937, shall come into force in Cooch-Bihar only on such date as the State Government may, by notification in the Official Gazette, appoint; and Cooch-Bihar Act 2 of 1897, known as the Muhammadan Inheritance Act, 1897, shall continue in force in Cooch-Bihar until that date, and shall on that date cease to be in force except as respects things done or omitted to be done before that date.

Note.—It is clear from S. 2 (c) that the Act covered matters relating to Union and concurrent Lists. Complete assimilation of laws could only be effected by simultaneous legislation by the Centre and the State of West Bengal. It was desirable that the Central Act and the State Act should come into force on the same day, i.e. "the appointed day," namely 1-1-1951. The West Bengal legislature, in pursuance of this policy, passed Act 63 of 1950 known as the Cooch-Bihar (Assimilation of State Laws) Act, 1950. This State Act also came into force on 1-1-1951 according to Notification No. 7497 J., D/- 18-12-1950 published in the Calcutta Gazette, D/- 28-12-1951, Part I, page 2605.

4. Provision for removal of difficulties.—If any difficulty arises in relation to the transition under Section 3 from one law or group of laws to another law or group of laws, the Central Government may, by order notified in the Official Gazette, make such provision as it considers necessary for the removal of such difficulty.

[THE] CO-OPERATIVE SOCIETIES ACT, 1912

(ACT II OF 1912)

[The text of the Act herein printed is as on 31-3-1970.]

CONTENTS

SECTIONS

PRELIMINARY

1. Short title and extent.
2. Definitions.

REGISTRATION

3. The Registrar.
4. Societies which may be registered.
5. Restrictions on interest of member of society with limited liability and a share capital.
6. Conditions of registration.
7. Power of Registrar to decide certain questions.
8. Application for registration.
9. Registration.
10. Evidence of registration.
11. Amendment of the bye-laws of a registered society.

RIGHTS AND LIABILITIES OF MEMBERS

12. Member not to exercise rights till due payment made.
13. Votes of members.
14. Restrictions on transfer of share or interest.

DUTIES OF REGISTERED SOCIETIES

15. Address of societies.
16. Copy of Act, rules and bye-laws to be open to inspection.
17. Audit.

PRIVILEGES OF REGISTERED SOCIETIES

18. Societies to be bodies corporate.
19. Prior claim of society.
20. Charge and set-off in respect of shares or interest of member.
21. Shares or interest not liable to attachment.

22. Transfer of interest on death of member.
23. Liability of past member.
24. Liability of the estates of deceased members.
25. Register of members.
26. Proof of entries in societies' books.
27. Exemption from compulsory registration of instruments relating to shares and debentures of registered society.
28. Power to exempt from income-tax, stamp-duty and registration-fees.

PROPERTY AND FUNDS OF REGISTERED SOCIETIES

29. Restrictions on loans.
30. Restrictions on borrowing.
31. Restrictions on other transactions with non-members.
32. Investment of funds.
33. Funds not to be divided by way of profit.
34. Contribution to charitable purpose.

INSPECTION OF AFFAIRS

35. Inquiry by Registrar.

36. Inspection of books of indebted society.
37. Costs of inquiry.
38. Recovery of costs.

DISSOLUTION OF SOCIETY

39. Dissolution.
40. Cancellation of registration of society.
41. Effect of cancellation of registration.
42. Winding up.

RULES

43. Rules.

MISCELLANEOUS

44. Recovery of sums due to Government.
45. Power to exempt societies from conditions as to registration.
46. Power to exempt registered societies from provisions of the Act.
47. Prohibition of the use of the word "co-operative."
48. Indian Companies Act, 1882, not to apply.
49. Saving of existing societies.
50. [Repealed.]

STATEMENT OF OBJECTS AND REASONS

"When the Bill, which subsequently became the Act of 1904,* was published, the following remarks were made in the Statement of Objects and Reasons:— "Legislation is called for not only in order to lay down the fundamental conditions, which must be observed; but, also with a view to giving such societies a corporate existence, without resort to the elaborate provisions of the Companies Act; but it is thought that legislation should be confined within the narrowest possible limits. The Bill has, therefore, been drawn so as to deal with those points which the Government consider to be essential and its provisions have been expressed in simple and general terms, a wide rule-making power being reserved to Local Governments, so that what is felt to be of the nature of an experiment may be tried in each Province or part of a Province on such lines as seem to offer most promise of success;" and these principles were followed in the Act as passed.

2. The adequacy of the existing Act was examined at a conference of Registrars of Co-operative Credit Societies in 1909, and it was held that, the Act still remained in many ways unduly restricted, and that it also required certain alterations in detail which had been suggested by experts since 1904. The conference of Registrars drew up proposals

for the amendment of the Act, and after consulting Local Governments on these proposals the Government of India have prepared the Bill now published. The chief changes, contemplated by the Government of India, are four in number:—

(i) The Act of 1904 applies to societies for the purpose of co-operative credit only and not to co-operative societies of other kinds, such as those established for production or distribution. It has in practice been found that the establishment of credit societies has led to the founding of other classes of co-operative societies also, and it is advisable that the privileges, extended by the Act to co-operative credit societies, should be extended to these other societies. It is proposed, therefore, that the Act, as now revised, should be made applicable to all classes of co-operative societies — vide clause 1 (i) and Clause 4 of the Bill.

(ii) In the Act of 1904, societies were classified according as they were "Urban" or "Rural" and the principle was laid down that, as a general rule, rural societies should be with unlimited liability. This basis for distinction was adopted, mainly because it represented a classification which had already been recommended and put in force in the initiation of co-operative credit societies in certain parts of India, but it was at the time criticised as unsuitable by experts, and it has in practice been found artificial and inconvenient. The real distinction is between societies with limit-

*That is, the Co-operative Credit Societies Act, 1904 (10 of 1904). This Act is repealed by the present Act, 2 of 1912.

ed and those with unlimited liability and it is proper in the new Bill to maintain this distinction only while retaining the principle that agricultural credit societies must as a general rule be with unlimited liability — see Clause 4 of the Bill.

(iii) The Act of 1904 did not contemplate that societies with unlimited liability should distribute profits. It is still felt that such societies do not represent the best form of co-operation for agricultural communities, but this form of societies has, in practice been for some time in existence in several Provinces, and societies of this character, though not of the orthodox type, are recognized to be capable of useful work. Although therefore, it is not intended to give them undue encouragement, it is proposed to legalize their existence and to permit an unlimited society, with the sanction of the Local Government to distribute profits — see Clause 28 of the Bill (now see Section 33).

(iv) A cardinal principle which is observed in the organization of co-operative societies in Europe is the grouping of such societies into Unions and their financing by means of Central Banks. This stage of co-operation had not been fully realised or provided for in the Act of 1904, but such grouping of societies has already been found feasible in most Provinces, and it is now considered desirable to legalize the formation of co-operative credit societies of which the members shall be other co-operative credit societies — vide Clauses 5 (1), 6 and 10 (3) of the Bill (now see Secs. 6 and 8.)

3. In addition to carrying out the main alterations above described the present Bill contains the several changes of detail and it has been found advisable to recast the Bill in order to improve the drafting and to incorporate the changes now contemplated”

—Gazette of India, 1911, Part V, p. 95.

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION

—Adapted by A. O., 1937: A. L. O., 1950: 2 A. L. O., 1956: M. P. A. L. O., 1956.

—Supplemented in A. P. by A. P. Act 7 of 1964.

—Repealed in part by Act 17 of 1914.

—Repealed and amended by Act 38 of 1920.

Repealed in—

Assam-Nagaland by Assam Act 1 of 1950.

Bengal by Bengal Act 21 of 1940.

Bihar and Orissa by B. and O. Act 6 of 1935.

Coorg district of Mysore State by Coorg Act 2 of 1936.

Gujarat by Bom. Act 7 of 1925.

Himachal Pradesh by H. P. Act 13 of 1956.

Maharashtra by Bom. Acts 7 of 1925 and 20 of 1960.

Mahakoshal region of M. P. by M. P. Act 17 of 1961.

Orissa by Reg. 1 of 1936 and Ori. Act 2 of 1963.

Punjab-Haryana by Punj. Act 14 of 1955.

Tamil Nadu by Tamil Nadu Act 6 of 1932.

Uttar Pradesh by U. P. Act 11 of 1966.

COGNATE ACTS AND PROVISIONS

(1) Multi-unit Co-operative Societies Act, 6 of 1942.

(2) National Co-operative Development Corporation Act, 26 of 1962.

[THE] CO-OPERATIVE SOCIETIES ACT, 1912

(ACT II OF 1912)*

[1st March, 1912.]

An Act to amend the Law relating to Co-operative Societies.

WHEREAS it is expedient further to facilitate the formation of Co-operative Societies for the promotion of thrift and self-help among agriculturists, artisans and persons of limited means, and for that purpose to amend the law relating to Co-operative Societies. It is hereby enacted as follows :

[*] For Report of Select Committee, see Gazette of India, 1912, Pt. V, p. 7; and for proceedings in Council see *ibid.*, 1911, Pt. VI, pp. 186, 679 and *ibid.*, 1912, Pt. VI, pp. 3, 31 and 256.

This Act had been declared to be in force in the Sonthal Parganas by notification under S. 3 of the Sonthal Parganas Settlement Regulation (3 of 1872), see Bihar and Orissa Gazette, 1913, Pt. II, p. 105. Sonthal Parganas form part of the State of Bihar now.

It has been repealed in its application to—

- (1) the State of Maharashtra by Bom. Act 7 of 1925, S. 73, read with Bom. Act 20 of 1960: Said Bom. Act has now been repealed by the Maharashtra Co-operative Societies Act, 1961 (Maha. Act 24 of 1961) S. 166 (26-1-1962).
- (2) the State of Gujarat by Bom. Act 7 of 1925, S. 73 read with Guj. Act 10 of 1962, S. 169 (1-5-1962).
- (3) State of Tamil Nadu by Tamil Nadu Act 6 of 1932, S. 66 read with T. N. Act 53 of 1961, S. 118.
- (4) States of Bihar and Orissa by B. and O Act 6 of 1935, Sec. 67: in Orissa separately by Reg. 1 of 1936: also see now Orissa Act 2 of 1963, S. 136 (1-7-1965).
- (5) State of West Bengal by Bengal Act 21 of 1940, S. 3 and Sch. I, except (a) S. 28 (1) and (b) S. 28 (2) so far as it relates to stamp duties specified in the second paragraph thereof.
- (6) States of Assam and Nagaland by Assam Act 1 of 1950, S. 101 (except S. 28 (2)) read with Act 27 of 1962, S. 26.
- (7) States of Punjab and Haryana and Union Territory of Chandigarh by Punjab Act 14 of 1955, S. 63; see now Punjab Act 25 of 1961 read with Act 31 of 1966, S. 88.
- (8) State of Uttar Pradesh by U. P. Act 11 of 1966, S. 134 (26-1-1968).
- (9) Mahakoshal region of State of Madhya Pradesh by M. P. Act 17 of 1961, S. 96 (1) (15-5-1962).
- (10) Union Territory of Himachal Pradesh by H. P. Act 13 of 1956, S. 119.

For Co-operative Societies Acts prevailing in the States of Andhra Pradesh, Kerala, Madhya Pradesh, Mysore, Rajasthan and Jammu and Kashmir, see A. P. Act 7 of 1964, Ker. Act 21 of 1969 (15-5-1969); M. P. Act 17 of 1961 (15-5-1962); Mys. Act 11 of 1959 (1-6-1960); Raj. Act 13 of 1965 (2-10-1965); J. and K. Act 28 of 1960, respectively.

For Co-operative Societies Law prevailing in the Union Territory of Laccadive, Minicoy and Amindivi Islands, see Reg. 5 of 1960 (1-12-1961); to the Union Territories of Delhi and Tripura, Bombay Co-operative Societies Act, 1925 (Bom. Act 7 of 1925) has been extended by notifications, with certain modifications — See Gaz. of Ind., 1949, Pt. I, S. 1, p. 66 and Gaz. of Ind., 1959, Pt. II-Sec. 3 (i), p. 575 respectively; to the Union Territory of Manipur, Assam Co-operative Societies Act, 1949 (Assam Act 1 of 1950) has been extended with effect from 1-5-1959 by G. S. R. 464, Gaz. of Ind., 1959, Pt. II, S. 3 (i), p. 549; to the Union Territories of Goa, Daman and Diu, Maharashtra Co-operative Societies Act, 1961 (Maha. Act 24 of 1961) has been extended by Reg. 12 of 1962.

PRELIMINARY

1. Short title and extent.—(1) This Act may be called **THE CO-OPERATIVE SOCIETIES ACT, 1912**; and

Preamble — Note 1

(1) The policy of the Co-operative Societies Act is to save the person concerned from protracted, expensive and sometimes ruinous litigation of the civil Courts. At the same time, these special enactments should be strictly construed and the rights of the subject to have recourse to the Courts of justice provided by the Crown should not be unnecessarily surrounded with restrictions. AIR 1935 Lah 631 (632) **

AIR 1918 All 419 (420) = 40 All 89 (DB).

(2) Object of the Act is to encourage thrift, help and co-operation among agriculturists, artisans and persons of limited means. AIR 1924 Lah 418 (420) (DB).

(3) The provisions of the Act provide stringent safeguards to prevent the society from having dealings with strangers. AIR 1931 Nag 48 (49)

(2) It extends to *[the whole of India except †[the territories which immediately before the 1st November, 1956, were comprised in Part B States].]

[*] Substituted for "all the Provinces of India" by A. L. O., 1950 (26-1-1950).

[†] Substituted for "Part B States" by 2 A. L. O., 1956. Immediately before the 1st of November, 1956 the following were the Part B States: Hyderabad, Jammu and Kashmir, Madhya Baharat, Mysore, Pepsu, Rajasthan, Saurashtra and Travancore-Cochin. Of these Part B States, Jammu and Kashmir, Mysore, Rajasthan and Travancore-Cochin (now called Kerala) have become full-fledged States and M. B., Pepsu, Hyderabad and Saurashtra have merged with M. P., Punjab, A. P. and Gujarat respectively.

2. Definitions.—In this Act, unless there is anything repugnant in the subject or context,—

- (a) "by-laws" means the registered by-laws for the time being in force, and includes a registered amendment of the by-laws;
- (b) "committee" means the governing body of a registered society to whom the management of its affairs is entrusted;
- (c) "member" includes a person joining in the application for the registration of a society and a person admitted to membership after registration in accordance with the by-laws and any rules;
- (d) "officer" includes a chairman, secretary, treasurer, member of committee, or other person empowered under the rules or the by-laws to give directions in regard to the business of the society;
- (e) "registered society" means a society registered or deemed to be registered under this Act;
- (f) "Registrar" means a person appointed to perform the duties of a Registrar of Co-operative Societies under this Act; and
- (g) "rules" means rules made under this Act.

SECTION 2

1. Clause (c) — "Member".— (1) There is nothing in the Act to prevent a joint Hindu family from becoming a member of a co-operative bank. AIR 1946 Nag 16 (18) = ILR (1945) Nag 677 (DB) ** AIR 1938 Mad 809 (809) ** AIR 1938 Pat 315 (316 and 317) (FB) ** AIR 1933 Nag 211 (213) (DB) ** (1958) 24 Cut LT 395.

(2) Where the application for a share of a Co-operative Bank is made in the name of the joint family firm, though it is signed by the manager of the family shop, and the share certificate is issued in the name of the head of the family, all the members of the joint family become members of the Bank. AIR 1946 Nag 16 (18) = ILR (1945) Nag 677 (DB).

[See also AIR 1931 Nag 43 (49). (Order of contribution cannot be passed against joint family as such, but can be passed only against such persons as are explicitly mentioned as members of society.)]

(3) Merely on basis of alleged loan taken by person, he cannot be held to be member of society. AIR 1940 Lah 193 (194).

(4) The admission of a member to a society cannot be unilateral act on the part of the society. AIR 1931 Nag 48 (49).

(5) The definition of 'member' as occurring in Sec. 2 (c) of the Act is an inclusive definition and implies that the categories specified in the definition are not exhaustive. AIR 1961 Madh Pra 40 (43, 44) = 1960 MPLJ 1209 (DB).

(6) A co-operative society registered under the above Co-operative Societies Act by bye-law 4 of its bye-laws provided that the membership was open to all officers of Government, serving or retired, residing or intending to reside in Kanpur who owned no houses or land and were not members of any other Housing Society in that City and certain others mentioned in it with the permission of the Registrar. Bye-law 5 stated that the membership of the society should consist of (a) those who joined the application for registration and (b) those who were subsequently elected as members according to the bye-laws. The appellant, who was the Regional Director in the National Productivity Council at Kanpur and who was also a signatory to the application for registration of the Society was refused allotment of a plot on the ground that he had not produced a certificate from the concerned Government Department to the effect that he was a Gazetted officer. The Deputy Registrar affirmed the order of refusal and without deciding whether the appellant was

REGISTRATION

3. The Registrar.—The *[State] Government may appoint a person to be Registrar of Co-operative Societies for the *[State] or any portion of it and may appoint persons to assist such Registrar, and may, by general or special order, confer on any such persons all or any of the powers of a Registrar under this Act.

[°] Substituted for "Provincial" by A. L. O., 1950 (26-1-1950).

Section 2 — Note 1 (contd.)

a signatory, proceeded on the basis that though he be a signatory he should still fulfil the requirements of Bye-law 4.

Held, that the appellant would be a member of the Society if he had joined the application for registration and he need not fulfil the qualifications mentioned in bye-law in such event. Bye-law 4 was relevant only for the purpose of Clause (b) of bye-law i.e., for the purpose of determining who could be subsequently elected as members. The question if he had signed the application for registration had to be gone into by the Deputy Registrar to whom the matter was sent back. 1969 All LJ 652.

2. Clause (d) — "Officer." — (1) Treasurer of a Co-operative Bank is one of the officers of the Bank under Section 2 (d). AIR 1946 Nag 16 (19) = ILR (1945) Nag 677 (DB).

(2) The legal adviser of a society is an officer of the society but a mere vakil of society is not. AIR 1933 Mad 682 (684, 685) = 56 Mad 970 (DB).

(3) An accountant is not an officer within the meaning of Section 2 (d) in the absence of any rules framed by the Provincial Government under Sec. 43 (2) (g) empowering him to give directions in regard to the business of the society. AIR 1945 Nag 183 (184) = ILR (1945) Nag 457.

(4) An Inspector of Co-operative Societies is not excluded from the definition of officer. (1937) 65 Cal L Jour 206 (208).

(5) A liquidator appointed by the Registrar of Co-operative Societies is not an officer under Section 2. AIR 1957 All 492 (494).

(6) Services of director to be gratuitous under bye-law of society — Secretary to be paid portion of yearly profit as honorarium under another bye-law — Director acting as secretary is entitled to honorarium. AIR 1937 Mad 379 (381).

(7) It is noteworthy that Clause (d) of Section 2 says that an officer 'includes' a chairman and so on and not that it 'means' a chairman. There is a difference between 'includes' and 'means'. The first is ordinarily illustrative, the second exhaustive. Thus the categories enumerated in this clause are not exhaustive. AIR 1960 All 289 (289).

(8) Shop Manager appointed by Co-operative society is officer. AIR 1960 All 289 (290) ** AIR 1960 All 294 (295) = 1960 All LJ 20 (DB). (Overruled on another point in AIR 1966 All 12 (FB).)

(9) A person whose status in a Co-operative Society was found to be an independent payment Contractor is not an 'officer' entitled to Rule 115 of the Co-operative Societies Rules (1936). AIR 1960 All 500 (503) (DB).

3. Clause (e).— (1) Registered co-operative society — Not a displaced person within the meaning of Sec. 2 (10) of the Displaced Persons (Debt Adjustments) Act (1951). AIR 1961 Raj 233 (235) = 1961 Raj LW 233

(2) Co-operative society registered under Co-operative Societies Act, 1912 — Included within definition of State in Article 12 — Amenable to writ jurisdiction — Not competent to order suspension of employee pending inquiry if not provided by a bye-law — Suspension order with retrospective effect is illegal. AIR 1961 Madh Pra 289 (291) = 1961 MPLJ 1059 (DB).

Section 3 — Note 1

(1) Notification issued by State Government prior to introduction of Sec. 11 (4) and (5), conferring on Deputy Registrar all powers of Registrar under Section 11 — Orders issued under Section 11 (4) and (5) by Deputy Registrar after amendment are valid in law. AIR 1958 Bom 330 (331) = ILR (1958) Bom 1047.

(2) Rules framed by Government of C. P. and Berar under Section 43 — Notification of Government conferring powers of Registrar under rules on Senior Deputy Registrar — There being two Deputy Registrars senior and junior — Award signed by "Deputy Registrar" — Person making award to be presumed Senior Deputy Registrar — Award is valid. AIR 1949 Nag 398 (399) = ILR (1949) Nag 708.

(3) Section 3 of the Co-operative Societies Act, 1912, spoke of the conferment of powers of the Registrar under the Act only and not under the bye-laws framed under Section 43 (2) (c) of the Act. Bye-laws made under Section 43 (2) (c) were quite different from the Rules made under the Act

4. Societies which may be registered.—Subject to the provisions hereinafter contained, a society which has as its object the promotion of the economic interests of its members in accordance with co-operative principles, or a society established with the object of facilitating the operations of such a society, may be registered under this Act with or without limited liability:

Provided that unless the *[State] Government by general or special order otherwise directs—

- (1) the liability of a society of which a member is a registered society shall be limited;
- (2) the liability of a society of which the object is the creation of funds to be lent to its members, and of which the majority of the members are agriculturists, and of which no member is a registered society, shall be unlimited.

[*] Substituted for "Provincial" by A. L. O., 1950 (26-1-1950).

5. Restrictions on interest of member of society with limited liability and a share capital.—Where the liability of the members of a society is limited by shares, no member other than a registered society shall—

- (a) hold more than such portion of the share capital of the society, subject to a maximum of one-fifth, as may be prescribed by the rules; or
- (b) have or claim any interest in the shares of the society exceeding one thousand rupees.

6. Conditions of registration.—(1) No society, other than a society of which a member is a registered society, shall be registered under this Act which does not consist of at least ten persons* above the age of eighteen years and, where the object of the society is the creation of funds to be lent to its members, unless such persons—

- (a) reside in the same town or village or in the same group of villages; or,
- (b) save where the Registrar otherwise directs, are members of the same tribe, class, caste or occupation.

(2) The word "limited" shall be last word in the name of every society with limited liability registered under this Act.

[*] See Section 40.

7. Power of Registrar to decide certain questions.—When any question arises whether for the purposes of this Act a person is an agriculturist or a non-agriculturist, or whether any person is a resident in a town or village or group of villages, or whether two or more villages shall be considered to form a group, or whether any person belongs to any particular tribe, class, caste or occupation, the question shall be decided by the Registrar, whose decision shall be final.

8. Application for registration.—(1) For purposes of registration an application to register shall be made to the Registrar.

(2) The application shall be signed—

- (a) in the case of a society of which no member is a registered society, by at least ten persons qualified in accordance with the requirements of S. 6, sub-section (1); and

Section 3 — Note 1 (contd.)

and were not part of the Act. Hence the investment of the Joint Registrar by the Government with all the powers of the Registrar under the Act by the notification under Section 3 could not make the approval given by the Joint Registrar to the resolution of the Managing Committee a valid approval under the bye-law. The resolution in pursuance of which the petitioner was dismissed must, therefore, be held to be illegal. AIR 1960 Madh Pra 273 (275,

276, 277) = 1960 MPLJ 433 = 1960 MPC 163 = ILR (1959) Madh Pra 840.

Section 5 — Note 1

(1) 'Society with limited liability' in sub-Rule (3) under Section 85, Punjab Co-operative Societies Act (25 of 1961) — Meaning — Expression covers even societies having no share capital, but where members undertake to pay only a fixed sum in the event of the society being wound up. (1967) 69 Pun LR 164 = ILR (1967) 2 Punj 338.

(b) in the case of a society of which a member is a registered society, by a duly authorised person on behalf of every such registered society, and where all the members of the society are not registered societies, by ten other members or, when there are less than ten other members, by all of them.

(3) The application shall be accompanied by a copy of the proposed by-laws of the society, and the persons by whom or on whose behalf such application is made shall furnish such information in regard to the society as the Registrar may require.

9. **Registration.**—If the Registrar is satisfied that a society has complied with the provisions of this Act and the rules and that its proposed by-laws are not contrary to the Act or to the rules, he may, if he thinks fit, register the society and its by-laws.

10. **Evidence of registration.**—A certificate of registration signed by the Registrar shall be conclusive evidence that the society therein mentioned is duly registered unless it is proved that the registration of the society, has been cancelled.

11. **Amendment of the by-laws of a registered society.**—(1) No amendment of the by-laws of a registered society shall be valid until the same has been registered under this Act, for which purpose a copy of the amendment shall be forwarded to the Registrar.

(2) If the Registrar is satisfied that any amendment of the by-laws is not contrary to this Act or to the rules, he may, if he thinks fit, register the amendment.

(3) When the Registrar registers an amendment of the by-laws of a registered society, he shall issue to the society a copy of the amendment certified by him, which shall be conclusive evidence that the same is duly registered.

RIGHTS AND LIABILITIES OF MEMBERS

12. **Member not to exercise rights till due payment made.**—No member of a registered society shall exercise the rights of a member unless or until he has made such payment to the society in respect of membership or acquired such interest in the society, as may be prescribed by the rules or by-laws.

13. **Votes of members.**—(1) Where the liability of the members of a registered society is not limited by shares, each member shall, notwithstanding the amount of his interest in the capital, have one vote only as a member in the affairs of the society.

Section 11 — Note 1

(1) When an amendment of the bye-law is within the power of the society but had been irregularly made, the certificate of the Registrar is conclusive and the validity of the bye-law cannot be questioned on the ground of the irregularities. AIR 1954 Mad 955 (959).

(2) What is contemplated under the Act is that after the failure of the society to carry out the orders of the Registrar under Section 11 (4) as amended by C. P. and Berar Co-operative Societies (Amendment) Act, 1949, there should be an exchange of views between the Registrar and the society before a final action is taken under sub-section (5) of Section 11. The failure of the Registrar to give an opportunity to the Society to explain its point of view for rejecting certain pro-

posed amendments to the bye-laws under Section 11 (4) vitiates his order under Section 11 (5). AIR 1958 Bom 330 (331) = ILR (1958) Bom 1047.

Section 12 — Note 1

(1) The disqualification under Sec. 12 attaches not only to non-payment in respect of membership but also to other defaults as may be prescribed by the rules or bye-laws, which may prevent his acquiring an interest as a member. The term 'default' is not restricted or qualified in R. 14-A of the M. P. Rules and is, therefore, wide enough to cover the case of non-payment of the sum due to the society for purchases, provided the period covered by the default exceeds twelve months. AIR 1954 Nag 203 (204) = ILR (1954) Nag 76 (DB).

(2) Where the liability of the members of a registered society is limited by shares, each member shall have as many votes as may be prescribed by the by-laws.

(3) A registered society which has invested any part of its funds in the shares of any other registered society may appoint as its proxy, for the purpose of voting in the affairs of such other registered society, any one of its members.

14. Restrictions on transfer of share or interest.—(1) The transfer or charge of the share or interest of a member in the capital of a registered society shall be subject to such conditions as to maximum holding as may be prescribed by this Act or by the rules.

(2) In case of a society registered with unlimited liability a member shall not transfer any share held by him or his interest in the capital of the society or any part thereof unless—

- (a) he has held such share or interest for not less than one year; and
- (b) the transfer or charge is made to the society or to a member of the society.

DUTIES OF REGISTERED SOCIETIES

15. Address of societies.—Every registered society shall have an address, registered in accordance with the rules, to which all notices and communications may be sent, and shall send to the Registrar notice of every change thereof.

16. Copy of Act, rules and by-laws to be open to inspection.—Every registered society shall keep a copy of this Act and of the rules governing such society, and of its by-laws, open to inspection free of charge at all reasonable times at the registered address of the society.

17. Audit.—(1) The Registrar shall audit or cause to be audited by some person authorised by him by general or special order in writing in this behalf the accounts of every registered society once at least in every year.

(2) The audit under sub-section (1) shall include an examination of the assets and liabilities of the society.

(3) The Registrar, the Collector or any person authorised by general or special order in writing in this behalf by the Registrar shall at all times have access to all the books, accounts, papers and securities of a society, and every officer of the society shall furnish such information in regard to the transactions and working of the society as the person making such inspection may require.

PRIVILEGES OF REGISTERED SOCIETIES

18. Societies to be bodies corporate.—The registration of a society shall render it a body corporate by the name under which it is registered, with per-

Section 17 — Note 1

(1) Defalcation in co-operative Bank — Application under Rule 18 for award against members of managing committee — Registrar deciding to act as arbitrator — Objection on ground of official bias — Not upheld. **AIR 1961 SC 1743 (1745, 1746) = (1962) 2 SCR 433. (AIR 1956 Ajmer 63, Reversed.)**

(2) Audit notes prepared under section — There is no provision of law under which their contents could be presumed to be correct — Section 114, Evidence Act, cannot be invoked. **AIR 1970 Punj 203 (205).**

Section 18 — Note 1

(1) Under Section 6 (2) of the Co-operative Credit Societies Act, 1904, it was held that the chairman of a

society had no right to institute a suit against a member of the society in his own name, but that the suit should be one by the society itself. (1911) 10 Ind Cas 570 (570) (DB) (Cal).

(2) Section 18 makes the co-operative society a body corporate. It is a separate entity and not a branch of the Government, nor does the cancellation of the registration convert the assets of the society into the assets of the Government. **AIR 1957 All 492 (494).**

(3) When the suit in which the decree was obtained was a suit against a Co-operative Loan Society, with unlimited liability and against the Secretary, the Chairman and two members

petual succession and a common seal, and with power to hold property, to enter into contracts, to institute and defend suits and other legal proceedings and to do all things necessary for the purposes of its constitution.

19. Prior claim of society.—Subject to any prior claim of the *[Govern-ment] in respect of land-revenue or any money recoverable as land-revenue or of a landlord in respect of rent or any money recoverable as rent, a registered society shall be entitled in priority to other creditors to enforce any outstanding demand due to the society from a member or past member—

- (a) in respect of the supply of seed or manure or of the loan of money for the purchase of seed or manure—upon the crops or other agricultural produce of such member or person at any time within eighteen months from the date of such supply or loan;
- (b) in respect of the supply of cattle, fodder for cattle, agricultural or industrial implements or machinery, or raw materials for manufacture, or of the loan of money for the purchase of any of the foregoing things—upon any such things so supplied, or purchased in whole or in part from any such loan, or on any articles manufactured from raw materials so supplied or purchased.

[*] Substituted for "Crown" by A.L.O. 1950, (26-1-1950).

20. Charge and set-off in respect of shares or interest of member.—A registered society shall have a charge upon the share or interest in the capital and on the deposits of a member or past member and upon any dividend, bonus or profits payable to a member or past member in respect of any debt due from such member or past member to the society, and may set-off any sum credited

Section 18 — Note 1 (contd.)

who signed the bond in respect of the money lent by the plaintiff in the suit held that the suit was clearly wrongly constituted as the Co-operative Society alone should have been sued. AIR 1925 Cal 203 (203) (DB).

(4) A decree against a Co-operative Society as a corporate body cannot be executed against a share-holder or member in his individual capacity. AIR 1934 Mad 181 (182, 183) (DB).

(5) A village Society on registration under Section 18 becomes a body corporate and a creditor who has obtained an award under the Act against the Society is not entitled to execute the award against any individual member of the same but only against the Society and its assets. AIR 1931 Pat 321 (323) = 11 Pat 174 (FB) ** (1950) 54 Cal WN (2 DR) 256 (261).

(6) A co-operative society is a legal person and its debts are distinct from liability of its members and they can be reached in winding up proceedings only. (1937) 20 Nag L Jour 6 (8) (DB).

(7) If a corporate body is not registered with limited liability, the members are liable to the full amount of the corporation's debts, but the liability, however, is a liability to contribute with others and such liability can only be enforced upon the winding up and no execution can proceed against a member. AIR 1931 Pat 321 (323) = 11 Pat 174 (FB).

(8) The liability of a co-operative society duly registered cannot be

equated to the liability of the members of its managing committee. Nor are the members of the managing committee competent to represent the co-operative society. A suit filed against the members of managing committee of a co-operative society in respect of amounts due from the society is not maintainable when the society is not made a party. AIR 1961 Ker 258 (258, 259) = 1960 Ker LT 1288.

Section 19 — Note 1

(1) Where the money is due to the District Co-operative Bank from a Co-operative Society on account of loans having been advanced by the former to the latter, Section 19, Co-operative Societies Act, has no application. AIR 1940 All 188 (188, 189) = ILR (1940) All 181 (DB).

(2) Fat intended to be purchased and sold at profit and not for purpose of manufacturing some other commodity is not "raw material." AIR 1917 Lah 81 (82).

(3) Musical instruments are not industrial "implements or machinery" within the meaning of the section. AIR 1917 Upp Bur 4 (5) = 2 Upp Bur Rul 133.

Section 20 — Note 1

(1) Under Section 73, Civil P. C., a Co-operative Society cannot enforce a charge under Section 19 unless there is a decree or charge under Section 20 of the Act. AIR 1915 Cal 197 (197) = 42 Cal 377 (DB).

or payable to a member or past member in or towards payment of any such debt.

21. Shares or interest not liable to attachment.—Subject to the provisions of Section 20, the share or interest of a member in the capital of a registered society shall not be liable to attachment or sale under any decree or order of a Court of Justice in respect of any debt or liability incurred by such member, and neither the Official Assignee under the Presidency-towns Insolvency Act, 1909, nor a Receiver under the *Provincial Insolvency Act, 1907, shall be entitled to or have any claim on such share or interest.

[*] See now the Provincial Insolvency Act, 1920 (5 of 1920).

22. Transfer of interest on death of member.—(1) On the death of a member a registered society may transfer the share or interest of the deceased member to the person nominated in accordance with the rules made in this behalf, or, if there is no person so nominated, to such person as may appear to the committee to be the heir or legal representative of the deceased member, or pay to such nominee, heir or legal representative, as the case may be, a sum representing the value of such member's share or interest, as ascertained in accordance with the rules or by-laws:

Provided that—

- (i) in the case of a society with unlimited liability, such nominee, heir or legal representative, as the case may be, may require payment by the society of the value of the share or interest of the deceased member ascertained as aforesaid;
- (ii) in the case of a society with limited liability, the society shall transfer the share or interest of the deceased member to such nominee, heir or legal representative, as the case may be, being qualified in accordance with the rules and bye-laws for membership of the society, or on his application within one month of the death of the deceased member to any person specified in the application who is so qualified.

(2) A registered society may pay all other moneys due to the deceased member from the society to such nominee, heir or legal representative, as the case may be.

(3) All transfers and payments made by a registered society in accordance with the provisions of this section shall be valid and effectual against any demand made upon the society by any other person.

23. Liability of past member.—The liability of a past member for the debts of a registered society as they existed at the time when he ceased to be a mem-

Section 21 — Note 1

(1) Shares of member in Co-operative Society attached — Co-operative Society has locus standi to object to attachment. AIR 1939 Lah 305 (306).

(2) Society keeping postal life policy of member as security for loan advanced — After death of member society recovering policy amount — Surplus left after adjusting debt due is not exempt from attachment. AIR 1945 Mad 507 (508).

(3) A person does not cease to be a member of the society by his adjudication as insolvent. AIR 1939 Lah 275 (275).

Section 22 — Note 1

(1) Bye-law 17 (b) of a Society which provided that "on the death of a

share-holder, his shares may be transferred to his heir or nominee if he or she is eligible for membership and is duly elected as such," held, was ultra vires and hence on the death of a member his share or interest could be transferred to his legal representative though he was not elected as a member. AIR 1934 Cal 537 (541) (DB).

Section 23 — Note 1

(1) Inasmuch as no member can be called upon to contribute to the debts of the Society until liquidation, Sec. 23 of the Act applies only to members who cease to be members before liquidation. AIR 1946 Nag 317 (318) = ILR (1946) Nag 474.

(2) The words "the debts of a registered society as they existed at

shall continue for a period of two years from the date of his ceasing to be a member.

24. Liability of the estates of deceased members.—The estate of a deceased member shall be liable for a period of one year from the time of his decease for the debts of a registered society as they existed at the time of his decease.

25. Register of members.—Any register or list of members or shares kept by any registered society shall be prima facie evidence of any of the following particulars entered therein:

(a) the date at which the name of any person was entered in such register or list as a member;

(b) the date at which any such person ceased to be a member.

26. Proof of entries in societies' books.—A copy of any entry in a book of a registered society regularly kept in the course of business, shall, if certified in

Section 23 — Note 1 (contd.)

the time when he ceased to be a member" in Sec. 23 refer to the debts due from the Society to third persons and it is with regard to these debts that the liability of a past member has been confined in the section to a period of two years from the date of his ceasing to be a member and no further. The debts referred to in the section have no reference whatever to the debts of the outgoing members due to the Society itself. AIR 1941 Oudh 315 (317) = 16 Luck 658 (DB) ** AIR 1937 Lah 931 (932) = ILR (1937) Lah 649 (DB) ** AIR 1935 Lah 947 (947).

(3) A person claiming not to be a past member within the meaning of Section 23 has a right to have his claim investigated by a civil Court. AIR 1937 Lah 912 (913).

(4) The period of two years mentioned in Section 23 is to run backwards not from the date on which the award of the liquidator is made but from the date of the dissolution of the Society, that is, the date on which its registration was cancelled. AIR 1941 Lah 284 (286) = ILR (1942) Lah 379 (DB).

(5) No doubt Section 23 limits the liability of a past member for the debts of the registered society, but there is no limitation either in the Act or in the rules under the Act for a debt of a past member due to a registered society. AIR 1935 Lah 947 (947).

(6) Under Sections 23 and 24 the liquidator cannot award anything against the estate of a deceased or the past member. 41 Pun LR 269 (270).

(7) A member's liability to make good the debts of a society does not arise till liquidation. This liability of a member to contribute to the assets of a society, which arises on its liquidation and cannot be enforced by an order before realising its assets, is not extinguished if the process of realisation of the assets by the liquidator is

prolonged for one reason or another beyond two years of the cessation of membership. So, the crucial date to fix the liability of a member is the date of the order of liquidation, not the date of the order of contribution. AIR 1955 Nag 262 (264) = ILR (1956) Nag 51 (DB).

Section 24 — Note 1

(1) Section 24 is restricted to proceedings in liquidation under Section 42 of the Act. AIR 1925 Cal 203 (204) (DB).

(2) It does not matter whether a member dies before or after liquidation. His estate is liable for a year after his death, but only for the debts as they existed at the date of his death. AIR 1946 Nag 317 (318) = ILR (1946) Nag 474.

(3) Under Section 24 the estate of a deceased member which devolves by inheritance on his widow under the Hindu Women's Rights to Property Act, is liable to the same extent as it would have been had he been alive. AIR 1946 Nag 317 (318, 319) = ILR (1946) Nag 474.

(4) Under Section 24 the limitation of one year for a suit by the liquidator against the heirs of a deceased member in possession of his estate for contribution due from him, starts from the date of death of the member and not from the date of liquidation. AIR 1946 Nag 317 (318) = ILR (1946) Nag 474.

Section 25 — Note 1

(1) There is no authority to rectify the register of members and to eliminate the name of a person entered as a member and substitute another. AIR 1957 All 492 (494).

(2) Powers of the Registrar under Rule 45 — Power of the Society to consider applications for withdrawal of membership. (1967) 69 Pun LR 164 = ILR (1967) 2 Punj 338.

Section 26 — Note 1

(1) Section 26 does not abrogate Section 34, Evidence Act. It merely obvi-

27. Exemption from compulsory registration of instruments relating to shares and debentures of registered society.—Nothing in Section 17, sub-section (1), clauses (b) and (c), of the Indian Registration Act, 1908, shall apply to—

- *[28. Power to exempt from income-tax, stamp duty and registration fees.—(1)]
The †[Central Government], by notification‡ in the §[Official Gazette], may, in the case of any registered society or class of registered society, remit *†[*] the income-tax payable in respect of the profits of the society, or of the dividends or other payments received by the members of the society on account of profits,*†*‡.

*§[(2) The ††[Government], by notification in the †§[Official Gazette], may, in the case of any registered society or class of registered society, remit—

- ††[In this sub-section "Government" in relation to a stamp duty in respect of bills of exchange, cheques, promissory notes, bills of lading, letters of credit, policies of insurance, *††[transfer of shares, debentures], proxies and receipts, and in relation to any stamp duty falling within †††[Entry 96] in List I in the Seventh Schedule to ††§[the Constitution] means the Central Government, and save as aforesaid means the State Government.]

Section 26 — Note 1 (contd.)

against the interest of the maker. They can only be used for corroboration. The accounts of Co-operative Societies form no exemption to this rule. AIR 1946 Nag 317 (319) = ILR (1946) Nag 474.

(1) Co-operative Society investing fluid assets in Government securities as per Government orders — Such investment not being part of their business, interest on those securities is not profits and is, therefore, assessable under the Income-tax Act. AIR 1929 Mad 387 (389) = 52 Mad 640 (FB).

- [†] Substituted by A. O., 1937, for "Governor-General in Council".
- [†] For notifications under this section, see General Rules and Orders, Vol. 4, pp. 340-341.
- [§] Substituted by A. O. for "Gazette of India".
- [°†] The letter and brackets "(a)" were repealed by Act, 1920 (38 of 1920), S. 2 and Sch. I.
- [°†°†] In Bengal even though the rest of the Act is repealed, sub-sec. (1) of Sec. 28 is excepted—see Bengal Act (21 of 1940), S. 3 and Sch. I.
- [°††] Clauses (b) and (c) were repealed, *ibid*.
- [°§] Inserted by the Devolution Act, 1920 (38 of 1920), S. 2 and Sch. I.
- [††] Substituted by A. O. for "Local Government".
- [†§] Substituted by A. O., 1937, for "local official Gazette".
- [†§] In Bengal and Assam even though the rest of the Act is repealed, sub-sec. (2) of S. 28, so far as it relates to the stamp duties specified in this paragraph is excepted—see Bengal Act (21 of 1940), S. 3 and Sch. I and Assam Act (1 of 1950), S. 101 and Sch.
- [††] Inserted by A. O., 1937.
- [°††] Inserted by A. L. O., 1950.
- [†††] Substituted for "Item 59", *ibid*.
- [††§] Substituted for "the Government of India Act, 1935", *ibid*.

Property and funds of registered societies.

29. Restrictions on loans.—(1) A registered society shall not make a loan to any person other than a member:

Provided that, with the general or special sanction of the Registrar, a registered society may make loans to another registered society.

(2) Save with the sanction of the Registrar, a society with unlimited liability shall not lend money on the security of moveable property.

(3) The °[State Government] may, by general or special order, prohibit or restrict the lending of money on mortgage of immovable property by any registered society or class of registered societies.

[°] Substituted for "Provincial" by A. L. O., 1950 (26-1-1950).

30. Restrictions on borrowing.—A registered society shall receive deposits and loans from persons who are not members only to such extent and under such conditions as may be prescribed by the rules or by-laws.

31. Restrictions on other transactions with non-members.—Save as provided in Sections 29 and 30, the transactions of a registered society with persons other than members shall be subject to such prohibitions and restrictions, if any, as the °[State] Government may, by rules, prescribe.

[°] Substituted for "Provincial" by A. L. O., 1950 (26-1-1950).

Section 29 — Note 1

(1) A contract by a Co-operative Credit Society to lend money to a non-member is illegal and cannot be enforced, but if the society pays moneys on the basis of such contract it can be recovered on the principle that the obligee at the time of taking the money made an implied contract to repay. AIR 1929 Lah 330 (331) (DB).

(2) Where a Co-operative Society advances a loan before its registration and subsequent to its registration the debtor acquiesces in the registration and makes payments towards the principal and interest, it must be inferred that the debtor agreed that the transaction entered into by him with the society before its registration should

be binding upon him and the society after its registration. AIR 1940 Rang 145 (146) = 1940 Rang LR 77.

(3) A bye-law of a Co-operative Society to the effect that the Society shall not sell goods on credit to a non-member cannot have the force of law, but can be regarded only as a domestic matter and it cannot be brought in defence of him for recovery of balance standing against him. AIR 1926 Nag 463 (464).

(4) Where a society registered under the Act constructs a house for its member under the bye-law framed under Section 8 (3), the transaction does not amount to a loan. AIR 1938 Lah 8 (10) (DB).

32. Investment of funds.—(1) A registered society may invest or deposit its funds—

- (a) in the Government Savings Bank, or
- (b) in any of the securities specified in Section 20 of the Indian Trusts Act, 1882, or
- (c) in the shares or on the security of any other registered society, or
- (d) with any bank or person carrying on the business of banking approved for this purpose by the Registrar, or
- (e) in any other mode permitted by the rules.

(2) Any investments or deposits made before the commencement of this Act which would have been valid if this Act had been in force are hereby ratified and confirmed.

33. Funds not to be divided by way of profit.—No part of the funds of a registered society shall be divided by way of bonus or dividend or otherwise among its members:

Provided that after at least one-fourth of the net profits in any year have been carried to a reserve fund, payments from the remainder of such profits and from any profits of past years available for distribution may be made among the members to such extent and under such conditions as may be prescribed by the rules or by-laws:

Provided also that in the case of a society with unlimited liability no distribution of profits shall be made without the general or special order of the **[State]* Government in this behalf.

[*] Substituted for "Provincial" by A. L. O., 1950 (26-1-1950).

34. Contribution to charitable purpose.—Any registered society may, with the sanction of the Registrar, after one-fourth of the net profits in any year has been carried to a reserve fund, contribute an amount not exceeding ten per cent of the remaining net profits to any charitable purpose, as defined* in Section 2 of the Charitable Endowments Act, 1890.

[*] Section 2 of the Charitable Endowments Act, 1890 (VI of 1890), is as follows:—

"2. In this Act, 'charitable purpose' includes relief of the poor, education, medical relief and the advancement of any other object of general public utility, but does not include a purpose which relates exclusively to religious teaching or worship."

Inspection of affairs

35. Inquiry by Registrar.—(1) The Registrar may of his own motion, and shall on the request of the Collector, or on the application of a majority of the

Section 33 — Note 1

(1) Where prima facie there has been no breach of any provision of the Co-operative Societies Act itself or any of its bye-laws, by a resolution passed at an annual general meeting of the share-holders of a co-operative society declaring payment of certain dividend on the preference shares such a resolution is not ultra vires, although it may be that the profits shown are apparent and not real profits, a considerable portion of them being unrealized interest income. AIR 1938 Cal 394 (397) = ILR (1938) 2 Cal 144.

Section 35 — Note 1

(1) The Registrar under the Co-operative Societies Act is given certain powers of general supervision over the

Societies and he has power to hold enquiry in the constitution, working and financial condition of the society. But this power can only be exercised where the entire working of the Society is defective and it is given to protect the interests of the shareholders. AIR 1956 All 43 (45).

(2) The Registrar has no power to interfere in the day to day administration of the Society. The Registrar cannot be deemed to be the head of the Co-operative Society and he should not be deemed to have power to interfere in the matters of appointments and dismissals of its employees. The State Government has still less power to do anything in the matter. AIR 1956 All 43 (45).

committee, or of not less than one-third of the members, hold an inquiry or direct some person authorised by him by order in writing in this behalf to hold an inquiry into the constitution, working and financial condition of a registered society.

(2) All officers and members of the society shall furnish such information in regard to the affairs of the society as the Registrar or the person authorised by the Registrar may require.

36. Inspection of books of indebted society.—(1) The Registrar shall, on the application of a creditor of a registered society, inspect or direct some person authorized by him by order in writing in this behalf to inspect the books of the society:

Provided that—

(a) the applicant satisfies the Registrar that the debt is a sum then due, and that he has demanded payment thereof and has not received satisfaction within a reasonable time; and

(b) the applicant deposits with the Registrar such sum as security for the costs of the proposed inspection as the Registrar may require.

(2) The Registrar shall communicate the result of any such inspection to the creditor.

37. Costs of inquiry.—Where an inquiry is held under Section 35, or an inspection is made under Section 36, the Registrar may apportion the costs, or such part of the costs as he may think right, between the society, the members or creditor demanding an inquiry or inspection, and the officers or former officers of the society.

38. Recovery of costs.—Any sum awarded by way of costs under Section 37 may be recovered, on application to a Magistrate having jurisdiction in the place where the person from whom the money is claimable actually and voluntarily resides or carries on business, by the distress and sale of any moveable property within the limits of the jurisdiction of such Magistrate belonging to such person.

Dissolution of society

39. Dissolution.—(1) If the Registrar, after an inquiry has been held under Section 35 or after an inspection has been made under Section 36 or on receipt of an application made by three-fourths of the members of a registered society, is of opinion that the society ought to be dissolved, he may cancel the registration of the society.

(2) Any member of a society may, within two months from the date of an order made under sub-section (1), appeal from such order.

(3) Where no appeal is presented within two months from the making of an order cancelling the registration of a society, the order shall take effect on the expiry of that period.

(4) Where an appeal is presented within two months, the order shall not take effect until it is confirmed by the appellate authority.

(5) The authority to which appeals under this section shall lie shall be the * [State] Government:

Provided that the * [State] Government may, by notification in the * [Official Gazette] direct that appeals shall lie to such Revenue authority as may be specified in the notification.

[*] Substituted for "Provincial" by A. L. O., 1950 (26-1-1950).

40. Cancellation of registration of society.—Where it is a condition of the registration of a society that it should consist of at least ten members, the Regis-

Section 39 — Note 1

(1) For the purposes of Section 4, 1912, shall be deemed to die when it is dissolved; see Securities Act, 1920, Section 4(4).
Securities Act, 1920 a body incorporated under the Co-operative Societies Act,

trar may, by order in writing, cancel the registration of the society if at any time it is proved to his satisfaction that the number of the members has been reduced to less than ten.

41. Effect of cancellation of registration.—Where the registration of a society is cancelled, the society shall cease to exist as a corporate body—

- (a) in the case of cancellation in accordance with the provisions of Section 39, from the date the order of cancellation takes effect.
- (b) in the case of cancellation in accordance with the provisions of Section 40, from the date of the order.

42. Winding up.—(1) Where the registration of a society is cancelled under Section 39 or Section 40, the Registrar may appoint a competent person to be liquidator of the society.

(2) A liquidator appointed under sub-section (1) shall have power—

- (a) to institute and defend suits and other legal proceedings on behalf of the society by his name of office;
- (b) to determine the contribution to be made by the members and past members of the society respectively to the assets of the society;
- (c) to investigate all claims against the society and subject to the provisions of this Act, to decide questions of priority arising between claimants;
- (d) to determine by what persons and in what proportions the costs of the liquidation are to be borne; and
- (e) to give such directions in regard to the collection and distribution of the assets of the society, as may appear to him to be necessary for winding up the affairs of the society.

SECTION 42 — SYNOPSIS

1. Scope.

2. Appointment of liquidator.

3. Sub-section (2) — Powers of liquidator.

4. Contribution by members.

4-A. Sub-section (4-A) (as inserted by U. P. Act (3 of 1919)).

5. Costs of litigation.

6. "Direction in regard to collection."

7. Sub-section (3) — Evidence.

8. Sub-section (5) — Enforcement of order.

9. Sub-section (6) — Jurisdiction of Civil Court.

1. Scope. — (1) Co-operative Society is a legal person — Its debts are distinct from members' liability — Members can be reached by corporation's creditors only in winding up proceedings. AIR 1938 Nag 434 (436) = ILR (1938) Nag 604 (DB).

(2) Even though the members of a co-operative credit society are subject to a statutory liability to contribute to the debts of the society, that liability can only be enforced by the procedure of winding up contained in the Act and not directly by a suit of the creditor. AIR 1933 Bom 191 (194) = 57 Bom 319 (DB).

(3) Section 42 deals separately with contributions to be made by the members etc., with costs of liquidation and

with collection and distribution of assets of a society. AIR 1954 All 646 (647).

2. Appointment of liquidator. — (1) When the Registrar appointed as liquidator the holder of a particular office, and subsequently another person was appointed to that office, the contention that the second individual is not appointed as liquidator under Section 42 (1) cannot prevail in view of General Clauses Act, Section 15. AIR 1955 Nag 262 (264) = ILR (1956) Nag 51 (DB).

(2) Paid manager of Co-operative Bank appointed liquidator — His duties are quasi-judicial and he is public officer as defined in Section 2 (17), Civil P. C., and requires notice under Section 80 of Code. AIR 1939 Nag 232 (233) ** AIR 1942 Lah 287 (288) = ILR (1943) Lah 389 (DB).

(3) Where according to the order of the Registrar the chief group officer of the Central Bank was appointed to act as liquidator and at the time of passing the order A was the Chief Group Officer and after A ceasing to be such officer B was appointed in his place as Chief Group Officer, it was held that the objection that B himself was not appointed the liquidator under Section 42 (1) could not prevail in view of Section 15 of the General Clauses Act. AIR 1955 Nag 262 (264) = ILR (1956) Nag 51 (DB).

3. Sub-section (2) — Powers of liquidator. — (1) A person cannot be pro-

(3) Subject to any rules, a liquidator appointed under this section shall, in so far as such powers are necessary for carrying out the purposes of this section, have power to summon and enforce the attendance of witnesses and to compel the production of documents by the same means and (so far as may be) in the same manner as is provided in the case of a Civil Court under the Code of Civil Procedure, 1908.

(4) Where an appeal from any order made by a liquidator under this section is provided for by the rules, it shall lie to the Court of the District Judge.

(5) Orders made under this section shall, on application, be enforced as follows:—

(a) when made by a liquidator, by any Civil Court having local jurisdiction in the same manner as a decree of such Court;

(b) when made by the Court of the District Judge on appeal, in the same manner as a decree of such Court made in any suit pending therein.

(6) Save in so far as is hereinbefore expressly provided, no Civil Court shall have any jurisdiction in respect of any matter connected with the dissolution of a registered society under this Act.

Section 42 — Note 3 (contd.)

ceeded against by the liquidator in a summary manner under Section 42 (2) (b) as a debtor to the society but as a member contributing to the assets of the society. AIR 1937 Lah 931 (932, 933) = ILR (1937) Lah 649 (DB).

(2) While deciding the matter of contribution under S. 42 (2) the liquidator has jurisdiction to decide whether the liability of the past member has ceased under S. 23. AIR 1935 Lah 330 (331).

(3) Liquidator cannot order that debtors are jointly and severally liable for each other's mortgage but may determine contribution to be made by several debtors to meet debts. AIR 1918 All 419 (420) = 40 All 89 (DB).

(4) Liquidator's order without notice to party against whom it is made is without jurisdiction and a nullity. AIR 1942 Lah 237 (240) = ILR (1943) Lah 553 (DB) ** AIR 1955 Nag 262 (264, 265) = ILR (1956) Nag 51 (DB) ** AIR 1954 Punj 268 (269) = ILR (1955) Punj 496.

(5) The power conferred on the liquidator under Section 42 (2) (b) is not an executive or an administrative power. The order passed by him thereunder is a judicial or at any rate a quasi-judicial act, and, therefore, a party is not to suffer in person or in purse without an opportunity of being heard. AIR 1955 Nag 262 (264) = ILR (1956) Nag 51 (DB) ** (1954) 20 Cut L Tim 729 (732) (DB).

(6) The notice by the Registrar is not contemplated by the statute or the rules and the power given to him is of a limited nature more in the nature of a revising authority who can approve, modify or order further enquiry. The notice sent by him is therefore contrary to law and is ineffectual. AIR 1954 Punj 268 (270) = ILR (1955) Punj 496.

(7) Collection and distribution of assets — Only liquidator can collect assets of society from its members and distribute them rateably among creditors. AIR 1938 Nag 434 (439) = ILR (1938) Nag 604 (DB).

(8) Clause (e) of Section 42 (2) merely prescribes the administrative procedure for the manner in which the collection and distribution of the assets of the Society in winding up may be made. To give direction in regard to the collection and distribution of the assets of the Society does not empower to adjudicate upon disputes between the Society and others. AIR 1959 All 733 (736).

(9) Where a liquidator makes an assessment on a person, who is not a member, or has ceased to be a member for over two years before the dissolution of the society, or whose liability to contribute had otherwise been extinguished by operation of law, he acts in excess of his jurisdiction and his order is a nullity and, therefore, incapable of execution. AIR 1942 Lah 237 (239) = ILR (1943) Lah 553 (DB).

(10) Under Section 42 (2) (b) there is no power given to the liquidator to say that a member of a co-operative society is merely a benamidar. AIR 1957 All 492 (494).

(11) Where a liquidator passed a contributory order in respect of shares held by minor members and by the deceased members against the plaintiff who was also a member of a mill dissolved under the Act, it was held that the liquidator in making a contributory order in respect of the minor members acted beyond his jurisdiction. AIR 1957 All 492 (494).

(12) Though the liquidator is given certain powers which a Court has under the Civil Procedure Code, these are very limited powers and he does

Section 42 — Note 3 (contd.)

not act as a Court of law. The orders under Section 42 are in the nature of quasi-administrative orders. The liquidator is not included in the definition of "officers". The duty that he performs is a duty of private character and not a public duty. Section 80, Civil P. C., is not therefore attracted in his case. AIR 1957 All 492 (494).

(13) The claim to recover amounts on requisition being made by the Registrar, Co-operative Societies, can only be realisable under the U. P. Land Revenue Act, 1951, if the Registrar could ask for it under Section 42 (a), Co-operative Societies Act and that depends upon whether the sum could be properly ordered to be recovered as a contribution under Section 42 (2) (b). If the liquidator could not make such order that order could not be sent to the Collector, nor could the Collector realise anything under that order. AIR 1957 All 492 (495).

(14) The defendant had executed a mortgage in favour of a co-operative credit society. The society having gone in liquidation the liquidator passed a contributory order directing the defendant to pay the mortgage debt with interest. It was held that Clause (f) of Section 42 (2) added by C. P. and Berar Co-operative Societies Amendment and Liquidators' Orders Validation Act, 1945, was retrospective in operation and the order passed by the liquidator was in substance order under Clause (f) and as such was a valid order. AIR 1953 Nag 230 (230, 231) = ILR (1952) Nag 680 (DB).

(15) Provision in Section 42 (2) (f) (M. P. Amendment) includes the power to apply to the civil court to execute the order passed by the liquidator. AIR 1953 Nag 230 (231) = ILR (1952) Nag 680 (DB).

4. Contribution by members. — (1) Member means member at the date of dissolution of society. AIR 1939 Lah 275 (275).

(2) "Past member" means past member, liable for debts under S 23. AIR 1937 Lah 912 (912).

(3) "Past member" means person, who is alive at all material times, but who has ceased to be member of society, otherwise than by death. AIR 1946 Nag 317 (318) = ILR (1946) Nag 474.

(4) When the question is whether liability of past member is subsisting at the date of dissolution in winding up of society, the crucial date is the date of dissolution. AIR 1941 Lah 284 (286) = ILR (1942) Lah 379 (DB).

(5) The heirs of a Chairman of a Society, against whom a personal decree has been obtained cannot call in

the provisions of Section 24 as an answer to the claim of the decree-holder to execute the decree, as that section applies only to a proceeding in liquidation under Section 42. AIR 1925 Cal 203 (203, 204) (DB).

(6) Section 42 (2)(b) is limited to members or past members and has no application to claim for contribution against the heirs of a deceased member. In such a case, the liquidator's only remedy is by way of a civil suit. AIR 1946 Nag 317 (319) = ILR (1946) Nag 474.

(7) "Contribution" presupposes existing liability. AIR 1942 Lah 237 (239) = ILR (1943) Lah 553 (DB).

(8) When a contributory order is made it must be shown what the assets and liabilities are and whether there is a deficit which has got to be made up by contributions from members. AIR 1949 Nag 25 (28) = ILR (1948) Nag 216.

(9) No claim can be made for contribution either against a member, a past member or the estate of a deceased member until the assets and liabilities of the society are determined. If it can pay off its debts from existing assets no claim for contribution can be made. That is only a last resort when all else fails. AIR 1946 Nag 317 (319, 320) = ILR (1946) Nag 474.

(10) Section 42 (2) (b): Contributory order made before assets of society are ascertained is ultra vires. First, the assets of the individual debtors should be realized. The contributory order made before such realization is ultra vires and cannot be executed. 1941 Nag L Jour 412 (414) (DB).

(11) The amended Rule 43 (f) framed under Section 43 by Madhya Pradesh was not made retrospective either expressly or by implication. It was only enabling and hence it could not validate the orders declared ultra vires. Rule 43 (f) did not validate the contributory orders passed before the decision in 1941 NLJ 412 and declared null and void by that decision. AIR 1956 Nag 183 (185) = ILR (1956) Nag 38 (FB) ** ILR (1951) Nag 309 (312, 313).

(12) Clause (f) of Section 42 (2) covers only debts and liabilities but does not cover orders for contribution. Orders under Clause (b) of Section 42 (2) were not validated by C. P. and Berar Co-operative Societies Amendment and Liquidators' Orders Validation Act 10 of 1945. AIR 1956 Nag 183 (185) = ILR 1956 Nag 38 (FB).

(13) In Rule 43 (f) (M. P. rule) the insufficiency of the assets and realisations is a condition precedent to the passing of the contributory order. AIR 1956 Nag 183 (186) = ILR (1956) Nag 38 (FB).

Section 42 — Note 4 (contd.)

(14) When a member of a joint family became a member of society and took a loan for family necessity, but the family as such was not brought on the list of members of the society, other members of the family are not liable to make contribution. AIR 1931 Nag 48 (49).

(15) A member of a Co-operative Society who is adjudicated insolvent and discharged, is not released from his statutory liability to contribute to the assets of the Society on its dissolution, subsequent to the discharge. AIR 1949 Lah 167 (170) = Pak LR (1949) Lah 192 (DB).

(16) The liability of a member of co-operative society to contribute to the assets of the society in the event of its being dissolved before or during insolvency of the member is a debt provable in insolvency and therefore the liquidator should either prove it or have it excluded from the schedule under Section 33, Provincial Insolvency Act, 1920, if it came within the provisions of that section. Where he does not do so, the member's liability for such debt ceases on his being granted a complete discharge by the insolvency Court as expressly provided in Section 44 (2) of that Act. The liquidator, therefore, has no jurisdiction to assess the contribution of the insolvent as a member of the society under Section 42 (2) of this Act after his complete discharge. AIR 1942 Lah 237 (238) = ILR (1943) Lah 553 (DB).

(17) Member applying in insolvency after society has gone into liquidation and obtaining his discharge — Decree passed by liquidator under Section 42 (2) (b) cannot be executed against the insolvent even if the liquidator was competent to make a decree and the liability could not be challenged by the executing Court because it was a decree made by a competent Court, and the liability must be deemed to have disappeared by force of Section 42 (2), Provincial Insolvency Act. AIR 1941 Lah 314 (315).

(18) Where certain members of a society are adjudged insolvents, before the society is dissolved, and a liquidator is not appointed until after the discharge of the insolvents, the liability of the insolvents as members of the society is not provable under the terms of Section 34 (2), Provincial Insolvency Act. Under Section 42 (b), it is the liquidator alone who can ascertain and fix the liabilities of the members. Therefore, until a liquidator is appointed, it cannot be said that there is any debt or liability, certain or contingent, which can affect the members. The liquidator is not, therefore, debarred from fixing the liability of the insolvents as mem-

bers, under the provisions of the Provincial Insolvency Act. AIR 1939 Lah 275 (276).

(19) Order of liquidator under Section 42(2)(b) is not decree for money within meaning of Section 7 (iv-A), Court-fees Act (Madras Amendment)—Court-fee for suit for declaration that order is null and void is Rs. 100 under Schedule II, Art. 17-A (iii). AIR 1937 Mad 604 (605) = ILR (1938) Mad 63.

(20) The amounts due by a debtor to the society can be treated as assets of the society and not as contributions and hence they cannot be included in the contribution order. Further these amounts are not recoverable under sub-section (4A) (Allahabad amendment) of Section 42 as arrears of land revenue but can only be recovered by following the procedure laid down by Clause (a) of sub-section (5) of Section 42. AIR 1954 All 646 (647).

4-A. Sub-section (4-A) (as inserted by U. P. Act (3 of 1919)).— (1) The phrase 'contribution to the assets of Society' refers to the liability of members of the Society to contribute to its assets in the event of the winding up of the Society. The principle of contribution by present or past members to the assets of a Society in winding up has obviously been borrowed from the Company law. The members of a Society with limited liability are liable to contribute in the event of the winding up of the Society, to its assets subject to a maximum which is determined by the limit of the member's liability. AIR 1959 All 733 (735).

(2) Foundation of power to recover amount under Section 42 (4-A) wanting — Proceedings culminating in arrest of member are illegal and against Article 21 of Constitution. AIR 1959 All 733 (736).

(3) A member or a past member is not under any liability to contribute to the assets of the Society when his shares are fully paid up. AIR 1959 All 733 (736, 737).

5. Costs of litigation. — (1) The liquidator has the power to determine the costs of litigation and such costs can be recovered as arrears of land revenue under Section 42 (4-A) (Allahabad amendment). If the petitioner has any grievance that the costs of litigation have been determined incorrectly or on wrong basis, he can move the appropriate authorities. AIR 1954 All 646 (647).

6. "Direction in regard to collection". — (1) Sub-sections (2) (b) and (2) (e) must be read as a whole. The directions given in sub-section (2) (e) are mainly administrative. A liquidator has no power under sub-section (2) (e) to make an order having the force of

Section 42 — Note 6 (contd.)

a decree in respect of a debt due to a society in liquidation. Such a debt is not included in contributions mentioned in sub-section (2)(b). AIR 1941 Lah 355 (355).

7. Sub-section (3) -- Evidence. — (1) Powers given by Section 42 (3) are subject to rules under the Act. Applicability of Section 32, Civil P. C., is restricted by Rule 26 (e) framed by the Punjab Government under Section 43 (1). Liquidator summoning person has no power to ask security from such person or impose sentence of imprisonment or fine for failure to furnish security. AIR 1939 Lah 357 (358) = ILR (1939) Lah 192 = 40 Cri L Jour 791.

(2) Proceedings under Section 42 (2) (b) and (d) are quasi-judicial — Some evidence is necessary for determination of questions referred to in clauses (b) and (d). When the Procedure laid down in rules is not followed, application for execution of order is not competent. AIR 1933 Cal 631 (632) (DB).

(3) To determine the liability of a member the liquidator may summon evidence. But such evidence should not be one-sided for no quasi-judicial tribunal can act without hearing both sides. AIR 1954 Punj 268 (270) = ILR (1955) Punj 496.

8. Sub-section (5) — Enforcement of order. — (1) Proceedings under Section 42 (2) (b) and (d) are quasi-judicial. Some evidence is necessary for determination of questions referred to in clauses (b) and (d) — Procedure not followed — Application for execution is not competent. AIR 1933 Cal 631 (632) (DB).

(2) An heir of a deceased member of a co-operative society can be arrested for an arrear due from his deceased father by virtue of Section 2, U. P. Co-operative Societies (Amendment) Act, 1919, read with Rule 31 (4), (5), (8) and (10) framed by U. P. Provincial Government under Section 43, and Section 42 (4a) of the Act as inserted by U. P. Act and Section 146, U. P. Land Revenue Act. AIR 1928 All 128 (131) = 29 Cri L Jour 244.

(3) No appeal lies from Civil Court's order enforcing liquidators' order under Section 42. AIR 1918 All 419 (420) = 40 All 89 (DB).

(4) A contributory order passed by a liquidator being enforceable as a decree, an objection that the order was invalid because of the omission to give notice to a member before determining his liability cannot be entertained in proceedings for execution of the order. AIR 1955 Nag 262 (265) = ILR (1956) Nag 51 (DB).

(5) When on a requisition under Section 42 (2) (b), Co-operative Societies

Act a certificate is filed under Section 6, Bengal Public Demands Recovery Act, but the certificate is cancelled by the Collector in appeal the case is not a revenue case and Revenue Tribunal has no jurisdiction to revise order of the Collector under Section 53, Public Demands Recovery Act. AIR 1949 Assam 29 (30, 31) = ILR (1949) 1 Assam 346 (FB).

9. Sub-section (6) — Jurisdiction of Civil Court. — (1) A civil suit for refund of money realised under the provisions of Section 42 (4a) of the Act as amended by U. P. Act, 3 of 1919 with Section 149 of U. P. Land Revenue Act is barred by the provisions of Section 233 (m) of the U. P. Land Revenue Act. AIR 1927 All 532 (533) = 49 All 701 (DB).

(2) Decree on an award in favour of a certain Co-operative Bank — On requisition from Registrar of Co-operative Societies, trees belonging to judgment-debtor put to sale for realising the amount due — No objection to attachment and sale of trees by person claiming to be the real owner within the prescribed time — Suit in civil Court by such person is not maintainable as the amount was realised as arrear of land revenue under the Co-operative Societies Act. AIR 1937 Oudh 249 (250).

(3) Rule 15 framed in 1931 under Burma Co-operative Societies Act (6 of 1927) — Section 50, does not bar the jurisdiction of civil Courts in relation to proceedings of the Registrars or arbitrators in the same way as the jurisdiction of Civil Court is barred with respect to matters connected with the liquidation of society under Section 42 of the Co-operative Societies Act. AIR 1937 Rang 363 (364) = 1937 Rang LR 399.

(4) Civil Court in execution of order of liquidator cannot go behind it. If the order is thus enforced there is no error of jurisdiction on the part of the Civil Court and revision to High Court does not lie. AIR 1930 Rang 18 (18, 19) = 7 Rang 533.

(5) Bharatpur State Co-operative Societies Act (I of 1915), Section 41 (6) — Winding up — Jurisdiction of Civil Court is barred. AIR 1960 Raj 148 (150) = 1959 Raj LW 484.

(6) Civil Court's jurisdiction to examine order passed under Section 42, Co-operative Societies Act — Plaintiff claiming amount of award not properly assessed by liquidator — Civil Court has no jurisdiction. (56) 58 Pun LR 408.

(7) Where a liquidator fixes the contribution due by a member and the money is realised, a suit by the member for return of that money is not cog-

Section 42 — Note 9 (contd.)

nizable by the civil Court. AIR 1934 Oudh 431 (433).

(8) Suit for declaration by past member (who admits himself to be one) that he is not liable to pay the amount declared by the liquidator as his liability ceased under Section 23 — Liquidator, held, had jurisdiction to decide the amount of contribution under Section 42, sub-section (2) and the suit was not maintainable in civil Court. AIR 1935 Lah 330 (331).

Liability to contribution disputed.

(9) If the liquidator makes an assessment on a person who is not a member, or had ceased to be a member for over two years before the dissolution of the society, or whose liability to contribute had otherwise been extinguished by operation of law, he has clearly acted in excess of his jurisdiction and his order is a nullity and, therefore, incapable of execution. AIR 1942 Lah 237 (239) = ILR (1943) Lah 553 (DB).

(10) Liquidation of society — Civil Courts have jurisdiction to consider whether a person is liable as past member when a person is liable as past member when a person denies his liability as past member, liquidator cannot make him liable as past member. AIR 1936 Mad 574 (576) = 59 Mad 859 (DB) ** AIR 1940 Mad 831 (836) = ILR (1940) Mad 929 (DB) ** AIR 1937 Lah 912 (913). (Person claiming not to be past member.) ** AIR 1933 Lah 422 (423) = 14 Lah 703 (DB). (Person disputing his membership.) ** AIR 1937 Cal 643 (644) (Do.)

Action by non-member.

(11) Section 42 (6) is no bar to a civil suit by a member of the society against the purchaser for declaration that the property attached and sold for debt due from him was not liable to be sold. AIR 1927 Nag 217 (219) = 23 Nag LR 66.

(12) Where the liquidator sold and conveyed properties of a wound up society to a stranger, the Civil Court is not precluded from questioning the validity of the transfer since the matter is not connected with the dissolution in winding up of the society. AIR 1937 Rang 98 (98, 99). (Case under Section 49, Burma Co-operative Societies Act, 1927.)

(13) Section does not bar a suit between co-members as to their respective rights when the plaintiff's property has been utilised by the defendant. AIR 1925 Rang 38 (39) = 2 Rang 325.

(14) There is nothing in Section 42 (6), express or implied, to prevent the Court from entertaining the application of one of the debtors of a co-operative society, which is in liquidation, for being declared insolvent. The official liquidator can press his claim against the insolvent in the same way

as the other creditors will do. AIR 1934 Pat 290 (290).

Action without jurisdiction.

(15) Executing Court can go behind the order passed by the liquidator under Section 42 (2) (b) and inquire if it has been passed within the limits of jurisdiction and can refuse to execute it, if it is found to be without jurisdiction. AIR 1942 Lah 237 (239) = ILR (1943) Lah 553 (DB) ** 1941 Nag L Jour 412 (414) (DB).

(16) Civil Court can intervene if liquidator's act or order is shown to be ultra vires. AIR 1931 Nag 48 (49, 50).

(17) If the Liquidator exceeds his power under Section 42, Court may determine its legality. Where a person was proceeded against by the liquidator as a debtor and not as a member, such person, may plead in Civil Court that he is not so liable. AIR 1937 Lah 931 (934) = ILR (1937) Lah 649 (DB).

(18) If the contributory order against a member is without jurisdiction, it may be challenged in a suit in a Civil Court. But such order cannot be questioned at the time of its execution in the Civil Court. AIR 1946 Nag 161 (162) = ILR (1946) Nag 60 (DB).

(19) The presence of sub-section (6) in Section 42 expressly barring the jurisdiction of the Court does not necessarily afford immunity from scrutiny by the Court. For, it is well settled that even if jurisdiction is so expressly excluded, the Civil Courts have jurisdiction to examine into cases not only where the provisions of the Act have not been complied with but also where the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure. AIR 1955 Nag 262 (265) = ILR (1956) Nag 51 (DB).

(20) Where the liquidator made an unqualified contributory order, it being not limited to the assets in the hands of the plaintiff it was held that the order being beyond the power of the liquidator Section 42 (6) was no bar to a civil suit. AIR 1957 All 492 (495).

(21) Under Section 42 (2) (f) of the Co-operative Societies Act, the Liquidator is no doubt quite competent to order payment of individual debts that a member might owe to a Co-operative Society. But if he does not care to look into the accounts and consider whether a debt is outstanding or is already satisfied and order a member to pay a non-existing debt, his order is illegal and ultra vires, and the Civil Court has jurisdiction to set it aside. AIR 1949 Nag 25 (29, 30) = ILR (1948) Nag 216 (DB).

Matters relating to dissolution.

(22) Correctness of amount assessed cannot be questioned by Court when

Rules

43. Rules.—(1) The *[State] Government may, for the whole or any part of the *[State] and for any registered society or class of such societies make rules to carry out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may—

- (a) subject to the provisions of Section 5, prescribe the maximum number of shares or portion of the capital of a society which may be held by a member;
- (b) prescribe the forms to be used and the conditions to be complied with in the making of applications for the registration of a society and the procedure in the matter of such applications;
- (c) prescribe the matters in respect of which a society may or shall make by-laws and for the procedure to be followed in making, altering and abrogating by-laws, and the conditions to be satisfied prior to such making, alteration or abrogation;

Section 42 — Note 9 (contd.)

award is passed by liquidator within his powers. AIR 1941 Lah 284 (286) = ILR (1942) Lah 379 (DB).

(23) Order of the liquidator under Section 42 (2) (b) and (e) directing contribution by members is final and cannot be questioned in a Civil Court even if the order is wrong, the matter being connected with dissolution of society. AIR 1926 Nag 379 (380) = 24 Nag LR 5.

(24) No question of validity of dissolution may be agitated in a Civil Court — No civil suit for declaration that order of contribution is null and void is maintainable. AIR 1944 Cal 245 (246) = ILR (1943) 2 Cal 186. (Assam Rules, Rule 41 (e), (f) and (j).)

(25) Court can question liquidator's jurisdiction in making award. (1939) 41 Pun LR 269 (270) ** AIR 1934 Oudh 431 (433). (Where the money is realised a suit by member for its realisation is barred.) ** AIR 1918 Oudh 112 (113) (DB).

(26) Civil Court cannot interfere in Liquidator's order to collect the assets of society from persons accountable to him. AIR 1920 Bom 62 (62) = 44 Bom 582 (DB).

(27) Civil Court cannot entertain suit by members of the Executive Committee to recoup the amount paid under liquidator's orders from ordinary members, since the matter is connected with dissolution of society. AIR 1927 Cal 578 (579) (DB).

(28) Court cannot refuse execution of liquidator's award under Section 42 (2) (f) though member against whom award was made, was discharged under Section 44, Provincial Insolvency Act. The matter is not one of lack of inherent jurisdiction but only a question of illegal exercise of jurisdiction. AIR 1940 Lah 280 (280).

SECTION 43 — SYNOPSIS**1. Scope.****1A. Sub-section 2 (c).****2. Sub-section 2 (1) — "Dispute touching the business of a society."****3. Decisions bearing on rules framed under sub-section (2), Cl. (1).****4. Other rules.****5. Rule and bye-law.**

1. Scope. — (1) The limits within which the rule-making powers of the Provincial Government could be exercised are contained in sub-section (1) of Section 43. Sub-section (2) simply sets out by way of illustration certain matters on which rules are considered desirable. It does not in any way, limit the powers given by sub-section (1) and the items mentioned in sub-section (2) do not exhaust the list of matters on which rules might be framed by the Provincial Government. AIR 1938 Cal 394 (398) = ILR (1938) 2 Cal 144 ** AIR 1938 Cal 327 (332, 333) = ILR (1938) 2 Cal 103 (DB).

(2) A petition involving the interpretation of validity of a rule framed under Co-operative Societies Act cannot be barred on the ground of laches. AIR 1956 Ajmer 63 (66).

(3) Arbitration Act 1940, Section 33 and Co-operative Societies Act, 1912 are not overlapping — Section 33 deals with existence and validity of arbitration agreement and award while Act of 1912 provides the machinery. 1960 All LJ 384 = 1960 All WR (HC) 300.

1-A. Sub-section 2 (c).— (1) Bye-laws framed under Section 43 (2)(c) are not part of the Act — Bye-law requiring approval of Registrar for dismissal of manager — Approval by Joint Registrar invested with all the powers of the Registrar under Act is not sufficient — Previous approval of Registrar is necessary — Construction of Bye-laws — Power of dismissal is incidental to that

- (d) prescribe the conditions to be complied with by persons applying for admission or admitted as members, and provide for the election and admission of members, and the payment to be made and the interest to be acquired before the exercise of the right of membership;
- (e) regulate the manner in which funds may be raised by means of shares — or debentures or otherwise;
- (f) provide for general meetings of the members and for the procedure at such meetings and powers to be exercised by such meetings;
- (g) provide for the appointment, suspension and removal of the members of the committee and other officers, and for the procedure at meetings of the committee, and for the powers to be exercised and the duties to be performed by the committee and other officers;
- (h) prescribe the accounts and books to be kept by a society and provide for the audit of such accounts and the charges, if any, to be made for such audit, and for the periodical publication of a balance-sheet showing the assets and liabilities of a society;
- (i) prescribe the returns to be submitted by a society to the Registrar and provide for the persons by whom and the form in which such returns shall be submitted;
- (j) provide for the persons by whom and the form in which copies of entries in books of societies may be certified;
- (k) provide for the formation and maintenance of a register of members and, where the liability of the members is limited by shares, of a register of shares;

Section 43 — Note 1-A (contd.)

of appointment. AIR 1960 Madh Pra 273 (276, 277) = 1960 MPLJ 433 (DB).

2. Sub-section (2) (1) — "Dispute touching the business of a society."

(1) The disputed liability of a member to repay money due to a co-operative society is a dispute touching the business of the society. AIR 1936 Pat 225 (226) = 14 Pat 292 (DB).

(2) Dispute between A, B and C members of society, relating to money alleged to have been borrowed by A from society but in reality misappropriated by B and C — Dispute held was concerning business of society. AIR 1936 Lah 786 (787).

(3) Dispute between member, officer and society regarding money entrusted to officer for purchase of articles is within sub-section (2) (1). AIR 1923 Mad 481 (482) (DB).

(4) The expression 'touching the business of the society' includes disputes arising out of particular transaction and disputes between members and officers. The words of S. 43 are very general and do not merely refer to a dispute regarding the internal management of the affairs of a society or disputes in regard to the principles which would regulate the conduct of business. AIR 1923 Mad 481 (482) (DB)
** AIR 1954 Mad 103 (107) = ILR (1953) Mad 1047 (FB).

(5) Registrar of the society has the power to lay down a procedure for holding election, including the power

to appoint a person to settle such preliminary points as, if not resolved earlier, were likely to hamper the holding of the election. AIR 1954 Nag 203 (204) = ILR (1954) Nag 76 (DB).

(6) "Business" is not confined to money business and includes election of officers. AIR 1925 All 356 (358) = 47 All 374 (DB).

(7) Dispute within clause (1) cannot be limited to dispute concerning the internal management of the society. Where the principal business of a society is to finance its members a dispute concerning the financial obligations of its members to the society would be a dispute concerning the business of the society. AIR 1938 Cal 327 (333) = ILR (1938) 2 Cal 103 (DB).

(8) Where a co-operative society has considered its treasurer to be responsible for embezzlement of money deposited with it by a person and the treasurer has throughout contended that he was not concerned with the alleged embezzlement, there is clearly a dispute between the treasurer and the society regarding question of embezzlement of money and hence the dispute can be referred to arbitration. AIR 1939 Lah 301 (302).

(9) A suit for a declaration that the constitution of the board of management of a co-operative society was illegal, that it had no authority to function or to call an extra ordinary general meeting of the share-holders, and that the resolution passed at the meet-

- (l) provide that any dispute touching the business of a society between members or past members of the society or persons claiming through a member or past member or between a member or past member or persons so claiming and the committee or any officer shall be referred to the Registrar for decision or, if he so directs, to arbitration, and prescribe the mode of appointing an arbitrator or arbitrators and the procedure to be followed in proceedings before the Registrar or such arbitrator or arbitrators, and the enforcement of the decisions of the Registrar or the awards of arbitrators;
- (m) provide for the withdrawal and expulsion of members and for the payments, if any, to be made to members who withdraw or are expelled and for the liabilities of past members;
- (n) provide for the mode in which the value of a deceased member's interest shall be ascertained, and for the nomination of a person to whom such interest may be paid or transferred;
- (o) prescribe the payments to be made and the conditions to be complied with by members applying for loans, the period for which loans may be made, and the amount which may be lent, to an individual member;

Section 43 — Note 2 (contd.)

ing thus convened was itself ultra vires is not a dispute between a member and the committee touching the business of the society. AIR 1938 Cal 394 (396) = ILR (1938) 2 Cal 144.

(10) Under clause (l) the dispute referred to the Registrar must be dispute between the members of the society and the committee. AIR 1942 Cal 290 (291) = ILR (1941) 2 Cal 551.

[See also ILR (1954) Mys 218 (221).]

(11) Mere willingness of the debtor to discharge his debt does not mean that there is no dispute. The dispute arises when the demand made for the payment is not immediately met and cannot be recovered without recourse to law. AIR 1946 Nag 16 (18) = ILR (1945) Nag 67 (DB).

(12) The word "business" is a very wide term and is not synonymous with the objects of the society and the expression "touching the business of a society" would mean affecting the business of a society or relating to the business of a society and it cannot be said that when a company employs or dismisses a servant, it does not do something which relates to its business. AIR 1954 Mad 103 (109) = ILR (1953) Mad 1047 (FB).

(13) Where a society gives up all its rights in the mortgage, the dispute between the assignee and the mortgagors does not in any way touch the business of the society. (1946) 50 Cal WN 7 (9) (DB).

(14) The imposition of a fine on past members for not trading in accordance with the rules of the society by which they had ceased to be bound is not a matter touching the business of the Society and has nothing to do with the society which has no power to interfere with the trading activities of out-

siders. AIR 1948 Nag 327 (328) = ILR (1948) Nag 449 (DB).

3. Decisions bearing on rules framed under sub-section (2), Cl. (l) — (A) Ajmer Rules. — (1) Rule 18 is intra vires of the powers of the Chief Commissioner under Section 43, Co-operative Societies Act and does not, in any manner, offend against the fundamental rights guaranteed by the Constitution. AIR 1956 Ajmer 63 (65).

(2) Rule 18 (a) and (b) must no doubt, be strictly construed and a dispute must lie within the four corners of Rule 18 (a), before it can be referred to the Registrar. The Registrar must also act strictly within the scope of his authority under Rule 18 (b). AIR 1956 Ajmer 63 (65, 66).

(3) Where a Registrar acting under Rule 18 (b) appoints an arbitrator and the arbitrator for some reason of his own declined to proceed further with the arbitration, the Registrar is competent to rescind the order appointing the arbitrator and to constitute himself as a tribunal for deciding the dispute or appoint another arbitrator. AIR 1956 Ajmer 63 (66).

(4) Where the question involves the liability of the members of the Managing Committee of a Co-operative Bank for embezzlement, there is a dispute concerning the business of the bank between the members and the Committee and hence a reference could be made to the Registrar under Rule 18 (a). AIR 1956 Ajmer 63 (65).

(5) Rules under S. 43 framed by Chief Commissioner of Ajmer, R. 18 — Dispute between Director of Bank and Bank itself falls within scope of Rule 18. 1960 Raj LW 561 = ILR (1960) 10 Raj 1070.

(6) Where, there being embezzlement in a co-operative bank its share-holders

- (p) provide for the formation and maintenance of reserve funds, and the objects to which such funds may be applied, and for the investment of any funds under the control of the society;
- (q) prescribe the extent to which a society may limit the number of its members;
- (r) prescribe conditions under which profits may be distributed to the members of a society with unlimited liability and the maximum rate of dividend which may be paid by societies;
- (s) subject to the provisions of Section 39, determine in what cases an appeal shall lie from the orders of the Registrar, and prescribe the procedure to be followed in presenting and disposing of such appeals; and
- (t) prescribe the procedure to be followed by a liquidator appointed under Section 42, and the cases in which an appeal shall lie from the order of such liquidator.

(3) The * [State] Government may delegate, subject to such conditions, if any, as it thinks fit, all or any of its powers to make rules under this section to any authority specified in the order of delegation.

(4) The power to make rules conferred by this section is subject to the condition of the rules being made after previous publication.

(5) All rules made under this section shall be published in the † [Official Gazette], and on such publication shall have effect as if enacted in this Act.

[*] Substituted for "Provincial" by A. L. O., 1950 (26-1-1950).

[†] For rules, see different local Rules and Orders.

[‡] Substituted for 'local Gazette' by A. L. O., 1937.

Section 43 — Note 3 (contd.)

present a plaint under Rule 18 (a) to the Registrar, the Registrar is not a fit person to act as a tribunal. AIR 1956 Ajmer 63 (66, 67).

(7) Dispute between Committee and its officer cannot be referred to Registrar — Question of proceedings being valid, because officer submitted to jurisdiction does not arise. AIR 1959 Raj 272 (272, 273) = 1953 Ajmer MLJ 156.

(B) Bengal Rules.

(8) As to settlement of disputes touching the business of a co-operative society registered in the Province of Bengal, now see the Bengal Co-operative Societies Act, 1940, Sections 86 to 88 and Section 140 (2) (lvii). The following cases were decided under the Rules framed by the Bengal Provincial Government under Section 43, Co-operative Societies Act, 1912.

(9) The purpose of the Legislature as embodied in Clause (1) of Section 43 (2), Co-operative Societies Act, clearly is that when the Registrar gives directions for "arbitration", the parties would have no right to have recourse to any alternative proceeding. The words "arbitration" and "award" in Section 43 (2), cl. (1) have been used merely to signify a special tribunal and the order of a special tribunal, as contradistinguished from a Civil Court and the decree of Civil Court respectively. That special tribunal may or may not in

all respects or substantially conform to the characteristics of an arbitration tribunal strictly so-called. The conferment of a right of appeal from the decision of such a tribunal does not involve any inherent inconsistency. If it is within the objects of the Act to set up a special tribunal for the decision of disputes the power to create such a tribunal includes the power to set up an appellate authority, which would create more confidence and a greater sense of security in the disputants. Clause (s) of Section 43 (2) is not the only provision giving rule-making power to set up a tribunal of appeal. As the Provincial Government has been given power to create by rules a special tribunal to decide disputes of the nature and between the parties mentioned in Section 43 (2), cl. (1), the jurisdiction of such special tribunal would be exclusive. Clause (1) gives that indication when it says that the Registrar, if he so chooses, may direct that the dispute shall be referred to arbitration. AIR 1938 Cal 327 (334) = ILR (1938) 2 Cal 103 (DB).

(10) In the case of a mortgage in favour of the society the award made by the Registrar can in no sense be a mortgage decree. The Registrar has no power to decide disputed claims of priority or to make decision which in any way affects the rights of other persons interested either in the mortgage security or in the equity of redemption. AIR 1942 Cal 290 (291) = ILR (1941) 2 Cal 551.

Section 43 — Note 3 (contd.)

(11) Court can entertain suit to have award declared invalid when reference to arbitrator itself is questioned. AIR 1934 Cal 23 (24) = 60 Cal 1207 (DB).

(12) Where a dispute, which cannot be referred to arbitration, is referred to arbitration and no objection is taken before the arbitrator or the Registrar in appeal the objection cannot be taken in revision against execution. (1936) 163 Ind Cas 591 (591) (Cal).

(13) The decision of the arbitrator may be wrong in fact or in law, but that is not a ground which would entitle the Civil Courts to interfere in the matter. AIR 1940 Cal 198 (202) = ILR (1940) 1 Cal 32 (DB) ** AIR 1940 Cal 162 (163) ** (1936) 164 Ind Cas 802 (804) (Cal). (Civil Court cannot alter award under Section 151, Civil P. C., even if it is anomalous or erroneous.) ** (1934) 60 Cal L Jour 572 (575) (DB).

(14) The machinery and the procedure indicated by the provisions of Rule 20 are totally inconsistent with the provisions contained in Chap. 2 of the Arbitration Act. Consequently the Civil Court has no jurisdiction to appoint an arbitrator in a proceeding under Rule 20 nor can it remove an arbitrator. AIR 1943 Cal 255 (256) = ILR (1943) 2 Cal 431 (DB).

(15) In the case of an award made under Rule 22, the date of the award should be regarded as the date on which such award is officially communicated to the person or persons affected thereby and not the date of the decision of the arbitrator. An execution application filed within three years of the date on which award is communicated to the party will be within time. AIR 1941 Cal 152 (153) = ILR (1940) 2 Cal 460.

(16) Article 178, Limitation Act, does not apply to the execution of the award under Rule 22. (1936) 163 Ind Cas 591 (591) (Cal) ** AIR 1943 Cal 255 (260) = ILR (1943) 2 Cal 431 (DB).

(17) An award given by an arbitrator under Rule 22 need not be stamped. AIR 1933 Cal 695 (696) = 60 Cal 906 (DB).

(18) Rule 22 (1) is not confined to such disputes as are referable to membership only but covers all disputes between a society and a member. Hence a dispute arising from a transaction entered into by two members as brokers is referable to arbitration. AIR 1933 Cal 267 (268) (DB).

(19) A dispute regarding a loan taken by a past member of a society from the Co-operative Bank, being a dispute between a past member and a committee within Rule 22 (1), cannot be referred to arbitration but should be referred to the Registrar. (1936) 163 Ind Cas 591 (591) (Cal).

(20) The whole scheme of the provisions of Rule 22, sub-rules (1) to (7) is to oust the jurisdiction of the Civil Court throughout the arbitration proceedings. AIR 1943 Cal 255 (256) = ILR (1943) 2 Cal 431 (DB).

(21) Suit for declaration that constitution of board of management of society is illegal and that it could not function or call extraordinary general meeting of share-holders and that resolution passed in such meeting is ultra vires is within jurisdiction of Civil Court. AIR 1938 Cal 394 (396, 397) = ILR (1938) 2 Cal 144.

(22) In giving by sub-r. (6) of R. 22 a finality to the decision of the Special Tribunal, the Provincial Government did not transgress its powers, but carried out the implications of cl. (1) as well as of general law. Sub-rules (2), (5) and (6) of R. 22 framed under S. 43 (1) are therefore not ultra vires and a Registrar has power to appoint a single arbitrator to decide a dispute filed before him. AIR 1938 Cal 327 (334) = ILR (1938) 2 Cal 103 (DB) ** AIR 1940 Cal 198 (201) = ILR (1940) 1 Cal 82 (DB) ** AIR 1940 Cal 162 (163).

(23) If the award is without jurisdiction, the Civil Court can certainly declare it to be a nullity. Even if the arbitrator was validly appointed, the award can still be a nullity, if there was violation of the rules regulating the arbitration in matters of substance. Not only a proper appointment of the arbitrator in accordance with the rules is essential for creating jurisdiction in the arbitrator but the fundamental rules attaching restraint to the exercise of authority by the arbitrator are equally mandatory and a violation of them would nullify the award. AIR 1940 Cal 198 (201) = ILR (1940) 1 Cal 82 (DB).

(24) Rule 22 (6) framed under Section 43 of the Co-operative Societies Act is not meant to take away the jurisdiction of the executing Court to enquire into the competency of an award made under the provisions of the section on the ground of jurisdiction. AIR 1933 Cal 267 (268) (DB).

(25) A contracting debt from Co-operative Bank — Inspector of Co-operative Societies standing as surety — Debt not paid — Bank filing dispute and Inspector forwarding same to Assistant Registrar recommending arbitration — Inspector later on challenging award and arbitrator's jurisdiction by instituting suit: Held that Inspector had brought himself within scope of Rule 22 and, therefore, his suit which was brought when Bank's claim was barred by limitation, was barred under Rule 22 (6). (1937) 65 Cal L Jour 206 (209).

(26) An award given by an arbitrator under Rule 22 has the force of a

Section 43 — Note 3 (contd.)

decree and before it can be enforced as a decree it is not necessary to file it in Court as in the case of awards by arbitrators appointed by the contract of parties. AIR 1933 Cal 695 (696) = 60 Cal 906 (DB) ** (1936) 163 Ind Cas 591 (591) (Cal).

(27) Where a Co-operative Society assigns to the plaintiff who is a non-member, a loan advanced by it to the defendant, a suit by the plaintiff for the recovery of the loan from the defendant is not excluded from the jurisdiction of the Civil Court by the provisions of Rule 22 (1), as neither of the conditions mentioned above are fulfilled. (1946) 50 Cal WN 7 (8) (DB).

(28) The use of the word "committee" in Section 43 (2), Clause (1) and Rule 22 (1) is sufficient to indicate a dispute with the society itself and enable proceedings to be initiated and carried on before the authority referred to therein in the name of the society. AIR 1938 Cal 327 (333) = ILR (1938) 2 Cal 103 (DB).

(C) Bihar Rules.

(29) The following case was decided with reference to Section 49 of the Bihar and Orissa Co-operative Societies Act, 1935. AIR 1939 Pat 500 (501) (DB). (Dispute referred to Registrar for award. Registrar functions as civil Court and does not act without jurisdiction in deciding whether dispute is time-barred or not.)

(30) As to settlement of disputes touching the business of a co-operative society registered in the Province of Bihar and Orissa, now see the Bihar and Orissa Co-operative Societies Act, 1935, Sections 48, 49 and 66 (2) (26), (27). See also the following cases:

(31) Claim by Society for compensation against Railways for short delivery of goods — Falls within explanation to Section 48 (1) of Bihar and Orissa Co-operative Societies Act (6 of 1935). 1960 BLJR 520 (DB).

(32) "Dispute touching the business of a registered society" — Election disputes — Section 48 (1) applies. ('62) ILR 41 Pat 325 (DB).

(33) The disputed liability of a member to repay money due to a co-operative society is covered by Rule 12 (1) and hence an award by the Registrar against such member is not without jurisdiction. AIR 1936 Pat 225 (226) = 14 Pat 292 (DB).

(34) Under Rule 12 of the rules framed under Section 43 of the Co-operative Societies Act, it is only members and persons claiming through members against whom the Registrar can pronounce a decision which can be exe-

cuted as a Civil Court decree. The society must enforce in the regular course any claim which it may have against outsiders. The decision of the Registrar so far as it affects a non-member is a nullity as being made without jurisdiction. This question must be considered by the Court executing the decision if it is raised by the person affected. AIR 1934 Pat 145 (146) (DB).

(35) The co-operative society has complete power to refer any matter in dispute between them and the estate of a deceased member to the arbitration of the Registrar. But there is no power in the Registrar of Co-operative Societies to compel strangers to appear before him unless they are sued as representing the estate of a deceased member. So, if the Registrar passes an award against the sons of a deceased member personally, the Civil Court has complete jurisdiction to set aside the award. AIR 1925 Pat 575 (575, 576) (DB).

(36) The power given to the Registrar under Rule 12 to decide the dispute and to give a decision after hearing the parties is comprehensive enough to include power to issue a mortgage award. The rule does not circumscribe his power in any manner, and no limitation has been placed as to the nature of the dispute over which he will have jurisdiction. Generally he has jurisdiction over all the disputes of the nature specified in sub-rule (1). When such a dispute is referred to him, he has complete power to dispose of that dispute, whether it concerns the recovery of money on a simple bond or mortgage bond. AIR 1957 Pat 408 (415) (DB).

(37) Where two brothers are separate and their lands have been divided, a mortgage bond executed by one of the brothers in respect of the lands owned by both of them in favour of a co-operative society and the subsequent award and auction sale do not affect the right, title and interest of the other brother in the lands owned by him. AIR 1957 Pat 408 (411) (DB).

(D) Bombay Rules.

(38) For the settlement of a dispute touching the business of a co-operative society registered in the Province of Bombay, now see the Bombay Co-operative Societies Act, 1925, Sections 54 to 59 and Section 71 (2) (u) and (cc). See also the following cases:

(39) An application to execute an award falls within Section 3, Limitation Act and hence it is subject to the law of limitation. Application to enforce award is not step-in-aid. AIR 1938 Bom 424 (425) (DB).

Section 43 — Note 3 (contd.)

(40) An award was made under Section 54, Bombay Co-operative Societies Act, 1925 and a certificate was issued by the Registrar; Durkhast proceedings were filed within three years from the date of the certificate; it was held that they were not barred by limitation and it was doubtful whether the award becomes a decree or order of Civil Court within the meaning of Article 182, Limitation Act. AIR 1936 Bom 396 (397) (DB).

(41) Awards under the Bombay Act are executable as decrees of Civil Court. They are effective from the date on which they are made. An application to execute an award made under the provisions of the Bombay Act is not a "proceeding arising out of a suit" within the meaning of these words in Section 3, Civil P. C., (Second Amendment) Act, 1937 (9 of 1937). AIR 1940 Sind 147 (147, 148, 150).

(42) Rules 31 and 34 provide that awards are to be enforced as decrees — Court having power to execute them can transfer them for execution. AIR 1922 Bom 377 (377) = 46 Bom 130 (DB).

(43) In a dispute between the society and a member, if the member dies, the arbitrators can decide for the purposes of continuing proceedings as to who the legal representatives of the deceased are. If decision is wrong an appeal lies to the Registrar and the Civil Courts have no jurisdiction in the matter. AIR 1926 Bom 352 (353) (DB).

(E) C. P. and Berar Rules.

(44) Under the Co-operative Societies Act and the rules and regulations thereunder, the Registrar has clearly the power to pass an award not only against society but also its members individually. He can pass two awards one against the society in favour of the bank and another against each member of the society in favour of the society. But where he does not pass two distinct awards but a consolidated award both against the society and its members and mentions the names of all the members of the society, it can bear the interpretation that the award is both against the society and the members. It may be irregular in form but that would not invalidate the award. There is a presumption that the award was made against both the society and its individual members in accordance with the usual preliminary formalities and if it is not objected to by the judgment-debtor at any time, the sale held thereunder cannot become void. AIR 1943 Nag 7 (8, 9) = ILR (1942) Nag 685.

[See also AIR 1938 Nag 434 (436) = ILR (1938) Nag 604 (DB).]

(45) Under Rule 26, a dispute touching the business of the society between

its member and its treasurer who is an officer of the bank under Section 2 (d) must be referred to the Registrar who has jurisdiction to decide it. AIR 1946 Nag 16 (18, 19) = ILR (1945) Nag 677 (DB).

(46) Under Rule 26 a dispute regarding the election of directors of the Provincial Bank can be validly referred to the Registrar by a representative elected by a Central Bank which is a member of the Provincial Bank, as such, a person comes in the category of a person claiming through a member. 1950 Nag L Jour 501 (506).

(47) The expression "the business of a co-operative society" occurring in Section 26 is not restricted to the dealing with the members of the society only but includes business which the co-operative society is, under the law, empowered to transact. Hence, the safe deposit of the fund of a society being essential to enable the society to command resources to grant loans to its members at any time, the investment or deposit of its funds cannot be isolated from the general business of the society. AIR 1946 Nag 16 (19) = ILR (1945) Nag 677 (DB).

(48) C. P. Government, Rule 26 — Joint family members in corporate capacity becoming treasurers of society — Liability undertaken as treasurers can be treated as domestic dispute and Registrar has jurisdiction to decide dispute. AIR 1946 Nag 16 (19, 20) = ILR (1945) Nag 677 (DB).

(49) The word "business" used in Rule 26 includes election disputes relating to Co-operative Societies, and they can be referred only to the Registrar, Co-operative Societies for decision. 1950 Nag L Jour 501 (506).

(50) An opinion expressed in the past by the Registrar, Co-operative Societies, on a point in his executive capacity without hearing both the parties, does not act as a bar to a subsequent reference of the same point for his decision under Rule 26. 1950 Nag L Jour 501 (507).

(51) Although by reason of Rule 32 of the Rules framed under the Co-operative Societies Act no Court can sit in judgment over a decision by the Registrar, the Registrar is not powerless to correct an award, at least if there is some mistake or error apparent on the face of the record. AIR 1949 Nag 313 (314) = ILR (1949) Nag 31.

(52) The member ceases to be member when he tenders his resignation and the society has no power to impose fines on him because he thereafter traded in a way forbidden by the rules of the society. The act of the Society in fining would be ultra vires and the Civil Court would have juris-

Section 43 — Note 3 (contd.)

diction to entertain a suit in respect of it, the jurisdiction not being barred by Rule 26 the matter being not one "touching the business of the Society". AIR 1948 Nag 327 (328) = ILR (1948) Nag 449 (DB).

(53) Award can be enforced as a decree or in the manner prescribed for recovery of land revenue. AIR 1945 Nag 281 (282, 283) = ILR (1945) Nag 651.

(54) Application, was made under Rule 33 for enforcement as in the manner for recovery of land revenue and subsequently attachment and sale under Section 128 (g), C. P. Land Revenue Act, was affected. It was held that the transferee was not affected by doctrine of *lis pendens*. AIR 1945 Nag 281 (282, 283) = ILR (1945) Nag 651.

(55) Dismissal of judgment-debtor application under Order 21, Rule 9, Civil P. C. as withdrawn — Time allowed to him to pay decretal amount by consent of parties — Default by judgment-debtor — His prayer for extension of time opposed — Court acts rightly in confirming sale after rejecting his prayer for extension of time. AIR 1968 SC 86 (89). (AIR 1963 Bom 230, Reversed.)

(56) Rule 33 of the rules made by C. P. Government under Section 43 does not say that an award by the Registrar is a decree. The rule, therefore, recognises that the award, decision or order of the Registrar is not a decree. There is a vast difference between an award being deemed to be a decree and an award being executable as a decree. AIR 1941 Nag 243 (244) = ILR (1942) Nag 636.

(57) Rule 33 prescribes that any sum falling due under an award shall on a certificate signed by the Registrar be recovered by the Deputy Commissioner as an arrear of land revenue. The award cannot be called in question in the revenue Court. But where there is an error patent on the face of the certificate, the Revenue Officer is justified in refraining from executing it and in referring it back to the Registrar. 1939 Nag L Jour 405 (407, 408).

(58) By a notification powers of Registrar were conferred on the Senior Deputy Registrar. Where at the material time there were two Deputy Registrars, Senior and Junior and the award was signed by the "Deputy Registrar," it was held that the person who made the award should be presumed to be the Senior Deputy Registrar and the award was valid. AIR 1949 Nag 398 (399) = ILR (1949) Nag 708.

(59) Where an award is in the form of a final decree not preceded by a preliminary decree and no objection is raised by the parties, the award does not become illegal on the ground that it is not preceded by a preliminary decree. The award has the force of a decree under the provisions of a special legislation and therefore all the provisions of the Civil P. C., do not apply to it. AIR 1949 Nag 398 (400) = ILR (1949) Nag 708.

(60) Rule 43 (f) (as amended in 1942) does not purport to operate retrospectively. The rule is not declaratory but confers a new power on the liquidator. It makes no attempt to validate that which was invalid at the date of the amendment. ILR (1951) Nag 309 (312) (DB).

(61) Rule 43 (f) — A son of a deceased member, of a Co-operative Society against whom an order of contribution had been made by the Liquidator can challenge that order on grounds which were open to the father. ILR (1951) Nag 309 (311) (DB). (AIR 1938 Nag 434, Applied.)

(62) Where the liquidator passes a contributory order without following the provisions of Rule 43 (f) the order is *ultra vires* and the Civil Court cannot execute the order. AIR 1951 Nag 210 (211).

(F) M. P. Rules.

(63) The main purport of the R. 14-A is to prescribe a disqualification to appointment of a member to a committee of the society. How it has to be worked out in a case of election has to be gathered from other provisions. In the matter of holding an election where the committee was dissolved, the relevant rule is Rule 14 (4). Therefore, the fact that under R. 14-A it is the society which appoints a member to a committee cannot detract from the power of the Registrar or the person or persons appointed by him under Rule 14 (4). The Registrar or Officer-in-charge of the society has thus the power to lay down a procedure for holding the election, including the power to appoint a person to settle such preliminary points as, if not resolved earlier, were likely to hamper the holding of the election. AIR 1954 Nag 203 (204) = ILR (1954) Nag 76 (DB).

(64) Rule 26 is attracted only if the following two conditions are satisfied: (i) the dispute must be touching the business of a co-operative society; and (ii) one of the parties concerned should be a member etc. There are no words in Rule 26 or Section 43 (2), Clause (1) of the Act limiting the meaning of 'dispute' in any sense. Hence, the Registrar has jurisdiction under Rule 26 to decide any dispute between a society

Section 43 — Note 3 (contd.)

and its member, even though the transaction leading to the dispute has no relation to the capacity of the member as such, provided that transaction touches the business of the society. AIR 1961 Madh Pra 40 (42, 43) = 1960 MPLJ 1209 (DB).

(65) Dispute between society and its officer or stranger cannot be referred to Registrar. AIR 1961 Madh Pra 40 (41, 42) = 1960 MPLJ 1209 (DB).

(66) Co-operative Society registered under Co-operative Societies Act — Included within definition of State in Article 12 — Amenable to writ jurisdiction — Not competent to order suspension of employee pending inquiry if not provided by a bye-law — Suspension order with retrospective effect is illegal. AIR 1961 Madh Pra 289 (291, 292, 293) = 1961 MPLJ 1059 (DB).

(67) Dispute as to election of an officer of Co-operative Society — Registrar alone can decide it. AIR 1967 Madh Pra 147 (148) = 1966 MPLJ 909 (DB).

(68) M. P. Rules under, Rule 26 — Dispute as to validity of election of chairman of Board of Directors of Co-operative Central and Land Mortgage Bank cannot be referred to Registrar.

Bye-law 52 of Co-operative Central and Land Mortgage Bank, Bilaspur. AIR 1962 Madh Pra 265 (268, 269, 270) — 1962 MPLJ 641 = ILR (1963) Madh Pra 620 (FB).

(G) Himachal Pradesh Rules.

(69) Rule 18 (a) states that certain kinds of disputes have to be referred to the Registrar in the manner contemplated therein and these disputes must firstly, relate to the business of the co-operative society and, secondly, must be between present or past members of the society or persons claiming through them on one side and the committee on the other. AIR 1954 Him Pra 63 (64).

(70) It being a part of the business of the co-operative society to hold general meetings of the members, to withdraw or expel members, and therefore, if certain members of the society sue for declaration that the proceedings of the annual general meeting and their removal from membership were illegal and mala fide and they still continued as members, the dispute is covered by Rule 18 (a) and the suit is not maintainable in Civil Court. AIR 1954 Him Pra 63 (65).

(H) Madras Rules.

(71) The scope of Clause (2) (b) of Section 43, Central Act is narrower than the scope of Section 51 of the Madras Act for it does not provide for the decision of a dispute, for example, between a member and the Society,

while the Madras Act does not make such provision. AIR 1954 Mad 103 (105) = ILR (1953) Mad 1047 (FB).

(72) As to the settlement of disputes touching the business of a co-operative society registered in the Presidency of Madras, now see the Madras Co-operative Societies Act, 1932, Sections 51 and 65 (2) (o).

(73) Whether the Registrar of Co-operative Societies is empowered to pass a mortgage decree or not, when such a decree has been passed and it is sought to be executed, the executing Court cannot refuse to execute the decree; nor could it amend it in any way as it cannot be said that the decree is in such cases on the face of it passed without jurisdiction. AIR 1934 Mad 40 (44) = 57 Mad 426.

(74) The Registrar of Co-operative Societies acting under Rule 14 is a Court for the purposes of Section 52, T. P. Act. At any rate, where once the award made by him has been put before a competent Civil Court in execution and the Court directs the sale of mortgaged property, any purchase during such proceedings will be subject to the rule of *lis pendens*. AIR 1934 Mad 40 (42, 43) = 57 Mad 426.

(75) Assistant Registrar acting under Rule 14 is 'Court' within the meaning of Section 195, Criminal P. C. AIR 1930 Mad 869 (870) = 32 Cri L Jour 219.

(76) The second sentence of sub-r. (1) of Rule 14 of Madras Rules, is not beyond the rule-making powers granted by Section 43. AIR 1928 Mad 210 (210).

(76-A) A Collector acting under Rule 14 (5) of the rules made under the Co-operative Societies Act, is not a Court and an application made to him for execution of a decision of the Registrar of Co-operative Societies is not an application to a Court so as to save limitation under Article 182 (5), Limitation Act. AIR 1936 Mad 150 (151) = 59 Mad 257.

(77) An award under the Co-operative Societies Act when it is filed in a Civil Court under Rule 15 (7) (e), attracts all the provisions of the Civil P. C., in the matter of execution. If it attracts all the provisions of the Code with regard to execution, it must of necessity attract the provisions of the Limitation Act which apply to the execution of decrees. The award, when it is filed has to be executed as a decree of the Court and in effect it becomes a decree of the Court. The provisions of Section 48, Civil P. C., must therefore, apply. Section 48 provides that a decree shall run for a period of twelve years, provided, of course, that steps in execution are taken at intervals of not more than three years as required by

Section 43 — Note 3 (contd.)

Article 182, Limitation Act. If, Sec. 48 applies, it follows that the appropriate Article is 182 and not Article 181. If Article 182 does not apply but Art. 181 does, there would be a conflict as Article 181 fixes a period of three years and Section 48, a period of twelve years. AIR 1940 Mad 635 (635) = ILR (1940) Mad 649 (DB). (AIR 1937 Mad 31, **Overruled.**)

(78) A sale certificate is not an indispensable condition pre-requisite for accrual of title in the case of a sale held in execution of an award obtained by a Co-operative Society under the Act. AIR 1950 Mad 609 (610).

(79) Co-operative Society carrying on motor transport business employing its own members in the undertaking — Special bye-laws providing for regulation of service conditions and for settlement of disputes — Such members are not "workmen" — Dispute regarding service conditions is a matter touching the business of society — Proper forum for adjudication is under Co-operative Societies Act — Petition under Section 33-C (2) Industrial Disputes Act (1947) not maintainable. AIR 1964 Mad 103 (106) = (1964) 1 Lab LJ 280 (DB). (AIR 1961 Mad 217, **Reversed.**)

(I) N. W. F. P. Rules.

(80) No procedure is provided in Rule 18 for conducting the inquiry either by the Registrar or by the arbitrator for the appointment of a guardian for the minor debtor. It would, therefore, be unsafe to rely on the appointment of a guardian by a Registrar in the summary proceeding and to extend it to the execution of a payment order in a Civil Court, which, should, by its very nature, be governed by the Civil P. C. Hence, it would be just that whenever an executing Court is approached to carry out the payment order of the Registrar and there are minors in the case, the execution Judge should act under Order 32, Civil P. C., and appoint a proper person to protect the interests of the minors concerned. AIR 1945 Pesh 39 (41) (DB).

(J) Punjab Rules.

(81) Where it is alleged that an award made under the Co-operative Societies Act was made without jurisdiction or was not within the terms of the Act, it is open to the person aggrieved to bring a suit to that effect but such objections cannot be taken in execution proceedings held in pursuance of the award the objector's remedy being an appeal to the Registrar. AIR 1939 Lah 40 (40) ** AIR 1936 Lah 901 (903) = ILR (1937) Lah 92 (DB).

(82) The rules framed under Sec. 43 of the Co-operative Societies Act must

be read together and then it becomes clear that the intention was to make all awards appealable and the use of the singular word in one sub-rule and the plural in another is due to unskilful drafting only. AIR 1937 Lah 673 (675) (DB).

(83) Death of person before institution of proceedings relating to award — Award against him — Execution — Execution application dismissed — On appeal, execution ordered to continue — Revision is maintainable. AIR 1937 Lah 63 (64).

(84) Awards transferred to Civil Court for execution. Decree held to be fully satisfied — No dispute remains outstanding and matter cannot be referred to the Registrar again — Remedy of the bank if not satisfied with the order of the executing Court is to appeal therefrom — Suit for a declaration in Civil Court that the subsequent arbitration proceeding taken and the award therein are ineffectual is entertainable. AIR 1935 Lah 631 (632) ** AIR 1936 Lah 901 (903) = ILR (1937) Lah 92 (DB).

(85) The mere fact that the minor was not properly represented, before the arbitrator, does not give sufficient ground to Civil Courts to entertain a suit for declaration that the award was not binding on the minor. AIR 1933 Lah 376 (377).

(86) An award against the representative of a deceased debtor affects only the estate of the deceased in the hands of the representative and not the representative personally. AIR 1933 Lah 376 (377).

(87) A dispute between a committee of a Co-operative Credit Union and its officer cannot be referred to the Registrar. Award, if made, is a nullity. AIR 1932 Lah 53 (54) (DB).

(88) In cases of dispute between a society and a member no action lies in Civil Court. AIR 1924 Lah 418 (420) (DB) ** AIR 1937 Lah 268 (269) ** AIR 1935 Lah 947 (948) ** AIR 1926 Lah 547 (547).

(89) An award granted under the Act is to be executed in the same manner as a decree of a Civil Court. AIR 1937 Lah 63 (64).

(90) By the provision in Rule 18 (h) it was intended that for the purposes of execution an award would have the same status as a decree and whatever provisions were applicable whether of procedure or of the Limitation Act (which is also a procedural law) to the execution of decrees would be applicable to the enforcement of awards. Hence, to the enforcement of an award under the Co-operative Societies Act the Article of the Limitation Act applicable is Article 182 read with Sec. 48,

Section 43 — Note 3 (contd.)

Civil P. C. and not Article 181. AIR 1947 Lah 269 (271, 272) (DB).

(91) Section 43 (1), Rules framed thereunder Rule 18 (i) — Scope of jurisdiction of appellate authority — Only such person who in fact goes up in appeal under Section 21 (3) or 21 (4) of East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act (50 of 1948) or Rule 18 (i) can be granted relief and person not aggrieved by order appealed against is not entitled to any relief. 1969 Cur LJ 96 (Punj).

(91-A) The substance of Section 50, Punjab Act (XIV of 1955) is very much in the same terms as Rule 18 although sub-section (3) contains a new provision. Under sub-section (3) of Section 50, when any question arises, whether for the purposes of this section a matter referred for decision is a dispute or not, the question shall be decided by the Registrar whose decision shall be final. AIR 1957 Punj 61 (62).

(91-B) In a dispute between a Co-operative Society and its lessors who were also the members of the society the object of the lease was to improve the economic status of the members of the society and it could not be said that the dispute was not between members and the society. Whatever capacity a member may hold, if he has any dispute with the society, the dispute would fall within the purview of Rule 18 or Section 50 of the Punjab Act, 14 of 1955. AIR 1957 Punj 61 (62).

(91-C) Rules under, Rule 18 (j) — Suit by member against other members before award has been made in reference — Jurisdiction of Civil Court to entertain suit not barred under Rule 18 (j) — Remedy of aggrieved member is to obtain stay of suit under Arbitration Act, 1940. AIR 1961 Punj 133 (134, 135, 136) = ILR (1959) Punj 940.

(K) U. P. Rules.

(91-D) On the death of a member of a Co-operative Society who owed money to the society a dispute arose whether certain person was the representative of the deceased. The Registrar referred the matter to arbitrator who passed a personal decree against the person. It was held that Arbitrator had no jurisdiction to pass personal decree against such person and suit by such person for declaration that property was not liable to attachment in execution of such decree was not barred by Section 233 (m), U. P. Land Revenue Act. AIR 1940 All 482 (484).

(91-E) Where dispute, referred to arbitration is still pending, a fresh reference to another arbitrator is not competent and must be regarded as of no legal

effect upon the rights of the parties. AIR 1941 Oudh 315 (319) = 16 Luck 658 (DB).

(91-F) A reference to arbitration under the provisions of the second schedule of the C. P. Code, is entirely distinct from the procedure contemplated by Rule 20 of the Rules. AIR 1925 All 356 (358) = 47 All 374 (DB).

(91-G) The provisions of R. 20(7) (i) (ii) and (iii) refer merely to defects of the procedure and do not invalidate an award by reason of such defects or irregularities. Even if an award is invalid on the ground that it was antedated or had been made after the expiration of the time fixed for making the award or because it was inoperative on the ground of certain procedural defects and irregularities, the proper course for setting it aside is by means of an appeal to the Assistant Registrar under Rule 20 (12) (i). AIR 1941 Oudh 315 (318) = 16 Luck 658 (DB).

(91-H) The bar of jurisdiction of a Civil Court created by Rule 20 (12) (ii) is not absolute but limited only. A civil Court is perfectly competent to entertain a suit in all cases where it can be shown that the act of the authorities of the Co-operative Societies is not within the scope of the Act or is otherwise without jurisdiction. AIR 1941 Oudh 315 (321) = 16 Luck 658 (DB).

(92) Rule 31 of the U. P. Co-operative Society Rules, 1936 is ultra vires the rule making power conferred by S. 43 of the Co-operative Societies Act, 1912 and is void for excessive delegation of legislative powers, beyond constitutionally permissible limits. 1968 All LJ 19.

(93) In case the Registrar is satisfied by the complaint received from some of the members that there had been mismanagement he can take action in this connection and it is the Registrar only who has such a power and not an Assistant Registrar. 1957 All L Jour 56 (59).

(94) Rules 115 and 116 framed under S. 43 by the U. P. Government do not go beyond the scope of the express power mentioned in clause (1) of sub-s. (2) of S. 43 of the Act and hence they are not invalid. AIR 1954 All 490 (491) ** AIR 1954 All 31 (31) (DB).

(95) Powers of arbitrator under Co-operative Societies Act — Order of stay or order granting interim injunction cannot be treated as interim award. AIR 1968 All 22 = 1967 All LJ 454.

(96) Matters relating to election of office-bearers of society are within rule. AIR 1968 All 22 = 1967 All LJ 454.

(97) Removal of elected delegate of a co-operative society challenged as illegal and ultra vires — R. 115 does not bar jurisdiction of civil Court to entertain such suit. AIR 1967 All 134 (134).

Section 43 — Note 3 (contd.)

(98) When the Registrar was given the power to decide the dispute himself or at his discretion to make a reference to arbitration, the power granted to him under R. 116 framed under S. 43, to decide further whether there shall be one or two or three arbitrators is also well within the scope of the Act and it cannot be said that the power is arbitrary. AIR 1954 All 490 (492).

(99) Powers of arbitrator — Arbitrator has no inherent, implied or incidental or consequential power in exercise of which he can pass order of stay or order in the nature of injunction. AIR 1968 All 22 (28) = 1967 All LJ 454.

(100) In order to determine whether a reference to arbitration under R. 115 is valid, two things have to be decided — (1) whether there was a dispute and (2) whether the dispute touched the business of the society. Once the dispute is found to be within the scope of arbitration it is no part of the province of the Court to enter into the merits of the dispute. AIR 1957 All 771 (772).

(101) Matters mentioned in sub-s. (2) are merely illustrative of general powers in sub-s. (1) — R. 115, not ultra vires. AIR 1966 All 12 (13, 14, 15) = 1965 All LJ 831 (FB). (AIR 1960 All 294, Overruled.)

(102) Officer — Includes past officer. AIR 1966 All 12 (15, 16) = 1965 All LJ 831 (FB).

(103) Applicant borrowed grain from Co-operative Society and agreed to return it by certain date. According to applicant time for returning grain was extended. Applicant sent grain within the extended time but society refused to accept it and the applicant was informed about penalty incurred as provided in the agreement. Registrar refused to refer the case to arbitration on application by the applicant. It was held that the dispute was one touching the business of the society under Rule 115 under Section 43 (2) and Registrar's refusal was against law. AIR 1953 All 465 (466) = ILR (1953) 1 All 997 (DB).

(104) Rule 116 is not inconsistent with the provisions of the Arbitration Act. AIR 1954 All 490 (492).

(105) Dy. Registrar allowing appeal from order of Assistant Registrar, ex parte — Ex parte order set aside on application — Date of setting aside is the date of review — It being within six months from date of ex parte order, review is valid. 1969 All LJ 652.

(106) State Government's power to frame rules under Section 43 (1) in regard to appeals not restricted by subsection (2) of Section 43. AIR 1962 All 439 (441, 442).

(107) Rule 133 is not ultra vires Section 42 (2) (1) — Provision in Rule

133-A for second appeal against orders of Asst. Registrar passed under Rule 174 is valid. AIR 1967 All 305 (306, 307).

(108) U. P. Co-operative Societies Rules (1936), Rule 134. Rule not beyond rule-making power of State Government. AIR 1967 All 218 (220).

(109) Enforcement of arbitration award made under Co-operative Societies Act — Two modes prescribed under Rule 137 are alternative and not mutually exclusive — As such, where the money due under such an arbitration award could not be recovered as land revenue through the Collector under Rule 137 (1), proceedings to execute the same award in civil Court under Rule 137 (2) are not barred. AIR 1967 All 281 = ILR (1967) 1 All 12 (DB).

(110) Award under — Application for execution of such award in Civil Court — Art. 182 of Limitation Act (1908) applies. AIR 1967 All 281 (283) = ILR (1967) 1 All 12 (DB).

(111) Writ petition against an award under U. P. Co-operative Societies Rules, 1936 is maintainable. AIR 1966 All 489 (492, 493) (DB). (AIR 1963 All 113, Overruled.)

(112) U. P. Co-operative Societies Rules 1936 — Power of directors to postpone properly convened meeting before meeting is actually held — Power to fix time and place for meeting includes power to postpone it after it has been convened, but before it is held. 1967 All LJ 1019 = (1968) 1 Com LJ 21.

4. Other rules. — (1) Rules framed under Section 43 of the Act are not ultra vires merely because they deprive a mortgagor of his right to a period of six months to pay up the mortgage decree. AIR 1933 Nag.211 (213) (DB).

(2) Rule 25 — Failure to give intimation of loan over Rs. 1000 by society to Registrar as provided by Rule 25 does not invalidate loan. AIR 1945 Cal 350 (354) (DB).

(3) Rule 26 (c) — This rule restricts the powers given by Section 32, Civil P. C., to those given in the sub-rule. Hence, in whatever capacity a person may have been summoned, the liquidator has no power either to ask for security or to impose a sentence of imprisonment or fine for his failure to furnish security. AIR 1939 Lah 357 (358) = ILR (1939) Lah 192 = 40 Cri L Jour 791.

(4) Rule 28 (3) refers to the auditor's report and not to his oral evidence. AIR 1938 Cal 394 (398) = ILR (1938) 2 Cal 144.

(5) Rule 137 (i) (U. P.) — Rule 137 merely provides summary procedure for realisation of money — It does not invest debt due to co-operative bank with character of land revenue due to the Crown. Bank cannot claim substantive right of priority by reason of Rule 137

Miscellaneous

44. Recovery of sums due to Government.—(1) All sums due from a registered society or from an officer or member or past member of a registered society as such to the Government, including any costs awarded to the Government under Section 37, may be recovered in the same manner as arrears of land revenue.

Section 43 — Note 4 (contd.)

(i). AIR 1940 All 188 (189) = ILR (1940) All 181 (DB).

(6) Rule 137 only permits the amount under an award to be realised as an arrear of land revenue against a society or person who is properly a party to the award. AIR 1956 All 112 (113) (DB).

(7) In a dispute between two registered Societies A and B the arbitrator passed an award against B and the execution was taken out under Rule 137 (i) to realise the amount of the award not from B but from the defaulting members of B, as though it were arrears of land revenue. It was held that the award against B could not be enforced against members of that Society but B could seek to obtain award against its defaulting members or A could proceed by an application to the Civil Court under Clause (ii) of Rule 137 to enforce the award as if it were a decree of the Court. AIR 1956 All 112 (113, 114) (DB).

(8) Rule 144 is not ultra vires the Act as it is covered by the powers given by Section 43, sub-section (n) of the said Act. AIR 1957 All 492 (495).

(9) Under Rule 144 an order could be made against the legal representatives of the deceased member, to the extent of the property of such member which had come to the representative's hands as such. AIR 1957 All 492 (493, 494).

(10) Under Rule 155 the Registrar is required to fix such remuneration for the liquidator as he thinks proper and such amount has to be paid out of the costs of liquidation. The liquidator is not remunerated by the Government by any fees or commission out of Government funds. AIR 1957 All 492 (494).

(11) Rule 25 prescribes as to what would be done at the annual general meeting but it is nowhere mentioned in that rule that fresh members will be elected without giving any notice of the same. 1957 All L Jour 56 (60).

(12) In case the Registrar is satisfied by a complaint received from some of the members that there has been mismanagement he can take action in this connection under Rule 31. The Assistant Registrar has no power in this respect. The Registrar cannot act under this rule without giving the committee reasonable time to show cause why it should not be stopped from functioning further. 1957 All L Jour 56 (59).

5. Rule and bye-law. — (1) Ordinarily a rule, which is as effective as section of the Act, must be followed in preference to a bye-law if there is a conflict be-

tween the two. AIR 1938 Lah 8 (10) (DB).

(2) It is settled law that the provision under the Co-operative Societies Act and rules together with the provisions on the same lines contained in the bye-laws of the Society to the effect that the liability of the members shall be joint and several, is a provision only concerning their liability to the Society and as between themselves. 54 Cal WN (2 DR) 256 (259).

(3) Bye-law of co-operative society — It cannot travel beyond domestic sphere of society — Such bye-law cannot be a law or have the force of law. AIR 1967 All 121 (123) = 1966 All LJ 875 (DB).

(4) Bye-law 19 providing that at least 15 days notice of general meeting shall be given — Bye law 19 is mandatory as regards period of notice and there can be no estoppel against challenging validity of meeting on ground of insufficiency of notice—Bye-law 21 providing that 'non-receipt of notice of general meeting by a member shall not invalidate its proceedings' — It only means that if posting of notice is in sufficient time to give a notice of 15 days then complaint about non-receipt of notice is not valid. 1963 MPLJ 35 = 1963 Jab LJ 193 (DB).

(5) National Transport Service Co-operative Societies — Bye-laws 19 and 23 — Annual general meeting — Bye-law providing for holding such meeting once a year on any day within two months from receipt audit of society — Though bye-law makes calling of such meeting compulsory it does not restrict or take away power to call meeting for any other purpose on other occasion. 1963 MPLJ 35 = 1963 Jab LJ 193 (DB).

(6) Rules and bye-laws — National Transport Service Co-operative Society—Bye-law of Co-operative Society — Managing Committee — Powers of — Bye-law empowering managing committee to expel member from society subject to confirmation by general meeting — Resolution of managing committee expelling some members can take effect only when confirmed by the general meeting. 1963 MPLJ 35 = 1963 Jab LJ 193 (DB).

Section 44 — Note 1

(1) Decree against society cannot be executed against members before winding up. AIR 1934 Mad 181 (182) (DB).

(2) Reading S. 44 with S. 128 of C. P. Land Revenue Act, an agriculturist's house is not exempt from being sold for debt to society. AIR 1927 Nag 217 (218) = 23 Nag LR 66.

(2) Sums due from a registered society to Government and recoverable under sub-section (1) may be recovered, firstly, from the property of the society; secondly, in the case of a society of which the liability of the members is limited, from the members subject to the limit of their liability and, thirdly, in the case of other societies, from the members.

45. Power to exempt societies from conditions as to registration.—Notwithstanding anything contained in this Act, the ^{*}[State] Government may, by special order in each case and subject to such conditions, if any, as it may impose, exempt any society from any of the requirements of this Act as to registration.

[^{*}] Substituted for "Provincial" by A. L. O., 1950 (26-1-1950).

46. Power to exempt registered societies from provisions of the Act.—The ^{*}[State] Government may, by general or special order, exempt any registered society from any of the provisions of this Act or may direct that such provisions shall apply to such society with such modifications as may be specified in the order.

[^{*}] Substituted for "Provincial" by A. L. O., 1950 (26-1-1950).

47. Prohibition of the use of the word "co-operative".—(1) No person other than a registered society shall trade or carry on business under any name or title of which the word "co-operative" is part without the sanction of the ^{*}[State] Government:

Provided that nothing in this section shall apply to the use by any person or his successor-in-interest of any name or title under which he traded or carried on business at the date on which this Act comes into operation.

(2) Whoever contravenes the provisions of this section shall be punishable with fine which may extend to fifty rupees, and in the case of a continuing offence with further fine of five rupees for each day on which the offence is continued after conviction therefor.

[^{*}] Substituted for "Provincial" by A. L. O., 1950 (26-1-1950).

48. Indian Companies Act, 1882, not to apply.—The provisions of the ^{*}Indian Companies Act, 1882, shall not apply to registered societies.

[^{*}] See now the Companies Act, 1956 (1 of 1956).

49. Saving of existing societies.—Every society now existing which has been registered under the Co-operative Credit Societies Act, 1904, shall be deemed to be registered under this Act, and its by-laws shall, so far as the same are not inconsistent with the express provisions of this Act, continue in force until altered or rescinded.

Section 44 — Note 1 (contd.)

(3) Composite award passed by the Registrar against the Society and its members is not void — Award not challenged by the judgment-debtor — Sale under the award which followed it is not void and ineffectual. AIR 1943 Nag 7 (8, 9) = ILR (1942) Nag 685.

(4) According to the strict meaning of the words "in the same manner as arrears of land revenue" a Revenue Officer cannot proceed under S. 46 and following sections of the Burma Land and Revenue Act, against any land belonging to the defaulter, unless the amount due from him is due on account of the land sought to be sold. (Case under Section 51, Burma Co-operative Societies Act, 1927). AIR 1940 Rang 240 (242) = 1940 Rang LR 230.

(5) Sale proceeds in the hands of the Collector are not liable to attachment at the instance of other creditor — Principle of Section 73, Civil P. C., cannot apply. (Case under Section 59 (b), Bombay Co-operative Societies Act, 1925). AIR 1938 Sind 157 (159, 160) = ILR (1939) Kar 104.

Section 49 — Note 1

(1) Bye-law framed under old Act 10 of 1904 giving rights and imposing liabilities of deceased member on successor-in-interest who is elected as member of society is not ultra vires not being inconsistent with express provision of the new Act — Person so elected must pay debts of deceased though exceeding assets left by him. AIR 1915 Oudh 15 (16) = 18 Oudh Cas 157.

50. Repeal. [Repealed by the Second Repealing and Amending Act, 1914 (17 [XVII] of 1914), S. 3 and Sch. II.]

[THE] COPYRIGHT ACT, 1957

(ACT XIV OF 1957)

[The text of the Act printed here is as on 31-3-1970.]

CONTENTS

SECTIONS

CHAPTER I

PRELIMINARY

1. Short title, extent and commencement.
2. Interpretation.
3. Meaning of publication.
4. When work not deemed to be published or performed in public.
5. When work deemed to be first published in India.
6. Certain disputes to be decided by Copyright Board.
7. Nationality of author where the making of unpublished work is extended over considerable period.
8. Domicile of corporations.

CHAPTER II

COPYRIGHT OFFICE AND COPYRIGHT BOARD

9. Copyright Office.
10. Registrar and Deputy Registrars of Copyrights.
11. Copyright Board.
12. Powers and procedure of Copyright Board.

CHAPTER III

COPYRIGHT

13. Works in which copyright subsists.
14. Meaning of copyright.
15. Special provision regarding copyright in designs registered or capable of being registered under the Indian Patents and Designs Act, 1911.
16. No copyright except as provided in this Act.

CHAPTER IV

OWNERSHIP OF COPYRIGHT AND THE RIGHTS OF THE OWNER

17. First owner of copyright.
18. Assignment of copyright.
19. Mode of assignment.
20. Transmission of copyright in manuscript by testamentary disposition.

21. Right of author to relinquish copyright.

CHAPTER V

TERM OF COPYRIGHT

22. Term of copyright in published literary, dramatic, musical and artistic works.
23. Term of copyright in anonymous and pseudonymous works.
24. Term of copyright in posthumous work.
25. Term of copyright in photographs.
26. Term of copyright in cinematograph-films.
27. Term of copyright in records.
28. Term of copyright in Government works.
29. Term of copyright in works of international organisations.

CHAPTER VI

LICENCES

30. Licences by owners of copyright.
31. Compulsory licence in works withheld from public.
32. Licence to produce and publish translations.

CHAPTER VII

PERFORMING RIGHTS SOCIETIES

33. Performing rights society to file statements of fees, charges and royalties.
34. Objections relating to published statements.
35. Determination of objections.
36. Existing rights not affected.

CHAPTER VIII

RIGHTS OF BROADCASTING AUTHORITIES

37. Broadcast reproduction right.
38. Other provisions of this Act to apply to broadcast reproduction rights.

39. Other rights not affected.

CHAPTER IX

INTERNATIONAL COPYRIGHT

- 40. Power to extend copyright to foreign works.
- 41. Provisions as to works of certain international organisations.
- 42. Power to restrict rights in works of foreign authors first published in India.
- 43. Orders under this Chapter to be laid before Parliament.

CHAPTER X

REGISTRATION OF COPYRIGHT

- 44. Register of Copyrights.
- 45. Entries in Register of Copyrights.
- 46. Indexes.
- 47. Form and inspection of register.
- 48. Register of Copyrights to be prima facie evidence of particulars entered therein.
- 49. Correction of entries in the Register of Copyrights.
- 50. Rectification of Register by Copyright Board.

CHAPTER XI

INFRINGEMENT OF COPYRIGHT

- 51. When copyright infringed.
- 52. Certain acts not be infringement of copyright.
- 53. Importation of infringing copies.

CHAPTER XII

CIVIL REMEDIES

- 54. Definition.
- 55. Civil remedies for infringement of copyright.
- 56. Protection of separate rights.
- 57. Author's special rights.
- 58. Rights of owner against persons possessing or dealing with infringing copies.
- 59. Restriction on remedies in the case of works of architecture.
- 60. Remedy in the case of groundless threat of legal proceedings.

STATEMENT OF OBJECTS AND REASONS

The existing law relating to copyright is contained in the Copyright Act, 1911 of the United Kingdom (hereinafter referred to as the United Kingdom Act) as modified by the Indian Copyright Act, 1914. Apart from the fact that the United Kingdom Act does not fit in with the changed constitutional status of

- 61. Owners of copyright to be party to the proceeding.
- 62. Jurisdiction of Court over matters arising under this Chapter.

CHAPTER XIII

OFFENCES

- 63. Offence of infringement of copyright or other rights conferred by this Act.
- 64. Power of police to seize infringing copies.
- 65. Possession of plates for purpose of making infringing copies.
- 66. Disposal of infringing copies or plates for purpose of making infringing copies.
- 67. Penalty for making false entries in register, etc. for producing or tendering false entries.
- 68. Penalty for making false statements for the purpose of deceiving or influencing any authority or officer.
- 69. Offences by companies.
- 70. Cognizance of offences.

CHAPTER XIV

APPEALS

- 71. Appeals against certain orders of magistrate.
- 72. Appeals against orders of Registrar of Copyrights and Copyright Board.
- 73. Procedure for Appeals.

CHAPTER XV

MISCELLANEOUS

- 74. Registrar of Copyrights and Copyright Board to possess certain powers of Civil Courts.
- 75. Orders for payment of money passed by Registrar of Copyrights and Copyright Board to be executable as a decree.
- 76. Protection of action taken in good faith.
- 77. Certain persons to be public servants.
- 78. Power to make rules.
- 79. Repeals, savings and transitional provisions.

India, it is necessary to enact an independent self-contained law on the subject of copyright in the light of growing public consciousness of the rights and obligations of authors and in the light of experience gained in the working of the existing law during the last forty years. New and adv-

anced means of communications like broadcasting, litho-photography, etc., also call for certain amendments in the existing law. Adequate provision has also to be made for fulfilment of international obligations in the field of copyright which India might accept. A complete revision of the law of copyright, therefore, seemed inevitable and the Bill attempts such a revision.

2. Though the draft Bill follows generally in a rearranged form the main principles of the existing law, it has introduced several new features which are briefly indicated below :

- (1) A Copyright Office is sought to be established under the immediate control of a Registrar of Copyrights who shall act under the superintendence and direction of the Central Government. The principal function of the Copyright Office will be to maintain a Register of Copyrights in which may be entered, at the option of the authors, the names or titles of works, the names and addresses of authors and owners of copyright for the time being, and other relevant particulars. Such Register will easily make available useful information to interested members of the public in regard to copyrighted works. In order to encourage registration of copyrights, provision is made that no proceeding regarding infringement of copyright shall be instituted unless the copyright is registered in the Copyright Office. In addition to being in charge of the Copyright Office, the duties of the Registrar of Copyrights will be to entertain and dispose of applications for compulsory licences and to inquire into complaints of importation of infringing copies. An appeal to the Copyright Board is provided for against orders of the Registrar of Copyrights.
- (2) Provision is made for setting up a Copyright Board which will determine the reasonableness of the rates of fees, charges or royalties claimed by performing rights societies, consider applications for general licences for public performances of works and will assess compensation payable under the Bill in certain circumstances. An appeal will lie to the High Court against the decisions of the Copyright Board.
- (3) The definition of "copyright" is enlarged to include the exclusive right to communicate works by radio-diffusion.
- (4) A cinematograph film will have a separate copyright apart from

its various components, namely, story, music, etc.

- (5) An author assigning copyright in his work is allowed the option to reacquire the copyright after seven years but before ten years of the assignment on condition that he returns the amount received by him at the time of the assignment with interest thereon.
- (6) The normal term of copyright is fixed to be the life of the author and a period of 25 years after his death as against the existing term of the life of the author and a period of 50 years after his death. Shorter terms are fixed for anonymous or pseudonymous works, cinematograph films, mechanical contrivances, photographs, etc.
- (7) Under the existing law, the sole right to produce a translation of a work first published in India is extinguished after ten years, unless a translation thereof is produced within that period. The draft Bill makes the right co-extensive with other rights arising out of copyright.
- (8) Provision is made for the issue of a general or special licence for public performances of any work by means of a radio receiving set or a mechanical contrivance.
- (9) A licence may be issued to any library to make or cause to be made one copy of any book in which copyright subsists and which is not available for sale.
- (10) Provision is made for regulating the activities of performing rights societies and also for controlling the fees, charges or royalties to be collected by them.
- (11) Certain rights akin to copyright are conferred on Broadcasting authorities in respect of programmes broadcast by them.
- (12) International copyright relations which are based on international treaties, will be regulated by specific orders to be made by the Central Government.
- (13) A fair dealing with any work for the purposes of radio summary or judicial proceeding will not hereafter constitute an infringement of copyright.

3. In preparing the Bill, the British Copyright Report, 1952, the suggestions of the various Ministries of the Government of India the State Governments, the Indian Universities and certain interested industries and associations who were invited to send their comments on the subject have been taken into consideration — Gaz. of Ind., Extra., 1-10-1955, Pt. II—Sec. 2, p. 515

COGNATE ACTS AND PROVISIONS

- (1) Patents and Designs Act, 2 of 1911. (2) Trade and Merchandise Marks
 (3) Limitation Act, 36 of 1963, Act 88. Act, 43 of 1958.

[THE] COPYRIGHT ACT, 1957
 (ACT XIV OF 1957)*

[4th June 1957.]

An Act to amend and consolidate the law relating to copyright.

Be it enacted by Parliament in the Eighth Year of the Republic of India as follows:—

[*] For Statement of Objects and Reasons, see Gaz. of Ind., 1-10-1955, Pt. II—Sec. 2, p. 544; and for Joint Committee Report, see Gaz. of Ind., Extra., 23-11-1956, Pt. II—Sec. 2, p. 907.

This Act has been extended to the Union Territories of—

Goa, Daman and Diu, by Regn. 12 of 1962 (w.e.f. 1-2-1965);

Dadra and Nagar Haveli, by Regn. 6 of 1963 (w.e.f. 1-7-1965);

Pondicherry, by Regn. 7 of 1963 (w.e.f. 1-10-1963).

CHAPTER I
 PRELIMINARY

1. Short title, extent and commencement.—(1) This Act may be called THE COPYRIGHT ACT, 1957.

(2) It extends to the whole of India.

(3) It shall come into force on such date* as the Central Government may, by notification in the Official Gazette, appoint.

[1914—S. 1 and Sch. I—S. 37.]

[*] The Act came into force on 21-1-1958—See Notification No. S.R.O. 269, dated 21-1-1958, published in Gaz. of Ind., Extra., Pt. II, Sec. 3, p. 167.

2. Interpretation.—In this Act, unless the context otherwise requires,—

(a) "adaptation" means,—

(i) in relation to a dramatic work, the conversion of the work into a non-dramatic work;

(ii) in relation to a literary work or an artistic work, the conversion of the work into a dramatic work by way of performance in public or otherwise;

(iii) in relation to a literary or dramatic work, any abridgement of the work or any version of the work in which the story or action is conveyed wholly or mainly by means of pictures in a form suitable for reproduction in a book, or in a newspaper, magazine or similar periodical; and

Section 1 — Note 1

(1) The Imperial Copyright Act, 1911, was "a law in force in the territory of India immediately before the commencement of the Constitution" and it continued in force by virtue of Article 372 (1) of the Constitution. The contention that under the terms of Section 25 of the Copyright Act, 1911 itself the provisions of the Act were inapplicable to self-governing Dominions and that when India attained the status of self-governing Dominion by reason of the Indian Independence Act in 1947, the India Copyright Act of 1911 ceased to apply to

India is incorrect as the words "self-governing Dominion" in Section 35 (1) of the Imperial Copyright Act, 1911 include only "Canada, Australia, New Zealand, South Africa and Newfoundland" and India did not become automatically added to that list by its attaining self-governing status on 15-8-1947. AIR 1959 Mad 410 (416, 417).

Section 2 — Note 1

(1) A map described as "Panoramic bird's eye view of the seat of war, from special drawings by French and German artists, showing the Rhine, France, Russia

- (iv) in relation to a musical work, any arrangement or transcription of the work;
- (b) "architectural work of art" means any building or structure having an artistic character or design, or any model for such building or structure;
- (c) "artistic work" means—
 - (i) a painting, a sculpture, a drawing (including a diagram, map, chart or plan), an engraving or a photograph, whether or not any such work possesses artistic quality;
 - (ii) an architectural work of art; and
 - (iii) any other work of artistic craftsmanship;

OBJECTS AND REASONS

Section 2 (c).—"The definition of 'artistic work' has been redrafted so as to make it clear that certain classes of artistic works will enjoy copyright notwithstanding that they do not possess any artistic quality. This change in the existing law is intended to resolve conflict of judicial opinion on the subject."—J. C .R.

(d) "author" means,—

- (i) in relation to a literary or dramatic work, the author of the work;
- (ii) in relation to a musical work, the composer;
- (iii) in relation to an artistic work other than a photograph, the artist,
- (iv) in relation to a photograph, the person taking the photograph;
- (v) in relation to a cinematograph film, the owner of the film at the time of its completion; and

Section 2 — Note 1 (contd.)
and Belgium", etc., is a book. (1871) 40 LJ Ch 489 (491).

(2) The Copyright Act of 1914 provides for different extents of copy right for a plan regarded as original literary work and a plan regarded as an artistic drawing or artistic design of an architectural work of art. ILR (1956) Mad 1347 (1359).

(3) Biographical notes compiled in golf annual from replies sent by golf players to questions sent by compiler — Copyright in notes vests in the compiler. (1907) 23 TLR 370 (371).

(4) 'Adaptation', in relation to a literary work, inter alia, means any abridgement of the work. (1966) 70 Cal WN 1130.

(5) Original artistic work — Picture produced by combination of parts of two other pictures in a new way is entitled to protection. AIR 1961 Mad 114 (119) = (1962) 1 Mad LJ 258 (DB). (Case under 1914 Act.)

(6) Reproduction of artistic work — Must be intangible form. AIR 1967 Mad 381 (387) = ILR (1964) 2 Mad 666 (DB).

(7) Author, in relation to a drama is the author of the drama. AIR 1967 Assam 70 (71) = ILR (1966) 18 Assam 272 (DB).

(8) Author in relation to a cinematograph film means the owner of the film at the time of its completion. AIR 1967

Assam 70 (71) = ILR (1966) 18 Assam 272 (DB).

(9) The definition of a cinematograph film in Section 2 (f), comprises both a movie as well as a talkie and each of them is a separate entity, and a work in respect of which there can be copyright. (1966) 1 Andh WR 473 = ILR (1967) Andh Pra 1385.

(10) Examination question papers are not Government work within Section 2 (k). AIR 1967 All 91 (96) = 1966 All LJ 550.

(11) A copy of the visible portion of the movie in a talkie film is not an infringing copy of the talkie film according to Section 2 (m). (1966) 1 Andhra WR 473 = ILR (1967) Andh Pra 1385.

(12) Word 'reproduction' has the same sense as expression 'colourable imitation'. AIR 1967 Mad 381 (387, 388) = ILR (1964) 2 Mad 666 (DB).

(13) Exact reproduction or copy is not necessary for purposes of infringement of copyright. AIR 1967 Mad 381 (389) = ILR (1964) 2 Mad 666 (DB).

(14) There should be reproduction of substantial part of picture for purposes of infringement of copy. AIR 1967 Mad 381 (389) = ILR (1964) 2 Mad 666 (DB).

(15) Examination question papers are 'original literary works' within the meaning of Sec. 13. AIR 1967 All 91 (92) = 1966 All LJ 550.

- (vi) in relation to a record, the owner of the original plate from which the record is made, at the time of the making of the plate:

OBJECTS AND REASONS

Section 2 (d).—"The definition of 'author' in relation to a photograph has been altered. The Committee feels that in the case of a photograph the person who takes the photograph and not the person who is the owner of the original negative should be deemed to be the author of the photograph."—J. C. R.

- (e) "calendar year" means the year commencing on the 1st day of January;
 (f) "cinematograph film" includes the sound track, if any, and 'cinematograph' shall be construed as including any work produced by any process analogous to cinematography;
 (g) "delivery", in relation to a lecture, includes delivery by means of any mechanical instrument or by radio-diffusion;
 (h) "dramatic work" includes any piece for recitation, choreographic work or entertainment in dumb show, the scenic arrangement or acting form of which is fixed in writing or otherwise but does not include a cinematograph film;

OBJECTS AND REASONS

Section 2 (h).—"The definition of 'dramatic work' has been amended so as to exclude from its purview a cinematograph film. Under the Bill a cinematograph film is an independent work which will enjoy copyright apart from its component parts."—J. C. R.

- (i) "engravings" include etchings, lithographs, wood-cuts, prints and other similar works, not being photographs;
 (j) "exclusive licence" means a licence which confers on the licensee or on the licensee and persons authorised by him, to the exclusion of all other persons (including the owner of the copyright), any right comprised in the copyright in a work, and "exclusive licensee" shall be construed accordingly;
 (k) "Government work" means a work which is made or published by or under the direction or control of—
 (i) the Government or any department of the Government;
 (ii) any Legislature in India;
 (iii) any Court, tribunal or other judicial authority in India;*

[*] It is interesting to note that the United States Supreme Court does not claim a copyright in its judgments.

OBJECTS AND REASONS

Section 2 (k).—"The definition of 'Government work' has been enlarged so as to include within its ambit any work made or published by or under the direction or control of any Legislature or any Court, tribunal or other judicial authority in India."—J. C. R.

- (l) "Indian work" means a literary, dramatic or musical work, the author of which is a citizen of India;
 (m) "infringing copy" means,—
 (i) in relation to a literary, dramatic, musical or artistic work, a reproduction thereof otherwise than in the form of a cinematograph film;
 (ii) in relation to a cinematograph film a copy of the film or a record embodying the recording in any part of the sound track associated with the film;
 (iii) in relation to record, any such record embodying the same recording; and
 (iv) in relation to a programme in which a broadcast reproduction right subsists under Section 37, a record recording the programme, if such reproduction, copy or record is made or imported in contravention of the provisions of this Act;

- (n) "lecture" includes address, speech and sermon;
- (o) "literary work" includes tables and compilations;
- (p) "musical work" means any combination of melody and harmony or either of them, printed, reduced to writing or otherwise graphically produced or reproduced;
- (q) "performance" includes any mode of visual or acoustic presentation, including any such presentation by the exhibition of a cinematograph film, or by means of radio-diffusion, or by the use of a record, or by any other means and, in relation to a lecture, includes the delivery of such lecture;
- (r) "performing rights society" means a society, association or other body, whether incorporated or not, which carries on business in India of issuing or granting licences for the performance in India of any works in which copyright subsists;
- (s) "photograph" includes photo-lithograph and any work produced by any process analogous to photography but does not include any part of a cinematograph film;
- (t) "plate" includes any stereotype or other plate, stone, block, mould, matrix, transfer, negative or other device used or intended to be used for printing or reproducing copies of any work, and any matrix or other appliance by which records for the acoustic presentation of the work are or are intended to be made;
- (u) "prescribed" means prescribed by rules made under this Act;
- (v) "radio-diffusion" includes communication to the public by any means of wireless diffusion whether in the form of sounds or visual images or both;
- (w) "record" means any disc, tape, perforated roll or other device in which sounds are embodied so as to be capable of being reproduced therefrom, other than a sound track associated with a cinematograph film;

OBJECTS AND REASONS

Section 2 (w).—"The definition of 'mechanical contrivance' has been omitted and in its place the expression 'record' has been defined." "Throughout the Bill for the words 'mechanical contrivance' or 'contrivance' the word 'record' has been substituted. The Committee feels that in view of modern inventions the expression 'mechanical contrivance' is a little out of date because nowadays sounds can be recorded without using any mechanical process, e.g., by a magnetic tape. Moreover, the expression 'record' is a common term which is easily understood."—J. C. R.

- (x) "recording" means the aggregate of the sounds embodied in and capable of being reproduced by means of a record;
 - (y) "work" means any of the following works, namely:—
 - (i) a literary, dramatic, musical or artistic work;
 - (ii) a cinematograph film;
 - (iii) a record;
 - (z) "work of joint authorship" means a work produced by the collaboration of two or more authors in which the contribution of one author is not distinct from the contribution of the other author or authors;
 - (za) "work of sculpture" includes casts and models.
- [1914—S. 2 and Sch. I, S. 35.]

3. Meaning of publication.—For the purposes of this Act, "publication" means—

- (a) in the case of a literary, dramatic, musical or artistic work, the issue of copies of the work to the public in sufficient quantities;

(b) in the case of a cinematograph film, the sale or hire or offer for sale or hire of the film or copies thereof to the public;

(c) in the case of a record, the issue of records to the public in sufficient quantities;

but does not, except as otherwise expressly provided in this Act, include,—

(i) in the case of a literary, dramatic or musical work, the issue of any records recording such work;

(ii) in the case of a work of sculpture or an architectural work of art, the issue of photographs and engravings of such work.

[1914—Sch. I, S. 1 (3).] [Cf. S. 3 (2) and (4) of Canada Copyright Act, 1952.]

OBJECTS AND REASONS

“This clause has been redrafted so as to make it clear that a work shall not be deemed to be published unless sufficient number of copies thereof have been issued to the public. The clause in its revised form is in accordance with Art. 4 (4) of the Berne Convention.”—J. C. R.

4. When work not deemed to be published or performed in public.—Except in relation to infringement of copyright, a work shall not be deemed to be published or performed in public, if published, or performed in public, without the licence of the owner of the copyright.

[1914—Sch. I-S. 35 (2).]

5. When work deemed to be first published in India.—For the purposes of this Act, a work published in India shall be deemed to be first published in India, notwithstanding that it has been published simultaneously in some other country, unless such other country provides a shorter term of copyright for such work; and a work shall be deemed to be published simultaneously in India and in another country if the time between the publication in India and the publication in such other country does not exceed thirty days or such other period as the Central Government may, in relation to any specified country, determine.

[1914—Sch. I, S. 35 (3).] [Cf. S. 3 (4) of the Canada Copyright Act, 1952.]

OBJECTS AND REASONS

“This clause explains when a work is deemed to be first published in India and when a work is deemed to be published simultaneously in this country and in some other country. The clause corresponds to Section 35 (3) of the U. K. Act and the only modification made is that the permissible interval between publication in India and publication in a foreign country has been extended from fourteen days to thirty days in accordance with the provisions of the Universal Copyright Convention, 1952, recently signed at Geneva to which India is a signatory.” — S. O. R.

6. Certain disputes to be decided by Copyright Board.—If any question arises,—

(a) whether for the purposes of section 3, copies of any literary, dramatic, musical or artistic work, or records are issued to the public in sufficient quantities; or

(b) whether for the purposes of section 5, the term of copyright for any work is shorter in any other country than that provided in respect of that work under this Act;

it shall be referred to the Copyright Board constituted under Section 11 whose decision thereon shall be final.

7. Nationality of author where the making of unpublished work is extended over considerable period.—Where, in the case of an unpublished work, the making of the work is extended over a considerable period, the author of the work

shall, for the purposes of this Act, be deemed to be a citizen of, or domiciled in, that country of which he was a citizen or wherein he was domiciled during any substantial part of that period.

[1914—Sch. I, S. 35 (4).] [Cf. S. 3 (5) of Canada Copyright Act, 1952.]

8. Domicile of corporations.—For the purposes of this Act, a body corporate shall be deemed to be domiciled in India if it is incorporated under any law in force in India.

OBJECTS AND REASONS

‘In the opinion of the Committee the correct test for determining whether a body corporate is domiciled in India, is not whether it does any business in India but whether it is incorporated under any law in India. The clause has been revised accordingly’. — J.C.R.

CHAPTER II COPYRIGHT OFFICE AND COPYRIGHT BOARD

9. Copyright Office.—(1) There shall be established for the purposes of this Act an office to be called the Copyright Office.

(2) The Copyright Office shall be under the immediate control of the Registrar of Copyrights who shall act under the superintendence and direction of the Central Government.

(3) There shall be a seal for the Copyright Office.

10. Registrar and Deputy Registrars of Copyrights.—(1) The Central Government shall appoint a Registrar of Copyrights and may appoint one or more Deputy Registrars of Copyrights.

(2) A Deputy Registrar of Copyrights shall discharge under the superintendence and direction of the Registrar of Copyrights such functions of the Registrar under this Act as the Registrar may, from time to time, assign to him; and any reference in this Act to the Registrar of Copyrights shall include a reference to a Deputy Registrar of Copyrights when so discharging any such functions.

11. Copyright Board.—(1) As soon as may be after the commencement of this Act, the Central Government shall constitute a Board to be called the Copyright Board which shall consist of a Chairman and not less than two nor more than eight other members.

(2) The Chairman and other members of the Copyright Board shall hold office for such period and on such terms and conditions as may be prescribed.

(3) The Chairman of the Copyright Board shall be a person who is, or has been, a Judge of the Supreme Court or a High Court or is qualified for appointment as a Judge of a High Court.

(4) The Registrar of Copyrights shall be the Secretary of the Copyright Board and shall perform such functions as may be prescribed.

OBJECTS AND REASONS

Sections 11 and 12 — “These clauses (that is, Sections 11 and 12) have been extensively revised. The Committee feels that the Copyright Board should consist of independent persons and should not contain any representatives of interested parties. In order to ensure the impartiality of the Copyright Board an express provision has been made that a member of the Board who is interested in any matter arising before the Board should not take part in the proceedings of the Board when that matter is under consideration [Section 12 (5)]. Since the Copyright Board has important functions to perform under the Bill, the Committee feels that it should be permissible for Government to appoint a Judge of the Supreme Court as

Chairman of the Board [S. 11 (3)]. In the opinion of the Committee the functions of the Registrar of Copyrights should be restricted to administrative matters only. The Registrar of Copyrights will not, therefore, be a member of the Board but will act as its Secretary. [S. 11 (4)]. The Committee is of the view that the Copyright Board should function through various benches sitting at different places in India so that people should have an easy access to it. The jurisdiction of the Copyright Board has accordingly been divided into various zones which correspond to the zones constituted under Section 15 of the States Reorganisation Act, 1956 [S. 12 (1)]." — J. C. R.

12. Powers and procedure of Copyright Board.—(1) The Copyright Board shall, subject to any rules that may be made under this Act, have power to regulate its own procedure, including the fixing of places and times of its sittings:

Provided that the Copyright Board shall ordinarily hear any proceeding instituted before it under this Act within the zone in which, at the time of the institution of the proceeding, the person instituting the proceeding actually and voluntarily resides or carries on business or personally works for gain.

Explanation.—In this sub-section "zone" means a zone specified in Section 15 of the States Reorganisation Act, 1956.

(2) The Copyright Board may exercise and discharge its powers and functions through Benches constituted by the Chairman of the Copyright Board from amongst its members, each Bench consisting of not less than three members.

(3) If there is a difference of opinion among the members of the Copyright Board or any Bench thereof in respect of any matter coming before it for decision under this Act, the opinion of the majority shall prevail:

Provided that where there is no such majority—

- (i) if the Chairman was one of the members who heard the matter, the opinion of the Chairman shall prevail;
- (ii) if the Chairman was not one of the members who heard the matters, the matter shall be referred to him for his opinion and that opinion shall prevail.

(4) The Copyright Board may authorise any of its members to exercise any of the powers conferred on it by Section 74 and any order made or act done in exercise of those powers by the member so authorised shall be deemed to be the order or act, as the case may be, of the Board.

(5) No member of the Copyright Board shall take part in any proceedings before the Board in respect of any matter in which he has a personal interest.

(6) No act done or proceeding taken by the Copyright Board under this Act shall be questioned on the ground merely of the existence of any vacancy in, or defect in the constitution of, the Board.

(7) The Copyright Board shall be deemed to be a civil Court for the purposes of Sections 480 and 482 of the Code of Criminal Procedure, 1898, and all proceedings before the Board shall be deemed to be judicial proceedings within the meaning of Sections 193 and 228 of the Indian Penal Code.

OBJECTS AND REASONS

See under Section 11.

CHAPTER III COPYRIGHT

13. Works in which copyright subsists.—(1) Subject to the provisions of this section and the other provisions of this Act, copyright shall subsist throughout India in the following classes of works that is to say,—

- (a) original literary, dramatic, musical and artistic works;

SECTION 13 — SYNOPSIS

1. Copyright in literary and dramatic work.

2. Copyright regarding translation, adaptation abridgement etc.

(b) cinematograph films; and

(c) records.

(2) Copyright shall not subsist in any work specified in sub-section (1), other than a work to which the provisions of Section 40 or Section 41 apply, unless,—

(i) in the case of a published work, the work is first published in India, or where the work is first published outside India, the author is at the date of such publication, or in a case where the author was dead at that date, was at the time of his death, a citizen of India;

(ii) in the case of an unpublished work other than an architectural work of art, the author is at the date of the making of the work a citizen of India or domiciled in India; and

(iii) in the case of an architectural work of art, the work is located in India.

Explanation.—In the case of a work of joint authorship, the conditions conferring copyright specified in this sub-section shall be satisfied by all the authors of the work.

Section 13 — Synopsis (contd.)

3. Copyright regarding designs, pictures, photographs, etc.

4. Copyright regarding films.

5. Cases where copyright does not exist.

1. Copyright in literary and dramatic work.— (1) The work "original" does not mean that the work must be the expression of original or inventive thought. Copyright Acts are not concerned with the origin of ideas, but with the expression of thought and in the case of "literary work" with the expression of thought in print or writing. The originality which is required relates to the expression of the thought but the Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work — that it should originate from the author. AIR 1924 PC 75 (85) = 51 Ind App 109 = 48 Bom 308 ** AIR 1938 All 266 (268) = ILR (1938) All 370 (DB). (Ideas are not protected by copyright but by patent laws. Copyright protects the particular expression of ideas.)

(2) The originality in work relates to the expression of thought — Much depends on the skill, labour, knowledge and the capacity to digest and utilise the raw materials contributed by others in imparting to the product the quality and the character which those materials did not possess and which differentiates the product from the materials used. AIR 1960 Andh Pra 415 (417) = 1960 Andh LT 219 (DB).

(3) It is well established that, in order to obtain copyright production for literary, domestic, musical and artistic works, the subject dealt with need not be original, nor the ideas expressed be something novel. What is required is the expenditure of original skill or labour in execution and not originality of thought. AIR 1961 Mad 111 (112) = (1960) 1 Mad LJ 53 (DB).

(4) Neither original thought nor original research is essential for claiming "a

literary work" to be original under Section 1 of Schedule 1, and the standard of originality required is a very low one, and had been complied with in the case of a plan which was not a mere copy of another plan but involved some little originality however little it may be. ILR (1956) Mad 1347 (1354) (DB).

(5) Though letters may approach the character of a literary work, every private letter cannot be described as a literary work. (1813) 35 ER 225 (229).

(6) The author of a book the subject-matter of which is arranged in a new way totally different from the earlier works on the subject can get a copyright in the work. AIR 1921 All 95 (96) = 43 All 412 (DB).

(7) Registrar of London Coal Market publishing statistics of coal imports in annual sheets priced at £ 335 per annum — Lord of the Treasury publishing mineral statistics priced at 2s. 6d. including and acknowledging the registrar's statistics — Registrar, held, was entitled to an injunction. (1867) 3 Eq 718 (724).

(8) Diary called "The Birthday Scripture Text Book" interleaved with blank space against each day with a text of scripture appended and designed to record birthday's of friends — Subsequent publication of work called "The Children's Birthday Text Book," can be restrained. (1872) 14 Eq 431 (433).

(9) While there may be no copyright in news, the particular form of language in which information is conveyed is the subject of copyright. (1892) 3 Ch 489 (495).

(10) University lectures taken down and published by student. Professor can restrain publication. (1888) 57 LJ PC 2 (8).

(11) Question papers set at examination are original literary works though paper-setter may have copied questions from text books. AIR 1966 Pat 33 (35, 36) = 1966 Cri LJ 54 = 1965 BLJR 719.

(3) Copyright shall not subsist—

(a) in any cinematograph film if a substantial part of the film is an infringement of the copyright in any other work;

(b) in any record made in respect of a literary, dramatic or musical work, if in making the record, copyright in such work has been infringed.

(4) The copyright in a cinematograph film or a record shall not affect the separate copyright in any work in respect of which or a substantial part of which, the film, or as the case may be, the record is made.

(5) In the case of an architectural work of art, copyright shall subsist only in the artistic character and design and shall not extend to processes or methods of construction.

[1914—Sch. I, S. 1 (1).] [Cf. Ss. 1 (1), 2 and 3 of Copyright Act, 1956 (U.K.).]

OBJECTS AND REASONS

"This clause (that is, S. 13) roughly corresponds to Section 1 (1) of the U. K. Act and describes the works in which copyright shall subsist. It provides that separate copyright shall subsist in a cinematograph film as distinct from its various component parts. Sub-clause (2) (i) gives effect to the recommendation made in Art. 2 of the Universal Copyright Convention, 1952 which provides that the works of nationals and residents of a convention country wherever published should have protection of copyright. Sub-clause (4) makes it clear that the copyright in a cinematograph film shall not affect the separate copyright in each of its various component parts." — J. C. R.

Section 13 — Note 1 (contd.)

((1916) 2 Ch. D 601 and AIR 1924 PC 75, Foll.) ** AIR 1967 All 91 (93) = 1966 All LJ 550.

(12) Printed music is to be considered as a book. (1835) 160 ER 117 (122).

(13) A copyright can subsist even in case of law book, dictionary, gazetteer grammar, map, etc., as their compilation also involves brain, skill and labour. AIR 1955 Mad 391 (393).

(14) Even small amount of originality will be protected by law as in the case of law books etc. AIR 1955 Mad 391 (393).

(15) Copyright is, no doubt, the sole right to produce or reproduce a work which is capable of being the subject of copyright protection, or any substantial part thereof, in any material form whatsoever. But the right to reproduce is enough to sustain copyright. Actual reproduction is not necessary, much less profits by reproducing the plan. Even unpublished works have copyright. ILR (1956) Mad 1347 (1355) (DB).

(16) Reporter of a speech delivered in public is the author of his own report. 1900 App Cas 539 (551).

(17) Whether a right of survivorship would or would not apply to a copyright in books published by one coparcener, the right can be inherited by the heirs of the author who owned the copyright. AIR 1921 All 95 (96) = 43 All 412 (412) (DB).

(18) The term "author" applies also to a foreigner residing in the United Kingdom. (1868) 3 HL 100 (115).

2. Copyright regarding translation, adaptation, abridgement etc. — (1) The

compiler of a work in which absolute originality is of necessity excluded is entitled to make use of preceding works upon the subject and where he bestows such mental labour upon what he has taken and subjects it to such revision and correction as to produce an original result he will not be committing a piracy. AIR 1938 All 266 (268, 269) = ILR (1938) All 370 (DB).

(2) To constitute a true and equitable abridgement, the entire work must be preserved in its precise import and exact meaning and then the act of abridgement is an exertion of the individuality employed in moulding and transfusing a large work into a small compass, thus rendering it less expensive and more convenient both to the time and use of the reader. Independent labour must be apparent and the reduction of the size and work by copying some of its parts and omitting others confers no title to authorship, and the result will not be an abridgement entitled to protection. To abridge in the legal sense of the word is to preserve the substance, the essence of the work in language suited to such a purpose, language substantially different from that of the original. To make such an abridgement requires the exercise of mind and labour, skill and judgment brought into play and the result is not merely copying. To constitute a proper abridgement the arrangement of the book abridged must be preserved, the ideas must also be taken and expressed in language not copied but condensed. The mere process of selecting passages from works readily accessible to the public is not, but difficulty in obtaining access to

Section 13 — Note 2 (contd.)

the original or skill manifested in making or arranging the selection is sufficient to give the character of an "original literary work" to the selection. AIR 1924 PC 75 (79, 80) = 48 Bom 308 = 51 Ind App 109 ** AIR 1921 Bom 463 (479) (DB).

(3) Though copyright might not include exclusive right of translation, author of book who made translation of it is entitled to copyright in it as if it were original work. AIR 1915 All 331 (331) = 16 Cri LJ 656.

(4) Copyright subsists in a translation. There is no copyright in specifications of patents. (1814) 35 ER 408 (408).

(5) There is no copyright in book consisting of extracts from a larger work linked together by connecting words, but there may be copyright in notes to such extracts. (1923) 93 LJPC 113 (121).

(6) Copyright subsists in new corrections and addition made to an old work. (1801) 102 ER 138 (139).

(7) Old traditional poem renovated — Result is original literary work. AIR 1938 Cal 594 (595).

3. Copyright as regards, designs, pictures, photographs, etc.— (1) There can be a separate copyright in a building as distinct from a copyright in the place on which the building is based and it vests in the architects. (1941) 3 All ER 144 (147, 148).

(2) The fact that the structure or construction as per a plan has not been actually erected and that the plaintiffs will not be able to erect it, as their tender has been rejected, will be no reason for rejecting their claim to copyright in the plan as an original literary work. Copyright may exist in the designer or inventor of a plan, though he may not himself be able to execute it. ILR (1956) Mad 1347 (1355) (DB).

(3) A building in three dimensions based on a plan in two dimensions and amounting only to an original literary work will not amount to an infringement of copyright and cannot be the subject-matter of a suit for injunction. The copyright protection afforded to a plan, as original literary work will not extend to processes or methods of construction. A plan as an original literary work should be looked at and compared with another plan, like that in two dimensions, just as a building should be compared with a building for infringement of the character or design of an architectural work of art. ILR (1956) Mad 1347 (1356, 1357) (DB).

(4) East India calendar published by A — B copying the work and selling at a lesser price — Copyright is infringed, though there can be no copyright in works of this nature generally. (1806) 33 ER 103 (106).

(5) Person employing another to compile a book of designs has himself the copyright in the work. Copyright may subsist in an advertising catalogue. (1875) 19 Eq 623 (626).

(6) Illustrated catalogue for advertisement and not for sale and without letter press is a book and subject-matter of copyright. (1882) 21 Ch D 369 (379).

(7) Publisher of trade advertisements classified under different headings has copyright in such headings though not in the advertisements themselves. (1893) 1 Ch 218 (225).

(8) Proprietors of photographic firm sending an employee to take a photograph — The proprietors are not the "authors" of the photograph. (1883) 11 QBD 627 (633).

(9) Person controlling the operation of taking a photograph is the "author" of it and not the person who does mechanical acts under his control. (1895) 2 Ch 531 (535).

(10) The copyright of ordinary photographs of an actress as a stationary figure taken by a film company for its own purpose and with its own apparatus belongs to that company. AIR 1939 Rang 266 (270) = 1939 Rang LR 121.

(11) Copyright subsists in a photograph taken from a picture. (1869) 4 QB 715 (723).

(12) Design registered as "The Christograph — The Christian's Puzzle — Suitable for all sects and denominations" — Design consisting of envelope containing cardboard piece casting a shadow of a well-known picture when held up — Design is not a literary work. (1883) 52 LJ Ch 107 (108).

(3) Picture produced in a new way by combination of parts of two other pictures is an original artistic work. AIR 1961 Mad 114 (119) = (1962) 1 Mad LJ 258 (DB).

(14) It is original skill or labour in execution, and not originality of thought which is required. Where the plaintiff by expending his labour and skill produced a portrait of Mahatma Gandhi by a combination of parts of two other photographs of Mahatma Gandhi in a new way so as to produce a different result:

Held, that the plaintiff was entitled to a copyright in the picture prepared by him. AIR 1961 Mad 114 (117, 118, 119) = (1962) 1 Mad LJ 258 (DB).

(15) Copyright subsists in every artistic work. Artistic work would comprise paintings, sculpture, drawings, engravings and photographs and works of architecture etc. AIR 1961 Mad 114 (118) = (1962) 1 Mad LJ 258 (DB).

4. Copyright regarding film.— (1) Film being a substantial reproduction of the drama 'Pijoh phookan' the owners of the film can have no copyright in the same. AIR 1967 Assam 70 (72) = ILR (1966) 18 Assam 272 (DB).

14. Meaning of copyright.—(1) For the purposes of this Act, “copyright” means the exclusive right, by virtue of, and subject to the provisions of, this Act,—

- (a) in the case of a literary, dramatic or musical work, to do and authorise the doing of any of the following acts, namely:
 - (i) to reproduce the work in any material form;
 - (ii) to publish the work;
 - (iii) to perform the work in public;
 - (iv) to produce, reproduce, perform or publish any translation of the work;
 - (v) to make any cinematograph film or a record in respect of the work;
 - (vi) to communicate the work by radio-diffusion or to communicate to the public by a loud-speaker or any other similar instrument the radio diffusion of the work;
 - (vii) to make any adaptation of the work;
 - (viii) to do in relation to a translation or an adaptation of the work any of the acts specified in relation to the work in clauses (i) to (vi);

Section 13 — Note 4 (contd.)

(2) A person who has an exclusive right to exhibit a talkie film in a particular language is not entitled to any rights in respect of the movie. (1966) 1 Andh Pra WR 473 = ILR (1967) Andh Pra 1385.

(3) The copyright in a talkie film is something independent of the copyright in any work or substantial part of the work in respect of which the film is made. (1966) 1 Andh WR 473 = ILR (1967) Andh Pra 1385.

5. Cases where copyright does not exist. — (1) Generally a title of a composition by itself cannot be the subject-matter of the copyright though in certain cases it may be so extensive and important as to require protection against being copied. AIR 1940 PC 55 (58).

(2) P originating name of a play, and of leading characters and supplying some lines in the dialogue — T, H and V writing music and lyrics: Held, that P's contribution could not be the subject-matter of copyright and he could not be called as one of the joint authors. (1921) 1 Ch 503 (511).

(3) Drawing representing a hand holding a pencil and making a cross within a square is not an artistic work and there can be no copyright in it. (1890) 25 QBD 99 (104).

(4) Title of a novel — No originality or invention displayed in the title — There can be no copyright. (1881) 50 LJ Ch 809 (814).

(5) Reporter of law reports has no copyright in respect of reports of judgments but has the protection of law in selecting and reporting cases which he obtains by expenditure of time, labour and money. AIR 1915 Cal 112 (112).

(6) A subsequent compiler of a directory or a guide book cannot adopt information contained in previous works on the same subject, and must work out the information by original enquiry. (1866) 1 Eq 697 (701, 702).

(7) A agreeing with B that B should adopt a foreign play, A to have the right of representing it on stage in London and B in provinces: — Held, A by employing B did not become owner of copyright in the adaptation. (1856) 25 LJCP 127 (131).

Section 14 — Note 1 Cases under the old Act.

(1) An author of an original work has the sole right to produce, reproduce, perform or publish any translation of the work. Any unauthorised translation is an infringement of the copyright of the author. (1951) 55 Cal WN 713 (715) ** (1968) 1 Andh Pra WR 323 = (1968) 2 Andh LT 71 ** AIR 1967 Ker 234 (235) = 1967 Cri LJ 1517 (2) = 1967 Ker LT 1110.

(2) Copyright can be claimed in a work, which is a piracy of another copyright work, provided that the piracy is not a mere slavish copy or, possibly obtained by fraud. The fact that the plaintiff's work was the infringement of a copyright in an earlier work should not, in principle, affect the right to copyright, so long as the infringer has done independent work. (1951) 55 Cal WN 713 (715).

(3) Even before the Copyright Act of 1911, the owner of a copyright had the exclusive right to representation and performance of his work and not only to the printing and publication thereof. AIR 1934 Cal 671 (672).

(4) An author of a law commentary cannot claim that once he quoted in his book a passage either from a decided

- (b) in the case of an artistic work, to do or authorise the doing of any of the following acts, namely:—
 - (i) to reproduce the work in any material form;
 - (ii) to publish the work;
 - (iii) to include the work in any cinematograph film;
 - (iv) to make any adaptation of the work;
 - (v) to do in relation to an adaptation of the work any of the acts specified in relation to the work in clauses (i) to (iii).
- (c) in the case of a cinematograph film, to do or authorise the doing of any of the following acts, namely:—
 - (i) to make a copy of the film;
 - (ii) to cause the film, in so far as it consists of visual images, to be seen in public and, in so far as it consists of sounds, to be heard in public;
 - (iii) to make any record embodying the recording in any part of the sound track associated with the film by utilising such sound track;
 - (iv) to communicate the film by radio-diffusion;
- (d) in the case of a record, to do or authorise the doing of any of the following acts by utilising the record, namely:—
 - (i) to make any other record embodying the same recording;
 - (ii) to cause the recording embodied in the record to be heard in public;
 - (iii) to communicate the recording embodied in the record by radio-diffusion.

Section 14 — Note 1 (contd.)

case or a standard work then no one else has any right again to quote that passage. Otherwise the defence of "common source" can never be available to any one. AIR 1954 All 570 (573) = ILR (1954) 1 All 289.

(5) Economic value is irrelevant when considering copyright. ILR (1956) Mad 1347 (1355) (DB).

(6) It is not only quantity of the matter alleged to have been copied but the value of that portion that has to be looked to. (1838) 40 ER 1110 (1110).

(7) As regards the position of broadcasters, so far as infringement of copyright is concerned, it is sufficient for them to show that they have "authorised" the performance in public of the works; and this will generally be established by proving that listeners with a licence were entitled to tune in their receivers and thus to perform the musical works in question in public as well as in private. AIR 1940 PC 111 (113).

(8) Cinema company engaging film actress placing order for advertisement with Cinema Journal — Publisher of Journal using advertisement by reproducing her photograph taken by another company for their use — The proprietor of the first company knowing or having reason to suspect that the publisher will so use the photograph in infringement of copyright — There is authorisation of

the infringement by him. AIR 1939 Rang 266 (271, 272) = 1939 Rang LR 121.

(9) The copyright exists from the moment the work is made. (1887) 19 QBD 629 (636).

(10) Words 'material form' — Words are used only to emphasize that reproduction of artistic work should take tangible form, viz., marble or bronze or similar substance in three dimensions when artistic work is sculpture. AIR 1967 Mad 381 (387) = ILR (1964) 2 Mad 666 (DB).

(11) Reproduction of substantial parts in picture not by way of appropriation but mathematically exact in regard to certain important measurements is clue to mode of reproduction adopted. AIR 1967 Mad 381 (389) (DB) = ILR (1964) 2 Mad 666 (DB).

(12) No prior work incorporating form of deity shown to exist before date of artist's painting — Held on facts that mode of drawing picture with substantial details constituted essential elements of originality and application of skill and labour in its execution and they constituted elements of copyright — Civil Suit No. 84 of 1958 (Mad), Affirmed. AIR 1967 Mad 381 (388) = ILR (1964) 2 Mad 666 (DB).

(13) Reproduction has the same sense as expression 'colourable imitation'. AIR

(2) Any reference in sub-section (1) to the doing of any act in relation to a work or a translation or an adaptation thereof shall include a reference to the doing of that act in relation to a substantial part thereof.

[1914—Sch. I, S. 1 (2).] [Cf. S. 1 of Copyright Act, 1956 (U. K.); S. 3 (1) of Canada Copyright Act, 1952 and S. 3 of Copyright Act, 1913 (1913, No. 4) (New Zealand).]

15. Special provision regarding copyright in designs registered or capable of being registered under the Indian Patents and Designs Act, 1911.—(1) Copyright shall not subsist under this Act in any design which is registered under the Indian Patents and Designs Act, 1911.

(2) Copyright in any design, which is capable of being registered under the Indian Patents and Designs Act, 1911, but which has not been so registered, shall cease as soon as any article to which the design has been applied has been reproduced more than fifty times by an industrial process by the owner of the copyright or, with his licence, by any other person.

[1914 — Sch. I, S. 22: Compare: the British Copyright Report, 1952, paragraph 241; S. 30 of the Copyright Act, 1913 (1914, No. 4) (New Zealand).]

16. No copyright except as provided in this Act.—No person shall be entitled to copyright or any similar right in any work, whether published or unpublished, otherwise than under and in accordance with the provisions of this Act or of

Section 14 — Note 1 (contd.)

1967 Mad 381 (387, 388) = ILR (1964) 2 Mad 666 (DB).

(14) Exact production or copy is not necessary for purpose of infringement of copyright. AIR 1967 Mad 381 (389) = ILR (1964) 2 Mad 666 (DB).

(15) Copyright means the exclusive right, in the case of a literary work, to do and authorise the doing of, inter alia, any of the following.

- (i) to reproduce the work in any material form
- (ii) to publish any translation of the work
- (iii) to make any adaptation of the work. (1966) 70 Cal WN 1130.

(16) So far as original literary work is concerned, ideas and opinions are not the subject matter of copyright, but only the form, or the expression of such ideas or opinions. AIR 1964 Mad 331 (332) = (1964) 1 Mad LJ 431 (DB) ** AIR 1967 Mad 381 (388) = ILR (1964) 2 Mad 666 (DB).

(17) Section 14 has not provided for the making of a copy of movie portion of a talkie film as included in the copyright of a talkie film. (1966) 1 Andh WR 473 = ILR (1947) Andh Pra 1385.

(18) Copyright in the case of a movie means the exclusive right to make or authorise making the copy of the movie and to cause the movie to be seen in public. (1966) 1 Andh WR 473 = ILR (1967) Andh Pra 1385.

(19) In the case of a talkie the copyright means the exclusive right to make or authorise the making of a copy of

the talkie film, and to cause it to be seen or heard in public. (1966) 1 Andh WR 473 = ILR (1967) Andh Pra 1385 ** 1969 BLJR 12 (DB).

(20) Copyright means the exclusive right to do certain things which are specified in this section. 1969 BLJR 12 (DB).

(21) Copyright is not confined to a literary repetition, but includes various modes in which the matter of any publication may be adopted, imitated or transferred with, more or less colourable alteration. 1969 BLJR 12 (DB)

(22) Student's Guide to novel prescribed for B. A. degree—No copyright in title — Words enclosed in bracket as sub-title sufficient to indicate the Guide or a book different from the novel — No infringement of copyright in title. AIR 1964 Mad 331 (333) = (1964) 1 Mad LJ 431 (DB).

Section 16 — Note 1

(1) The provisions of the Copyright Act must be interpreted as the provisions of the Act made by a Sovereign Legislature of this land. If historically some roots of this legislation are formed in English Statutes, they may be read and the judgments may be cited as aid to thinking. However, the interpretation of this statute must primarily be based upon the object of this legislation and the language used. AIR 1969 Bom 302 (308) = 1969 Cri LJ 1109 = 71 Bom LR 409.

(2) A copy would seem to include any material thing, by means of which the essential features of the work, or the

any other law for the time being in force, but nothing in this section shall be construed as abrogating any right or jurisdiction to restrain a breach of trust or confidence.

[1914—Sch. I, S. 31.] [Cf. S. 4 of Copyright Act, 1913 (1913, No. 4) (New Zealand).]

CHAPTER IV

OWNERSHIP OF COPYRIGHT AND THE RIGHTS OF THE OWNER

17. First owner of copyright.—Subject to the provisions of this Act, the author of a work shall be the first owner of the copyright therein:

Provided that—

- (a) in the case of a literary, dramatic or artistic work made by the author in the course of his employment by the proprietor of a newspaper, magazine or similar periodical under a contract of service or apprenticeship, for the purpose of publication in a newspaper, magazine or similar periodical, the said proprietor shall, in the absence of any agreement to the contrary, be the first owner of the copyright in the work in so far as the copyright relates to the publication of the work in any newspaper, magazine or similar periodical, or to the reproduction of the work for the purpose of its being so published, but in all other respects the author shall be the first owner of the copyright in the work;
- (b) subject to the provisions of clause (a), in the case of a photograph taken, or a painting or portrait drawn, or an engraving or a cinematograph film made, for valuable consideration at the instance of any person, such person shall, in the absence of any agreement to the contrary, be the first owner of the copyright therein;
- (c) in the case of a work made in the course of the author's employment under a contract of service or apprenticeship, to which clause (a) or clause (b) does not apply, the employer shall, in the absence of any agreement to the contrary, be the first owner of the copyright therein;

Section 16 — Note 1 (contd.)

ideas, or information in the work may be communicated. It is a copy, if the work is a reproduction of the fundamental idea of the original so far as possible in the material in which the copyist works. 1969 BLJR 12 (DB).

Section 17 — Note 1

(1) Husband can restrain photographer from exhibiting the photograph of his wife and children in public. The inference being that wife acts as agent of her husband in having herself and children photographed. (1901) 18 TLR 126 (126).

(2) The arrangement whereby a publisher agrees to pay author for writing a story on the lines of a synopsis approved by them is equivalent to employment. (1906) 2 Ch 550 (561).

(3) Proprietor of trade directory getting headings of classified advertisements prepared by some persons on payment — Copyright rests in the proprietor. (1893) 1 Ch 218 (225).

(4) Author and designer of a drama who employ a person on payment to compose music for the drama retain the right over the music so composed. (1859) 29 LJ CP 20 (24, 25).

(5) Proprietor of encyclopaedia employing and paying a person to write articles for the same has the copyright of the articles in absence of special circumstances, and where the employment and the payment are the only material facts. 1904 App Cas 17 (21, 22).

(6) The publisher of an encyclopaedia cannot issue an article written for an encyclopaedia and paid for accordingly, as a separate work. (1848) 17 LJ Ch 210 (214).

(7) Where the employment is in terms that the copyright shall belong to the proprietor of the journal in which the work is published as an article the proprietor cannot publish the same separately, except as part of the journal to which the article was contributed. (1860) 70 ER 766 (767).

(d) in the case of a Government work, Government shall, in the absence of any agreement to the contrary, be the first owner of the copyright therein;

(e) in the case of a work to which the provisions of Section 41 apply, the international organisation concerned shall be the first owner of the copyright therein.

[1914—Sch. I, S. 5.] [Cf. S. 4 of Copyright Act, 1956 (U. K.); S. 12 of Canada Copyright Act, 1952; S. 8 (1) of Copyright Act 1913 (1913, No. 4) (New Zealand).]

OBJECTS AND REASONS

“....Under clause (a) copyright in a literary, dramatic or artistic work made by an author in the course of his employment by the proprietor of a newspaper, magazine or similar periodical under a contract of service or apprenticeship will be split into two parts. So far as such copyright relates to the publication of the work in any newspaper, magazine or similar periodical or to the reproduction of the work for the purpose of its being so published, it will vest in the proprietor of the newspaper, magazine or periodical. In all other respects the copyright will vest in the author. Clause (b).... relates to commissioned work. In the opinion of the Committee it is only in the case of a photograph, painting portrait, engraving or cinematograph film that the copyright should vest in the person who commissions the work....” — J. C. R.

18. Assignment of copyright.—(1) The owner of the copyright in an existing work or the prospective owner of the copyright in a future work may assign to any person the copyright either wholly or partially and either generally or sub-

Section 17 — Note 1 (contd.)

(8) Articles secured for and published in a journal do not become the copyright of the publishers of the journal when the authors of such articles have not been paid for. (1846) 16 LJ Ch 140 (144).

(9) Actual payment to the author of an article is a necessary condition to entitle a publisher to a copyright. (1851) 20 LJ Ch 553 (555).

(10) Author of a work shall be the first owner of the copyright therein. AIR 1967 Ker 234 (235) = 1967 Cri LJ 1517 (2) = 1967 Ker LT 1110.

(11) The question papers are not Government work' as defined in Section 2 (k) and hence proviso (d) to Section 17 does not confer ownership of the copyright in such papers on the Board or on the Government and the copyright belongs to the paper-setters in the absence of assignment under Section 18 or a contract giving up the claim for copyright. AIR 1967 All 91 (93) = 1966 All LJ 550.

(12) Section 5 (b) of the 1911 Act contemplates (1) an author in the employment of the claimant under contract of service, (2) the compilation of the work having been made in the course of such employment of the author by the claimant; (3) and there shall have been no agreement to the contrary. The claimant could be first owner of copyright only when these conditions are fulfilled. (1968) 1 Andh Pra WR 323 = (1968) 2 Andh JT 71 ** AIR 1967 Assam 70 = ILR (1966) 18 Assam 272 (DB).

(13) Even when a literary work is revised and rewritten, the copyright in respect of such revised work vests ordinarily in the author thereof, that is, in the person who has done the work of revising and rewriting. 1968 Ker LJ 440 = (1969) 1 Lab LJ 323.

(14) The mere circumstance that the author had been engaged by the publisher to write the book for a fixed remuneration does not warrant any legal presumption that the intention of the parties was that the copyright should belong to the publisher. 1968 Ker LJ 440 = (1969) 1 Lab LJ 323.

(15) Question papers set by paper-setters appointed under Bihar School Examination Board Act (7 of 1952) — Paper setters are first owners of copyrights in question papers. AIR 1966 Pat 33 (36, 37) = 1966 Cri LJ 54 = 1965 BLJR 719.

(16) Contract of producing for price enamelled colour individual photograph on copper plate — It is contract of sale and not one of work and labour — Sale is liable to tax — Fact that copyright in photograph remained with customer can have no bearing in determining liability of tax on such sale. (1965) 16 STC 1021 (Guj) (DB).

Section 18 — Note 1

(1) Copyright of work not in existence but to be written can be assigned by an agreement. (1906) 75 LJ Ch 732 (736).

(2) There cannot be a transfer or assignment of copyright in a non-exist-

ject to limitations and either for the whole term of the copyright or any part thereof :

Provided that in the case of the assignment of copyright in any future work, the assignment shall take effect only when the work comes into existence.

(2) Where the assignee of a copyright becomes entitled to any right comprised in the copyright, the assignee as respects the rights so assigned, and the assignor as respects the rights not assigned, shall be treated for the purposes of this Act as the owner of copyright and the provisions of this Act shall have effect accordingly.

(3) In this section, the expression "assignee" as respects the assignment of the copyright in any future work includes the legal representatives of the assignee, if the assignee dies before the work comes into existence.

[1914 Sch. I, S. 5 (2) and (3).] [Cf. S. 8 (2) of Copyright Act, 1913 (1913, No. 4) (New Zealand); S. 36 (1), (2) and (3) of Copyright Act, 1956 (U.K.).]

19. Mode of assignment.—No assignment of the copyright in any work shall be valid unless it is in writing signed by the assignor or by his duly authorised agent.

[1914 — Sch. I, S. 5 (2).]

Section 18 — Note 1 (contd.)

ing work. A document transferring copyright of a future work does not have an effect of transferring such copyright. AIR 1939 Lah 433 (435).

(3) An instrument which is merely an acknowledgment on the part of the author that he has received the consideration for the copyright and agreed to deliver a regular assignment when called upon to do so does not operate as an actual present assignment. It is a mere agreement to assign. (1838) 59 ER 316 (317, 318).

(4) Where a copyright of songs has been sold the fact that the author had reserved a condition to revise and re-write those songs before publishing would not vitiate such a sale otherwise complete on the author's failure to so revise before publication. AIR 1920 Mad 529 (531) (DB).

(5) On a proprietor of a work becoming bankrupt its copyright will pass to the trustees in bankruptcy without assignment in writing. (1826) 38 ER 380 (383).

(6) An agreement between author and a publisher whereby the author grants sole and exclusive license to print, publish and sell his work however reserving to him copyright of such volume and other rights, amounts to publishing agreement and not assignment of copyright. AIR 1938 Lah 173 (175) = ILR (1938) Lah 84 (DB).

(7) Sale of first edition of book amounts to assignment of interest in copyright until the last copy is sold. AIR 1935 Cal 508 (508, 509) = 62 Cal 1057.

(8) The vendor of a copyright can continue to sell the copies remaining in his possession after disposing of the copyright unless there is a stipulation to

the contrary in the conditions of the sale. (1869) 7 Eq 418 (420).

(9) The term "partial" can be deemed to include an assignment for a period of time as well as an assignment of one particular aspect of the copyright on an assignment for a particular territorial area. Agreement stating that it will terminate on publisher's notifying author, at the end of five years from the date of issue of work or at any time thereafter, that demand for it has ceased. Author cannot unilaterally terminate the assignment. AIR 1953 Punj 279 (282) (DB).

(10) The real meaning of an agreement rather than the particular choice of words of the parties has to be looked into in determining whether there is only a license to print, publish and sell copies or there is a partial assignment of copyright. AIR 1953 Punj 279 (282) (DB).

(11) Acceptance of remuneration by author or sending manuscript to publisher does not constitute assignment of copyright. 1968 Ker LJ 440 = (1969) 1 Lab LJ 323.

(12) Under Section 18 there can be an assignment of copyright but the assignment under Section 19 of the Act has to be in writing signed by the assignor or by the duly authorised agent. AIR 1967 Assam 70 (72) = ILR (1966) 18 Assam 272 (DB) ** (1968) 1 Andh WR 323 = (1968) 2 Andh LT 71.

(13) In the absence of contract giving up claim for copyright, or assignment under Section 18, copyright for examination papers belongs to paper-setters. AIR 1967 All 91 (93) = 1966 All LJ 550.

Section 19 — Note 1

(1) An assignment of copyright, if not in writing, is not valid. (1876) 4 Ch D 419 (420).

20. Transmission of copyright in manuscript by testamentary disposition.—Where under a bequest a person is entitled to the manuscript of a literary, dramatic or musical work, or to an artistic work, and the work was not published before the death of the testator, the bequest shall, unless the contrary intention is indicated in the testator's will or any codicil thereto, be construed as including the copyright in the work in so far as the testator was the owner of the copyright immediately before his death.

Explanation.—In this section, the expression "manuscript" means the original document embodying the work, whether written by hand or not.

[Cf: S. 38 of the Copyright Act, 1956 (U. K.).]

OBJECTS AND REASONS

"This is a new clause (S. 20) which provides for a contingency where the manuscript of a work is bequeathed under a will without the testator making any express provision in respect of the copyright in the manuscript. The clause provides that in such circumstances the copyright in the manuscript will pass along with the manuscript, unless the testator has made a contrary provision in the will." — J. C. R.

21. Right of author to relinquish copyright.—(1) The author of a work may relinquish all or any of the rights comprised in the copyright in the work by giving notice in the prescribed form to the Registrar of Copyrights and thereupon such rights shall, subject to the provisions of sub-section (3), cease to exist from the date of the notice.

(2) On receipt of a notice under sub-section (1), the Registrar of Copyrights shall cause it to be published in the Official Gazette and in such other manner as he may deem fit.

(3) The relinquishment of all or any of the rights comprised in the copyright in a work shall not affect any rights subsisting in favour of any person on the date of the notice referred to in sub-section (1).

CHAPTER V

TERM OF COPYRIGHT

22. Term of copyright in published literary, dramatic, musical and artistic works.—Except as otherwise hereinafter provided, copyright shall subsist in any literary, dramatic, musical or artistic work (other than a photograph) published

Section 19 — Note 1 (contd.)

(2) Copyright is moveable property and can be assigned by unregistered deed even in India. Transfer of Property Act, Section 54 does not apply. AIR 1939 All 305 (308) = ILR (1939) All 275 (DB).

(3) Oral agreement conferring exclusive right to publish a work in England amounts only to a license and does not operate to assign copyright. (1814) 171 ER 3 (3, 4).

(4) Mere acquiescence does not prove assignment of copyright which must be according to the mode prescribed by statute. (1818) 171 ER 679 (680).

(5) Under the Act, assignment shall be in writing signed by the owner of the right in respect of which the assignment

is made or by his duly authorised agent. 1968 Ker LJ 440 = (1969) 1 Lah LJ 323
** AIR 1966 Mad 175 (176) = 1966 Cri LJ 553 = (1965) 2 Mad LJ 377.

(6) No assignment of copyright shall be valid unless it is in writing signed by the owner of the right in respect of which the assignment or grant is made. (1968) 1 Andh Pra WR 323 = (1968) 2 Andh LT 71.

(7) A copyright cannot be acquired by oral agreement. (1968) 1 Andh Pra WR 323 = (1968) 2 Andh LT 71.

Section 22 — Note 1

(1) In the case of any works in existence before the Act of 1914 the question which has to be examined to determine whether there is copyright under

within the lifetime of the author until fifty years from the beginning of the calendar year next following the year in which the author dies.

Explanation.—In this section the reference to the author shall, in the case of a work of joint authorship, be construed as a reference to the author who dies last.

[1914—Sch. I, S. 3.] [Cf. Ss. 5 and 8 of Canada Copyright Act, 1952; Ss. 6 and 22 of Copyright Act, 1913 (1913, No. 4) (New Zealand); S. 3 (4) of Copyright Act, 1956 (U. K.).]

OBJECTS AND REASONS

Clause 20 of the Bill as originally introduced in the Rajya Sabha prescribed the general term of copyright which was to be the life of the author and a period of twenty-five years after his death. But the Joint Committee say: "The Committee feels that India should fall in line with the majority of the Berne Convention countries and that the normal term of copyright should be the life of the author and fifty years thereafter. In the case of a work of joint authorship, the term of fifty years should be computed from the death of the author who dies last. The clause has been revised accordingly." — I. C. R.

23. Term of copyright in anonymous and pseudonymous works.—(1) In the case of a literary, dramatic, musical or artistic work (other than a photograph), which is published anonymously or pseudonymously, copyright shall subsist until fifty years from the beginning of the calendar year next following the year in which the work is first published:

Provided that where the identity of the author is disclosed before the expiry of the said period, copyright shall subsist until fifty years from the beginning of the calendar year next following the year in which the author dies.

(2) In sub-section (1), references to the author shall, in the case of an anonymous work of joint authorship, be construed,—

- (a) where the identity of one of the authors is disclosed, as references to that author;
- (b) where the identity of more authors than one is disclosed, as references to the author who dies last from amongst such authors.

(3) In sub-section (1), references to the author shall, in the case of a pseudonymous work of joint authorship, be construed,—

- (a) where the names of one or more (but not all) of the authors are pseudonyms and his or their identity is not disclosed, as references to the author whose name is not a pseudonym, or, if the names of two or more of the authors are not pseudonyms, as references to such of those authors who dies last;
- (b) where the names of one or more (but not all) of the authors are pseudonyms and the identity of one or more of them is disclosed, as references to the author who dies last from amongst the authors whose names are not pseudonyms and the authors whose names are pseudonyms and are disclosed; and
- (c) where the names of all the authors are pseudonyms and the identity of one of them is disclosed, as references to the author whose identity is disclosed or if the identity of two or more of such authors is disclosed, as references to such of those authors who dies last.

Explanation.—For the purposes of this section, the identity of an author shall be deemed to have been disclosed, if either the identity of the author is disclosed publicly by both the author and the publisher or is otherwise established to the satisfaction of the Copyright Board by that author.

[Cf: S. 11 of Copyright Act, 1956 (U. K.).]

OBJECTS AND REASONS

“This clause has been completely revised so as to make the position of anonymous and pseudonymous works clear. In the case of a pseudonymous work of joint authorship, there may be a number of possibilities. The names of some of the authors may be pseudonyms while the names of some others may not be pseudonyms. Some authors may have disclosed their identity while others may not have done so. The revised clause provides for all such contingencies.” — J. C. R.

24. Term of copyright in posthumous work.—(1) In the case of a literary, dramatic or musical work or an engraving, in which copyright subsists at the date of the death of the author or, in the case of any such work of joint authorship, at or immediately before the date of the death of the author who dies last, but which, or any adaptation of which, has not been published before that date, copyright shall subsist until fifty years from the beginning of the calendar year next following the year in which the work is first published or, where an adaptation of the work is published in any earlier year, from the beginning of the calendar year next following that year.

(2) For the purposes of this section a literary, dramatic or musical work or an adaptation of any such work shall be deemed to have been published, if it has been performed in public or if any records made in respect of the work have been sold to the public or have been offered for sale to the public.

[1914—Sch. I, S. 17.] [See S. 6 of the Canada Copyright Act, 1952; S. 23 of Copyright Act, 1913 (1913, No. 4) (New Zealand).]

25. Term of copyright in photographs.—In the case of a photograph, copyright shall subsist until fifty years from the beginning of the calendar year next following the year in which the photograph is published.

[1914—Sch. I, S. 21.] [See S. 9 of Canada Copyright Act, 1952.]

26. Term of copyright in cinematograph films.—In the case of a cinematograph film, copyright shall subsist until fifty years from the beginning of the calendar year next following the year in which the film is published.

[1914—Sch. I, S. 19.] [Cf. S. 13 of Copyright Act, 1956 (U.K.).]

27. Term of copyright in records.—In the case of a record, copyright shall subsist until fifty years from the beginning of the calendar year next following the year in which the record is published.

[1914—Sch. I, S. 19.] [See S. 10, Canada Copyright Act, 1952; S. 12 of Copyright Act, 1956 (U.K.).]

28. Term of copyright in Government works.—In the case of a Government work, where Government is the first owner of the copyright therein, copyright shall subsist until fifty years from the beginning of the calendar year next following the year in which the work is first published.

[1914—Sch. I, S. 18.] [See S. 11 of Canada Copyright Act, 1952; S. 24 of Copyright Act, 1913 (1913, No. 4) (New Zealand) and S. 39 of Copyright Act, 1956 (U.K.).]

29. Term of copyright in works of international organisations.⁸—In the case of a work of an international organisation to which the provisions of Section 41 apply, copyright shall subsist until fifty years from the beginning of the calendar year next following the year in which the work is first published.

[⁸] For such organisations, see the Copyright (International Organisation) Order, 1958—Gaz. of Ind., 1958, Pt. II, S. 3, Extra., p. 183.

CHAPTER VI LICENCES

30. Licences by owners of copyright.—The owner of the copyright in any existing work or the prospective owner of the copyright in any future work may grant any interest in the right by licence in writing signed by him or by his duly authorised agent :

Provided that in the case of a licence relating to copyright in any future work, the licence shall take effect only when the work comes into existence.

Explanation.—Where a person to whom a licence relating to copyright in any future work is granted under this section dies before the work comes into existence, his legal representatives shall, in the absence of any provision to the contrary in the licence, be entitled to the benefit of the licence.

[1914—Sch. I, S. 5 (2).] [Cf. S. 36 (4) of Copyright Act, 1956 (U.K.).]

31. Compulsory licence in works withheld from public.—(1) If at any time during the term of copyright in any Indian work which has been published or performed in public, a complaint is made to the Copyright Board that the owner of copyright in the work—

- (a) has refused to republish or allow the republication of the work or has refused to allow the performance in public of the work, and by reason of such refusal the work is withheld from the public; or
- (b) has refused to allow communication to the public by radio-diffusion of such work or in the case of a record the work recorded in such record, on terms which the complainant considers reasonable;

the Copyright Board, after giving to the owner of the copyright in the work a reasonable opportunity of being heard and after holding such inquiry as it may deem necessary, may, if it is satisfied that the grounds for such refusal are not reasonable, direct the Registrar of Copyright to grant to the complainant a licence to republish the work, perform the work in public or communicate the work to the public by radio-diffusion, as the case may be, subject to payment to the owner of the copyright of such compensation and subject to such other terms and conditions as the Copyright Board may determine; and thereupon the Registrar of Copyrights shall grant the licence to the complainant in accordance with the directions of the Copyright Board, on payment of such fee as may be prescribed.

Explanation.—In this sub-section, the expression “Indian work” includes—

- (i) an artistic work, the author of which is a citizen of India; and
- (ii) a cinematograph film or a record made or manufactured in India.

Section 30 — Note 1

(1) Where licence was not granted to the club by the authors, the publisher's note in the drama reserving all rights in the club neither confers ownership nor amounts to assignment of licence by the authors to the club. AIR 1967 Assam 70 (73) = ILR (1966) 18 Assam 272 (DB).

(2) Where two or more persons have made a complaint under sub-section (1), the licence shall be granted to the complainant who in the opinion of the Copyright Board would best serve the interests of the general public.

[1914 — Sch. I, S. 4.] [Cf: S. 13 of the Canada Copyright Act, 1952: S. 7 of Copyright Act, 1913 (1913, No. 4) (New Zealand).]

OBJECTS AND REASONS

"This clause has been revised so as to vest the discretion of granting a licence in the Copyright Board instead of in the Registrar of Copyrights. An express provision has been made for the payment of compensation to the owner of copyright. Provision is also made that a licence shall be granted only if the grant of the licence is in the public interest and that it shall not be granted if the work is withdrawn from further circulation....." — J. C. R.

32. Licence to produce and publish translations.—(1) Any person may apply to the Copyright Board for a licence to produce and publish a translation of a literary or dramatic work in any language.

(2) Every such application shall be made in such form as may be prescribed and shall state the proposed retail price of a copy of the translation of the work.

(3) Every applicant for a licence under this section shall, along with his application, deposit with the Registrar of Copyrights such fee as may be prescribed.

(4) Where an application is made to the Copyright Board under this section, it may, after holding such inquiry as may be prescribed, grant to the applicant a licence, not being an exclusive licence, to produce and publish a translation of the work in the language mentioned in the application, on condition that the applicant shall pay to the owner of the copyright in the work royalties in respect of copies of the translation of the work sold to the public, calculated at such rate as the Copyright Board may, in the circumstances of such case, determine in the prescribed manner:

Provided that no such licence shall be granted unless—

- (a) a translation of the work in the language mentioned in the application has not been published by the owner of the copyright in the work or any person authorised by him, within seven years of the first publication of the work, or if a translation has been so published, it has been out of print;
- (b) the applicant has proved to the satisfaction of the Copyright Board that he had requested and had been denied authorisation by the owner of the copyright to produce and publish such translation, or that he was unable to find the owner of the copyright;
- (c) where the applicant was unable to find the owner of the copyright, he had sent a copy of his request for such authorisation to the publisher

Section 32 — Note 1

(1) The object of the provisions of Section 4 (1) of the Copyright Act (1914) was to confer on the author the sole right of translation for a period of ten years. If it was omitted to be exercised the result would be that at the end of the ten year's period the statutory right to copyright would not include the sole right of translation. In other words, any person could thereafter translate the work. But this does not however mean that there was no copyright in the translation. The right to copyright in the translation springs from the very terms of Sec. 1 of the English Act of 1911, because the translation itself would be an original

literary work. Section 4 is no bar to the assertion of such a right. AIR 1959 Mad 410 (426).

(2) Where the author either himself or with the assistance of others makes a translation of his work within the period of ten years the proviso confers upon him a further right in the shape of forbidding others from translating his original work into the same language as that chosen by the author. Such a translation could be injuncted as an infringement of the copyright. This right is quite distinct from the right to copyright in the translation as an original literary work. AIR 1959 Mad 410 (426).

whose name appears from the work, not less than two months before the application for the licence;

- (d) the Copyright Board is satisfied that the applicant is competent to produce and publish a correct translation of the work and possesses the means to pay to the owner of the copyright the royalties payable to him under this section;
- (e) the author has not withdrawn from circulation copies of the work; and
- (f) an opportunity of being heard is given, wherever practicable, to the owner of the copyright in the work.

[1914 — S. 4.]

OBJECTS AND REASONS

“Under the existing law, namely, section 4 of the Indian Copyright Act, 1914, the sole right to produce a translation of a work first published in India is extinguished after ten years unless a translation thereof is produced within that period. The Bill provides that the right to produce a translation shall enure so long as other rights comprising the copyright subsist. Provision has, however, been made for the issue of a compulsory licence for a translation on payment of compensation if no translation is published by or on behalf of the owner of the work within seven years of the first publication of the work.” — S. O. R.

CHAPTER VII

PERFORMING RIGHTS SOCIETIES

33. Performing rights society to file statements of fees, charges and royalties.—(1) Every performing rights society shall, within the prescribed time and in the prescribed manner, prepare, publish and file with the Registrar of Copyrights, statements of all fees, charges or royalties which it proposes to collect for the grant of licences for performance in public of works in respect of which it has authority to grant such licences.

(2) If any such society fails to prepare, publish or file with the Registrar of Copyrights the statements referred to in sub-section (1) in relation to any work in accordance with the provisions of that sub-section, no action or other proceeding to enforce any remedy, civil or criminal, for infringement of the performing rights in that work shall be commenced except with the consent of the Registrar of Copyrights.

[Cf: S. 48 of Canada Copyright Act, 1952.]

OBJECTS AND REASONS

“The representative of the Performing Right Society, London, who gave evidence before the Committee pointed out that it would not be possible for a Performing Right Society to prepare and publish a list of all its works which run into several thousands. The clause has, therefore, been amended to provide for the publication of only the statement of fees, charges and royalties which a performing right society proposes to collect.” — J. C. R.

34. Objections relating to published statements.—Any person having any objections to any fees, charges or royalties or other particulars included in any statement referred to in Section 33 may at any time lodge such objections in writing at the Copyright Office.

35. Determination of objections.—(1) Every objection lodged at the Copyright Office under Section 34 shall, as soon as may be, be referred to the Copyright Board and the Copyright Board shall decide such objection in the manner hereinafter provided.

(2) The Copyright Board shall, in respect of every such objection, give notice thereof to the performing rights society concerned.

(3) The Copyright Board shall, after giving such society and the person who lodged the objection a reasonable opportunity of being heard and after making such further inquiry as may be prescribed, make such alterations in the statements as it may think fit, and shall transmit the alterations made by it to the Registrar of Copyrights, who shall thereupon, as soon as practicable after the receipt of such alterations, publish, them in the Official Gazette and furnish the performing rights society concerned and the person who lodged the objection with a copy thereof.

(4) The fees, charges or royalties as altered by the Copyright Board shall be the fees, charges or royalties which the performing rights society concerned may respectively lawfully sue for or collect in respect of the grant by it of licences for the performance in public of works to which such fees, charges or royalties relate.

(5) No performing rights society shall have any right of action or any right to enforce any civil or other remedy for infringement of the performing rights in any work against any person who has tendered or paid to such society the fees, charges or royalties specified in respect of that work in a statement published by that society under sub-section (1) of Section 33 or where such statement has been altered by the Copyright Board under this section in the statement so altered.

(6) Where any person has lodged an objection at the Copyright Office regarding the fees, charges or royalties in respect of any work included in a statement published under Section 33, that person or any other person, on depositing such fees, charges or royalties at the Copyright Office, may, pending the final decision of such objection by the Copyright Board or the High Court, as the case may be, perform that work without infringing the copyright therein.

(7) The fees, charges or royalties deposited at the Copyright Office under sub-section (6) shall be paid to the performing rights society concerned or to the person who made the deposit, or partly to such society and partly to such person, in accordance with the final decision on the objection as aforesaid.

36. Existing rights not affected.—Nothing in this Chapter shall be deemed to affect—

- (a) any rights or liabilities in relation to the performing rights in any work accrued or incurred before the commencement of this Act;
- (b) any legal proceedings in respect of such rights or liabilities pending at such commencement.

[1914 — Sch. I, S. 24.]

CHAPTER VIII

RIGHTS OF BROADCASTING AUTHORITIES

37. Broadcast reproduction right.—(1) Where any programme is broadcast by radio-diffusion by the Government or any other broadcasting authority, a special right to be known as "broadcast reproduction right" shall subsist in such programme.

(2) The Government or other broadcasting authority, as the case may be, shall be the owner of the broadcast reproduction right and such right shall subsist until twenty-five years from the beginning of the calendar year next following the year in which the programme is first broadcast.

(3) During the continuance of a broadcast reproduction right in relation to any programme, any person who,—

(a) without the licence of the owner of the right—

- (i) rebroadcasts the programme in question or any substantial part thereof; or

- (ii) causes the programme in question or any substantial part thereof to be heard in public; or
 - (b) without the licence of the owner of the right to utilise the broadcast for the purpose of making a record recording the programme in question or any substantial part thereof, makes any such record,
- shall be deemed to infringe that broadcast reproduction right.

[Cf: S. 14 of Copyright Act, 1956 (U. K.)]

38. Other provisions of this Act to apply to broadcast reproduction rights.—Sections 18, 19, 30, 53, 55, 58, 64, 65 and 66 shall, with any necessary adaptations and modifications, apply in relation to the broadcast reproduction right in any programme as they apply in relation to the copyright in a work :

Provided that a licence to utilise a broadcast for the purpose of making a record recording a programme in which broadcast reproduction right subsists or any substantial part of such programme, shall not take effect unless the person to whom such licence is granted has also obtained a licence to make records recording the work embodied in such programme from the owner of the copyright in such work.

OBJECTS AND REASONS

“A proviso has been added to the clause to make it clear that no person can make records from any programme broadcast unless such person has also obtained a licence for making such records from the owner of the copyright in the work which is broadcast.”—J. C. R.

39. Other rights not affected.—For the removal of doubts, it is hereby declared that the broadcast reproduction right conferred upon a broadcasting authority under this Chapter shall not affect the copyright—

- (a) in any literary, dramatic or musical work which is broadcast by that authority; or
- (b) in any record recording any such work.

CHAPTER IX

INTERNATIONAL COPYRIGHT

40. Power to extend copyright to foreign works.—The Central Government may, by order* published in the Official Gazette, direct that all or any provisions of this Act shall apply—

- (a) to works first published in any territory outside India to which the order relates in like manner as if they were first published within India;
- (b) to unpublished works, or any class thereof, the authors whereof were at the time of the making of the work, subjects or citizens of a foreign country to which the order relates, in like manner as if the authors were citizens of India;
- (c) in respect of domicile in any territory outside India to which the order relates in like manner as if such domicile were in India;
- (d) to any work of which the author was at the date of the first publication thereof, or, in a case where the author was dead at that date, was at the time of his death, a subject or citizen of a foreign country to which the order relates in like manner as if the author was a citizen of India at that date or time;

and thereupon, subject to the provisions of this Chapter and of the Order, this Act shall apply accordingly:

Provided that—

- (i) before making an order under this section in respect of any foreign country (other than a country with which India has entered into a treaty or which is a party to a convention relating to copyright to which India is also a party), the Central Government shall be satisfied that that foreign country has made, or has undertaken to make, such provisions, if any, as it appears to the Central Government expedient to require for the protection in that country of works entitled to copyright under the provisions of this Act;
- (ii) the order may provide that the provisions of this Act shall apply either generally or in relation to such classes of works or such classes of cases as may be specified in the order;
- (iii) the order may provide that the term of copyright in India shall not exceed that conferred by the law of the country to which the order relates;
- (iv) the order may provide that the enjoyment of the rights conferred by this Act shall be subject to the accomplishment of such conditions and formalities, if any, as may be prescribed by the order;
- (v) in applying the provisions of this Act as to ownership of copyright, the order may make such exceptions and modifications as appear necessary, having regard to the law of the foreign country;
- (vi) the order may provide that this Act or any part thereof shall not apply to works made before the commencement of the order or that this Act or any part thereof shall not apply to works first published before the commencement of the order.

[1914—Schedule I, Section 29.]

[*] For the International Copyright Order, 1958, see Gaz. of Ind. Extra., 21-1-1958, Pt. II, S. 3, p. 181. The Order has been printed in the last volume of this work. See also the Universal Copyright Convention and Protocols 1 to 3 given after the text of this Act. Cf. S. 33 of Copyright Act, 1913 (1913, No. 4) (New Zealand).

41. Provisions as to works of certain international organisations.—(1) Where—

- (a) any work is made or first published by or under the direction or control of any organisation to which this section applies, and
- (b) there would, apart from this section, be no copyright in the work in India at the time of the making or, as the case may be, of the first publication thereof, and
- (c) either—

- (i) the work is published as aforesaid in pursuance of an agreement in that behalf with the author, being an agreement which does not reserve to the author the copyright, if any, in the work, or

- (ii) under Section 17 any copyright in the work would belong to the organisation;

there shall, by virtue of this section, be copyright in the work throughout India.

(2) Any organisation to which this section applies which at the material time had not the legal capacity of a body corporate shall have and be deemed at all material times to have had the legal capacity of a body corporate for the purpose of holding, dealing with, and enforcing copyright and in connection with all legal proceedings relating to copyright.

(3) The organisations to which this section applies are such organisations as the Central Government may, by order* published in the Official Gazette, declare to be organisations of which one or more sovereign powers or the Government or

Governments thereof are members to which it is expedient that this section shall apply.

[*] For Copyright (International Organisations) Order, 1958, see Gaz. of Ind., Extra., 21-1-1958, Pt. II, S. 3, p. 183 (21-1-1958).

Organisations to which the section applies are:—

- (1) United Nations Organisation.
- (2) Specialised Agencies of the United Nations Organisation.
- (3) Organisation of American States.

42. Power to restrict rights in works of foreign authors first published in India.—If it appears to the Central Government that a foreign country does not give or has not undertaken to give adequate protection to the works of Indian authors, the Central Government may, by order published in the Official Gazette, direct that such of the provisions of this Act as confer copyright on works first published in India shall not apply to works, published after the date specified in the order, the authors whereof are subjects or citizens of such foreign country and are not domiciled in India, and thereupon those provisions shall not apply to such works.

[Cf. S. 31 of Copyright Act, 1913 (1913, No. 4) (New Zealand).]

43. Orders under this Chapter to be laid before Parliament.—Every order made by the Central Government under this Chapter shall, as soon as may be after it is made, be laid before both Houses of Parliament and shall be subject to such modifications as Parliament may make during the session in which it is so laid or the session immediately following.

CHAPTER X

REGISTRATION OF COPYRIGHT

44. Register of Copyrights.—There shall be kept at the Copyright Office a register in the prescribed form to be called the Register of Copyrights in which may be entered the names or titles of works and the names and addresses of authors, publishers and owners of copyright and such other particulars as may be prescribed.

OBJECTS AND REASONS

Sections 44 to 50.—“Under the existing law there is no provision for the registration of copyright. Such registration will furnish useful information to interested members of public. . . .”—S. O. R.

45. Entries in Register of Copyrights.—(1) The author or publisher of, or the owner of or other person interested in the copyright in, any work may make an application in the prescribed form accompanied by the prescribed fee to the Registrar of Copyrights for entering particulars of the work in the Register of Copyrights.

(2) On receipt of an application in respect of any work under sub-section (1), the Registrar of Copyrights may, after holding such inquiry as he may deem fit, enter the particulars of the work in the Register of Copyrights.

[Cf. S. 50 of Copyright Act, 1913 (1913, No. 4) (New Zealand).]

46. Indexes.—There shall be also kept at the Copyright Office such indexes of the Register of Copyrights as may be prescribed.

Section 45 — Note 1

(1) Registration of a book is a condition for acquiring copyright with respect to it. AIR 1960 Andh Pra 415 (417, 418) = 1960 Andh LT 219 (DB).

47. Form and inspection of register.—The Register of Copyrights and indexes thereof kept under this Act shall at all reasonable times be open to inspection, and any person shall be entitled to take copies of, or make extracts from, such register or indexes on payment of such fee and subject to such conditions as may be prescribed.

48. Register of Copyrights to be prima facie evidence of particulars entered therein.—The Register of Copyrights shall be prima facie evidence of the particulars entered therein and documents purporting to be copies of any entries therein, or extracts therefrom certified by the Registrar of Copyrights and sealed with the seal of the Copyright Office shall be admissible in evidence in all Courts without further proof or production of the original.

[Cf. S. 45, Copyright Act, 1913 (1913, No. 4) (New Zealand).]

49. Correction of entries in the Register of Copyrights.—The Registrar of Copyrights may, in the prescribed cases and subject to the prescribed conditions, amend or alter the Register of Copyrights by—

- (a) correcting any error in any name, address or particulars; or
- (b) correcting any other error which may have arisen therein by accidental slip or omission.

[Cf. S. 48 of Copyright Act, 1913 (1913, No. 4) (New Zealand).]

50. Rectification of Register of Copyright Board.—The Copyright Board, on application of the Registrar of Copyrights or of any person aggrieved, shall order the rectification of the Register of Copyrights by—

- (a) the making of any entry wrongly omitted to be made in the register; or
- (b) the expunging of any entry wrongly made in, or remaining on, the register, or
- (c) the correction of any error or defect in the register.

[Cf. S. 49, Copyright Act, 1913 (1913, No. 4) (New Zealand).]

CHAPTER XI

INFRINGEMENT OF COPYRIGHT

51. When copyright infringed.—Copyright in a work shall be deemed to be infringed—

- (a) When any person, without a licence granted by the owner of the Copyright or the Registrar of Copyrights under this Act or in contravention of the conditions of a licence so granted or of any condition imposed by a competent authority under this Act—
 - (i) does anything, the exclusive right to do which is by this Act conferred upon the owner of the copyright, or

SECTION 51 — SYNOPSIS

1. Infringement of copyright in books.
2. Infringement of copyright under Section 51 (b).
3. Infringement of copyright in pictures, photographs, etc.
4. Principles for deciding infringement of copyright.
5. No infringement of copyright.
6. Absence of copyright.

1. Infringement of copyright in books.
- (1) The author of an original work

has the sole right to reproduce or translate the work. Any unauthorised translation is an infringement of the copyright of the author. (1951) 55 Cal WN 713 (715).

(2) Abridgements and translations can both be infringement of a copyright. (1966) 70 Cal WN 1130.

(3) Publication of other name in place of real author — No express or implied authorisation by author — Publication amounts to infringement of copyright by publisher. 1968 Ker LJ 440 = (1969) 1 Lab LJ 323.

- (ii) permits for profit any place to be used for the performance of the work in public where such performance constitutes an infringement of the copyright in the work unless he was not aware and had no reasonable ground for believing that such performance would be an infringement of copyright, or
- (b) when any person—
 - (i) makes for sale or hire, or sells or lets for hire, or by way of trade displays or offers for sale or hire, or
 - (ii) distributes either for the purpose of trade or to such an extent as to affect prejudicially the owner of the copyright, or
 - (iii) by way of trade exhibits in public, or
 - (iv) imports (except for the private and domestic use of the importer) into India, any infringing copies of the work.

Explanation.—For the purposes of this section, the reproduction of a literary, dramatic, musical or artistic work in the form of a cinematograph film shall be deemed to be an “infringing copy”.

[1914 — Sch. I, S. 2.] [Cf. S. 17 of Canada Copyright Act, 1952; S. 5 of Copyright Act, 1956 (United Kingdom); and S. 5 of Copyright Act, 1913 (1913, No. 4) (New Zealand).]

OBJECTS AND REASONS

“This clause has been amended so as to make it clear that a contravention of any condition of a licence shall also be an infringement of copyright. . . . An Explanation has been added in respect of a cinematograph film which is otherwise excluded from the definition of ‘infringing copy’ in clause 2 (1).”—J. C. R.

Section 51 — Note 1 (contd.)

(4) A copyright in a work shall be deemed to be infringed only when anything is done without the consent of the owner of the copyright. (1968) 1 Andh Pra WR 323 = (1968) 2 Andh LT 71.

(5) Where a person has copyright in a literary work, and any other person produces or reproduces the work or any substantial part thereof in any material form he is committing an infringement of copyright. AIR 1964 Mad 331 (332) = (1964) 1 Mad LJ 431 (DB).

(6) Clause (a) of Section 51 makes it an infringement of copyright if any person does anything, the exclusive right to do which is conferred by the Copyright Act upon the owner of the copyright. 1969 BLJR 12 (DB).

(7) Infringement of a copyright can be complained of only if the exclusive right to do any act conferred upon the owner of the copyright has been infringed. (1966) 1 Andh WR 473 = ILR (1967) Andh Pra 1385.

(8) If a defendant, who is undoubtedly at liberty to draw upon common sources of information, saved himself the trouble and labour requisite for collecting that information by adopting the plaintiff's work in general plan, style and arrangement with colourable variation, he is guilty of infringement of plaintiff's copyright even though the plaintiff's work

is based on materials which are common property. (1935) 61 Cal L Jour 573 (575) (DB).

(8-A) Reproduction of the “Golden Treasury of Poems”, wherein the chronological order was changed, some additional matter was added, such as short biography of the poets, a mass of notes and other critical and explanatory matter, was held to be infringement of copyright of the original book. (1890) ILR 17 Cal 951 (961, 962).

(9) When in a book published by the defendant, not only references of significance are copied from the plaintiff's book, but there is absolute identity of information and language that it appears that the work of the defendant is a copy of the plaintiff's in a high degree, the plaintiff is entitled to succeed in an action for infringement of copyright. (1922) 67 Ind Cas 983 (984) (Lah).

(10) Verbatim copying of head-notes or marginal notes inserted in digest of cases — Copyright is infringed. (1855) 24 LJCP 175 (181).

(11) Telegraphic code word book substantially copied for private use — Copyright is infringed. (1884) 26 Ch D 637 (643).

(12) A's work translated into German — B retranslating it into English — Copyright is infringed. (1853) 22 LJ Ch 457 (464).

Section 51 — Note 1 (contd.)

(13) Music broadcasts diffused in factory by means of loudspeakers — Act is performance in public and an infringement of the performing rights in such pieces. (1943) 1 All ER 413 (417, 418).

(14) Milton's poems with Dr. Newton's notes published with the addition of some commentary — Copyright was infringed. (1818) 36 ER 1017 (1020).

(15) Though there can be nothing to prevent a person from publishing a work like a Court calendar, the making of a verbatim copy of another work without the application of original labour can be restrained. (1809) 33 ER 987 (988).

(16) Tables of information in a diary reproduced without making enquiry about the existence of copyright — Copyright is infringed. (1943) 1 All ER 322 (327).

(17) Where the person copied only those portions which were essential for the narration of the story, and the method adopted was to incorporate the language of the original to narrate the story, leaving out those portions which constituted what might be termed purple patches in the work.

Held, that a substantial part of the work had been reproduced so as to constitute an infringement. AIR 1959 Mad 410 (425).

2. Infringement of copyright under Section 51 (b). — (1) When a local body authorised infringement of a musical piece, and the profits made thereby were used for the relief of the rate payers, it was held that the local body was acting for private profit within the meaning of Section 2 (3) of the Act of 1914. AIR 1930 PC 314 (318).

(2) When a person sold the right to publish a number of songs composed by him, to one person and subsequently to another. It was held that the first purchaser acquired an exclusive right to publish the songs and anyone publishing them without his consent will be infringing his copyright. AIR 1920 Mad 529 (531) (DB).

(3) The language of Section 2 is wide enough to include not only a sale of the copyright by a person not entitled to sell the same but also an attempt to sell the same. Accordingly, an advertisement by the defendant claiming a right in copyright which was owned by the plaintiff and offering to sell the same constitute an infringement of the right. AIR 1945 All 55 (57) = ILR (1945) All 20.

(4) An infringement takes place not only when a book is reprinted but also when a book, in respect of which a copyright exists, is sold. There is a fresh cause of action in every sale of the book. AIR 1934 All 922 (927) (DB).

(5) An advertisement for sale in a newspaper or Journal amounts to "offer for sale" within meaning of that expression in Section 51 (b) (i). AIR 1969

Bom 302 (308, 309) = 1969 Cri LJ 1109 = 71 Bom LR 409.

(6) The "offer to sale" could be deemed to have been made at every place where a Journal in which the advertisement for sale is given, is either published or reaches by way of circulation. Hence the offence contemplated by Section 51 (b) (i) must be deemed to have been committed at such places. AIR 1969 Bom 302 (308, 309) = 1969 Cri LJ 1109 = 71 Bom LR 409.

3. Infringement of copyright in pictures, photographs, etc. — (1) Proprietor of copyright in two paintings entering description of the same under Section 4 of Fine Arts Copyright Act (25 and 26 Vict., C. 68) — Person making and selling photographic copies of the same, held, would be convicted under Section 6 of the same Act. (1868) 3 QB 387 (395).

(2) Cartoons copied, some with and some without descriptive writing — Object of larger work containing copies of the cartoons same as that of the originals — Copyright is infringed. (1873) 8 Ex Ch 1 (7).

(3) A photograph of a lion reproduced in posters with minor change — **Held**, there had been an infringement of copyright. (1898) 14 TLR 550 (550, 551).

(4) Picture of winged female kneeling on a rock and looking into the water below, reproduced in a magazine without the background and the wings — Copyright, held, was infringed. (1905) 74 LJ Ch 304 (309).

(5) In deciding whether there is an infringement of copyright in pictures, the question is whether the offending pictures are copies of substantial portions of the copyright pictures. The figures may have been reduced in the offending pictures and slight modifications may have been introduced or the clothes and colours may have been different but it is sufficient if the main figures have an identical pose. AIR 1928 Cal 359 (360) = 30 Cri L Jour 16 ** AIR 1967 Mad 381 (389, 390) = ILR (1964) 2 Mad 666 (DB) ** AIR 1961 Mad 111 (113) = (1960) 1 Mad LJ 53 (DB).

(6) A copy is that which comes so near to the original as to suggest that original to the mind of every person seeing it. AIR 1961 Mad 111 (112) = (1960) 1 Mad LJ 53 (DB).

(7) An infringement could only come into existence where the defendant's work was taken from the plaintiff's work. In deciding this question, there need not be an exact reproduction to support the inference that the defendant's work was taken from the plaintiff's work. AIR 1961 Mad 111 (114) = (1960) 1 Mad LJ 53 (DB). (1895 AC 20, Foll.)

(8) Where impression created is that basically and in substance one picture is a reproduction of the other, further modifications or variations will not alter

Section 51 — Note 3 (contd.)

effect of infringement. AIR 1967 Mad 381 (389, 390) = ILR (1964) 2 Mad 666 (DB).

(9) A bad copy does not cease to be a copy. If the Court, on a consideration of all the relevant circumstances and a comparison of the plaintiffs' picture and the infringing pictures comes to the conclusion that the defendants' picture was consciously copied from the work of the plaintiff, that would be sufficient to hold that copyright is infringed. AIR 1967 Mad 381 (390) = ILR (1964) 2 Mad 666 (DB).

4. Principles for deciding infringement of copyright. — (1) In order to constitute an infringement of copyright, there must be a substantial infringement of the work. Fair dealing with any work has been kept out of the mischief of the Copyright Act. AIR 1954 All 570 (574) = ILR (1954) 1 All 289.

(2) The Court should be reluctant to sit as an expert to decide the question of infringement of copyright without the aid of the expert evidence. But in a case capable of construction, the Court should exercise a prima facie judgment upon it. The proper course, in ordinary circumstance, in such cases is to get the opinion of such experts who may be appointed as Commissioners to investigate and report on the matters in issue. AIR 1924 Cal 595 (597).

(3) Although one has the same right to the words of the English and Tamil languages, as any other, still a man is not allowed to appropriate for himself the arrangement, sequence, order, idiom, etc., employed by another using his brains, skill and labour. AIR 1955 Mad 391 (394).

(4) The sameness of the thing delineated must produce similarity in delineation. The mere fact of resemblance is not in itself evidence of piracy where subject dealt with is the same. AIR 1954 All 570 (576) = ILR (1954) 1 All 289.

(5) The test to detect piracy is to see whether mistakes and deviations occurring in the original also have been reproduced. AIR 1945 Bom 51 (53).

(6) Infringement comes in only when it can be shown that some one has instead of utilizing the available sources for originaling his work appropriated the labours of another's work by a slavish copy or colourable imitation thereof. The 'animus furandi', the intention to take from another for purpose of saving labour is one of the important ingredients of infringement. AIR 1954 All 570 (577) = ILR (1954) 1 All 289 ** (1890) ILR 17 Cal 951 (960, 961).

(7) The question whether there has been an infringement of copyright depends on whether a colourable imitation has been made. Whether a work is a colourable imitation of another is a

question of fact. Similarity is a great point to be considered but mere similarity is not enough. A conglomeration of similarities which cannot be mere coincidence is evidence of infringement. AIR 1931 Cal 233 (236) (DB).

(8) In deciding whether a book is a copy of another the external and internal features of the books should be looked into. The 'get up' and overall scope of the book form the external features while the general lay out and manner of treatment of the subject-matter and the amount of material contained in the book form the internal feature. AIR 1954 All 570 (577) = ILR (1954) 1 All 289.

(9) In an action for breach of copyright intrinsic evidence to be derived from comparison of the two literary works must be of a most cogent force, though it may be sufficient and accepted in the face of direct evidence pointing the other way. Much stress cannot be laid upon the actual coincidences in two works by different authors in respect of the plan, scheme, phraseal identities and similar mistakes while deciding upon the question of infringement when such evidence can be explained on basis of authors having recourse to common source. AIR 1933 PC 26 (28, 29).

(10) Law restraining human enterprise should be liberally construed and therefore Copyright Act cannot be interpreted so as to shut out research and scholarship. AIR 1934 Lah 777 (781) = 16 Lah 103 (DB).

(11) In a suit for injunction for infringement of plaintiff's copyright in his almanac it was found that tables given in parties' almanacs agreed except in minutes and second, that calculations were admittedly worked out on "makrand" that there were other almanacs resembling that of defendants: **Held**, that these findings were not sufficient to establish infringement, and that in previous years defendants purchased information for their almanacs from plaintiff did not affect the case. Weakness of defence does not compensate for want of proof of plaintiff's allegations. 1910 Pun LR No. 95, p. 273 (274, 275).

(12) The burden lies on the plaintiff to satisfy the Court that the defendant had infringed his copyright. AIR 1954 All 570 (577) = ILR (1954) 1 All 289.

(13) Innocence is no defence to a charge of infringement under Section 2 (1) of the 1914 Act — Offence is complete even if the offender authorises infringement innocently. AIR 1930 PC 314 (317).

(14) Proviso (iv) to Section 2 (1) of the 1914 Act allows only two passages from the works of the same author and not two poems out of each of many works published by the same author separately. AIR 1933 All 474 (476) = 55 All 564 (DB).

Section 51 — Note 4 (contd.)

(15) The effect of defendant's publication as a competitor with plaintiff's work is only one of factors for ascertaining whether reproduction is substantial. AIR 1959 Mad 410 (425).

(16) An infringement of copyright is in the nature of an invasion of a right to property and therefore the intention of the infringer is immaterial provided there is infringement. AIR 1959 Mad 410 (424).

(17) To be liable for infringement of copyright defendant must have made substantial use of form in which original thought or information is expressed. AIR 1967 Ker 234 (235) = 1967 Cri LJ 1517 (2) = 1967 Ker LT 1110.

(18) In order to be actionable the infringement must be a colourable imitation of the originals with the purpose of deriving profits. AIR 1965 J and K 101 (101) = 1965 (2) Cri LJ 639 = 1965 Kash LJ 219 (DB).

(19) Infringement is not avoided by the fact that, in a subsequent publication or by performance, only part of copyrighted musical composition was appropriated. It is to be found as a fact whether the appropriation is insignificant or substantial. (1969) BLJR 12 (DB).

(20) In order to constitute infringement there should be direct or indirect use of those features of the plaintiff's work in which copyright subsists. The conclusion must depend really on the effect produced upon the mind by a study of the picture, and of that which is alleged to be a copy of it or at least of its design. AIR 1961 Mad 114 (119) = (1962) 1 Mad LJ 258 (DB).

(21) For determination of the question of infringement of copyright, the result and not the intention is relevant. 1969 BLJR 12 (DB).

(22) In the case of rights created by statute which prescribes the scope of the right and defines the purposes for which substantial parts of copyright works might be reproduced, a custom or usage according to which whenever the University or other educational authorities prescribe as a text book any classical work or an original literary work, publishers prepare guide books in relation to such text books for enabling the students to master the prescribed texts, would be inadmissible as being in contravention of the statute. AIR 1959 Mad 410 (429). ((1892) 3 Ch 489, Rel. on.)

(23) If there were an abstraction of something of value to an appreciable degree, it is immaterial whether the copying is or is not likely to compete with the copyright work. AIR 1959 Mad 410 (428).

(24) If there were a motive to compete, it would render the dealing 'unfair' but if the works were not intended to compete, this would not set at rest all questions concerning 'fair dealing' sub-

stantial and vital parts of the works are reproduced the intention to appropriate to the infringer the labour of others for his own profit is made out and there need not be proof of any independent oblique motive. AIR 1959 Mad 410 (428).

5. No infringement of copyright. —

(1) When a party submitted along with a tender for contract a plan for the proposed construction, it was held that the plan is an original literary work under Copyright Act. But the plan as an original literary work would not be infringed if the construction is carried out by others according to another plan though the latter plan is a copy of the former in essential features. ILR (1956) Mad 1347 (1353, 1360).

(2) The Court will not interfere where the value of the extract taken for the purpose of criticism is very minute and trifling. (1839) 8 LJ Ch 141 (142).

(3) Similarity in two dramatic works due to coincidence, both works being derived independently from common stock of dramatic ideas — There is no infringement of copyright. (1911) 28 TLR 69 (72).

(4) No appreciable likeness of words in two plays — Likeness of stage situation and scenic effect ought not to be taken into consideration. (1908) 77 LJKB 577 (582).

(5) Where, both the plaintiff and the defendant have stolen from a foreign book written and published in a foreign country and there was no link between the work of the plaintiff and that of the defendant, and the defendant has not availed himself in any way of the pain and labour employed by the plaintiff, there is no infringement of copyright. (1951) 55 Cal WN 713 (716).

(6) A producing a foreign drama but introducing two scenes of his own — B producing same foreign drama with A's scenes included: **Held**, in the circumstances of the case, there was no infringement of copyright. (1878) 3 App Cas 483 (499).

(7) *Prima facie*, an abridgment of a work was not, upto the year 1914, an infringement of copyright, if an abridgment was a fair and bona fide one and did not amount to reprinting of the work of the author. But the position seems now to have been considerably changed in view of the wider language employed in the Act of 1914. Now in order to decide whether a fair abridgment of the original work is or is not an infringement of copyright the test is whether or not it is a reproduction of the work or substantial part of it in any material form whatsoever. It may be that upto a certain limit when an abridgment is not more than a mere short synopsis index to other work there would be no infringement. On the other hand, when an abridgment is on such an extensive

52. Certain acts not to be infringement of copyright.—(1) The following acts shall not constitute an infringement of copyright, namely:—

(a) a fair dealing with a literary, dramatic, musical or artistic work for the purposes of—

(i) research or private study ;

(ii) criticism or review, whether of that work or of any other work;

Section 51 — Note 5 (contd.)

scale as to amount to a reproduction of a substantial part of the original work in a material form, it would undoubtedly be an infringement of copyright. AIR 1934 All 922 (924, 925) (DB).

(8) In the following English cases decided before 1914, it was held that a fair abridgment of the original work does not constitute infringement of copyright. (1801) 31 ER 817 (817). (Abridgment of Law Reports leaving out arguments of the counsel and some other parts is not a fair abridgment.) ** (1785) ER 1235 (1235) ** (1761) 27 ER 270 (271) ** (1740) 26 ER 489 (490). (Colourable shortening for evading the statute cannot be called an abridgment.)

(9) Portion copied not substantial and material — Copyright is not infringed (1878) 3 App Cas 483 (498).

(10) Where the defendants had the positions put in the earlier plans by their own independent thinking unaided by the plaintiffs, even if they reverted to the original positions on seeing, the positions in plan of the plaintiffs and on realising that the original positions were better, they would not be infringing the copyright of the plaintiffs in their plan by doing so, as they were only going back to their own original positions and not stealing anything from the product of the plaintiffs' brains, industry and money. ILR (1956) Mad 1347 (1362, 1363) (DB).

(11) Pictorial album is not a book—Copying title of such album ("castle album") is no infringement of copyright. (1886) 33 Ch D 546 (550).

(12) Adopting title of a musical composition to a talkie film does not constitute an infringement of the performing rights in the composition where not a word of the composition is repeated in the film. AIR 1940 PC 55 (57).

(13) New book produced by author after further studies and research — Fresh incidents and details, taken from works published before as well as after book, copyright of which alleged to be infringed — No infringement of copyright held committed. AIR 1934 Lah 777 (780) = 16 Lah 103 (DB).

(14) Broken and detached fragments from a literary work consisting of six pages out of forty for criticism — There is no infringement of copyright. (1817) 36 ER 679 (681).

(15) Where the character and substantial part of the plot of the film and the drama are historical, though there may be some similarity no infringement can be alleged. AIR 1967 Assam 70 (73, 74) =

ILR (1966) 18 Assam 272 (DB).

(16) Mere making of an infringing copy or an infringing work is not made by itself an offence under Section 51 (b) (i). It is the making for sale or hire that is an offence. AIR 1969 Bom 302 (308) = 1969 Cri LJ 1109 = 71 Bom LR 409.

(17) Note, on the books prescribed by the university, published as guides to students, amounted to criticism or review of the original books and there was no infringement of copyright under Section 51. AIR 1965 J and K 101 (101, 102) = 1965 (2) Cri LJ 639 = 1965 Kash LJ 219 (DB).

(18) Where the respondent's work was neither an abridgment, nor a piece of literary criticism in itself, but was functional in character designed to enable students to give effective answers to examination questions, the work was held not to infringe the copyright of the original writer. AIR 1964 Mad 331 (333, 334) = (1964) 1 Mad LJ 431 (DB).

6. Absence of Copyright. — (1) A person who in his book quotes from a decided case or a standard work, a passage, cannot contend that he was in effect "selecting" the passage and no one else could thereafter make the same selection — Decisions reported in Law Reports are "Common Property" of commentators on law. AIR 1954 All 570 (573) = ILR (1954) 1 All 289.

(2) List of selections of courses of study by a member of the Board of Studies of University — Publication of the list in the syllabus by the University: Held that the member retained no copyright in the selections inasmuch as when he laid the results of his skill and experience before the board and joined with the other members in preparing the syllabus for the examination he placed his labours unreservedly at the disposal of the university authorities: Held also, that when the University authorities published their syllabus they surrendered their copyright into the hands of the public. AIR 1916 All 216 (217) = 38 All 484 (DB).

Section 52 — Note 1

(1) In order that the printer may be entitled to exemption from liability under Section 8, he must prove that he was not aware that the original from which the copy was made was the subject of copyright. The mere fact that the printer was not aware that the work printed by him was an infringement of another work or even that such other work existed, is not enough. AIR 1961 Mad 114 (120) = (1962) 1 Mad LJ 258

- (b) a fair dealing with a literary, dramatic, musical or artistic work for the purpose of reporting current events—
 - (i) in a newspaper, magazine or similar periodical, or
 - (ii) by radio-diffusion or in a cinematograph film or by means of photographs;
- (c) the reproduction of a literary, dramatic, musical or artistic work for the purpose of a judicial proceeding or for the purpose of a report of a judicial proceeding;
- (d) the reproduction or publication of a literary, dramatic, musical or artistic work in any work prepared by the Secretariat of a Legislature or, where the Legislature consists of two Houses, by the Secretariat of either House of the Legislature, exclusively for the use of the members of that Legislature;
- (e) the reproduction of any literary, dramatic or musical work in the certified copy made or supplied in accordance with any law for the time being in force;
- (f) the reading or recitation in public of any reasonable extract from a published literary or dramatic work;
- (g) the publication in collection, mainly composed of non-copyright matter, bona fide intended for the use of educational institutions, and so described in the title and in any advertisement issued by or on behalf of the publisher, of short passages from published literary or dramatic works not themselves published for the use of educational institutions, in which copyright subsists:

Provided that not more than two such passages from works by the same author are published by the same publisher during any period of five years.

Explanation.—In the case of a work of joint authorship, references in this clause to passages from works shall include references to passages from works by any one or more of the authors of those passages or by any one or more of those authors in collaboration with any other person;

Section 52 — Note 1 (contd.)

(DB). (1936 KB 715; 1936 All ER 379, Applied.)

(2) In determining the applicability of the proviso two matters have to be borne in mind. The first is with reference to the purpose for which a substantial part of the copyright work is reproduced, the second with regard to manner of use pertaining to that purpose; in order to receive protection it must be fair dealing. The enumerated purposes are private study, research, criticism, review or newspaper summary. A dealing with a work for private study is such a dealing that does not involve any publication. "Research is to be most diligent protracted investigation especially for the purpose of adding to human knowledge, studious enquiry". A summary which extracts and reproduces substantial parts of the copyright work for the purpose of narrating a story is not "criticism". AIR 1959 Mad 410 (427, 428).

(3) Artist while keeping original painting in his own custody, printing copies of it and giving them and sold them to public and gave some free copies to temples for installation — Held, that would not tantamount to installing

his original work in public place on analogy of sculpture kept in public square or painting hung in portrait gallery. AIR 1967 Mad 381 (388) = ILR (1964) 2 Mad 666 (DB).

(4) Exact reproduction or copy not necessary for purposes of infringement of copyright. (Reproduction of substantial Part of the work is sufficient.) AIR 1967 Mad 381 (389, 390) = ILR (1964) 2 Mad 666 (DB).

(5) Preparing or 'publishing notes on books prescribed by University falls within the exception under Section 52 (1) (a), and there is no infringement of copyright. AIR 1965 J and K 101 (102) = 1965 (2) Cri LJ 639 = 1965 Kash LJ 219 (DB).

(6) Students' guide to a novel prescribed by University for B. A. students was held to be distinctly a creation of the Respondent even if it be regarded as an abridgement of the novel, in part and in part a running commentary upon it — It was covered by the exception enacted in Section 2 (1) (i) of the 1914 Act. AIR 1964 Mad 331 (332, 335) = (1964) 1 Mad LJ 431 (DB).

- (h) the reproduction of a literary, dramatic, musical or artistic work—
 - (i) by a teacher or a pupil in the course of instruction; or
 - (ii) as part of the questions to be answered in an examination; or
 - (iii) in answers to such questions;
- (i) the performance, in the course of the activities of an educational institution, of a literary, dramatic or musical work by the staff and students of the institution, or of a cinematograph film or a record, if the audience is limited to such staff and students, the parents and guardians of the students and persons directly connected with the activities of the institution;
- (j) the making of records in respect of any literary, dramatic or musical work, if—
 - (i) records recording that work have previously been made by, or with the licence or consent of, the owner of the copyright in the work; and
 - (ii) the person making the records has given the prescribed notice of his intention to make the records, and has paid in the prescribed manner to the owner of the copyright in the work royalties in respect of all such records to be made by him, at the rate fixed by the Copyright Board in this behalf;

Provided that in making the records such person shall not make any alterations in, or omissions from, the work, unless records recording the work subject to similar alterations and omissions have been previously made by, or with the licence or consent of, the owner of the copyright or unless such alterations and omissions are reasonably necessary for the adaptation of the work to the records in question;
- (k) the causing of a recording embodied in a record to be heard in public by utilising the record,—
 - (i) at any premises where persons reside, as part of the amenities provided exclusively or mainly for residents therein, or
 - (ii) as part of the activities of a club, society or other organisation which is not established or conducted for profit;
- (l) the performance of a literary, dramatic, or musical work by an amateur club or society, if the performance is given to a non-paying audience, or for the benefit of a religious institution;
- (m) the reproduction in a newspaper, magazine or other periodical of an article on current economic, political, social or religious topics, unless the author of such article has expressly reserved to himself the right of such reproduction;
- (n) the publication in newspaper, magazine or other periodical of a report of a lecture delivered in public;
- (o) the making of not more than three copies of a book (including a pamphlet, sheet of music, map, chart or plan) by or under the direction of the person in charge of a public library for the use of the library if such book is not available for sale in India;
- (p) the reproduction, for the purpose of research or private study or with a view to publication, of an unpublished literary, dramatic or musical work kept in a library, museum or other institution to which the public has access:

Provided that where the identity of the author of any such work or, in the case of a work of joint authorship, of any of the authors is known to the library, museum or other institution, as the case may be, the provisions of this clause shall apply only if such reproduction is made at the time more than fifty years from the date of the death of the author or, in the case of a work of joint authorship, from the death of

the author whose identity is known or, if the identity of more authors than one is known from the death of such of those authors who dies last;

(q) the reproduction or publication of—

- (i) any matter which has been published in any Official Gazette except an Act of a Legislature;
- (ii) any Act of a Legislature subject to the condition that such Act is reproduced or published together with any commentary thereon or any other original matter;
- (iii) the report of any Committee, commission, council, board or other like body appointed by the Government if such report has been laid on the Table of the Legislature, unless the reproduction or publication of such report is prohibited by the Government;
- (iv) any judgment or order of a Court, tribunal or other judicial authority, unless the reproduction or publication of such judgment or order is prohibited by the Court, the tribunal or other judicial authority, as the case may be;

(r) the production or publication of a translation in any Indian language of an Act of a Legislature and of any rules or orders made thereunder—

- (i) if no translation of such Act or rules or orders in that language has previously been produced or published by the Government; or
- (ii) where a translation of such Act or rules or orders in that language has been produced or published by the Government, if the translation is not available for sale to the public;

Provided that such translation contains a statement at a prominent place to the effect that the translation has not been authorised or accepted as authentic by the Government;

(s) the making or publishing of a painting, drawing, engraving or photograph of an architectural work of art;

(t) the making or publishing of a painting, drawing, engraving or photograph of a sculpture, or other artistic work falling under sub-clause (iii) of cl. (c) of Section 2, if such work is permanently situate in a public place or any premises to which the public has access;

(u) the inclusion in a cinematograph film of —

- (i) any artistic work permanently situate in a public place or any premises to which the public has access; or
- (ii) any other artistic work, if such inclusion is only by way of background or is otherwise incidental to the principal matters represented in the film;

(v) the use by the author of an artistic work, where the author of such work is not the owner of the copyright therein, of any mould, cast, sketch, plan, model or study made by him for the purpose of the work:

Provided that he does not thereby repeat or imitate the main design of the work;

(w) the making of an object of any description in three dimensions of an artistic work in two dimensions, if the object would not appear, to persons, who are not experts in relation to objects of that description, to be a reproduction of the artistic work;

(x) the reconstruction of a building or structure in accordance with the architectural drawings or plans by reference to which the building or structure was originally constructed;

Provided that the original construction was made with the consent or licence of the owner of the copyright in such drawings and plans;

(y) in relation to a literary, dramatic or musical work recorded or reproduced in any cinematograph film, the exhibition of such film after the expiration of the term of copyright therein:

Provided that the provisions of sub-clause (ii) of clause (a), sub-clause (i) of clause (b) and clauses (d), (f), (g), (m) and (p) shall not apply as respects any act unless that act is accompanied by an acknowledgment—

(i) identifying the work by its title or other description; and

(ii) unless the work is anonymous or the author of the work has previously agreed or required that no acknowledgment of his name should be made, also identifying the author.

(2) The provisions of sub-section (1) shall apply to the doing of any act in relation to the translation of a literary, dramatic or musical work or the adaptation of a literary, dramatic, musical or artistic work as they apply in relation to the work itself.

[1914—Sch. I, S. 2; S. 19 (2).] [Cf. Ss. 6, 7, 8 and 9 of Copyright Act, 1956 (United Kingdom).]

OBJECTS AND REASONS

“This clause has been revised and expanded so as to include all acts which will not constitute an infringement of copyright. The important additions made are the following:—

- (1) the reproduction or publication of any literary, dramatic, musical or artistic work in any work prepared by the Secretariat of a Legislature for the exclusive use of the members of that Legislature; [S. 52 (1) (d)]
- (2) the making of records of a literary, dramatic or musical work, if records of such work had previously been made with the licence of the owner of the copyright in the work; [S. 52 (1) (j)]
- (3) the production, reproduction, performance or publication of a translation in any Indian language of an Indian work after the expiry of a period of ten years from the date of the first publication of the work; [now see S. 32] and
- (4) the reproduction, publication or translation of certain classes of Government works [S. 52 (1) (q).]

The first addition is necessary because the Secretariats of the Rajya Sabha and Lok Sabha often produce brochures or pamphlets taking copyright matter (presumably the same practice prevails in the State Legislatures also) for the use of members of Parliament. The addition is intended to give protection to such brochures or pamphlets.

The second addition is the result of the omission of the original cl. 30. The Committee feels that no licence should be required for making records of a work if records of the work had previously been made with the licence of the owner of the copyright in the work.

The third addition replaces the original cl. 31. [But now see S. 32.]

So far as the fourth addition is concerned, the Committee feels that certain classes of Government works should be in the public domain. The following classes of Government works have been placed in the public domain:—

- (i) any matter published in the Official Gazette;
- (ii) Acts of Legislatures, subject to the condition that any such Act is reproduced or published together with any commentary thereon or any other original matter;
- (iii) reports of committees, etc., appointed by the Government if such report has been laid on the Table of the Legislature, unless the reproduction or publication of the report is prohibited by a competent authority;
- (iv) reproduction of any judgment or order of a Court, Tribunal or other judicial authority unless such reproduction or publication is prohibited by the Court, Tribunal or other judicial authority as the case may be.”—J. C. R.

53. Importation of infringing copies.—(1) The Registrar of Copyrights, on application by the owner of the copyright in any work or by his duly authorised agent and on payment of the prescribed fee, may, after making such inquiry as he deems fit, order that copies made out of India of the work which if made in India would infringe copyright shall not be imported.

(2) Subject to any rules made under this Act, the Registrar of Copyrights or any person authorised by him in this behalf may enter any ship, dock or premises where any such copies as are referred to in sub-section (1) may be found and may examine such copies.

(3) All copies to which any order made under sub-section (1) applies shall be deemed to be goods of which the import has been prohibited or restricted under Section 19 of the Sea Customs Act, 1878,* and all the provisions of that Act shall have effect accordingly :

Provided that all such copies confiscated under the provisions of the said Act shall not vest in the Government but shall be delivered to the owner of the copyright in the work.

[1914—S. 6 and Sch. I, S. 14.] [Cf. S. 21 of Copyright Act, 1913 (1913, No. 4) (New Zealand): Ss. 5 and 41 of the Copyright Act, 1956 (United Kingdom).]

[*] Now see S. 11 of the Customs Act, 1962.

CHAPTER XII CIVIL REMEDIES

54. Definition.—For the purposes of this Chapter, unless the context otherwise requires, the expression “owner of copyright” shall include—

(a) an exclusive licensee;

(b) in the case of an anonymous or pseudonymous literary, dramatic, musical or artistic work, the publisher of the work, until the identity of the author or, in the case of an anonymous work of joint authorship, or a work of joint authorship published under names all of which are pseudonyms, the identity of any of the authors, is disclosed publicly by the author and the publisher or is otherwise established to the satisfaction of the Copyright Board by that author or his legal representatives.

55. Civil remedies for infringement of copyright.—(1) Where copyright in any work has been infringed, the owner of the copyright shall, except as otherwise provided by this Act, be entitled to all such remedies by way of injunction, damages, accounts and otherwise as are or may be conferred by law for the infringement of a right:

Section 54 — Note 1

(1) Right of author in drama not assigned to society claiming the drama — Society is not the owner nor the licensee and cannot maintain a suit for its infringement. AIR 1967 Assam 70 (73) = ILR (1966) 18 Assam 272 (DB).

(2) Once the original authors of the books allowed the books to be published by the university in their syllabus and the university in turn published these books as part of the syllabus prescribed for the students, no copyright in the strict sense of the term remained with the university. AIR 1965 J and K 101

(102) = 1965 (2) Cri LJ 639 = 1965 Kash LJ 219 (DB).

SECTION 55 — SYNOPSIS

1. Civil remedies.
2. Onus of proof.
3. Injunctions.
4. Who can sue.

1. Civil remedies. — (1) The rights conferred upon the owner of copyright by Sections 6 and 7 are based on different grounds. Under Section 6 he has the usual remedies available where a similar right of property is infringed and can recover damages for the loss sustain-

Provided that if the defendant proves that at the date of the infringement he was not aware and had no reasonable ground for believing that copyright subsisted in the work, the plaintiff shall not be entitled to any remedy other than an injunction in respect of the infringement and a decree for the whole or part of the profits made by the defendant by the sale of the infringing copies as the Court may in the circumstances deem reasonable.

(2) Where, in the case of a literary, dramatic, musical or artistic work, a name purporting to be that of the author or the publisher, as the case may be, appears on copies of the work as published, or, in the case of an artistic work, appeared on the work when it was made, the person whose name so appears or appeared shall, in any proceeding in respect of infringement of copyright in such work, be presumed, unless the contrary is proved, to be the author or the publisher of the work, as the case may be.

(3) The costs of all parties in any proceedings in respect of the infringement of copyright shall be in the discretion of the Court.

[1914—Sch I, S. 6; S. 8.] [Cf. S. 9 of Copyright Act, 1913 (1913 No. 4) (New Zealand); S. 17 of Copyright Act, 1956 (United Kingdom).]

OBJECTS AND REASONS

"The Proviso to sub-clause (1) has been revised so as to empower the Court to grant to the plaintiff in addition to an injunction a decree for the whole or a part of the profits made by the infringer as the Court may deem reasonable. Incidentally, the words "that the plaintiff was the owner of the copyright" which occurred in the original Proviso have been omitted. A new sub-clause (2) has been added to raise certain presumptions about the authorship or the publisher of a literary, dramatic, musical or artistic work". — J. C. R.

Section 55 — Note 1 (contd.)

ed by infringement or if he prefers payment of the profits resulting from the piracy. Under Section 7 he has an action of detinue in respect of unsold infringing copies and plates which by virtue of the section are deemed to be his own property and an action for conversion in respect of such infringing copies and plates as may have been sold, and further the measure of damages for conversion under Section 7 is not limited to profits but extends to the full value of the work converted. AIR 1931 Cal 233 (237, 238) ** (1918) 2 Ch 281 (284, 285).

(2) Section 6 deals with remedies legal and equitable, appropriate to the infringement of the incorporeal right of copyright defined by Section 1, sub-section (2) of the Copyright Act. AIR 1957 Punj 161 (163).

(3) Though remedies given by Ss. 6 and 7 are not alternative yet owner of copyright getting damages under S. 6 is not generally entitled to damages under Section 7. AIR 1938 Lah 173 (175) = ILR (1938) Lah 84 (DB).

(4) Where in a case of infringement of copyright the plaintiff asked for damages under Section 6 on the footing of the loss sustained and in the alternative under Section 7 for the delivery of the unsold infringing copies and damages on the footing of conversion in respect of the infringing copies sold, and the Court awarded damages under Section 6 and also decreed delivery of the unsold

copies—Held, that the plaintiff could not claim damages under S. 7 also. AIR 1931 Cal 233 (238) (DB).

(5) The plaintiff is entitled to an account and payment of net profits. (1857) 69 ER 1241 (1242).

(6) Where infringed copies are sold by the defendants they are entitled to all expenses necessarily and properly incurred by them in selling the infringed copies. AIR 1957 Punj 161 (163).

(7) (Obiter):— When there was no contract entered into with the plaintiffs by the defendants regarding the construction of work costing one crore, damages for infringement of the plan cannot be assessed on damages for breach of a non-existing contract, damages for such infringement differ from case to case. Held, that in India, Rs. 5,000 will be the very utmost which can be thought of as damages even if there was an infringement of the plaintiff's copyright in their plan as a literary work. ILR (1956) Mad 1347 (1366) (DB).

(8) Where copyright in a work has been infringed, the owner of the copyright shall be entitled to all such remedies by way of injunction or interdict, damages, accounts, and otherwise, as are or may be conferred by law for the infringement of a right. The proper remedy for the author is to pursue that allowed to him by a civil suit. The owner is not entitled to a writ under Art. 226 against the person alleged to have infringed the copyright to prohibit and prevent him

Section 55 — Note 1 (contd.)

from publishing and selling any copies of the infringing work. AIR 1952 Trav-Co 38 (40).

(9) Defendant pleading that he had no reasonable ground for suspecting infringement should prove it affirmatively. AIR 1930 PC 314 (317).

(10) Complaint that certain books were translations of complainant's books — It is a matter for Court to compare them and find out whether they are substantial translations of complainant's books — But when a civil suit is pending in respect of very same matter, Criminal Court will not give finding on that matter. AIR 1967 Ker 234 (235) = 1967 Cri LJ 1517 (2) = 1967 Ker LT 1110.

(11) The bar of limitation is against an action for an infringement of copyright after three years but each infringement gives rise to a fresh cause of action. The copyright itself cannot cease to belong to its owner. AIR 1962 All 111 (114).

(12) For exemption under the Proviso to Section 55 (1) the defendant must discharge the burden of proving that at the date of the infringement he was not aware and had no reasonable ground for suspecting that copyright subsisted in the work. Where the defendant believed that he and not the plaintiff was the owner of copyright it cannot be said that he did not suspect that any copyright existed and hence is not entitled to the benefit of the proviso to Section 55 (1). 1968 Ker LJ 440 = (1969) 1 Lab LJ 323.

(13) Copyright is a right of property and any injury caused to such right will give rise to a claim for damages. (Copyright Act (1911), Ss. 6, 7). AIR 1961 Mad 114 (121) = (1962) 1 Mad LJ 258 (DB).

(14) Section 6 (1) in general terms confers on the owner of the copyright the remedy by way of damages as may be conferred by the law for the infringement of a right. Section 7 deals with the remedies based on conversion. It is two-fold in its scope. It gives the right to the owner of the copyright to take proceedings for the recovery of the possession of all the infringing copies. It also confers on him a right to take proceedings in respect of the conversion of such copies. AIR 1961 Mad 114 (121) = (1962) 1 Mad LJ 258 (DB).

(15) The foundations of the claims under Sections 6 and 7 respectively are different. Damages under Section 6 are claimed for infringement of copyright which is an incorporeal right in property — Damages claimed under Section 7 are on the basis of conversion of goods, which are deemed to be the property of the plaintiff — There should not be overlapping in the assessment of damages. AIR 1961 Mad 114 (121) = (1962) 1 Mad LJ 258 (DB).

(16) In the case of infringement of the Government's copyright, the Government, as owners of copyright are entitled to the civil remedies enumerated under Section 6 of the Copyright Act as applicable to India. But there is no provision of law under which the Government are entitled to demand unconditional apology for the infringement of the copyright. AIR 1959 All 492 (493) = 1959 Cri LJ 929 = 1959 All LJ 359.

2. Onus of proof. — (1) Action for infringement of copyright — Onus of proof — It is not for the defendant to prove that there was no infringement — The onus is upon the plaintiffs to prove that in fact there was. AIR 1939 Bom 347 (349) = ILR (1939) Bom 295.

(2) There was provision in Section 3 of the Copyright Act of 1847 that a certificate of the entry in the Copyright Register Book was prima facie evidence of the proprietorship of the person mentioned therein to the copyright of the book in question. That provision has been repealed by the Act of 1914. AIR 1916 Mad 1015 (1016) = 16 Cri LJ 673.

(3) An irrebuttable presumption arises that an alleged work is a work in which copyright exists and that the plaintiff is the owner of it where the defendant does not dispute the existence of the copyright. AIR 1924 Cal 595 (595).

(4) The defendant should allege ignorance in respect of the existence of the copyright and prove it to come within the provisions of Section 8 of the 1914 Act. AIR 1939 Bom 347 (351) = ILR (1939) Bom 295.

3. Injunctions. — (1) Since one of the remedies available for the infringement of a copyright is by way of injunction the precise rule of law contained in Section 56 of the Specific Relief Act cannot in any way interfere with the discretion of the Court in regard to the grant of temporary injunction thereunder. AIR 1931 Lah 624 (625).

(2) Where a person publishes a book containing selections from another book there is a prima facie case for issue of temporary injunction. AIR 1935 Lah 282 (283).

(3) In order to justify the grant of temporary injunction in an action by the plaintiff restraining the defendant from infringing his copyright it is not necessary for the plaintiff to make out a strong case and show that there is no other remedy open to him by which he can protect himself from the consequence of the injury. Injunction in such a case is an appropriate relief. In doubtful cases where the question as to legal right is one on which the Court is not prepared to pass an opinion, or the legal right being admitted the fact of its violation is denied, the course of the Court is either to grant the injunction pending the trial of the legal right or to order the motion

56. Protection of separate rights.—Subject to the provisions of this Act, where the several rights comprising the copyright in any work are owned by different persons, the owner of any such right shall, to the extent of that right, be entitled to the remedies provided by this Act and may individually enforce such right by means of any suit, action or other proceeding without making the owner of any other right a party to such suit, action or proceeding.

OBJECTS AND REASONS

“This clause provides that the author or any other owner of copyright or any person deriving any right, title or interest in the copyright by assignment or otherwise may individually for himself and in his own name bring an action for protecting or enforcing his rights.”—S. O. R.

57. Author's special rights.—(1) Independently of the author's copyright, and even after the assignment either wholly or partially of the said copyright, the author of a work shall have the right to claim the authorship of the work as well as the right to restrain, or claim damages in respect of—

- (a) any distortion, mutilation or other modification of the said work; or
- (b) any other action in relation to the said work which would be prejudicial to his honour or reputation.

(2) The right conferred upon an author of a work by sub-section (1), other than the right to claim authorship of the work, may be exercised by the legal representatives of the author.

58. Rights of owner against persons possessing or dealing with infringing copies.—All infringing copies of any work in which copyright subsists and all plates used or intended to be used for the production of such infringing copies, shall be deemed to be the property of the owner of the copyright who accordingly may take proceedings for the recovery of possession thereof or in respect of the conversion thereof:

Section 55 — Note 3 (contd.)

to stand over until the legal right has been tried. In determining which of these two courses it shall adopt, the Court is governed by the consideration as to the comparative mischief or inconvenience to the parties which may arise from granting or withholding the injunction. AIR 1931 Lah 624 (626).

(4) Temporary injunction will not be granted in cases where no irreparable injury will be caused to the plaintiff by its non-issue and where the plaintiff's interest is otherwise protected. AIR 1933 Lah 448 (449).

(5) Where the publications are voluminous it is the common course to state the piracy generally and refer to particular passages of the works in argument in proof of it, and injunction if granted being granted generally. If any part is shown to be taken from common source it would not in fact be copied from plaintiff's work and would not fall within the terms of the injunction. (1840) 9 LJ Ch 323 (324).

(6) In an application for infringement of copyright where the Court is concerned with the minds and methods of teaching of a large section of student community it is a case for injunction. (1966) 70 Cal WN 1170.

4. Who can sue. — (1) Joint owners of copyright — One or more of them may sue on the infringement of the entire copyright, although the owners take as tenants-in-common. (1892) 3 Ch 402 (413, 414).

(2) Where there was no assignment in writing in compliance with the provisions of the Act, the Publishing House acquired no rights of publication and as such could seek no relief on that footing. (1968) 1 Andh Pra WR 323 = (1968) 2 Andh LT 71.

(3) The plaintiff whose name appears as the publishers of the text book is entitled to maintain an action for infringement of copyright. (1966) 70 Cal WN 1130.

(4) Film alleged to be infringing drama — Drama claimed by a society — Society is not its owner and hence society's suit for its infringement is not maintainable. AIR 1967 Assam 70 (73) = ILR (1966) 18 Assam 272 (DB).

Section 58 — Note 1

(1) Owner of copyright can recover unsold infringing copies and price of copies actually sold. AIR 1938 All 266 (271) = ILR (1938) All 370 (DB).

(2) In case of publishing infringed books in the absence of any mention in

Provided that the owner of the copyright shall not be entitled to any remedy in respect of the conversion of any infringing copies, if the opponent proves—

(a) that he was not aware and had no reasonable ground to believe that copyright subsisted in the work of which such copies are alleged to be infringing copies; or

(b) that he had reasonable grounds for believing that such copies or plates do not involve infringement of the copyright in any work.

[1914—Sch. I, S. 7.] [Cf. S. 10 of Copyright Act, 1913 (1913, No. 4) (New Zealand).]

59. Restriction on remedies in the case of works of architecture.—(1) Notwithstanding anything contained in the Specific Relief Act, 1877, where the construction of a building or other structure which infringes or which, if completed, would infringe the copyright in some other work has been commenced, the owner of the copyright shall not be entitled to obtain an injunction to restrain the construction of such building or structure or to order its demolition.

(2) Nothing in Section 58 shall apply in respect of the construction of a building or other structure which infringes or which, if completed, would infringe the copyright in some other work.

[1914—S. 12 and Sch. I, S. 9.] [Cf. S. 12 of Copyright Act, 1913 (1913, No. 4) (New Zealand).]

60. Remedy in the case of groundless threat of legal proceedings.—Where any person claiming to be the owner of copyright in any work, by circulars, advertisements or otherwise, threatens any other person with any legal proceedings or liability in respect of an alleged infringement of the copyright, any person aggrieved thereby may, notwithstanding anything contained in Section 42 of the Specific Relief Act, 1877,* institute a declaratory suit that the alleged infringement to which the threats related was not in fact an infringement of any legal rights of the person making such threats and may in any such suit—

(a) obtain an injunction against the continuance of such threats; and

(b) recover such damages, if any, as he has sustained by reason of such threats:

Provided that this section shall not apply if the person making such threats, with due diligence, commences and prosecutes an action for infringement of the copyright claimed by him.

[*] Now see S. 34 of Specific Relief Act, 1963 (47 of 1963) (1-3-1964).

[Note: Based on S. 41-A of the Australian Act.]

61. Owners of copyright to be party to the proceeding.—(1) In every civil suit or other proceeding regarding infringement of copyright instituted by an exclusive licensee, the owner of the copyright shall, unless the Court otherwise directs, be made a defendant and where such owner is made a defendant, he shall have the right to dispute the claim of the exclusive licensee.

Section 58 — Note 1 (contd.)

the judgment regarding the time of conversion of books etc., and omission of the words "printing and publishing" in the preliminary decree for accounts concerning sale of copies of infringing works, the decree-holder is entitled to the accounts relating to sale of books only and the cost of printing and publishing is to be excluded from such accounts. AIR 1957 Punj 161 (163).

(3) Where the author has printed the book while the copyright is vested in the publisher and when it is not alleged that the marketable value of copyright has been reduced, the preliminary decree for accounts should relate to accounts for conversion. AIR 1957 Punj 161 (163).

(4) Action on infringement — Defendant in possession of some unsold copies — Plaintiff is entitled to delivery of such copies besides an injunction. (1898) 1 Ch 58 (64).

(2) Where any civil suit or other proceeding regarding infringement of copyright instituted by an exclusive licensee is successful, no fresh suit or other proceedings in respect of the same cause of action shall lie at the instance of the owner of the copyright.

62. Jurisdiction of Court over matters arising under this Chapter.—(1) Every suit or other civil proceedings arising under this Chapter in respect of the infringement of copyright in any work or the infringement of any other right conferred by this Act shall be instituted in the District Court having jurisdiction.

(2) For the purpose of sub-section (1), a "District Court having jurisdiction" shall, notwithstanding anything contained in the Code of Civil Procedure, 1908, or any other law for the time being in force, include a District Court within the local limits of whose jurisdiction, at the time of the institution of the suit or other proceeding, the person instituting the suit or other proceeding or, where there are more than one such persons, any of them actually and voluntarily resides or carries on business or personally works for gain.

[1914—S. 13.]

OBJECTS AND REASONS

"Clause 65 of the Bill as originally introduced provided that no suit for infringement of copyright or proceeding should lie unless the copyright was registered with the Registrar of Copyrights. While omitting this provision the Joint Committee say: "Sub-clause (2) of the original clause 65 has been omitted and replaced by a new sub-clause. The Committee feels that the provisions of the original sub-clause (2) would virtually make registration of copyright compulsory and would be an undue restriction on the owner of the copyright to exercise his rights. In the opinion of the Committee many authors are deterred from instituting infringement proceedings because the Court in which such proceedings are to be instituted is situated at a considerable distance from the place of their ordinary residence. The Committee feels that this impediment should be removed and the new sub-clause (2) accordingly provides that infringements proceedings may be instituted in the District Court within the local limits of whose jurisdiction the person instituting the proceedings ordinarily resides, carries on business, etc."—J. C. R.

Section 62 — Note 1

(1) Madras City Civil Court has no jurisdiction to entertain and try any suit for infringement of a copyright. AIR 1937 Mad 94 (94).

(2) Definition of District Judge in the General clauses Act cannot be applied for finding out the jurisdiction of a District Court under S. 62. AIR 1967 Mad 381 (385) = ILR (1964) 2 Mad 666 (DB).

(3) Copyright is property, and therefore, a suit seeking reliefs for infringement of copyright is a suit of a civil nature. If such infringement occurs, and the cause of action for a suit based on the infringement arises within the area of the ordinary original civil jurisdiction of the High Court, that Court can be deemed to be a District Court as per definition in Section 2 (4) of the C. P. Code and will have power to try the suit. AIR 1967 Mad 381 (384) = ILR (1964) 2 Mad 666 (DB).

(4) Under Section 20 of the C. P. Code, it is the place where the defendant resides that gives jurisdiction to the

Court. But Section 62 (2) of the Copyright Act alters this principle, and defines the place where the plaintiff resides or carries on business as the place where the suit has to be filed. It is only for the purpose of making this alteration, that Section 62 (2) of the Copyright Act uses the non obstante clause; but in other respects the C. P. Code will apply. AIR 1967 Mad 381 (385) = ILR (1964) 2 Mad 666 (DB).

(5) The terms of Section 62 specially sub-s. (2) imply that the definitions of District and District Court in the Civil P. C. will apply for purposes of determining the jurisdiction under the copyright Act. The High Court was held to have jurisdiction to try the suit (where cause of action arose in the city of Madras.) AIR 1967 Mad 381 (385) = ILR (1964) 2 Mad 666 (DB).

(6) There is a specific provision in Section 62 relating to the place of suing in a civil proceeding. AIR 1969 Bom 302 (303) = 1969 Cri LJ 1109 = 71 Bom LR 409.

CHAPTER XIII

OFFENCES

63. Offence of infringement of copyright or other rights conferred by this Act.—Any person who knowingly infringes or abets the infringement of—

(a) the copyright in a work, or

(b) any other right conferred by this Act,

shall be punishable with imprisonment which may extend to one year, or with fine, or with both.

Explanation.—Construction of a building or other structure which infringes or which, if completed, would infringe the copyright in some other work shall not be an offence under this section.

[1914—S. 7.] [Cf. S. 14 of Copyright Act, 1913 (1913, No. 4) (New Zealand).]

Section 63 — Note 1

(1) Offence described in Section 7 (a) (of the 1914 Act) is complete as soon as the book infringing the copyright is printed and does not depend for its completion upon the ensuing of any consequence as contemplated by Section 179, Criminal Procedure Code. AIR 1917 Lah 335 (336) = 1916 Pun Re No. 28 = 18 Cri LJ 353.

(2) The complainant alleged in his complaint that certain pictures were entrusted to the accused for the preparation of blocks and printing them, that he clandestinely used the said blocks for printing more pictures and that he did not return the blocks: **Held**, that complaint disclosed an offence under Ss. 7 and 8 (of the 1914 Act) and its dismissal on the ground that the dispute is of a civil nature could not be sustained. AIR 1942 Mad 124 (124).

(3) In complaint for infringement of copyright in respect of work published when Act XX of 1847 was in force, a plea of non-payment of the fee for registration required under the former Act as bar to the maintainability of action is not available as the procedure for payment of fees had no place in the Act of 1914. AIR 1927 Mad 981 (983) = 51 Mad 180 = 28 Cri LJ 957.

(4) Where the Court has proceeded on a wrong view of the law in acquitting the accused and where the matter is of great importance to the complainant in his position as author of the book which will be pirated by another who will secure for himself the gains that ought legitimately to go to the petitioner, a retrial should be ordered. AIR 1927 Mad 981 (983) = 51 Mad 180 = 28 Cri LJ 957.

(5) Where in a criminal prosecution the order did not disclose under which clause of Section 7 (of the 1914 Act) it was started, and the accused also had

no knowledge regarding the same, it was held that the accused was not given a fair trial. AIR 1934 Pat 522 (523) = 36 Cri LJ 30.

(6) 'Knowing infringement' — Substitution of author's name and other alterations in body, made by third person — Publisher publishing work with those alterations held not shown to have knowingly violated any right conferred by Act. AIR 1965 All 274 (277) = 1965 (1) Cri LJ 672 = 1964 All WR (HC) 669.

(7) 'Knowingly infringes' the copyright has to be distinguished from knowingly publishing or printing of a work in which there is a copyright. The term publication has been defined in Section 3 of the Copyright Act and the term 'Copyright' has been defined in Section 14 of the Copyright Act quite comprehensively. In the case of publication, the definition denotes certain activities whereas the term 'Copyright' connotes certain kinds of exclusive right to do certain Act. AIR 1965 All 274 (275, 276) = 1965 (1) Cri LJ 672 = 1964 All WR (HC) 669

(8) It is purely a question of fact whether, upon fact proved the accused person could and did entertain a bona fide belief in the existence of his copyright and the proof of such belief is a sufficient answer to a case in which the law requires proof of knowledge of an infringement as a necessary ingredient of an offence. AIR 1965 All 274 (276) = 1964 All WR (HC) 669 = 1965 (1) Cri LJ 672. ((1903) 89 LT 129, Disting.)

(9) Where a person knowingly publishes and prints a work in which another person has copyright, the ingredients of mens rea required by S. 63 are not satisfied. AIR 1965 All 274 (275) = 1965 (1) Cri LJ 672 = 1964 All WR (HC) 669.

(10) What is required under Section 63 of the Copyright Act for an action in respect of an offence is that the accused

64. Power of police to seize infringing copies.—(1) Where a Magistrate has taken cognizance of any offence under Section 63 in respect of the infringement of copyright in any work, it shall be lawful for any police officer, not below the rank of Sub-Inspector, to seize without any warrant from the Magistrate, all copies of the work wherever found, which appear to him to be infringing copies of the work and all copies so seized shall, as soon as practicable, be produced before the Magistrate.

(2) Any person having an interest in any copies of a work seized under subsection (1) may, within fifteen days of such seizure, make an application to the Magistrate for such copies being restored to him and the Magistrate, after hearing the applicant and the complainant and making such further inquiry as may be necessary, shall make such order on the application as he may deem fit.

[Cf. S. 16 of Copyright Act, 1913 (1913 No. 4) (New Zealand).]

OBJECTS AND REASONS

"This is a new clause which enables a police officer not below the rank of a Sub-Inspector to seize all copies of a work which appear to him to be infringing copies after a Magistrate has taken cognizance of an offence relating to infringement of copyright in such work. In the opinion of the Committee such a provision is necessary in the interest of authors and publishers particularly in cases of wholesale and deliberate acts of piracy."—J. C. R.

65. Possession of plates for purpose of making infringing copies.—Any person who knowingly makes, or has in his possession, any plate for the purpose of making infringing copies of any work in which copyright subsists shall be punishable with imprisonment which may extend to one year, or with fine, or with both. [1914—S. 8.]

66. Disposal of infringing copies or plates for purpose of making infringing copies.—The Court trying any offence under this Act may, whether the alleged offender is convicted or not, order that all copies of the work or all plates in the

Section 63 — Note 1 (contd.)

must have knowingly infringed or abetted the infringement of the copyright in a work, or any other right conferred by the Copyright Act. AIR 1966 Mad 175 (176) = 1966 Cri LJ 553 = (1965) 2 Mad LJ 377 ** AIR 1967 Ker 234 (235) = 1967 Ker LT 1110 = 1967 Cri LJ 1517 (2).

(11) Notes published on books prescribed by University did not amount to infringement of copyright to make out a criminal offence. AIR 1965 J and K 101 (102) = 1965 (2) Cri LJ 639 = 1965 Kash LJ 219 (DB).

(12) There is no specific provision in Section 63 regarding the place of suing for the commission of a criminal offence. The Criminal P. C. has to be referred to for the purpose. AIR 1969 Bom 302 (303) = 1969 Cri LJ 1109 = 71 Bom LR 409.

(13) In the case of infringement of a copyright in respect of a literary work of two joint authors, one of the authors, who is aggrieved, is entitled to maintain a criminal action for the offence. AIR 1966 Mad 175 (176) = 1966 Cri LJ 553 = (1965) 2 Mad LJ 377.

(14) The mandatory provision contained in Section 64, Copyright Act, 1957

makes the production of infringing copies necessary before the Magistrate trying the case to prove the ingredient of knowledge of infringement by accused contained in Section 63 of the Act. AIR 1965 All 206 (207, 208) = 1965 (1) Cri LJ 530 = 1963 All LJ 930.

Section 64 — Note 1

(1) The mandatory provision of Section 64 makes the production of infringing copies necessary before the Magistrate trying the case. This is necessary to prove the ingredient of knowledge of infringement by accused. It is also necessary for handing over the copies to the complainant, if the Magistrate considers it expedient to do so. AIR 1965 All 206 (207, 208) = 1965 (1) Cri LJ 530 = 1963 All LJ 930.

Section 66 — Note 1

(1) If the Magistrate trying the case under Copyright Act considers it expedient to hand over the infringing copies seized at another place from the accused, the Magistrate is justified under Section 64 to call for the infringing copies. AIR 1965 All 206 (207) = 1965 (1) Cri LJ 530 = 1963 All LJ 930.

possession of the alleged offender, which appear to it to be infringing copies or plates for the purpose of making infringing copies, be delivered up to the owner of the copyright.

[1914—S. 10 (1).]

67. Penalty for making false entries in register, etc., for producing or tendering false entries.—Any person who,—

- (a) makes or causes to be made a false entry in the Register of Copyrights kept under this Act, or
- (b) makes or causes to be made a writing falsely purporting to be a copy of any entry in such register, or
- (c) produces or tenders or causes to be produced or tendered as evidence any such entry or writing, knowing the same to be false,

shall be punishable with imprisonment which may extend to one year, or with fine, or with both.

68. Penalty for making false statements for the purpose of deceiving or influencing any authority or officer.—Any person who,—

- (a) with a view to deceiving any authority or officer in the execution of the provisions of this Act, or
- (b) with a view to procuring or influencing the doing or omission of anything in relation to this Act or any matter thereunder,

makes a false statement or representation knowing the same to be false, shall be punishable with imprisonment which may extend to one year, or with fine or with both.

69. Offences by companies.—(1) Where any offence under this Act has been committed by a company, every person who at the time the offence was committed was in charge of, and was responsible to the company for, the conduct of the business of the company, as well as the company shall be deemed to be guilty of such offence and shall be liable to be proceeded against and punished accordingly :

Provided that nothing contained in this sub-section shall render any person liable to any punishment, if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company, and it is proved that the offence was committed with the consent or connivance of, or is attributable to any negligence on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation.—For the purposes of this section—

- (a) “company” means any body corporate and includes a firm or other association of persons; and
- (b) “director” in relation to a firm means a partner in the firm.

70. Cognizance of offences.—No Court inferior to that of a Presidency Magistrate or a Magistrate of the First Class shall try any offence under this Act.

[1914 — S. 11.]

Section 69 — Note 1

(1) Criminal complaint under the Copyright Act is maintainable in law against the partners of a firm as well as the firm itself in its trade name as accused persons. AIR 1969 Bom 302 (309) — 1969 Cri LJ 1109 = 71 Bom LR 409.

CHAPTER XIV

APPEALS

71. Appeals against certain orders of Magistrate.—Any person aggrieved by an order made under sub-section (2) of Section 64 or Section 66 may, within thirty days of the date of such order, appeal to the Court to which appeals from the Court making the order ordinarily lie, and such appellate Court may direct that execution of the order be stayed pending disposal of the appeal.

[1914 — S. 10 (2).]

72. Appeals against orders of Registrar of Copyrights and Copyright Board.—(1) Any person aggrieved by any final decision or order of the Registrar of Copyrights may, within three months from the date of the order or decision, appeal to the Copyright Board.

(2) Any person aggrieved by any final decision or order of the Copyright Board, not being a decision or order made in an appeal under sub-section (1), may, within three months from the date of such decision or order, appeal to the High Court within whose jurisdiction the appellant actually and voluntarily resides or carries on business or personally works for gain:

Provided that no such appeal shall lie against a decision of the Copyright Board under Section 6.

(3) In calculating the period of three months provided for an appeal under this section, the time taken in granting a certified copy of the order or record of the decision appealed against shall be excluded.

73. Procedure for appeals.—The High Court may make rules consistent with this Act as to the procedure to be followed in respect of appeals made to it under Section 72.

CHAPTER XV

MISCELLANEOUS

74. Registrar of Copyrights and Copyright Board to possess certain powers of civil Courts.—The Registrar of Copyrights and the Copyright Board shall have the powers of a civil Court when trying a suit under the Code of Civil Procedure, 1908, in respect of the following matters, namely:—

- (a) summoning and enforcing the attendance of any person and examining him on oath;
- (b) requiring the discovery and production of any document;
- (c) receiving evidence on affidavits;
- (d) issuing commissions for the examination of witnesses or documents;
- (e) requisitioning any public record or copy thereof from any Court or office;
- (f) any other matter which may be prescribed.

Explanation.—For the purpose of enforcing the attendance of witnesses, the local limits of the jurisdiction of the Registrar of Copyrights or the Copyright Board, as the case may be, shall be the limits of the territory of India.

Section 71 — Note 1

(1) An order passed under Section 66 is appealable under this section. AIR 1934 Pat 522 (523) = 38 Cri L Jour 30. (Case under Act of 1914.)

75. Orders for payment of money passed by Registrar of Copyrights and Copyright Board to be executable as a decree.—Every order made by the Registrar of Copyrights or the Copyright Board under this Act for the payment of any money or by the High Court in any appeal against any such order of the Copyright Board shall, on a certificate issued by the Registrar of Copyrights, the Copyright Board or the Registrar of the High Court, as the case may be, be deemed to be a decree of a civil Court and shall be executable in the same manner as a decree of such Court.

76. Protection of action taken in good faith.—No suit or other legal proceeding shall lie against any person in respect of anything which is in good faith done or intended to be done in pursuance of this Act.

77. Certain persons to be public servants.—Every officer appointed under this Act and every member of the Copyright Board shall be deemed to be a public servant within the meaning of Section 21 of the Indian Penal Code.

78. Power to make rules.—(1) The Central Government may, by notification in the Official Gazette, make rules^{*} for carrying out the purposes of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, the Central Government may make rules to provide for all or any of the following matters, namely :—

- (a) the term of office and conditions of service of the Chairman and other members of the Copyright Board;
- (b) the form of complaints and applications to be made, and the licences to be granted, under this Act;
- (c) the procedure to be followed in connection with any proceeding before the Registrar of Copyrights;
- (d) the manner of determining any royalties payable under this Act, and the security to be taken for the payment of such royalties;
- (e) the form of Register of Copyrights to be kept under this Act and the particulars to be entered therein;
- (f) the matters in respect of which the Registrar of Copyrights and the Copyright Board shall have powers of a civil Court;
- (g) the fees which may be payable under this Act;
- (h) the regulation of business of the Copyright Office and of all things by this Act placed under the direction or control of the Registrar of Copyrights.

(3) All rules made under this section shall, as soon as may be after they are made, be laid before both Houses of Parliament for not less than thirty days and shall be subject to such modifications as Parliament may make during the session in which they are so laid or the session immediately following.

[^{*}] For the Copyright Rules, 1958, see Gaz. of Ind., Extra., 21-1-1958, Pt. II, S. 3, page 167 (Am. by G. S. R. 267, dated 22-4-1958).

79. Repeals, savings, and transitional provisions.—(1) The Indian Copyright Act, 1914, and the Copyright Act of 1911 passed by the Parliament of the United Kingdom as modified in its application to India by the Indian Copyright Act, 1914, are hereby repealed.

(2) Where any person has, before the commencement of this Act, taken any action whereby he has incurred any expenditure or liabilities in connection with

the reproduction or performance of any work in a manner which at the time was lawful or for the purpose of or with a view to the reproduction or performance of a work at a time when such reproduction or performance would, but for the coming into force of this Act, have been lawful, nothing in this section shall diminish or prejudice any rights or interests arising from or in connection with such action which are subsisting and valuable at the said date, unless the person who, by virtue of this Act, becomes entitled to restrain such reproduction or performance, agrees to pay such compensation as, failing agreement, may be determined by the Copyright Board.

(3) Copyright shall not subsist by virtue of this Act in any work in which copyright did not subsist immediately before the commencement of this Act under any Act repealed by sub-section (1).

(4) Where copyright subsisted in any work immediately before the commencement of this Act, the rights comprising such copyright shall, as from the date of such commencement, be the rights specified in Section 14 in relation to the class of works to which such work belongs, and where any new rights are conferred by that section, the owner of such rights shall be—

- (a) in any case where copyright in the work was wholly assigned before the commencement of this Act, the assignee or his successor-in-interest;
- (b) in any other case, the person who was the first owner of the copyright in the work under any Act repealed by sub-section (1) or his legal representatives.

(5) Except as otherwise provided in this Act, where any person is entitled immediately before the commencement of this Act to copyright in any work or any right in such copyright or to an interest in any such right, he shall continue to be entitled to such right or interest for the period for which he would have been entitled thereto if this Act had not come into force.

(6) Nothing contained in this Act shall be deemed to render any act done before its commencement an infringement of copyright if that act would not otherwise have constituted such an infringement.

(7) Save as otherwise provided in this section, nothing in this section shall be deemed to affect the application of the General Clauses Act, 1897, with respect to the effect of repeals.

[1914 — Sch. I, Ss. 33, 34, 36.]

APPENDIX

UNIVERSAL COPYRIGHT CONVENTION

[Ratification by India]

PRESS NOTE

It is hereby announced for the information of the general public that the Government of India have ratified Universal Copyright Convention and Protocols 1 and 2 thereto and acceded to protocol 3 of the Convention.

The Instrument of Ratification was deposited with UNESCO on 21st October 1957, and the Convention will come into force as respects India, with effect from January 21, 1958.

India has been a party to the Berne Convention for the protection of Literary and Artistic Works ever since 1887.

A number of countries from Europe, Asia and America have joined this Convention but United States of America and certain other American countries

have not been members of the Berne Convention as those countries had a copyright system which could not fit into some of the important provisions of the Berne Convention.

The position, therefore, was that though the Berne countries were bound to one another by the Berne Convention, they were required to enter into separate agreement with non-Berne countries in regard to copyright matters.

This position was obviously unsatisfactory and unceasing efforts were made for many years to bring the various countries following divergent systems under a common umbrella in the matter of international copyright.

For this purpose, an inter-Governmental Conference was convened under the auspices of the UNESCO, at which delegations of Governments of about 50 countries including India were present. This Conference adopted a convention called the "Universal Copyright Convention," along with three Protocols, for regulating copyright relations amongst the countries ratifying or acceding to the Convention.

UNIVERSAL COPYRIGHT

The Universal Copyright Convention does not, however, supersede the Berne Convention. In fact, the Berne Convention continues to regulate the copyright relationship amongst the Berne countries (vide Article XVII and the Declaration annexed thereto).

The Universal Copyright Convention only established relationship between the Berne countries and the non-Berne countries; it serves as a bridge between the Berne countries and the non-Berne countries. Berne countries ratifying the Universal Copyright Convention will no longer need to enter into separate arrangements with non-Berne countries ratifying the Convention and the copyright relations between such countries will be regulated by the provisions of the Universal Copyright Convention. Likewise, the non-Berne countries which are signatories to the Universal Copyright Convention will claim protection under that Convention in the Berne countries which are signatories to the Universal Copyright Convention, without any further special arrangements.

BASIC PRINCIPLE

The basic principle adopted in the Universal Copyright Convention is of 'National treatment.' It is expressed in Article II of the Convention in the following words :—

"1. Published works of nationals of any Contracting State and works first published in that State shall enjoy in each other Contracting State the same protection as that other State accords to works of its nationals first published in its own territory."

"2. Unpublished works of nationals of each Contracting State shall enjoy in each other Contracting State the same protection as that other State accords to unpublished works of its own nationals."

Accordingly Indian works and works of Indian nationals can, by virtue of this provision, claim in every non-Berne Universal Copyright Convention country the same protection which is enjoyed by the national of that country in respect of his works published in that country.

Many countries require under their domestic law compliance with certain formalities (e. g. registration, deposit of copies, notice, etc.), for acquisition of copyright within their territory.

The Universal Copyright Convention dispenses with this requirement and provides that it shall be deemed to have been satisfied if all copies of a work bear at a prominent place merely the symbol (C) (the letter C in a Circle) accompanied by the name of the Copyright proprietor and the year of first publication (Article III); Indian works have thus not now to comply with the formalities prescribed in the laws of the non-Berne Universal Copyright Convention countries and will secure copyright protection by reason of the aforesaid symbol.

The Universal Copyright Convention also permits translation of published writings under certain conditions (Article V).

The following non-Berne countries have so far ratified the Universal Copyright Convention :

Andorra, Argentine Republic, Cambodia, Chile, Costa Rica, Cuba, Ecuador, the German Federal Republic, Guatemala, Haiti, Ireland, Laos, Liberia, Mexico, Nicaragua, Republic of El Salvador, Republic of Honduras, Republic of San Marino, Uruguay and the United States of America.

It is necessary that the Indian law of copyright should enable India to give effect to the terms of the Universal Copyright Convention. Parliament has recently passed the Copyright Act, 1957, and it is proposed to bring the Act into force and make a suitable order under Sections 40 and 41 thereof for the purpose before January 21, 1958.

TEXT OF UNIVERSAL COPYRIGHT CONVENTION

[Geneva, 6 September, 1952.]

The Contracting States,

Moved by the desire to assure in all countries copyright protection of literary, scientific and artistic works,

Convinced that a system of copyright protection appropriate to all nations of the world and expressed in a universal convention, additional to, and without impairing international systems already in force, will ensure respect for the rights of the individual and encourage the development of literature, the sciences and the arts,

Persuaded that such a universal copyright system will facilitate a wider dissemination of works of the human mind and increase international understanding,

Have agreed as follows :

ARTICLE I

Each Contracting State undertakes to provide for the adequate and effective protection of the rights of authors and other copyright proprietors in literary, scientific and artistic works, including writings, musical, dramatic and cinematographic works, and paintings, engravings and sculpture.

ARTICLE II

1. Published works of nationals of any Contracting State and works first published in that State shall enjoy in each other Contracting State the same protection as that other State accords to works of its nationals first published in its own territory.

2. Unpublished works of nationals of each Contracting State shall enjoy in each other Contracting State the same protection as that other State accords to unpublished works of its own nationals.

3. For the purpose of this Convention any Contracting State may, by domestic legislation, assimilate to its own nationals any person domiciled in that State.

ARTICLE III

1. Any Contracting State which, under its domestic law, requires as a condition of copyright, compliance with formalities such as deposit, registration, notice, notarial certificates, payment of fees or manufacture or publication in that Contracting State, shall regard these requirements as satisfied with respect to all works protected in accordance with this Convention and first published outside its territory and the author of which is not one of its nationals, if from the time

of the first publication all the copies of the work published with the authority of the author or other copyright proprietor bear the symbol (C) accompanied by the name of the copyright proprietor and the year of first publication placed in such manner and location as to give reasonable notice of claim of copyright.

2. The provision of paragraph 1 of this article shall not preclude any Contracting State from requiring formalities or other conditions for the acquisition and enjoyment of copyright in respect of works first published in its territory or works of its nationals wherever published.

3. The provisions of paragraph 1 of this article shall not preclude any Contracting State from providing that a person seeking judicial relief must, in bringing the action, comply with procedural requirements, such as that the complainant must appear through domestic counsel or that the complainant must deposit with the Court or an administrative office, or both, a copy of the work involved in the litigation; provided that failure to comply with such requirements shall not affect the validity of the copyright, nor shall any such requirement be imposed upon a national of another Contracting State if such requirement is not imposed on nationals of the State in which protection is claimed.

4. In each Contracting State there shall be legal means of protecting without formalities the unpublished works of nationals of other Contracting States.

5. If a Contracting State grants protection for more than one term of copyright and the first term is for a period longer than one of the minimum periods prescribed in Article IV, such State shall not be required to comply with the provisions of paragraph 1 of this Article III in respect of the second or any subsequent term of copyright.

ARTICLE IV

1. The duration of protection of a work shall be governed, in accordance with the provisions of Article II and this Article, by the law of the Contracting State in which protection is claimed.

2. The term of protection for works protected under this Convention shall not be less than the life of the author and twenty-five years after his death.

However, any Contracting State which, on the effective date* of this Convention in that State, has limited this term for certain classes of works to a period computed from the first publication of the work, shall be entitled to maintain these exceptions and to extend them to other classes of works. For all these classes the term of protection shall not be less than twenty-five years from the date of first publication.

Any Contracting State which, upon the effective date of this Convention in that State, does not compute the term of protection upon the basis of the life of the author, shall be entitled to compute the term of protection from the date of the first publication of the work or from its registration prior to publication, as the case may be, provided the term of protection shall not be less than twenty-five years from the date of first publication or from its registration prior to publication, as the case may be.

If the legislation of a Contracting State grants two or more successive terms of protection, the duration of the first term shall not be less than one of the minimum periods specified above.

3. The provisions of paragraph 2 of this Article shall not apply to photographic works or to works of applied art; provided, however, that the term of protection in those Contracting States which protect photographic works, or works of applied art in so far as they are protected as artistic works, shall not be less than ten years for each of said classes of works.

4. No Contracting State shall be obliged to grant protection to a work for a period longer than that fixed for the class of works to which the work in question belongs, in the case of unpublished works by the law of the Contracting

State of which the author is a national, and in the case of published works by the law of the Contracting State in which the work has been first published.

For the purposes of the application of the preceding provision, if the law of any Contracting State grants two or more successive terms of protection, the period of protection of that State shall be considered to be the aggregate of those terms. However, if a specified work is not protected by such State during the second or any subsequent term for any reason, the other Contracting States shall not be obliged to protect it during the second or any subsequent term.

5. For the purposes of the application of paragraph 4 of this Article, the work of a national of a Contracting State, first published in a non-Contracting State, shall be treated as though first published in the Contracting State of which the author is a national.

6. For the purposes of the application of paragraph 4 of this Article, in case of simultaneous publication in two or more Contracting States, the work shall be treated as though first published in the State which affords the shortest term; any work published in two or more Contracting States within thirty days of its first publication shall be considered as having been published simultaneously in said Contracting States.

[*] Effective dates in countries that have ratified the Convention :

Andorra	16.9.1955	Israel	16.9.1955
Argentina	13.2.1958	Italy	24.1.1957
Austria	2.7.1957	Japan	28.4.1956
Cambodia	16.9.1955	Laos	16.9.1955
Chile	16.9.1955	Liberia	27.7.1956
Costa Rica	16.9.1955	Luxembourg	15.10.1955
Cuba	18.6.1957	Mexico	12.5.1957
Ecuador	5.6.1957	Monaco	16.9.1955
France	14.1.1956	Pakistan	16.9.1955
German Federal Republic	16.9.1955	Philippines	19.11.1955
Great Britain	27.9.1957	Portugal	25.12.1956
Haiti	16.9.1955	Spain	16.9.1955
Holy Sea	5.10.1955	Switzerland	30.3.1956
Iceland	18.12.1956	United States of America	16.9.1955
India	21.1.1958		

ARTICLE V

1. Copyright shall include the exclusive right of the author to make, publish, and authorize the making and publication of translations of works protected under this Convention.

2. However, any Contracting State may, by its domestic legislation, restrict the right of translation of writings, but only subject to the following provisions :

If, after the expiration of a period of seven years from the date of the first publication of a writing, a translation of such writing has not been published in the national language or languages, as the case may be, of the Contracting State, by the owner of the right of translation or with his authorization, any national of such Contracting State may obtain a non-exclusive licence, from the competent authority thereof to translate the work and publish the work so translated in any of the national languages in which it has not been published; provided that such national, in accordance with the procedure of the State concerned, establishes either that he has requested, and been denied, authorization by the proprietor of the right to make and publish the translation, or that, after due diligence on his part, he was unable to find the owner of the right. A licence may also be granted on the same conditions if all previous editions of a translation in such language are out of print.

If the owner of the right of translation cannot be found, then the applicant for a licence shall send copies of his application to the publisher whose name appears on the work and, if the nationality of the owner of the right of translation

is known, to the diplomatic or consular representative of the State of which such owner is a national, or to the organisation which may have been designated by the Government of that State. The licence shall not be granted before the expiration of a period of two months from the date of the dispatch of the copies of the application.

Due provision shall be made by domestic legislation to assure to the owner of the right of translation a compensation which is just and conforms to international standards, to assure payment and transmittal of such compensation, and to assure a correct translation of the work.

The original title and the name of the author of the work shall be printed on all copies of the published translation. The licence shall be valid only for publication of the translation in the territory of the Contracting State where it has been applied for. Copies so published may be imported and sold in another Contracting State if one of the national languages of such other State is the same language as that into which the work has been so translated, and if the domestic law in such other State makes provision for such licences and does not prohibit such importation and sale. Where the foregoing conditions do not exist, the importation and sale of such copies in a Contracting State shall be governed by its domestic law and its agreements. The licence shall not be transferred by the licensee.

The licence shall not be granted when the author has withdrawn from circulation all copies of the work.

ARTICLE VI

"Publication," as used in this Convention, means the reproduction in tangible form and the general distribution to the public of copies of a work from which it can be read or otherwise visually perceived.

ARTICLE VII

This Convention shall not apply to works or rights in works which, at the effective date of the Convention in a Contracting State where protection is claimed, are permanently in the public domain in the said Contracting State.

ARTICLE VIII

1. This Convention, which shall bear the date of September 6, 1952, shall be deposited with the Director-General of the United Nations Educational, Scientific and Cultural Organisation and shall remain open for signature by all States for a period of 120 days after that date. It shall be subject to ratification or acceptance by the signatory States.

2. Any State which has not signed this Convention may accede thereto.

3. Ratification, acceptance or accession shall be effected by the deposit of an instrument to that effect with the Director-General of the United Nations Educational, Scientific and Cultural Organisation.

ARTICLE IX

1. This Convention shall come into force three months after the deposit of twelve instruments of ratification, acceptance or accession, among which there shall be those of four States which are not members of the International Union for the Protection of Literary and Artistic Works.

2. Subsequently, this Convention shall come into force in respect of each State three months after that State has deposited its instrument of ratification, acceptance or accession.

ARTICLE X

1. Each State party to this Convention undertakes to adopt, in accordance with its Constitution, such measures as are necessary to ensure the application of this Convention.

2. It is understood, however, that at the time an instrument of ratification, acceptance or accession is deposited on behalf of any State, such State must be in a position under its domestic law to give effect to the terms of this Convention.

ARTICLE XI

1. An Inter-governmental Committee is hereby established with the following duties :

- (a) to study the problems concerning the application and operation of this Convention;
- (b) to make preparation for periodic revisions of this Convention;
- (c) to study any other problems concerning the international protection of copyright, in co-operation with the various interested international organizations, such as the United Nations Educational, Scientific and Cultural Organisations, the International Union for the protection of Literary and Artistic Works and the Organization of American States;
- (d) to inform the Contracting States as to its activities.

2. The Committee shall consist of the representatives of twelve Contracting States to be selected with due consideration to fair geographical representation and in conformity with the Resolution relating to this article, annexed to this Convention.

The Director-General of the United Nations Educational, Scientific and Cultural Organization, the Director of the Bureau of the International Union for the Protection of Literary and Artistic Works and the Secretary-General of the Organization of American States, or their representatives, may attend meetings of the Committee in an advisory capacity.

ARTICLE XII

The Inter-governmental Committee shall convene a conference for revision of this Convention whenever it deems necessary, or at request of at least ten Contracting States, or of a majority of the Contracting States if there are less than twenty Contracting States.

ARTICLE XIII

Any Contracting State may, at the time of deposit of its instrument of ratification, acceptance or accession, or at any time thereafter, declare by notification addressed to the Director-General of the United Nations Educational, Scientific and Cultural Organization that this Convention shall apply to all or any of the countries or territories for the international relations of which it is responsible and this Convention shall thereupon apply to the countries or territories named in such notification after the expiration of the term of three months provided for in Article IX. In the absence of such notification, this Convention shall not apply to any such country or territory.

ARTICLE XIV

1. Any Contracting State may denounce this Convention in its own name or on behalf of all or any of the countries or territories as to which a notification has been given under Article XIII. The denunciation shall be made by notification addressed to the Director-General of the United Nations Educational, Scientific and Cultural Organization.

2. Such denunciation shall operate only in respect of the State or of the country or territory on whose behalf it was made and shall not take effect until twelve months after the date of receipt of the notification.

ARTICLE XV

A dispute between two or more Contracting States concerning the interpretation or application of this Convention, not settled by negotiation, shall, unless

the States concerned agree on some other method of settlement, be brought before the International Court of Justice for determination by it.

ARTICLE XVI

This Convention shall be established in English, French and Spanish. The three texts shall be signed and shall be equally authoritative.

2 Official texts of this Convention shall be established in German, Italian and Portuguese.

Any Contracting State or group of Contracting States shall be entitled to have established by the Director-General of the United Nations Educational, Scientific and Cultural Organization other texts in the language of its choice by arrangement with the Director-General.

All such texts shall be annexed to the signed texts of this Convention.

ARTICLE XVII

1. This Convention shall not in any way affect the provisions of the Berne Convention for the Protection of Literary and Artistic Works or membership in the Union created by that Convention.

2. In application of the foregoing paragraph, a Declaration has been annexed to the present article. This Declaration is an integral part of this Convention for the States bound by the Berne Convention on January 1, 1951, or which have or may become bound to it at a later date. The signature of this Convention by such States shall also constitute signature of the said Declaration, and ratification, acceptance or accession by such States shall include the Declaration as well as the Convention.

ARTICLE XVIII

This convention shall not abrogate multilateral or bilateral copyright conventions or arrangements that are or may be in effect exclusively between two or more American Republics. In the event of any difference either between the provisions of such existing conventions or arrangements and the provisions of this Convention, or between the provisions of this Convention and those of any new convention or arrangement which may be formulated between two or more American Republics after this Convention comes into force, the convention or arrangement most recently formulated shall prevail between the parties thereto. Rights in works acquired in any Contracting State under existing conventions or arrangements before the date this Convention comes into force in such State shall not be affected.

ARTICLE XIX

This Convention shall not abrogate multilateral or bilateral conventions or arrangements in effect between two or more Contracting States. In the event of any difference between the provisions of such existing conventions or arrangements and the provisions of this Convention, the provisions of this Convention shall prevail. Rights in works acquired in any Contracting State under existing conventions or arrangements before the date on which this Convention comes into force in such State shall not be affected. Nothing in this article shall affect the provisions of Articles XVII and XVIII of this Convention.

ARTICLE XX

Reservations to this Convention shall not be permitted.

ARTICLE XXI

The Director-General of the United Nations Educational, Scientific and Cultural Organization shall send duly certified copies of this Convention to the States interested, to the Swiss Federal Council and to the Secretary-General of the United Nations for registration by him.

He shall also inform all interested States of the ratifications, acceptances and accessions which have been deposited, the date on which this Convention comes into force, the notifications under Article XIII of this Convention and denunciations under Article XIV.

APPENDIX DECLARATION RELATING TO ARTICLE XVII

The States which are members of the International Union for the Protection of Literary and Artistic Works, and which are signatories to the Universal Copyright Convention,

Desiring to reinforce their mutual relations on the basis of the said Union and to avoid any conflict which might result from the co-existence of the Convention of Berne and the Universal Convention,

Have, by common agreement, accepted the terms of the following declaration:

- (a) Works which, according to the Berne Convention, have as their country of origin a country which has withdrawn from the International Union created by the said Convention, after January 1, 1951, shall not be protected by the Universal Copyright Convention in the countries of the Berne Union;
- (b) The Universal Copyright Convention shall not be applicable to the relationships among countries of the Berne Union in so far as it relates to the protection of works having as their country of origin, within the meaning of the Berne Convention, a country of the International Union created by the said Convention.

RESOLUTION CONCERNING ARTICLE XI

THE INTER-GOVERNMENTAL COPYRIGHT CONFERENCE

Having considered the problems relating to the Inter-Governmental Committee provided for in Article XI of the Universal Copyright Convention, resolves:

1. The first members of the Committee shall be representatives of the following twelve States, each of those States designating one representative and an alternate: Argentina, Brazil, France, Germany, India, Italy, Japan, Mexico, Spain, Switzerland, United Kingdom and United States of America.

2. The Committee shall be constituted as soon as the Convention comes into force in accordance with Article XI of this Convention.

3. The Committee shall elect its Chairman and one Vice-Chairman. It shall establish its rules of procedure having regard to the following principles:—

- (a) the normal duration of the office of the representatives shall be six years; with one-third retiring every two years;
- (b) before the expiration of the term of office of any members, the Committee shall decide which States shall cease to be represented on it and which States shall be called upon to designate representatives; the representatives of those States which have not ratified, accepted or acceded shall be the first to retire;
- (c) the different parts of the world shall be fairly represented; and expresses the wish that the United Nations Educational, Scientific and Cultural Organisation provide its Secretariat.

In faith whereof the undersigned, having deposited their respective full powers, have signed this Convention.

Protocol 1 annexed to the Universal Copyright Convention concerning the application of that Convention to the works of Stateless Persons and Refugees,

The States parties hereto, being also parties to the Universal Copyright Convention (hereinafter referred to as 'the Convention') have accepted the following provisions:—

1. Stateless persons and refugees who have their habitual residence in a State party to this Protocol shall, for the purposes of the Convention, be assimilated to the nationals of that State.

2. (a) This Protocol shall be signed and shall be subject to ratification or acceptance, or may be acceded to, as if the provisions of Article VIII of the Convention applied hereto.

(b) This Protocol shall enter into force in respect of each State, on the date of deposit of the instrument or ratification, acceptance or accession of the State concerned or on the date of entry into force of the Convention with respect to such State, whichever is the later.

In faith whereof the undersigned, being duly authorised thereto, have signed this Protocol.

Done at Geneva, this sixth day of September, 1952, in the English, French and Spanish languages, the three texts being equally authoritative, in a single copy which shall be deposited with the Director-General of UNESCO. The Director-General shall send certified copies to the signatory States, to the Swiss Federal Council and to the Secretary-General of the United Nations for registration.

Protocol 2 annexed to the Universal Copyright Convention concerning the application of that Convention to the works of certain International Organisations.

The States parties hereto, being also parties to the Universal Copyright Convention (hereinafter referred to as 'the Convention').

Have accepted the following provisions:—

1. (a) The protection provided for in Article II(1) of the Convention shall apply to works published for the first time by the United Nations, by the specialized Agencies in relationship therewith, or by the Organisation of American States;

(b) Similarly, Article II(2) of the Convention shall apply to the said organisation or agencies.

2. (a) This Protocol shall be signed and shall be subject to ratification or acceptance, or may be acceded to, as if the provisions of Article VIII of the Convention applied hereto.

(b) This Protocol shall enter into force for each State on the date of deposit of the instrument or ratification, acceptance or accession of the State concerned or on the date of entry into force of the Convention with respect to such State, whichever is the later.

In faith whereof the undersigned, being duly authorised thereto, have signed this Protocol.

Done at Geneva, this sixth day of September, 1952, in the English, French and Spanish languages, the three texts being equally authoritative, in a single copy which shall be deposited with the Director-General of the UNESCO.

The Director-General shall send certified copies to the signatory States, to the Swiss Federal Council, and to the Secretary-General of the United Nations for registration.

Protocol 3 annexed to the Universal Copyright Convention concerning the effective date of instruments or Ratification or Acceptance of or Accession to that Convention.

States parties hereto,

Recognizing that the application of the Universal Copyright Convention (hereinafter referred to as 'the Convention') to States participating in all the interna-

tional copyright systems already in force will contribute greatly to the value of the Convention;

Have agreed as follows:—

1. Any State party hereto may, on depositing its instrument or ratification or acceptance of or accession to the Convention, notify the Director-General of the United Nations Educational, Scientific and Cultural Organisation (hereinafter referred to as 'Director-General') that that instrument shall not take effect for the purposes of Article IX of the Convention until any other State named in such notification shall have deposited its instrument.

2. The notification referred to in paragraph 1 above shall accompany the instrument to which it relates.

3. The Director-General shall inform all States signatory or which have then acceded to the Convention of any notifications received in accordance with this Protocol.

4. This Protocol shall bear the same date and shall remain open for signature for the same period as the Convention.

5. It shall be subject to ratification or acceptance by the signatory States. Any State which has not signed this Protocol may accede thereto.

6. (a) Ratification or acceptance or accession shall be effected by the deposit of an instrument to that effect with the Director-General.

(b) This Protocol shall enter into force on the date of deposit of not less than four instruments of ratification or acceptance or accession. The Director-General shall inform all interested States of this date. Instruments deposited after such date shall take effect on the date of their deposit.

In faith whereof the undersigned, being duly authorised thereto, have signed this Protocol.

Done at Geneva, this sixth day of September, 1952 in the English, French and the Spanish languages, the three texts being equally authoritative, in a single copy of which shall be annexed to the original copy of the Convention. The Director-General shall send certified copies to the signatory States, to the Swiss Federal Council, and to the Secretary-General of United Nations for registration.

—See Assam Gazette, 7-5-1958, Part II-A, p. 1268.

[THE] CORONERS ACT, 1871

(ACT IV OF 1871)

[The text of the Act printed here is as on 31-3-1970.]

CONTENTS

PREAMBLE

CHAPTER I

PRELIMINARY

SECTIONS

1. Short title.

2. [Repealed.]

CHAPTER II

APPOINTMENT OF CORONERS

3. Coroners of Calcutta and Bombay.

4. Their appointment, suspension and removal.

5. Coroners to be public servants.

6. Power to hold other offices.

7. [Repealed.]

CHAPTER III

DUTIES AND POWERS OF CORONERS

8. Jurisdiction to inquire into deaths.

9. Coroner to be sent for when prisoner dies.

10. Power to hold inquests on bodies within local limits wherever cause of death occurred.

11. Power to order body to be disinterred.
12. Summoning jury.
Inquest may be on Sunday.
13. Opening Court.
14. Jurors to be sworn.
15. View of body
16. Proclamation for witnesses.
17. Summoning witnesses.
18. Post-mortem examinations
Fees to medical witnesses.
- 18-A. Report of Chemical Examiner.
19. Evidence to be on oath.
Evidence on behalf of accused.
Interpreter.
Questions suggested by jury.
20. Coroner to take down evidence in writing.
Witnesses to sign depositions.
Coroner to subscribe depositions.
Coroner a Magistrate.
21. Adjournment of inquest.
Jurors' recognizances.
22. Coroner to sum up to jury.
23. Coroner to draw up inquisition.
24. Contents of inquisition.
25. Procedure where death is found due to an act amounting to an offence.
26. Power to arrest and commit for trial.
27. [Repealed.]
28. Warrant for burial.

29. Inquisitions not to be quashed for want of form.
Amendment of inquisition.
30. Cessation of jurisdiction as to treasure-trove, wrecks, etc.
Felo de se.
Deodands.

CHAPTER IV CORONERS' JURIES

31. Fine on juror neglecting to attend.
32. Certificate as to defaulting juror.
Service of copy of certificate.
33. Levy of fine.
34. Jurors not to be summoned twice within the year.
35. Jurors on inquest on prisoner.

CHAPTER V RIGHTS AND LIABILITIES OF CORONERS

36. Coroner's salary.
37. Disbursements to be repaid.
38. Power to appoint deputy.
Revocation of appointment.
39. Exemption from serving on juries.
40. Privilege from arrest.
41. Penalty for failure to comply with Act.
42. Limitation of suits.

FIRST SCHEDULE.— [Repealed.]

SECOND SCHEDULE.— FORM OF IN-
QUISITION.

REPORT OF SELECT COMMITTEE

We, the undersigned, the Members of the Select Committee of the Council of Governor-General of India for the purpose of making Laws and Regulations, to which the Bill to consolidate laws relating to Coroners has been referred, have the honour to present this preliminary report.

The Bill, as introduced, was intended merely to consolidate the existing law contained in two statutes and three Acts, and it provided, in the words of 33 Geo. III, Cap. 52, S. 157, that the Coroners should exercise the like jurisdiction as by law might be exercised by Coroners elected for counties in England. We have struck out this provision, which would have necessitated constant reference to English statutes and text-books, and we have in lieu thereof codified such part of the English law of Coroners as seemed adapted to the Presidency towns.

The amended Bill accordingly declares the Coroner's jurisdiction to enquire into deaths by accident, homicide or suicide, sudden deaths by means unknown, and deaths of prisoners in prison. It enables him to order a body to be disinterred. It provides for summoning juries, swearing the jurors, viewing the body, summoning witnesses, and post mortem examinations.

It declares that the evidence shall be taken on oath, that witnesses unacquainted with English shall be examined through an interpreter, that questions suggested by the jury shall be put, and that the Coroner shall take down the material parts of the evidence. Power is given to adjourn the inquest. When the witnesses have been examined, the Coroner will sum up, and the jury will consider of their verdict. When the verdict is delivered, the Coroner will draw up an inquisition setting forth the matters specified in S. 24, and in the form given in the second Schedule.

When the verdict amounts to murder, culpable homicide, or killing by a rash or negligent act (the last mentioned offence is about to be added to the Penal Code) the Coroner will bind by recognizance any person acquainted with the facts to appear at the next sessions, and prosecute or give evidence. The Coroner will also certify the recognizances and deliver them with the inquisition and evidence to the Court in which the trial is to be. He may also issue his warrant for the apprehension of the accused.

The amended Bill expressly abolishes the Coroner's jurisdiction as to treasure-trove and wrecks, and declares that he shall not be liable to execute process.

The Coroner of Calcutta will, under the amended Bill, be appointed by the Lieutenant Governor of Bengal and not by the Governor-General in Council.

As to Coroner's juries, we have provided (S. 31) that when an inquest is held on the body of a prisoner, no officer of the prison and no prisoner confined therein shall be a juror. There is a similar provision in the Schedule to the English Prisons Act (28 and 29 Vic., c. 126), clause 48.

As to a Coroner's rights, we have added three clauses, one providing for repaying his disbursements for fees to medical witnesses, hire of rooms for the jury, and the like; another exempting him from serving on juries, and a third privileging him from arrest while engaged in the discharge of his official duty.

We have omitted the clause corresponding with Act 12 of 1867, S. 12, as this will more fitly be placed in the Prisoners Bill now before the Council.

We have omitted, as unnecessary, the elaborate specification of the informalities in case of which the inquisition may be amended by a Judge of the High Court. For variances between the statements in the inquisition and the Evidence Act 18 of 1862 (Ss. 1 and 57) appears to provide sufficiently”—Gazette of Ind., 1870, Pt. V, p. 351.

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION

- Amended by Acts 5 of 1889, 38 of 1920.
- Adapted by A. O., 1937; A. L. O., 1950; 2 A. L. O., 1956.
- Amended in West Bengal by Bengal Act 7 of 1944; Ord. 10 of 1966.
- Amended in Maharashtra and Gujarat by Bombay Acts 13 of 1930; 25 of 1942; 6 of 1947; 16 of 1948; 39 of 1953; 69 of 1954.
- Repealed and amended by Acts 10 of 1881; 4 of 1908.
- Repealed in part by Acts 9 of 1871; 10 of 1873; 12 of 1873; 16 of 1874; 12 of 1891.

[THE] CORONERS ACT, 1871.

(ACT IV OF 1871)*

[27th January, 1871.]

An Act to consolidate and amend the laws relating to Coroners.

Preamble.—Whereas it is expedient to consolidate and amend the laws relating to Coroners in the Presidency-towns;† It is hereby enacted as follows:—

[*] For Statement of Objects and Reasons, see Gaz. of Ind., 1870, Pt. V, p. 295; for Preliminary Report of the Select Committee, see *ibid*, p. 351; and for Proceedings in Council, see *ibid*, Supplement, pp. 1077, 1195, 1298; and *ibid*, 1871, pp. 198 and 207.

[†] There are only 3 such towns in India Bombay, Calcutta and Madras. The Act, however, does not extend to Madras.

CHAPTER I PRELIMINARY

1. Short title.—This Act may be called THE CORONERS ACT, 1871.

*[.]

[*] The local extent and commencement clauses were repealed, by the Coroners Act, 1881 (10 of 1881), S. 2, and by the Repealing Act, 1874 (16 of 1874), respectively.

2. Repeal of enactments. [Repealed by the Repealing Act, 1873 (12 of 1873).]

CHAPTER II APPOINTMENT OF CORONERS

*[3. Coroners of Calcutta and Bombay.—Within the local limits of the ordinary original civil jurisdiction† of each of the High Courts of Judicature at Fort William and Bombay there shall be a Coroner.‡ Such Coroners shall be called respectively the Coroner of Calcutta and the Coroner of Bombay.]

[°] Substituted for original section, by the Coroners (Madras) Act, 1889 (5 of 1889), Section 2.

[†] For performance of similar duties in areas comprised within the local limits of ordinary original civil jurisdiction of the High Court at Madras, see S. 174 of Criminal Procedure Code (1898) (as amended by the Coroners (Madras) Act, 1889).

[‡] The English institution of Coroners originated about 1194; they were officers below the rank of Sheriff elected in the County Court. Their duty to hold inquests on sudden death commenced in the 13th century. A Coroner is an official having both judicial and ministerial duties. His ministerial office is only as the Sheriff's substitute where he is incapable of acting. The judicial duties include the inquiry into the manner of death of persons slain or dying in suspicious circumstances or in prison. There are Coroners for every County in England elected by the County Council—See Jowit's Dictionary, 1959 Edn., p. 499.

STATE AMENDMENTS

Maharashtra:

Renumber Section 3 as sub-section (1) of that section and after sub-section (1) so renumbered, insert the following new sub-section, namely:—

“(2) The State Government may, from time to time, direct that there shall be one or more Additional Coroners within the local limits of the Ordinary Original Civil Jurisdiction of the High Court of Judicature at Bombay. Every such Additional Coroner shall be competent to exercise and perform all the powers and duties conferred upon or assigned to the Coroner of Bombay by or under this Act or any other law for the time being in force.”—Bom. Act 16 of 1948, S. 2 (24-3-1948).

Section 3-A

West Bengal:

After S. 3, insert the following:—

“3-A. Additional Coroner of Calcutta.—(1) One or more persons may be appointed as Additional Coroner or Additional Coroners of Calcutta.

(2) An Additional Coroner shall exercise all the powers and perform all the duties conferred upon or assigned to the Coroner by or under this Act or any other law for the time being in force:

Provided that, except when the Coroner is absent on account of illness or for any other cause, an Additional Coroner shall deal with such cases or matters only as the Coroner may, having regard to the business pending before him, from time to time, by order in this behalf, direct.

(3) A Coroner may transfer to, or withdraw to himself from, an Additional Coroner any case or matter with which the Coroner is competent to deal, or may transfer any such case or matter from one Additional Coroner to another Additional Coroner.”—West Bengal Ordinance 10 of 1966, Section 3.

4. Their appointment, suspension and removal.—Every such officer shall be appointed and may be suspended or removed by the °[State Government]

[°] Substituted for ‘Provincial Government’ by A. L. O., 1950.

[†] The words “Every person now holding such office shall be deemed to have been appointed under this Act” were repealed by the Amending Act, 1891 (12 of 1891).

STATE AMENDMENT

West Bengal:

In its application to the City of Calcutta, in Section 4,—

(a) For the words "Every such officer", substitute "Every Coroner and every Additional Coroner";

(b) after the words "may be suspended", insert "dismissed"; and

(c) add the following proviso at the end, namely—

"Provided that only such persons* as have, for not less than ten years held judicial office or practised as Advocates or Solicitors of a High Court or of two or more such Courts in succession shall be eligible for appointment as Coroner or Additional Coroner under this Act."—West Bengal Ordinance 10 of 1966, Section 4.

[*] No person can be appointed a Coroner or Deputy or Assistant Deputy Coroner in England unless he is a barrister, solicitor or legally qualified medical practitioner of not less than five years' standing in his profession: Coroners (Amendment) Act, 1926 (16 and 17 Geo. 5, c. 59), S. 1(1) and Medical Act, 1950 (14 Geo. 6, c. 29), Schedule II.

STATE AMENDMENT

Section 4-A

Maharashtra:

After S. 4, insert the following new Section 4-A:—

"4-A. When one or more Additional Coroners are appointed, the Coroner of Bombay shall make such arrangements as he thinks fit for distribution of the work, of the Coroner under the Act between himself and the Additional Coroners."—Bom. Act, 16 of 1948, S. 3 (24-3-1948).

5. Coroners to be public servants.—Every Coroner shall be deemed a public servant within the meaning of the Indian Penal Code.

STATE AMENDMENT

West Bengal:

For S. 5, substitute the following:—

"5. Coroners and Additional Coroners to be public servants.—Every Coroner and every Additional Coroner shall be deemed to be public servants within the meaning of the Indian Penal Code."—West Bengal Ordinance 10 of 1966, S. 5.

6. Power to hold other offices.—Any Coroner may hold simultaneously any other office under Government.

STATE AMENDMENT

West Bengal:

In its application to the City of Calcutta, in S. 6, after the words "Any Coroner", insert the words "or Additional Coroner".—West Bengal Ordinance 10 of 1966, S. 6.

7. Oath to be taken by Coroner. [Repealed by the Indian Oaths Act, 1873 (10 of 1873).]

CHAPTER III

DUTIES AND POWERS OF CORONERS

8. Jurisdiction to inquire into deaths.—When a Coroner *[has reason to believe] that the death of any person has been caused by accident, homicide, sui-

Section 8 — Note 1

(1) A Coroner's inquest is aimed at inquiring into the cause of the death of any person which he has reason to believe to have been caused by accident homicide, suicide or suddenly by means

unknown. AIR 1946 Bom 184 (185) = 47 Cri L Jour 555.

(2) One of the object of holding a public inquiry by a coroner is to satisfy the public conscience that an unnatural death was not hushed up. AIR 1946 Bom 184 (185) = 47 Cri L Jour 555.

cide, or suddenly by means unknown, or that any person being a prisoner has died in prison,

and that the body is lying within the place for which the Coroner is so appointed,

the Coroner shall inquire into the cause of death.

Every such inquiry shall be deemed a judicial proceeding within the meaning of Section 193 of the Indian Penal Code.

[*] Substituted by the Coroners Act, 1881 (10 of 1881), S. 5, for "is informed".

STATE AMENDMENTS

Maharashtra:

Substitute for S. 8:—

"8. Jurisdiction to inquire into death.—(1) When the Coroner is informed that the dead body of a person is lying within his jurisdiction and there is reasonable cause to suspect that such person has died under any of the circumstances mentioned in Section 9 or has died a sudden death of which the cause is unknown, the Coroner may proceed to hold a preliminary inquiry on the body, without a jury.

(2) For the purpose of an inquiry under sub-section (1) the Coroner may, as soon as practicable after the receipt of the information, proceed to view and examine the body. Such view and examination shall be held in the presence of the Police Officer to whose section the case belongs and, if possible, in the presence of the relations or friends, if any, of the deceased and the Coroner may reduce to writing such observations as the appearance of the body requires. When the inquiry is concluded if the Coroner is satisfied as to the cause of death and if a post mortem examination is in his opinion not necessary, the Coroner may authorise the body to be disposed of."—Bom. Act 13 of 1930, S. 2.

West Bengal:

To the first paragraph of S. 8 ending with the words "inquire into the cause of death", add the following proviso:—

"Provided that, unless the State Government otherwise directs, no such inquiry shall be held in the case where the death of any person has been caused by enemy action."—Bengal Act 7 of 1944 (8-2-1945).

STATE AMENDMENT

Section 8-A

Maharashtra:

Insert the following after S. 8:—

*[8-A. Where the Coroner has reason to believe that death has occurred within his jurisdiction in any of the circumstances mentioned in Section 8 or 9 and that owing to the destruction of the body, or disposal thereof in contravention of any law for the time being in force, or to the fact that the body is lying in a place from which it cannot be recovered, an inquest cannot be held except by virtue of the provisions of this section, he may report the facts to the State Government and the State Government may, if it considers it desirable so to do, direct an in-

Section 8 — Note 1 (contd.)

(3) The enquiry by a coroner under Section 8 is a general inquiry for further action by police if necessary. AIR 1946 184 (185) = 47 Cri L Jour 555.

(4) Inquiry before the coroner, although it may be judicial proceeding is not a proceeding between the prosecutor and the accused. AIR 1933 Bom 479 (479) = 35 Cri L Jour 106 ** AIR 1946 Bom 184 (185) = 47 Cri L Jour 555.

(5) No analogy exists between a Coroner's inquest and an inquiry into the cause of death under Criminal P. C. (1878) 3 Cal 742 (752) (DB).

(6) Inquest by Jury — Duty of Coroner — He should not make unjustified remarks which might affect Jury's mind prejudicially. AIR 1968 Bom 426 (433) = 1968 Cri LJ 1610 = 70 Bom LR 238 (DB).

quest to be held touching the death. When such direction is given, an inquest shall be held accordingly by the Coroner and the provisions of this Act shall apply with such modifications as may be necessary in consequence of the inquest being held otherwise than on or after view of the body.]

[*] Inserted by Coroners (Bombay Amendment) Act, 1954 (69 of 1954), Section 3 (15-11-1954).

9. Coroner to be sent for when prisoner dies.—Whenever a prisoner dies in a prison situate within the place for which a Coroner is so appointed, the Superintendent of the prison shall send for the Coroner before the body is *[disposed of]. Any Superintendent failing herein shall on conviction before a Magistrate be punished with fine not exceeding five hundred rupees.

Nothing in the former part of this section applies to cases in which the death has been caused by cholera or other epidemic disease.

[*] Substituted for "buried", by the Coroners (Amendment) Act, 1908 (4 of 1908), Section 2.

STATE AMENDMENT

Maharashtra:

For Section 9, substitute the following:—

"9°. Inquest by jury.—(1) If it appears to the Coroner, either before or in the course of an inquiry under Section 8, that there is reason to suspect—

- (a) that the deceased came by his death by homicide, suicide or infanticide; or
- (b) that the death was caused by an accident, or poison, or machinery; or
- (c) that the death was caused by an occurrence arising out of the use of a vehicle in a street, public road or in a private place; or
- (d) that the death occurred in a prison in which the deceased was a prisoner or that it occurred whilst the deceased was in the custody of the police; or
- †[(dd) that the death occurred—

- (i) in a leper asylum appointed under the Lepers Act, 1898;
- (ii) in an asylum or mental hospital established or licensed under the Indian Lunacy Act, 1912;
- (iii) in a Borstal School established under the Bombay Borstal Schools Act, 1929;
- (iv) in a Receiving Centre or certified Institution provided and maintained under the Bombay Beggars Act, 1945;
- (v) in any certified school, Remand Home or fit person institution or approved place, established, maintained, declared or recognised, as the case may be, under the Bombay Children Act, 1948;

in which the deceased was received, detained, committed to, confined or kept, as the case may be, under the orders of any authority competent to pass such orders under the said Acts; or]

- (e) that the death occurred in circumstances the continuance or possible recurrence of which is prejudicial to the health or safety of the public or any section of the public;

and in any other case, if it appears to the Coroner either before or in the course of the preliminary inquiry that there is reason for holding an inquest

Section 9 — Note 1

(1) Section 9 read as a whole, merely indicates in what circumstances the Coroner would be justified in holding an inquest by Jury. Clause (e) of Section 9 indicates that if there are any circumstances attending the death in question which endanger public health or safety, the Coroner would be entitled to hold

an inquest by Jury. But Clause (e) has no bearing on the question as to what should be recorded in the Coroner's Jury's verdict under Section 24. For that purpose, Section 24 is the only section which deals with the contents of an inquisition. AIR 1968 Bom 426 (431) = 1968 Cri IJ 1610 = 70 Bom LR 238 (DB).

he shall proceed to hold such inquest, whether or not the cause of death arose within his jurisdiction:

‡[Provided that such inquest shall not be held in the case of death arising out of an offence triable under the Bombay Public Security Measures Act, 1947].

(2) Such inquest shall ordinarily be held in the Coroner's Court-house.

(3) The Coroner may hold one inquest on the bodies of several persons provided that they all are believed to have come by their deaths, in or in consequence of one and the same incident.

(4) Every such inquest shall be deemed to be a judicial proceeding within the meaning of Section 193 of the Indian Penal Code and for the purpose of any such inquest the Coroner shall have and may exercise all the powers of a Criminal Court under Section 476 and Section 480 of the Code of Criminal Procedure, 1898.

(5) The Coroner may hold an inquest by jury simultaneously with the preliminary inquiry."

[°] Original Section 9 was substituted by Bom. Act 13 of 1930, Section 2.

[†] Inserted by Coroners (Bombay Amendment) Act, 1953 (Bom. Act 39 of 1953), Section 2 (17-6-1953).

[‡] Substituted for the former proviso, by the Bombay Public Security Measures Act, 1947 (Bom. Act 6 of 1947), Section 26 (23-3-1947).

10. Power to hold inquests on bodies within local limits wherever cause of death occurred.—Whenever an inquest ought to be holden on any body lying dead within the local limits of the jurisdiction of any Coroner, he shall hold such inquest, whether or not the cause of death arose within his jurisdiction.

STATE AMENDMENT

Maharashtra:

°[10. (1) When a person dies—

- (a) in a prison situate within the local limits of the Coroner's jurisdiction, the Superintendent of the prison;
- (b) whilst in the custody of the police, the police officer in charge of the section concerned;
- (c) in any of the places referred to in clause (dd) of sub-section (1) of Section 9, the Superintendent where there is a superintendent appointed for such place and elsewhere, the person in charge of the place,

shall report the death to the Coroner and await his orders before the body is disposed of.

(2) Any superintendent of prison or any such police officer or any superintendent or person in charge of the place referred to in clause (dd) of sub-section (1) of Section 9, who fails to comply with the requirements in sub-section (1) shall, on conviction before a Magistrate, be punished with fine which may extend to five hundred rupees.]

[°] Original Section 10 was substituted by Bom. Act 13 of 1930 and that section was again substituted by the Coroners (Bombay Amendment) Act, 1953 (Bom. Act 39 of 1953), Section 3 (17-6-1953).

11. Power to order body to be disinterred.—A Coroner may order a body to be disinterred within a reasonable time after the death of the deceased person either for the purpose of taking an original inquisition where none has been taken, or a further inquisition °[where the Coroner considers it necessary or desirable in the interests of justice to take a further inquisition].

[°] Substituted for "where the first was insufficient," by the Coroners (Amendment) Act, 1908 (4 of 1908), Section 3.

STATE AMENDMENT

Maharashtra:

For Section 11, substitute the following:—

“11. Penalty for disposal of body to prevent an inquest.—(1) Any person who, with the intention of preventing the holding of an inquest on a dead body which the Coroner is bound to hold under Section 9, buries, cremates or otherwise disposes of it, and any person who with such intention abets such burial, cremation or disposal of a dead body shall, on conviction before a Magistrate, be punished with fine which may extend to five hundred rupees.

(2) Such punishment shall be in addition to the punishment to which such person may be liable for any offence of which he may be found guilty in respect of the death of the deceased or under Section 201 of the Indian Penal Code.”—Bom. Act 13 of 1930, Section 2.

12. Summoning jury.—On receiving notice of any death mentioned in Section 8, the Coroner shall summon five, seven, nine, eleven, thirteen or fifteen respectable persons to appear before him at a time and place to be specified in the summons, for the purpose of inquiring when, how and by what means the deceased came by his death.

Inquest may be on Sunday.

Any inquest under this Act may be held on a Sunday.

STATE AMENDMENT

Maharashtra:

For Section 12, substitute the following:—

“12. Power to order body to be disinterred.—A Coroner may order a body to be disinterred within a reasonable time after the death of the deceased person, either for the purpose of taking an original inquisition where none has been taken, or a further inquisition where further inquisition is, in the opinion of the Coroner, necessary or desirable in the interests of justice.”—Bom. Act 13 of 1930, Section 2.

13. Opening Court.—When the time arrives, the Coroner shall proceed to the place so specified, open the Court by proclamation, and call over the names of the jurors.

STATE AMENDMENT

Maharashtra:

For Section 13, substitute the following:—

“13. Summoning jury.—In order to the impanelling of a jury for an inquest under Section 9 the Coroner shall summon not less than five nor more than eleven respectable persons to appear before him at a time and place to be specified in the summons for the purpose of inquiring where, when and by what means the deceased came by his death.”—Bom. Act 13 of 1930, Section 2.

14. Jurors to be sworn.—When a sufficient jury is in attendance, he shall administer an oath to each juror to give a true verdict according to the evidence, and shall then proceed with the jury to view the body.

STATE AMENDMENT

Maharashtra:

For Section 14, substitute the following:—

“14. Opening Court, Jurors to be sworn.—(1) On the day and at the hour fixed for the inquest the Coroner shall proceed to open his Court by proclamation and shall call over the names of the jurors on whom summonses under Section 13 have been duly served. If not less than five jurors are in attendance, the Coroner shall administer an oath to each juror to give a verdict according to the evidence.

(2) If the number of jurors in attendance is less than five, or, if in the course of an inquest at any time before the return of the verdict a juror is absent and it is not practicable to enforce his immediate attendance, the Coroner may appoint

such number of persons as may be necessary to serve as jurors in the inquest.”—
Bom. Act 13 of 1930, Section 2.

STATE AMENDMENT

Section 14-A

Maharashtra:

After Section 14 insert the following:—

“14-A. Inquest may be on Sunday or public holiday.—An inquest under this Act or its adjourned hearing under Section 21 may be held on a Sunday or a public holiday.” — Inserted by Bom. Act 13 of 1930, S. 2.

15. View of body.—The Coroner and the jury shall view and examine the body at the first sitting of the inquest, and the Coroner shall make such observations to the jury as the appearance of the body requires:

*[Provided that the Coroner may, with the concurrence of a majority of the jury, dispense with a view of the body, if he is satisfied, from medical evidence or medical certificates, that no advantage would result from such viewing.]

[*] Inserted by the Coroners (Amendment) Act, 1908 (4 of 1908), Section 4.

STATE AMENDMENT

Maharashtra:

For Section 15 substitute the following:—

“15. View of body.—At or before the first sitting of an inquest on a body, the Coroner shall view the body and if before the body has been disposed of, a majority of the jurors so desire, it shall be viewed by the jurors also:

Provided that when a preliminary inquiry on the body has been held under Section 8, or if from the medical evidence or from a medical certificate, the Coroner is satisfied that no advantage will result from such viewing, the Coroner may dispense with a view of the body at the inquest. — Substituted by Bom. Act 13 of 1930, S. 2.

16. Proclamation for witnesses.—The Coroner shall then make proclamation for the attendance of witnesses, or, where the inquiry is conducted in secret, shall call in separately such as know anything concerning the death.

STATE AMENDMENT

Maharashtra:

For Section 16, substitute the following:—

“16. Proclamation for witnesses.—The Coroner shall then make proclamation for the attendance of witnesses; or, where the inquiry is conducted in secret, shall call in separately such as know anything concerning the death.”—Bom. Act 13 of 1930, Section 2 — Substituted by Bom. Act 13 of 1930, S. 2.

17. Summoning witnesses.—*[It shall be the duty of all persons acquainted with the circumstances attending the death to appear before the inquest as witnesses; the Coroner shall inquire of such circumstances and the cause of death, and, if before or during the inquiry he is informed that any person, whether within or without the local limits of his jurisdiction, can give evidence or produce any document material thereto, may issue a summons requiring him to attend and give evidence or produce such document on the inquest.

Any person disobeying such summons shall be deemed to have committed an offence under Section 174, Section 175 or Section 176 of the Indian Penal Code, as the case may be.]

Section 17 — Note 1

(1) Coroner is not a Court. AIR 1959 Bom 6 (8) = 1959 Cri LJ 30 = 60 Bom LR 822 (DB).

For the purpose of causing prisoners to be brought up to give evidence, the Coroner shall be deemed a Criminal Court within the meaning of †[Part IX of the Prisoners Act, ‡1900].

[°] Substituted for the original paragraphs, by the Coroners Act, 1881 (10 of 1881), Section 6.

[†] Substituted for "Act No. XV of 1869 (to provide facilities for obtaining the evidence and appearance of prisoners and for service of process upon them", by the Coroners (Amendment) Act, 1908 (4 of 1908), Section 5.

[‡] Now see the Prisoners (Attendance in Courts) Act, 1955 (32 of 1955).

STATE AMENDMENT

Maharashtra:

For Section 17 substitute the following:—

"17. **Summoning witnesses.**—(1) It shall be the duty of all persons acquainted with the circumstances attending the death to appear before the inquest as witnesses. The Coroner shall inquire of such circumstances and the cause of death, and if before or during the inquiry he is informed that any person, whether within or without the local limits of his jurisdiction, can give evidence or produce any document material thereto, may issue a summons requiring him to attend and give evidence or produce such document on the inquest.

(2) When any person so summoned fails to appear and the summons has been proved to be duly served on him in time to admit of his appearing in accordance therewith and no reasonable excuse is offered for such failure, the Coroner may, after recording his reasons in writing, issue a warrant for his arrest. Such warrant shall be executed as if it were issued under Section 90 of the Code of Criminal Procedure, 1898.

(3) Any person disobeying a summons issued under sub-section (1) shall be deemed to have committed an offence under Section 174, Section 175 or Section 176 of the Indian Penal Code, as the case may be.

(4) For the purpose of causing prisoners to be brought up to give evidence, the Coroner shall be deemed a Criminal Court within the meaning of Part IX of the Prisoners Act, 1900."—Bom. Act 13 of 1930, Section 2.

18. Post-mortem examinations.—The Coroner may direct the performance of a post-mortem examination with or without an analysis of the contents of the stomach or intestines by any medical witness summoned to attend the inquest:

Fees to medical witnesses.

and every medical witness, other than the Chemical Examiner to Government, shall be entitled to such reasonable remuneration as the Coroner thinks fit.

STATE AMENDMENT

Maharashtra

For S. 18, substitute the following :

18. Post-mortem examinations. Fees to medical witnesses.—(1) If before proceeding to view a body under section 8 or at the view or at any stage of an inquest by jury, it appears to the Coroner that a post-mortem examination of the body is necessary to ascertain the cause of death, he may direct such examination to be held by his Surgeon or by a duly qualified Registered Medical Practitioner invited to attend as a witness. The Coroner may also direct an analysis of any of the organs or parts of the body or of their contents. Every Medical witness other than the Chemical Examiner to Government and the Coroner's surgeon shall be entitled to such reasonable remuneration as the Coroner thinks fit. For the purpose of such post-mortem examination the Coroner may order the removal of the body to any place within his jurisdiction which may be provided for that purpose.

(2) **Report of Chemical Examiner.**—Any document purporting to be a report under the hand of any Chemical Examiner or Assistant Chemical Examiner to Government upon any matter or thing duly submitted to him for examination, or analysis and report

in the course of any proceeding under this Act, may be used as evidence in any inquest under this Act and in any subsequent inquiry, trial or other proceeding under the Code of Criminal Procedure, 1898 — Bom. Act 13 of 1930, S. 2.

*[18A. Report of Chemical Examiner.—Any document purporting to be a report under the hand of any Chemical Examiner or Assistant Chemical Examiner to Government upon any matter or thing duly submitted to him for examination or analysis and report in the course of any proceeding under this Act, may be used as evidence in any inquest under this Act and in any subsequent inquiry, trial or other proceeding under the Code of Criminal Procedure, 1898.]

[°] Inserted by the Coroners (Amendment) Act, 1908 (4 of 1908), S. 6.

STATE AMENDMENT

Maharashtra:

After S. 18, insert the following:

18A. Notwithstanding anything contained in this Act, the Coroner may, at any stage of the proceedings under this Act for the purposes of preservation or safe custody, order the removal of the body to any place within his jurisdiction which may have been provided for that purpose—Coroners (Bombay Amendment) Act, 1954 (Bom. Act 69 of 1954), S. 4 (15-11-1954).

19. Evidence to be on oath. Evidence on behalf of accused.—All evidence given under this Act shall be on oath, and the Coroner shall be bound to receive evidence on behalf of the party (if any) accused of causing the death of the deceased person.

Interpreter.

Witnesses unacquainted with the English language shall be examined through the medium of an interpreter, who shall be sworn to interpret truly as well the oath as the questions put to, and the answers given by, the witnesses.

Section 19 — Note 1

(1) An inquest is not the same thing as a trial before a Criminal Court where under a special provision of the Criminal Procedure Code the accused is not to be administered an oath. In the absence of any similar provision in the Coroner's Act, the person accused at the inquest can give evidence on his own behalf. (1928) 29 Cri L Jour 234 (234) (Bom).

[But see AIR 1926 Bom 144 (148) = 50 Bom 56 = 27 Cri L Jour 433.]

(2) The whole spirit of the Coroner's Act is that all persons acquainted with the circumstances and cause of the death of a deceased person, excepting persons implicated in a crime in respect of such death, shall be examined as witnesses on oath by the Coroner. AIR 1926 Bom 144 (148) = 50 Bom 56 = 27 Cri L Jour 433.

(3) Where a person who gave evidence before the Coroner died before the enquiry against the accused before the Magistrate started, his evidence is not admissible, in the trial of the accused in the Sessions Court, under Section 33 of Evidence Act. AIR 1933 Bom 479 (479) = 35 Cri L Jour 106.

(4) Under Section 19 (3) as amended by Bombay Act 13 of 1930, a Coroner shall be deemed to be a Magistrate for the purpose of Section 26 of the Evidence Act. AIR 1941 Bom 50 (50) = ILR (1941) Bom 27.

(5) There is no provision of law which renders a statement made voluntarily by an accused, a suspect, in inquest proceedings before a Coroner inadmissible against the accused on his trial for the offence. AIR 1928 Bom 52 (53) = 29 Cri L Jour 651 ** AIR 1926 Bom 151 (152) = 50 Bom 111 = 27 Cri L Jour 466 ** (1928) 29 Cri L Jour 234 (234) (Bom).

(6) A statement of a person on oath in the course of an inquest by the Coroner cannot be used against him during his trial for an offence suspected to have been committed by him in the same proceedings for which the inquest is held. AIR 1926 Bom 144 (146) = 50 Bom 56 = 27 Cri L Jour 433.

(7) When an accused is examined on oath, as a witness by Coroner, his statement cannot be admitted as a confession, it not being a voluntary statement. AIR 1926 Bom 144 (149) = 50 Bom 56 = 27 Cri L Jour 433

(8) The Coroner is not justified in making remarks against witnesses and advocates appearing in the inquest just to relieve the alleged tension in Court. The proceedings must not lose the serenity which they deserve. AIR 1968 Bom 426 (433) = 1968 Cri LJ 1610 = 70 Bom LR 238 (DB).

(9) A Coroner is not a Court — The words "shall be deemed to be" in Section 19(3) would show that its intention

Questions suggested by jury.

After each witness has been examined, the Coroner shall inquire whether the jury wish any further questions to be put to the witness, and, if the jury wish that any such questions should be put, the Coroner shall put them accordingly.

STATE AMENDMENT**Maharashtra:**

For S. 19, substitute the following :

19. Evidence to be on oath.—(1) All evidence given under this Act, shall except in the case provided in sub-section (2), be on oath and the Coroner shall be bound to receive the evidence on behalf of the person who is alleged to have caused or to be concerned in causing the death of the deceased person.

(2) **Evidence on behalf of accused.**—If such person himself wishes to make a statement it shall be the duty of the Coroner to warn him that he is not bound to make any statement; but if such person persists, the Coroner shall, without administering him any oath, record his statement in full after duly warning him that any incriminating statement which he may make may be used in evidence in any subsequent inquiry, trial or other proceeding under the Code of Criminal Procedure, 1898.

(3) For the purpose of section 26 of the Indian Evidence Act, 1872, a Coroner shall be deemed to be a Magistrate.

(4) **Interpreter.**—Witnesses unacquainted with the English language shall be examined through the medium of an interpreter, who shall be sworn to interpret truly as well the oath as the question put to, and the answer given by each witness.

(5) After each witness has been examined, the Coroner shall enquire whether the jury wish any further questions to be put to the witness, and if the jury wish that any such questions shall be put the Coroner shall put them accordingly — Bom. Act 13 of 1930, S. 2.

20. Coroner to take down evidence in writing.—The Coroner shall commit to writing the material parts of the evidence given to the jury, and shall read or cause to be read over such parts to the witness and then procure his signature thereto.

Witnesses to sign depositions.

Any witnesses refusing so to sign shall be deemed to have committed an offence under Section 180 of the Indian Penal Code.

Coroner to subscribe depositions.

Every such deposition shall be subscribed by the Coroner.

Coroner a Magistrate.

*[For the purposes of Section 26 of the Indian Evidence Act, 1872, a Coroner shall be deemed to be a Magistrate.]

[*] Inserted by the Coroners Act, 1881 (10 of 1881), S. 7.

STATE AMENDMENT**Maharashtra:**

For S. 20, substitute the following :

20. Mode of recording evidence.—(1) The evidence given to the jury shall be recorded in the manner prescribed in section 356 of the Code of Criminal Procedure, 1898.

(2) For the purpose of this section the Coroner shall be deemed to be a Magistrate. —Bom. Act 13 of 1930, Section 2.

Section 19 — Note 1 (contd.)

was that for certain limited purposes the Coroner was to discharge his functions in a manner in which a criminal Court, would discharge them. AIR 1959 Bom 6 (8) = 1959 Cri LJ 30 = 60 Bom LR 822 (DB).

Section 20 — Note 1

(1) A Coroner is not a Court in the hierarchy of Courts established for the administration of justice. AIR 1959 Bom 6 (8) = 1959 Cri LJ 30 = 60 Bom LR 822 (DB).

21. Adjournment of inquest.—The Coroner may adjourn the inquest from time to time, and from place to place.

Juror's recognizances.

Whenever the inquest is adjourned the Coroner shall take the recognizances of the jurors to attend at the time and place appointed, and notify to the witnesses when and where the inquest will be proceeded with.

The amount of such recognizances shall in each case be fixed by the Coroner [°][and the whole, or such part thereof as to the Coroner seems fit, shall, in default of attendance by the jurors, be recoverable in the same manner as a fine imposed under Section 31].

[[°]] Inserted by the Coroners (Amendment) Act, 1908 (4 of 1908), S. 7.

STATE AMENDMENT

Section 21-A

Maharashtra:

After Section 21 insert Section 21A, namely—

21A. Inquest to be adjourned if criminal proceedings have been instituted before a Magistrate.—(1) If on an inquest touching a death, the Coroner is informed, before the jury have given their verdict that criminal proceedings have been instituted against some person before a Magistrate in respect of an offence touching the death of the deceased, he may adjourn the inquest until after the conclusion of the criminal proceedings and may, if he thinks fit, discharge the jury.

(2) After the conclusion of the criminal proceedings which it shall be the duty of the police to communicate to the Coroner, the Coroner may, subject as hereinafter provided if he thinks fit, resume the adjourned inquest:

Provided that at such resumed inquest no inquisition shall be held against any person in respect of any offence with which he was charged or of which he could have been convicted in the proceedings referred to in sub-section (1), and no finding shall be recorded which is inconsistent with the determination of any matter by the result of those proceedings.

(3) Where the Coroner resumes an inquest which has been adjourned and the jury has been discharged, he shall proceed in all respects as if the inquest had not previously been begun and the provisions of this Act shall apply accordingly as if the resumed inquest were a fresh inquest, except that it shall not be obligatory on the Coroner to view the body.

(4) If, having regard to the result of the criminal proceedings, the Coroner decides not to resume the inquest, he shall furnish the Commissioner of Police with a certificate stating the result of the criminal proceedings and any particulars necessary for the registration of the death which may have been ascertained.

(5) For the purposes of this section, the expression "the criminal proceedings" means the proceedings before a Magistrate and before any Court to which the accused person is committed for trial or before which an appeal from the conviction of that person is heard, and criminal proceedings shall not be deemed to be concluded until no further appeal can be made in the course thereof.—Bombay Act XIII of 1930, S. 3.

22. Coroner to sum up to jury.—When all the witnesses have been examined, the Coroner shall sum up the evidence to the jury, and the jury shall then consider of their verdict.

23. Coroner to draw up inquisition.—When the verdict is delivered the Coroner shall draw up the inquisition according to the finding of the jury, or, when the jury is not unanimous, according to the opinion of the majority.

Section 22 — Note 1

(1) The provision would show that the Legislature did not intend the Coroner to be a Court like the Courts in the

hierarchy of Courts established for the administration of justice. AIR 1959 Bom 6 (8) = 1959 Cri LJ 30 = 60 Bom LR 822 (DB).

24. Contents of inquisition.—Every inquisition under this Act shall be signed by the Coroner with his name and style of office and by the jurors, and shall set forth—

- (1) where, when and before whom the inquisition is holden,
- (2) who the deceased is,
- (3) where his body lies,
- (4) the names of the jurors, and that they present the inquisition upon oath,
- (5) where, when and by what means the deceased came by his death, and
- (6) if his death was occasioned by the criminal act of another, who is guilty thereof.

If the name of the deceased be unknown, he may be described as a certain person to the jurors unknown.

Every such inquisition shall be in the form set forth in the Second Schedule hereto annexed, with such variation as the circumstances of each case require.

***[25. Procedure where death is found due to an act amounting to an offence.**—When the jury or a majority of the jury find that the death of the deceased person was occasioned by an act which amounts to an offence under any law in force in †[India] the Coroner shall immediately after the inquest forward a copy of the inquisition, together with the names and addresses of the witnesses, to the Commissioner of Police.]

[°] Substituted for the original section, by the Coroners (Amendment) Act, 1908 (4 of 1908), S. 8.

[†] Substituted for “a Part A State or a Part C State,” by 2 A. L. O., 1956.

***[26. Power to arrest and commit for trial.**—The Coroner may also, where the verdict justifies him in so doing, issue his warrant for the apprehension of

Section 24 — Note 1

(1) The inquest is not a decision, but a *prima facie* opinion and stands on no higher footing than an order of commitment to the sessions. It is not a judgment, much less a judgment *inter partes*. AIR 1946 Bom 184 (185) = 47 Cri L Jour 555.

(2) The Coroner has power to draw up an inquisition which is to set out the details mentioned in Section 24. He has no power to pronounce a binding and authoritative judgment. AIR 1959 Bom 6 (8) = 1959 Cri LJ 30 = 60 Bom LR 822 (DB).

(3) Coroner's inquest is not admissible in evidence in subsequent trial of the accused. AIR 1946 Bom 184 (185) = 47 Cri L Jour 555.

(4) Inquest Report — Admissibility in evidence — Mere recitals in inquest report, not substantive evidence. AIR 1965 Ker 44 (46) = 1965 (1) Cri LJ 173 (DB).

(5) Duty of Coroner to put pointed questions to foreman of Jury to record findings under Section 24 — Absence of verdict of Jury as to cause of death — Coroner merely copying out cause of death from post-mortem report — Jury's verdict of negligence is vitiated when there is no finding that such negligence amounted to criminal act as contemplated by Section 24. AIR 1968 Bom 426

(430) = 1968 Cri LJ 1610 = 70 Bom LR 238 (DB).

(6) Clause (e) of Section 9 indicates that if there are any circumstances attending the death in question which endanger public health or safety, the Coroner would be entitled to hold an inquest by jury. But clause (e) has no bearing on the question as to what should be recorded in Coroner's jury's verdict under Section 24. AIR 1968 Bom 426 (431) = 1968 Cri LJ 1610 = 70 Bom LR 238 (DB).

(7) Not setting out names of Jurors in inquisition as required by Section 24 (4) is merely a technical defect — But recording of verdict of negligence without finding it amounted to criminal act within Section 24 (6) is a substantial defect. AIR 1968 Bom 426 (429, 433) = 1968 Cri LJ 1610 = 70 Bom LR 238 (DB).

Section 25 — Note 1

(1) The provisions under Section 25 show that the Legislature did not intend the Coroner to be a Court like the Court in the hierarchy of Courts established for administration of justice. AIR 1959 Bom 6 (8) = 1959 Cri LJ 30 = 60 Bom LR 822 (DB).

Section 26 — Note 1

(1) Powers of the Coroner under — Not such as those of Courts established for administration of justice. AIR 1959 Bom 6 (8) = 1959 Cri LJ 30 = 60 Bom LR 822 (DB).

the person who is found to have caused the death of the deceased person, and send him forthwith to a Magistrate empowered to commit him for trial.]

[°] Substituted for the original section, by the Coroners (Amendment) Act, 1908 (4 of 1908), S. 9.

27. Power to accept bail.—[Repealed by the Coroners (Amendment) Act, 1908 (4 of 1908), S. 10.]

28. Warrant for burial.—When the proceedings are closed, or before, if it be necessary to adjourn the inquest, the Coroner shall give his warrant for the °[disposal] of the body on which the inquest has been taken.

[°] Substituted for "burial," by the Coroners (Amendment) Act, 1908 (4 of 1908), Section 11.

29. Inquisitions not to be quashed for want of form.—No inquisition found upon or by any inquest shall be quashed for any technical defect.

Amendment of inquisition.

In any case of technical defect, a Judge of the High Court may, if he thinks fit, order the inquisition to be amended, and the same shall forthwith be amended accordingly.

30. Cessation of jurisdiction as to treasure trove, wrecks, etc.—It shall no longer be the duty of the Coroner to inquire whether any person dying by his own act was or was not *felo de se*,° to inquire of treasure trove† or wrecks,‡ to seize any fugitive's goods,§ to execute process or to exercise as Coroner any jurisdiction not expressly conferred by this Act.

Felo de se.

A *felo de se*° shall not forfeit his goods.

Deodands.

Deodands°† are hereby abolished.

[°] *Felo de se* (a felon with respect to himself); one who feloniously commits suicide. In England escheat or forfeiture for felony was abolished by the Forfeiture Act, 1870 (33 and 34 Vict., c. 23). A Coroner's inquest must be held in every case of suicide, and in the absence of evidence of unsoundness of mind a verdict of *felo de se* may be directed and returned — See Wharton's Law Lexicon; Earl Jowitt's Dictionary of English Law, 1959 Ed., page 792.

[†] Money or coin, gold, silver, plate, or bullion, found hidden in the earth or other private place, the owner thereof being unknown or unfound, in which case it

Section 29 — Note 1

(1) Bombay High Court has, subject to the provisions of the Coroners Act, all the powers which the Court of King's Bench had with reference to the inquisitions when the High Court was constituted. There is no provision in the Act enabling the Coroner to make a reference to the High Court. But any party interested in or affected by the inquisition may apply to the High Court for either amending or quashing the verdict of the jury. Under S. 29, the High Court can amend the inquisition only in cases of technical defects. High Court will not quash an inquisition merely on the ground that the findings of the jury are against the evidence in the case. AIR 1927 Bom 163 (164, 165) = 51 Bom 300 = 28 Cri L Jour 285 (DB).

(2) Coroner's Court is not a Criminal Court within the meaning of Clause 27 of the Letters Patent of the Bombay

High Court. AIR 1927 Bom 163 (165) = 51 Bom 300 = 28 Cri L Jour 385 (DB).

(3) No evidence or data justifying conclusion of jury—High Court can quash inquisition under first part of Section 29. AIR 1962 Bom 252 (253, 254) = 1962 (2) Cri LJ 478 — 64 Bom LR 339 (DB).

(4) High Court has power to quash inquisition though not merely on technical grounds — Power can be exercised to cure substantial defects — Not setting out names of Jurors in inquisition as required by Section 24 (4) is merely a technical defect — But recording verdict of negligence without finding that it amounted to criminal act within S. 24 (6) is a substantial defect — Direction that certain portions in inquisition should stand quashed given. AIR 1968 Bom 426 (429, 433) = 1968 Cri LJ 1610 = 70 Bom LR 238 (DB).

belongs to the Crown: see Wharton's Law Lexicon, 14th Ed., page 1009; Jowitt's Dictionary of English Law, 1959 Edn., p. 1777. In England the Coroner has jurisdiction to hold an inquest under the Coroner's Act, 1887 (50 and 51 Vict., c. 71) S. 36, as to treasure trove; but his function is confined to ascertaining whether any given thing is or is not within the definition, and he cannot inquire as to who is entitled to it — See Earl Jowitt's Dictionary of English Law, 1959 Ed., page 1777.

- [†] Such goods, including the ship or cargo or any part, as, after a shipwreck, are afloat or cast upon the land by the sea. Formerly they were not wreck so long as they remained at sea in the jurisdiction of the Admiralty: In England, it is a branch of coroner's office to inquire concerning shipwrecks and certify whether there has been a wreck or not and who is in possession of goods. In India such investigation is made by the Receiver of Wreck appointed by the Central Government, under S. 391 of the Merchant Shipping Act, 1958 — See Earl Jowitt's Dictionary of English Law, 1959 Ed., page 1884. See also the definition of 'wreck' given in S. 3 (58) of the Merchant Shipping Act, 1958 (44 of 1958) and Part XIII of the said Act dealing with 'wreck and salvage.'
- [§] Fugitive's goods—the goods of a man which had been forfeited because he had made flight. See also sections 87, 88 and 89 of the Code of Criminal Procedure.
- [*†] Defendant—A personal chattel which had been the immediate occasion of the death of any reasonable creature; it was forfeited to the Crown to be applied to pious uses and distributed in alms by the high almoner. Deodands were abolished in England by the Deodands Act, 1862 (9 and 10 Vict., c. 62) — See Earl Jowitt's Dictionary of English Law, 1959 Ed., page 612.

CHAPTER IV CORONERS' JURIES

31. **Fine on juror neglecting to attend.**—Whenever any person has been duly summoned to appear as a juror by a Coroner, and fails or neglects to attend at the time and place specified in the summons, the Coroner may cause him to be openly called in his Court three times to appear and serve as a juror; and upon the non-appearance of such person, and proof that such summons has been served upon him or left at his usual place of abode, may impose such fine upon the defaulter, not exceeding fifty rupees, as to the Coroner seems fit.

STATE AMENDMENT

Maharashtra:

For Section 31 substitute the following, namely—

31. **List of Jurors.**—(1) The Coroners shall prepare and from time to time revise a list of sufficient number of persons of good character and adequate education, liable to serve as jurors in his Court.

(2) All male persons between the ages of twenty-one and sixty whose names are not in the Common Jury list of the High Court, shall, subject to the exemptions mentioned in Section 320 of the Code of Criminal Procedure, 1898, be liable to serve as jurors in the Coroner's Court.

(3) **Fine on juror neglecting to attend.**—Whenever any person has been duly summoned to appear as a juror by a Coroner, and fails or neglects to attend at the time and place specified in the summons, the Coroner may cause him to be openly called in his Court three times to appear and serve as a juror, and upon the non-appearance of such person, and proof that such summons has been served upon him or left at his usual place of abode, may impose such fine upon the defaulter, not exceeding fifty rupees as to the Coroner seems fit; Provided that the Coroner may, in his discretion, remit any fine so imposed.—Bombay Act XIII of 1930, Section 4.

32. Certificate as to defaulting juror.—The Coroner shall make out and sign a certificate, containing the name and surname, the residence and trade or calling of every person so making default, together with the amount of the fine so imposed, and the cause of such fine,

and shall send such certificate to one of the Magistrates of the place of which he is the Coroner,

Service of copy of certificate.

and shall cause a copy of such certificate to be served upon the person so fined, by having it left at his usual place of residence, or by sending the same through the Post Office, addressed as aforesaid and registered.

33. Levy of fine.—Thereupon such Magistrate shall cause the fine to be levied in the same manner as if it had been imposed by himself.

34. Jurors not to be summoned twice within the year.—Unless in case of necessity, no person who has appeared, or has been summoned to appear, as a juror on an inquest, and has not made default shall, within one year after such appearance or summons, be summoned to appear as a juror under this Act.

35. Jurors on inquest on prisoner.—When an inquest is held on the body of a prisoner dying within a prison, no officer of the prison and no prisoner confined therein shall be a juror on such inquest.

CHAPTER V

RIGHTS AND LIABILITIES OF CORONERS

36. Coroner's salary.—Every Coroner shall be entitled to such salary for the performance of the duty of his office as is prescribed in that behalf by the *[State Government].

[°] Substituted for 'Provincial Government' by A. L. O., 1950.

STATE AMENDMENT

Section 36-A

West Bengal:

After Section 36, insert the following:—

"36A. Allowances of Additional Coroners.—An Additional Coroner shall be entitled to receive such allowances as may be fixed by the State Government."—West Bengal Ordinance 10 of 1966, S. 7.

37. Disbursements to be repaid.—All disbursements duly made by a Coroner for fees to medical witnesses, hire of rooms for the jury, and the like, shall be repaid to him by the *[State Government].

[°] Substituted for 'Provincial Government' by A. L. O., 1950.

38. Power to appoint deputy.—Every Coroner may from time to time, with the previous sanction of the *[State Government,] appoint, by writing under his hand, a proper person to act for him as his deputy in the holding of inquests. †[* * *]

All inquests taken and other acts done by any such deputy, under or by virtue of any such appointment, shall be deemed to be the acts of the Coroner appointing him:

Provided that no such deputy shall act for any such Coroner except during the illness of the said Coroner, or during his absence for any lawful and reasonable cause.

Revocation of appointment.

Every such appointment may at any time be cancelled and revoked by the Coroner by whom it was made.

[°] Substituted for 'Provincial Government' by A. L. O., 1950.

[†] The words "and such deputy shall take and subscribe, before one of the Judges of the High Court, an oath that he will faithfully discharge the duties of office" were repealed by the Indian Oaths Act, 1873 (18 of 1873).

39. Exemption from serving on juries.—No Coroner or Deputy Coroner shall be liable to serve as a juror.

STATE AMENDMENT

West Bengal:

In S. 39, after the words "No Coroner," insert the punctuation mark, and words "Additional Coroner"—West Bengal Ordinance 10 of 1966, S. 8.

40. Privilege from arrest.—Coroners and Deputy Coroners shall be privileged from arrest while engaged in the discharge of their official duty.

STATE AMENDMENT

West Bengal:

In Section 40, after the word "Coroners," insert the punctuation mark and words "Additional Coroners"—West Bengal Ordinance 10 of 1966, S. 9.

41. Penalty for failure to comply with Act.—Any Coroner or Deputy Coroner failing to comply with the provisions of this Act, or otherwise misconducting himself in the execution of his office, shall be liable to such fine as the Chief Justice of the High Court, upon summary examination and proof of the failure or misconduct, thinks fit to impose.

STATE AMENDMENT

West Bengal:

Omit Section 41—West Bengal Ordinance 10 of 1966, S. 10.

42. Limitation of suits.—No proceeding for anything done under this Act, or for any failure to comply with its provisions shall be commenced or prosecuted *[* * *] after tender of sufficient amends.

[°] The words "after the expiration of three months from such fact or failure nor" were repealed by the Indian Limitation Act, 1871 (9 of 1871).

FIRST SCHEDULE

Enactments repealed.—[Repealed by the Repealing Act, 1873 (12 of 1873).]

SECOND SCHEDULE**FORM OF INQUISITION**

An Inquisition taken at _____ on the _____ day of _____ 187 , before E F, Coroner of _____ * [in the case of A B deceased] upon the oath of G H, I J, K L, and M N, then and there duly sworn and charged to inquire when, how and by what means the said A B came to his death.

We, the said jurors, find unanimously [or by a majority of _____] that the death of the said A B was caused, on or about the _____ day of _____ 187 , by [here state the cause of death as in the following examples]:—

1. [Cases of homicide]—a blow on the head with a stick inflicted on him by C D, under such circumstances that the act of C D was justifiable [or accidental] homicide.
- a stab on the heart with a knife inflicted on him by C D under such circumstances that the act of C D was culpable homicide not amounting to murder [or culpable homicide amounting to murder, or a rash or negligent act not amounting to culpable homicide.]

2. [Cases of accident] — falling out of a boat into the river Hooghly, whereby he was drowned.
 — a kick from a horse which fractured his skull and ruptured blood-vessels in his head.
3. [Cases of suicide] — Shooting himself through the head with a pistol.
 — arsenic, which he voluntarily administered to himself.
4. [Cases of sudden death by means unknown] — disease of the heart.
 — apoplexy.
 — sunstroke.

And so say the Jurors upon their oath aforesaid.

Witness our hands. E F Coroner of

G H, I J, K L, M N, O P (Jurors).

[°] Substituted for "on view of the body of A B then and there lying dead" by the Coroners (Amendment) Act, 1908 (4 of 1908), S. 12.

STATE AMENDMENT

Maharashtra:

Substitute for the original second schedule the following, namely:—

"SECOND SCHEDULE FORM OF INQUISITION (See Section 24)

An inquisition taken at _____ on the _____ day of _____ 19____
 before E F, Coroner of _____ (in the case of A B deceased) upon the
 oath of G H, I J, K L, and M N, then and there duly sworn and charged to en-
 quire when, how and by what means the said A B came to his death.

We, the said Jurors, find unanimously that the death of said A B was caused,
 on or about the _____ day of _____ 19____, by

1. Cases of homicide — a blow on the head with a stick inflicted on him by C D under such circumstances that the act of C D was justifiable (or accidental) homicide.
 — a stab on the heart with a knife inflicted on him by C D under such circumstances that the act of C D was culpable homicide not amounting to murder.
2. Cases of suicide — Shooting himself through the head with a pistol
 drowning himself in a tank, river or sea,
 Opium or arsenic, which he voluntarily administered to himself. Cutting his throat with a razor or any sharp instrument.
3. Cases of infanticide — strangling to death a newly-born child by its mother.
 — by exposure caused by C D with the knowledge that it would necessarily result in the death of A B, a newly-born child.
4. Cases of accident — falling out of a boat into any river, whereby he was drowned
 — a kick from a horse which fractured his skull and ruptured blood-vessels in his head.
5. Cases of poisoning — opium or arsenic which was administered to the said A B by C D with the intention of killing him.
6. Cases of death caused by machinery — while working in a mill or a workshop being caught in moving machinery.

7. Cases of death arising the wheel of a motor-car or a heavy cart which
out of the use of a was negligently driven by C D passing over
vehicle — his chest and causing death.

8. Cases of death from — disease of the heart.
any other cause — apoplexy.
— sun-stroke or any other disease.

And so say the jurors upon their oath aforesaid
Witness our hands.

EF, Coroner of
GH, IJ, KL, MN, OP (jurors)
— Bom. Act 13 of 1930, section 5.

[THE] COST AND WORKS ACCOUNTANTS ACT, 1959 (ACT XXIII OF 1959)

[The Act printed here is as on 1-4-1970.]

CONTENTS

SECTIONS

CHAPTER I

PRELIMINARY

1. Short title, extent and commencement.
2. Definitions and interpretation.

CHAPTER II

THE INSTITUTE OF COST AND WORKS ACCOUNTANTS

3. Incorporation of the Institute.
4. Entry of names in the Register.
5. Fellows and Associates.
6. Certificate of practice
7. Members to be known as cost accountants.
8. Disabilities.

CHAPTER III

COUNCIL OF THE INSTITUTE

9. Constitution of the Council of the Institute.
10. Mode of election to Council.
11. Nomination in default of election.
12. President and Vice-President.
13. Resignation of membership and casual vacancies.
14. Duration and dissolution of Council.
15. Functions of the Council.
16. Staff, remuneration and allowances.
17. Committees of the Council.
18. Finances of the Council.

CHAPTER IV

REGISTER OF MEMBERS

19. Register.
20. Removal from the Register.

CHAPTER V

MISCONDUCT

21. Procedure in inquiries relating to misconduct of members of Institute.
22. Misconduct defined.

CHAPTER VI

REGIONAL COUNCILS

23. Constitution and functions of Regional Councils.

CHAPTER VII

PENALTIES

24. Penalty for falsely claiming to be a member, etc.
25. Penalty for using name of the Council, awarding degrees of cost accountancy, etc.
26. Companies not to engage in cost accountancy.
27. Unqualified persons not to sign.
28. Offences by companies.
29. Sanction to prosecute.

CHAPTER VIII

DISSOLUTION OF THE INSTITUTE OF COST AND WORKS AC- COUNTANTS REGISTERED UNDER THE COMPANIES ACT, 1956

30. Dissolution of the Institute of Cost and Works Accountants registered under the Companies Act, 1956.

31. Transfer of assets and liabilities of the dissolved company to the Institute.
32. Provisions respecting employees of the dissolved company.

CHAPTER IX MISCELLANEOUS

33. Appeals.
34. Alteration in the Register and cancellation of certificate.

35. Directions of the Central Government.
36. Protection of action taken in good faith.
37. Maintenance of branch offices.
38. Reciprocity.
39. Power to make regulations.

THE FIRST SCHEDULE.

THE SECOND SCHEDULE.

STATEMENT OF OBJECTS AND REASONS

"The increasing tempo of industrialisation in this country in the context of planning has brought the subject of costing and cost accountancy to the forefront. Current discussions on the measures needed to improve productive skill and industrial management will not by themselves be adequate unless due account is taken of the necessity for the maximum utilisation of labour and materials at the minimum of cost. It is now recognised that this can be ensured only by a proper system of costing and cost accounting. The profession of cost accountants is, however, of comparatively recent origin in India and, unlike the profession of chartered accountants, there is no law to regulate this profession, particularly because there is no law imposing any obligation in regard to the maintenance, certification or publication of cost accounts by

industrial undertakings. It is, however, considered desirable that, notwithstanding the absence of any such legal obligation, in view of the increasing necessity of costing in the context of the rapid industrialisation of the country, the profession should be organised on a statutory basis on the lines of the Institute of Chartered Accountants of India so that the profession assumes the responsibilities for the maintenance of requisite standards of professional qualifications, discipline and conduct of its members under the general guidance and supervision of the Government.

2. The Bill seeks to authorise the establishment of an autonomous Institute of Cost Accountants and to entrust to it the functions of regulating the profession."

—Gaz. of India, 24-9-1958, Extra., Pt. II-Sec. 2, page 1056.

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION

- Amended by Act 25 of 1968.
- Extended by Regs. 6 of 1963 as amended by Reg. 2 of 1965; 7 of 1963; 11 of 1963 and Act 25 of 1968.

COGNATE ACTS AND PROVISIONS

Chartered Accountants Act, 38 of 1949.

[THE] COST AND WORKS ACCOUNTANTS ACT, 1959 (ACT XXIII OF 1959)*

[The Act printed here is as on 1-4-1970.]

[19th May, 1959.]

An Act to make provision for the regulation of the profession of cost and works accountants.

Be it enacted by Parliament in the Tenth Year of the Republic of India as follows :

[*] For Statement of Objects and Reasons, see Gaz. of India, 24-9-1958, Pt. II, S. 2, Extra., p. 1056.

CHAPTER I PRELIMINARY

1. Short title, extent and commencement.—(1) This Act may be called THE COST AND WORKS ACCOUNTANTS ACT, 1959.
- (2) It extends to the whole of India [* * * * *].

(3) It shall come into force on such date† as the Central Government may, by notification in the Official Gazette, appoint.

[*] The words "except the State of Jammu and Kashmir" omitted by the Central Laws (Extension to Jammu and Kashmir) Act, 1968 (25 of 1968), S. 2 and Sch. (15-8-1968).

[†] The date appointed is 28-5-1959, see G. S. R. 610 published in Gaz. of India, 1959, Extra., Pt. II, S. 3 (i), page 259.

The Act is extended to the Union territories of:—

- (1) Pondicherry — See Reg. 7 of 1963, S. 3 and Sch. I (1-10-1963);
- (2) Dadra and Nagar Haveli — See Reg. 6 of 1963 as amended by Reg. 2 of 1965, S. 4 (i) (w. e. f. 1-7-1965).
- (3) Goa, Daman and Diu — See Reg. 11 of 1963, S. 3 (1) and Sch. (w. e. f. 1-8-1965).

It has been extended to Jammu and Kashmir by Act 25 of 1968 (15-8-1968).

2. Definitions and interpretation.—(1) In this Act, unless the context otherwise requires,—

- (a) "associate" means an associate member of the Institute;
- (b) "cost accountant" means a person who is a member of the Institute;
- (c) "Council" means the Council of the Institute;
- (d) "dissolved company" means the Institute of Cost and Works Accountants registered under the Companies Act, 1956;
- (e) "fellow" means a fellow of the Institute;
- (f) "Institute" means the Institute of Cost and Works Accountants of India constituted under this Act;
- (g) "prescribed" means prescribed by regulations made under this Act;
- (h) "President" means the President of the Council;
- (i) "Register" means the Register of members maintained under this Act;
- (j) "Vice-President" means the Vice-President of the Council;
- (k) "year" means the period commencing on the 1st day of April of any year and ending on the 31st day of March of the succeeding year.

(2) Save as otherwise provided in this Act, a member of the Institute shall be deemed "to be in practice" when, individually or in partnership with one or more members of the Institute in practice, he, in consideration of remuneration received or to be received,—

- (i) engages himself in the practice of cost and works accountancy; or
- (ii) offers to perform or performs services involving the costing or pricing of goods or services or the preparation, verification or certification of cost accounting and related statements or holds himself out to the public as a cost accountant in practice; or
- (iii) renders professional services or assistance in or about matters of principle or detail relating to cost accounting procedure or the recording, presentation or certification of costing facts or data; or
- (iv) renders such other services as, in the opinion of the Council, are or may be rendered by a cost accountant in practice;

and the words "to be in practice," with their grammatical variations and cognate expressions, shall be construed accordingly.

Explanation.—A member of the Institute who is a whole-time salaried employee of any person shall not be deemed to be in practice within the meaning of this sub-section.

Section 2 — Note 1

Case under Chartered Accountants Act 1949, S. 2 (2).

(1) A member of the institute is deemed to be in practice under S. 2 (2) (iv) when he renders such other services as

in the opinion of the council are or may be rendered by a chartered Accountant. A liquidator appointed by Calcutta High Court was deemed to be in practice. AIR 1958 SC 72 (76, 77) = 1958 SCR 371.

CHAPTER II

THE INSTITUTE OF COST AND WORKS ACCOUNTANTS

3. Incorporation of the Institute.—(1) All persons whose names are entered in the Register at the commencement of this Act and all persons who may hereafter have their names entered in the Register under the provisions of this Act, so long as they continue to have their names borne on the said Register, are hereby constituted a body corporate by the name of the Institute of Cost and Works Accountants of India, and all such persons shall be known as members of the Institute.

(2) The Institute shall have perpetual succession and a common seal, and shall have power to acquire, hold and dispose of property, both moveable and immovable, and shall by its name sue or be sued.

4. Entry of names in the Register.—(1) Any of the following persons shall be entitled to have his name entered in the Register, namely:—

- (i) any person who was an associate or a fellow of the dissolved company (other than an honorary associate or honorary fellow thereof) immediately before the commencement of this Act, except any such person who is not a permanent resident of India and is not at such commencement practising as a cost accountant in India;
- (ii) any person who has passed such examination and completed such training as may be prescribed for members of the Institute;
- (iii) any person who, at the commencement of this Act, is engaged in the practice of cost accountancy in India and who fulfils such conditions as the Central Government or the Council may specify in this behalf;
- (iv) any person who has passed such other examination and completed such other training without India as is recognised by the Central Government or the Council as being equivalent to the examination and training prescribed for members of the Institute:

Provided that in the case of any person who is not permanently residing in India, the Central Government or the Council may impose such further conditions as it may deem fit;

- (v) any person domiciled in India, who at the commencement of this Act is studying for any foreign examination and is at the same time undergoing training, whether within or without India, or, who, having passed such examination, is at such commencement undergoing training whether within or without India:

Provided that such foreign examination and training are recognised by the Central Government or the Council in this behalf:

Provided further that the person passes the examination and completes his training within five years from the commencement of this Act.

(2) Every person belonging to the class mentioned in clause (i) of sub-section (1) shall have his name entered in the Register without the payment of any entrance fee.

(3) Every person belonging to any of the classes mentioned in clauses (ii), (iii), (iv) and (v) of sub-section (1) shall have his name entered in the Register on application being made and granted in the prescribed manner and on payment of the prescribed entrance fee, which shall not exceed rupees three hundred in any case.

(4) The Central Government shall take such steps as may be necessary for the purpose of having the names of all persons belonging to the class mentioned in clause (i) of sub-section (1) entered in the Register at the commencement of this Act.

5. Fellows and Associates.—(1) The members of the Institute shall be divided into two classes designated respectively as associates and fellows.

(2) Any person other than a person to whom the provisions of sub-section (3) apply shall, on his name being entered in the Register, be deemed to have become an associate member of the Institute and so long as his name remains so entered, shall be entitled to use the letters AICWA after his name to indicate that he is an associate member of the Institute of Cost and Works Accountants.

(3) Any person who was a fellow of the dissolved company and who is entitled to have his name entered in the Register under clause (i) of sub-section (1) of Section 4, shall be entered in the Register as a fellow of the Institute.

(4) A member, being an associate who has been in continuous practice in India for at least five years, whether before or after the commencement of this Act, or whether partly before and partly after the commencement of this Act, and a member who has been an associate for a continuous period of not less than five years and who possesses such qualifications as the Council may prescribe with a view to ensuring that he has experience equivalent to the experience normally acquired as a result of continuous practice for a period of five years as a cost accountant shall, on payment of the prescribed entrance fee, which shall not exceed rupees two hundred in any case, and on application made and granted in the prescribed manner, be entered in the Register as a fellow of the Institute.

Explanation I.—For the purposes of this sub-section, a person shall be deemed to have practised in India for any period for which he has held a certificate of practice under Section 6, notwithstanding that he did not actually practise during that period.

Explanation II.—In computing the continuous period during which a person has been an associate of the Institute, there shall be included any continuous period during which the person has been an associate of the dissolved company immediately before he became an associate of the Institute.

(5) Any person whose name is entered in the Register as a fellow of the Institute and so long as his name remains so entered, shall be entitled to use the letters FICWA after his name to indicate that he is a fellow of the Institute of Cost and Works Accountants.

6. Certificate of practice.—(1) No member of the Institute shall be entitled to practise whether in India or elsewhere, unless he has obtained from the Council a certificate of practice.

(2) Every such member shall make application in such form and pay such annual fee, for his certificate as may be prescribed, and such fee shall be payable on or before the 1st day of April in each year:

Provided that if a member of the Institute who was in practice immediately before the commencement of this Act has made within one month of such commencement an application for the grant of certificate of practice, he shall not be deemed to have contravened the provisions of sub-section (1) by reason of his having practised during the period between such commencement and the disposal of the application.

7. Members to be known as cost accountants.—Every member of the Institute in practice shall, and any other member may, use the designation of a cost accountant and no member using such designation shall use any other description, whether in addition thereto or in substitution therefor:

Provided that nothing in this section shall be deemed to prohibit any such member from adding any other description or letters to his name, if entitled thereto, to indicate membership of such other Institute of Accountancy, whether in India or elsewhere, as may be recognised in this behalf by the Council, or any other qualification that he may possess, or to prohibit a firm, all the partners of which are members of the Institute and in practice, from being known by its firm name as cost accountants.

8. Disabilities.—Notwithstanding anything contained in Section 4, a person shall not be entitled to have his name entered in, or borne on, the Register, if he—

- (i) has not attained the age of twenty-one years at the time of his application for the entry of his name in the Register; or
- (ii) is of unsound mind and stands so adjudged by a competent Court; or
- (iii) is an undischarged insolvent; or
- (iv) being a discharged insolvent, has not obtained from the Court a certificate stating that his insolvency was caused by misfortune without any misconduct on his part; or
- (v) has been convicted by a competent Court whether within or without India, of an offence involving moral turpitude and punishable with imprisonment or of an offence, not of a technical nature, committed by him in his professional capacity unless in respect of the offence committed he has either been granted a pardon or, on an application made by him in this behalf, the Central Government has, by an order in writing removed the disability; or
- (vi) has been removed from membership of the Institute on being found on inquiry to have been guilty of professional or other misconduct:

Provided that a person who has been removed from membership for a specified period, shall not be entitled to have his name entered in the Register until the expiry of such period.

CHAPTER III COUNCIL OF THE INSTITUTE

9. Constitution of the Council of the Institute.—(1) There shall be a Council of the Institute for the management of the affairs of the Institute and for discharging the functions assigned to it by or under this Act.

(2) The Council shall be composed of—

- (a) not more than twelve persons elected by members of the Institute from amongst the fellows of the Institute chosen in such manner and from such regional constituencies^o as may be specified in this behalf by the Central Government by notification in the Official Gazette; and
- (b) not more than four persons nominated by the Central Government.

[^o] The Central Government has specified the following four regional constituencies for the purposes of elections to the Council, namely,—

- (1) Western India Regional Constituency: Comprising the States of Bombay and Madhya Pradesh; (State of Bombay now stands divided into the States of Gujarat and Maharashtra—See Act 11 of 1960);
- (2) Southern India Regional Constituency: Comprising the States of Andhra Pradesh, Kerala, Madras and Mysore;
- (3) Eastern India Regional Constituency: Comprising the States of Assam, Bihar, Orissa and West Bengal and the Union Territories of Manipur and Tripura;

Section 8 — Note 1

Cases under Chartered Accountants Act 1949, Section 8.

(1) Section 8 deals with disabilities. Sub-sections (v) and (vi) of this section support the argument that disciplinary jurisdiction can be exercised even in respect of conduct which may not fall expressly within the inclusive definition contained in Section 22. AIR 1958 SC 72 (77) = 1958 SCR 371.

(2) Section 8 applies to the first entry of a person's name in the Register and also to maintenance of his name after

it has been entered. AIR 1957 Cal 33 (39) = (1957) 27 Com Cas 114 (DB).

(3) A member whose name has been removed from the Register will not be entitled to have his name again entered on the Register unless so permitted by the High Court. AIR 1952 Nag 393 (394) = 1953 Cri LJ 46 = 1953 Nag LJ 221 (DB).

(4) Section 8 embraces within its per-view misconduct committed wholly before or after the commencement of the Act provided the person concerned is found to have been guilty of it. AIR 1957 Cal 33 (40) = (1957) 27 Com Cas 114 (DB).

(Assam is divided into the States of Assam and Nagaland—See Act 27 of 1962); (Autonomous State of Meghalaya within Assam has been created by Act 55 of 1969).

- (4) Northern India Regional Constituency: Comprising the States of Punjab, Rajasthan and Uttar Pradesh and the Union Territories of Delhi and Himachal Pradesh—See G.S.R. 612 published in Gazette of India, 1959, Extra., Pt. II, Sec. 3 (i), page 303. (Punjab is divided into the States of Haryana and Punjab and the Union Territory of Chandigarh. Parts of Punjab have been added to the Union Territory of Himachal Pradesh as well—See Act 31 of 1966.)

—See G.S.R. 612, published in Gaz. of Ind., 1959, Extra., Pt. II, S. 3 (i), p. 303.

Note.—Of the State and territories to which the Act has now been extended, Jammu and Kashmir would fall under the Northern India Constituency; Goa, Daman and Diu and Dadra and Nagar Haveli under the Western India Regional Constituency and Pondicherry would be covered by the Southern Regional Constituency.

10. Mode of election to Council.—(1) Elections under cl. (a) of sub-sec. (2) of Section 9 shall be conducted in the prescribed manner:

Provided that the first election under the said clause shall be held in such manner as the Central Government may specify in this behalf.*

(2) Where any dispute arises regarding any such election, the matter shall be referred by the Council to a Tribunal appointed by the Central Government in this behalf and the decision of such Tribunal shall be final:

Provided that no such reference shall be made except on an application made to the Council by an aggrieved party within thirty days from the date of the declaration of the result of the election.

(3) The expenses of the Tribunal shall be borne by the Council.

[*] For the Council of the Institute of Cost and Works Accountants (First Election) Regulations, 1959, see G. S. R., 613 published in Gaz. of Ind., 1959, Extra., Pt. II, S. 3 (i), page 304.

11. Nomination in default of election.—If the members of the Institute fail to elect any member under clause (a) of sub-section (2) of Section 9 from any of the regional constituencies that may be specified under that clause, the Central Government may nominate any duly qualified person from such constituency to fill the vacancy, and any person so nominated shall be deemed to be a duly elected member of the Council.

12. President and Vice-President.—(1) The Council at its first meeting shall elect two of its members to be respectively the President and the Vice-President thereof, and so often as the office of the President or the Vice-President becomes vacant, the Council shall choose a person to be the President or the Vice-President, as the case may be:

Provided that on the first constitution of the Council a member of the Council nominated in this behalf by the Central Government shall discharge the functions of the President, until such time as a President is elected under the provisions of this sub-section.

(2) The President shall be the Chief Executive Authority of the Council.

(3) The President or the Vice-President shall hold office for a period of one year from the date on which he is chosen but so as not to extend beyond his term of office as a member of the Council, and, subject to his being a member of the Council at the relevant time, he shall be eligible for re-election:

Provided that the President of the Council at the time of the expiration of its duration shall continue to hold office until a new Council is constituted in accordance with the provisions of this Act.

13. Resignation of membership and casual vacancies.—(1) Any member of the Council may at any time resign his membership by writing under his hand, addressed to the President, and the seat of such member shall become vacant when such resignation is notified in the Official Gazette.

(2) A member of the Council shall be deemed to have vacated his seat if he is declared by the Council to have been absent without sufficient excuse from three consecutive meetings of the Council, or if his name is, for any cause, removed from the Register under the provisions of Section 20.

(3) A casual vacancy in the Council shall be filled by fresh election from the constituency concerned or by nomination by the Central Government, as the case may be, and the person elected or nominated to fill the vacancy shall hold office until the dissolution of the Council.

Provided that no election shall be held to fill a casual vacancy occurring within six months prior to the date of the expiration of the duration of the Council, but such a vacancy may be filled by nomination by the Central Government after consultation with the President of the Council.

(4) No act done by the Council shall be called in question on the ground merely of the existence of any vacancy in, or defect in the constitution of, the Council.

14. Duration and dissolution of Council.—(1) The duration of any Council constituted under this Act shall be three years from the date of its first meeting.

(2) Notwithstanding the expiration of the duration of a Council (hereinafter referred to as 'the former Council'), the former Council shall continue to exercise its functions under this Act until a new Council is constituted in accordance with the provisions of this Act, and on such constitution, the former Council shall stand dissolved.

15. Functions of the Council.—(1) The duty of carrying out the provisions of this Act shall be vested in the Council.

(2) In particular, and without prejudice to the generality of the foregoing power, the duties of the Council shall include—

- (a) the examination of candidates for enrolment and the prescribing of fees therefor;
- (b) the registration and training of students;
- (c) the prescribing of qualifications for entry in the Register;
- (d) the recognition of foreign qualifications and training for purposes of enrolment;
- (e) the granting or refusal of certificates of practice under this Act;
- (f) the maintenance and publication of a Register of persons qualified to practise as cost accountants;
- (g) the levy and collection of fees from members, examinees and others persons;
- (h) the removal of names from the Register and restoration to the Register of names which have been removed;
- (i) the regulation and maintenance of the status and standard of professional qualifications of members of the Institute;
- (j) the carrying out, by financial assistance to persons other than members of the Council or in any other manner, of research in accountancy;
- (k) the maintenance of libraries and publication of books and periodicals relating to cost accountancy and allied subjects; and
- (l) the exercise of disciplinary powers conferred by this Act.

16. Staff, remuneration and allowances.—(1) For the efficient performance of its duties, the Council may—

(a) appoint a Secretary who may also, if so decided by the Council, act as Treasurer;

(b) appoint such other persons on its staff as it deems necessary;

- (c) require and take from the Secretary or from any other employee of the Council such security for the due performance of his duties as the Council considers necessary;
- (d) fix the salaries, fees, allowances and other conditions of service of the Secretary and other employees of the Council;
- (e) with the previous sanction of the Central Government fix the allowances of the President, Vice-President and other members of the Council and its Committees.

(2) The Secretary of the Council shall be entitled to participate in the meetings of the Council and the Committees thereof but shall not be entitled to vote thereat.

17. Committees of the Council.—(1) The Council shall constitute from amongst its members the following Standing Committees, namely:—

- (i) an Executive Committee;
- (ii) a Disciplinary Committee; and
- (iii) an Examination Committee.

(2) The Council may also form a Training and Educational Facilities Committee and such other Committees from amongst its members as it deems necessary for the purpose of carrying out the provisions of this Act.

(3) The Executive Committee shall consist of the President, and the Vice-President, ex officio, and three other members of the Council elected by the Council.

(4) The Disciplinary Committee shall consist of the President, ex officio, one member to be nominated by the Central Government from amongst the members nominated to the Council by that Government and one member to be elected by the Council.

(5) The Examination Committee shall consist of the President or the Vice-President, ex officio, as the Council may decide, and two other members of the Council elected by the Council.

(6) Notwithstanding anything contained in this section, any Committee formed under sub-section (2), may, with the sanction of the Council, co-opt such other members of the Institute not exceeding two-thirds of the total membership of the Committee as the Committee thinks fit, and any member so co-opted shall be entitled to exercise all the rights of a member of the Committee.

(7) The President shall be the Chairman of every Committee of which he is a member, and in his absence, the Vice-President, if he is a member of the Committee, shall be the Chairman.

(8) The Standing Committees and other Committees formed under this section shall exercise such functions and be subject to such conditions in the exercise thereof as may be prescribed.

18. Finances of the Council.—(1) There shall be established a fund under the management and control of the Council into which shall be paid all moneys received by the Council and out of which shall be met all expenses and liabilities properly incurred by the Council.

(2) The Council may invest any money for the time being standing to the credit of the fund in any Government security or in any other security approved by the Central Government.

(3) The Council shall keep proper accounts of the funds distinguishing capital from revenue.

(4) The annual accounts of the Council shall be subject to audit by a chartered accountant in practice within the meaning of the Chartered Accountants Act, 1949, to be appointed annually by the Council:

Provided that no member of the Council who is a chartered accountant or a person who is in partnership with such member shall be eligible for appointment as an auditor under this sub-section.

(5) As soon as may be practicable at the end of each year, but not later than the 30th day of September of the year next following, the Council shall cause to be published in the Gazette of India a copy of the audited accounts and the Report of the Council for that year and copies of the said accounts and Report shall be forwarded to the Central Government and to all the members of the Institute.

(6) The Council may borrow from a scheduled bank as defined in the Reserve Bank of India Act, 1934, or from the Central Government—

- (a) any money required for meeting its liabilities on capital account on the security of the fund or on the security of any other assets for the time being belonging to it; or
- (b) for the purpose of meeting current liabilities pending the receipt of income by way of temporary loan or overdraft.

CHAPTER IV REGISTER OF MEMBERS

19. Register.—(1) The Council shall maintain in the prescribed manner a Register of the members of the Institute.

(2) The Register shall include the following particulars about every member of the Institute, namely,—

- (a) his full name, date of birth, domicile, residential and professional addresses;
- (b) the date on which his name is entered in the Register;
- (c) his qualifications;
- (d) whether he holds a certificate of practice; and
- (e) any other particulars which may be prescribed.

(3) The Council shall cause to be published in such manner as may be prescribed a list of members of the Institute as on the 1st day of April of each year, and shall, if requested to do so by any such member, send him a copy of such list.

(4) Every member of the Institute shall, on his name being entered in the Register, pay such annual membership fee differing in amount according as he is an associate or a fellow as may be prescribed.

20. Removal from the Register.—(1) The Council may remove from the Register the name of any member of the Institute,—

- (a) who is dead; or
- (b) from whom a request has been received to that effect; or
- (c) who has not paid any prescribed fee required to be paid by him; or
- (d) who is found to have been subject at the time when his name was entered in the Register, or who at any time thereafter has become subject to any of the disabilities mentioned in Section 8, or who for any other reason has ceased to be entitled to have his name borne on the Register.

(2) The Council shall remove from the Register the name of any member in respect of whom an order has been passed under this Act removing him from membership of the Institute.

CHAPTER V MISCONDUCT

21. Procedure in inquiries relating to misconduct of members of Institute.—

(1) Where on receipt of information by, or a complaint made to, it, the Council is 'prima facie' of opinion that any member of the Institute has been guilty of any professional or other misconduct, the Council shall refer the case to the Disciplinary Committee constituted under Section 17, and the Disciplinary Committee shall thereupon hold such inquiry and in such manner as may be prescribed and shall report the result of its inquiry to the Council.

(2) If on receipt of such report the Council finds that the member of the Institute is not guilty of any professional or other misconduct, it shall record its finding accordingly and direct that the proceedings shall be filed, or the complaint shall be dismissed, as the case may be.

(3) If on receipt of such report the Council finds that the member of the Institute is guilty of any professional or other misconduct, it shall record a finding accordingly, and shall proceed in the manner laid down in the succeeding sub-sections.

(4) Where the finding is that a member of the Institute has been guilty of a professional misconduct specified in the first Schedule, the Council shall afford to the member an opportunity of being heard before orders are passed against him on the case, and may thereafter make any of the following orders, namely:—

(a) reprimand the member;

(b) remove the name of the member from the Register for such period, not exceeding five years, as the Council thinks fit:

Provided that where the Council is of opinion that the case is one in which the name of the member ought to be removed from the Register for a period exceeding five years or permanently, it shall not make any order referred to in clause (a) or clause (b), but shall forward the case to the High Court with its recommendations thereon.

(5) Where the misconduct in respect of which the Council has found any member of the Institute guilty is a misconduct other than any such misconduct as is referred to in sub-section (4), it shall forward the case to the High Court with its recommendations thereon.

(6) On receipt of any case under sub-section (4) or sub-section (5), the High Court shall fix a date for the hearing of the case and shall cause notice of the date so fixed to be given to the member of the Institute concerned, the Council and to the Central Government, and shall afford such member, the Council and the Central Government an opportunity of being heard and may thereafter make any of the following orders, namely:—

(a) direct that the proceedings be filed, or dismiss the complaint, as the case may be;

(b) reprimand the member;

(c) remove him from membership of the Institute either permanently or for such period as the High Court thinks fit;

(d) refer the case to the Council for further inquiry and report.

(7) Where it appears to the Court that the transfer of any case pending before it to another High Court, will promote the ends of justice or tend to the general convenience of the parties, it may so transfer the case, subject to such conditions, if any, as it thinks fit to impose, and the High Court to which such case is transferred shall deal with it as if the case had been forwarded to it by the Council.

Explanation I.—In this section "High Court"* means the highest Civil Court of appeal, not including the Supreme Court, exercising jurisdiction in the area in

which the person whose conduct is being inquired into carries on business, or has his principal place of business at the commencement of the inquiry:

Provided that where the cases relating to two or more members of the Institute have to be forwarded by the Council to different High Courts, the Central Government shall, having regard to the ends of justice and the general convenience of the parties, determine which of the High Courts to the exclusion of others shall hear the cases against all the members.

[*] The following are such Courts functioning for areas mentioned against each of them:—

- (1) Allahabad High Court—For the State of Uttar Pradesh.
- (2) Andhra Pradesh High Court—For the State of Andhra Pradesh.
- (3) Assam and Nagaland High Court—For the States of Assam and Nagaland.
- (4) Bombay High Court—For State of Maharashtra and Union Territory of Dadra and Nagar Haveli.
- (5) Calcutta High Court—For the State of West Bengal and the Union Territory of Andaman and Nicobar Islands.
- (6) Delhi High Court—For the Union Territories of Delhi and Himachal Pradesh.
- (7) Gujarat High Court—For the State of Gujarat.
- (8) Jammu and Kashmir High Court—For the State of Jammu and Kashmir.
- (9) Kerala High Court—For the State of Kerala and Union Territory of Laccadive, Minicoy and Amindivi Islands.
- (10) Madhya Pradesh High Court—For the State of Madhya Pradesh.
- (11) Madras High Court—For the State of Tamil Nadu and Union Territory of Pondicherry.
- (12) Mysore High Court—For the State of Mysore.
- (13) Orissa High Court—For the State of Orissa.
- (14) Patna High Court—For the State of Bihar.
- (15) Punjab and Haryana High Court—For the States of Punjab and Haryana and the Union Territory of Chandigarh.
- (16) Rajasthan High Court—For the State of Rajasthan.

Explanation II.—For the purposes of this section “member of the Institute” includes a person who was a member of the Institute on the date of the alleged misconduct although he has ceased to be a member of the Institute at the time of the inquiry.

(8) For the purposes of any inquiry under this section the Council and the Disciplinary Committee shall have the same powers as are vested in a civil Court under the Code of Civil Procedure, 1908, in respect of the following matters:—

- (a) summoning and enforcing the attendance of any person and examining him on oath;
- (b) the discovery and production of any document; and
- (c) receiving evidence on affidavits.

Note.—This section corresponds S. 21 of the Chartered Accountants Act, 1949. Cases decided under that section can be usefully referred to, for the purposes of this section. See Notes under S. 21, Chartered Accountants Act, 1949.

22. Misconduct defined.—For the purposes of this Act, the expression “professional misconduct” shall be deemed to include any act or omission specified in any of the Schedules, but nothing in this section shall be construed to limit

Section 22 — Note 1

Cases under Chartered Accountants Act (1949), Section 22.

duct of any member of the institute under any other circumstances. (1952-53) 22 Com Cas 130 (134) (DB) (Bom) ** AIR 1953 Mad 310 (311, 312) = (1952) 2 Mad LJ 560 (DB).

(1) The schedule under Section 22 is merely illustrative and not exhaustive and nothing in Section 22 should be construed to limit or abridge the power of the Council to enquire into the con-

(2) The acts and omissions specified in the schedule all constitute conduct which will render a person unfit to be a member of the institute. But the use

or arbitrage in any way the power conferred or duty cast on the Council under sub-section (1) of Section 21 to inquire into the conduct of any member of the Institute under any other circumstances.

CHAPTER VI REGIONAL COUNCILS

23. Constitution and functions of Regional Councils.—(1) For the purpose of advising and assisting it on matters concerning its functions, the Council may constitute such Regional Councils as and when it deems fit for one or more of the regional constituencies* that may be specified by the Central Government under clause (a) of sub-section (2) of Section 9.

(2) The Regional Councils shall be constituted in such manner and exercise such functions as may be prescribed.

[*] For specification of such constituencies, see Gaz. of Ind., Ext., 1959, Pt. II, S. 3 (i), p. 259.

CHAPTER VII PENALTIES

24. Penalty for falsely claiming to be a member, etc.—Any person who,—

(i) not being a member of the Institute—

(a) represents that he is a member of the Institute; or

(b) uses the designation cost accountant; or

(ii) being a member of the Institute, but not having a certificate of practice, represents that he is in practice or practises as a cost accountant;

shall be punishable on first conviction with fine which may extend to one thousand rupees and on any subsequent conviction with imprisonment which may extend to six months, or with fine which may extend to five thousand rupees, or with both.

25. Penalty for using name of the Council, awarding degrees of cost accountancy, etc.—(1) Save as otherwise provided in this Act, no person shall,—

(i) use a name or a common seal which is identical with the name or the common seal of the Institute or so nearly resembles it as to deceive or as is likely to deceive the public;

(ii) award any degree, diploma or certificate or bestow any designation which indicates or purports to indicate the position or attainment of any qualification or competence in cost accountancy similar to that of a member of the Institute; or

(iii) seek to regulate in any manner whatsoever the profession of cost and works accountants.

(2) Any person contravening the provisions of sub-section (1) shall, without prejudice to any other proceedings which may be taken against him, be punishable on first conviction with fine which may extend to one thousand rupees, and on any subsequent conviction with imprisonment which may extend to six months, or with fine which may extend to five thousand rupees, or with both.

Section 22 — Note 1 (contd.)
of the word 'include' shows that there may be other such acts and omissions. AIR 1956 Cal 414 (424) = 60 Cal WN 124 (DB).

(3) Under Section 22 there is a residual jurisdiction in respect of matters other than those specified in the schedule including therein whatever might be added under clause V of the schedule. AIR

1953 Mad 310 (311, 312) = (1952) 2 Mad LJ 560 (DB).

(4) Even when the conduct may not fall expressly within the inclusive definition contained in the earlier part of this section, the larger powers and jurisdiction conferred by Section 21 (1) can be invoked by the Council to hold enquiries into the conduct of the Accountant. AIR 1958 SC 72 (77) = 1958 SCR 371.

(3) Nothing contained in this section shall apply to any University established by law or to any body affiliated to the Institute.

(4) If the Central Government is satisfied that any diploma or certificate or any designation granted or conferred by any person other than the Institute, which purports to be a qualification in cost accountancy but which, in the opinion of the Central Government, falls short of the standard of qualifications prescribed for cost accountants and does not in fact indicate or purport to indicate the position or attainment of any qualification or competence in cost accountancy similar to that of a member of the Institute, it may, by notification in the Official Gazette and subject to such conditions as it may think fit to impose, declare that this section shall not apply to such diploma or certificate or designation.

26. Companies not to engage in cost accountancy.—(1) No company, whether incorporated in India or elsewhere, shall practise as cost accountants.

(2) Any contravention of the provisions of sub-section (1) shall be punishable on first conviction with fine which may extend to one thousand rupees, and on any subsequent conviction to five thousand rupees.

27. Unqualified persons not to sign.—(1) No person other than a member of the Institute shall sign any document on behalf of a cost accountant in practice or a firm of such cost accountants in his or its professional capacity.

(2) Any person contravening the provision of sub-section (1) shall, without prejudice to any other proceedings which may be taken against him, be punishable with fine which may extend on first conviction to one thousand rupees, and on any subsequent conviction with imprisonment which may extend to six months, or with fine which may extend to five thousand rupees or with both.

28. Offences by companies.—(1) If the person committing an offence under this Act is a company, the company as well as every person in charge of, and responsible to, the company for the conduct of its business at the time of the commission of the offence shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any such person liable to any punishment if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or that the commission of the offence is attributable to any neglect on the part of any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation.—For the purposes of this section,—

(a) “company” with respect to an offence under Section 24, Section 25 or Section 27, means any body corporate and includes a firm or other association of individuals; and with respect to an offence under Section 26 means a body corporate; and

(b) “director”, in relation to a firm, means a partner in the firm.

29. Sanction to prosecute.—No person shall be prosecuted under this Act except on a complaint made by or under the order of the Council or of the Central Government.

CHAPTER VIII

DISSOLUTION OF THE INSTITUTE OF COST AND WORKS
ACCOUNTANTS REGISTERED UNDER THE
COMPANIES ACT, 1956 (1 OF 1956)

30. Dissolution of the Institute of Cost and Works Accountants registered under the Companies Act, 1956.—On the commencement* of this Act,—

- (a) the company known as the Institute of Cost and Works Accountants registered under the Companies Act, 1956, shall be dissolved and thereafter no person shall make, assert or take any claims, demands or proceedings against the dissolved company or against any officer thereof in his capacity as such officer except in so far as may be necessary, for enforcing the provisions of this Act;
- (b) the right of every member to or in respect of the dissolved company shall be extinguished, and thereafter no member of that company shall make, assert or take any claims or demands or proceedings in respect of that company except as provided in this Act.

[°] That is 28-5-1959—See S. 1 (3).

31. Transfer of assets and liabilities of the dissolved company to the Institute.—(1) On the commencement* of this Act, there shall be transferred to and vested in the Institute all the assets and liabilities of the dissolved company.

(2) The assets of the dissolved company shall be deemed to include all rights and powers, and all property, whether movable or immovable of the company, including, in particular, cash balances, reserve funds, investments, deposits and all other interests and rights in or arising out of such property as may be in the possession of the dissolved company and all books of accounts or documents of the dissolved company; and the liabilities shall be deemed to include all debts, liabilities and obligations of whatever kind then existing of that company.

(3) All contracts, debts, bonds, agreements and other instruments of whatever nature to which the dissolved company is a party, subsisting or having effect immediately before the commencement of this Act, shall be of as full force and effect against or in favour of the Institute as the case may be, and may be enforced as fully and effectively as if instead of the dissolved company, the Institute had been a party thereto.

(4) If, on the commencement* of this Act, any suit, appeal or other legal proceeding of whatever nature by or against the dissolved company is pending, the same shall not abate, be discontinued or be in any way prejudicially affected by reason of the transfer to the Institute of the assets and liabilities of the dissolved company or of anything contained in this Act, but the suit, appeal or other proceeding may be continued, prosecuted and enforced by or against the Institute, in the same manner and to the same extent as it would or may be continued, prosecuted and enforced by or against the dissolved company if this Act had not been passed.

[°] That is 28-5-1959—See Section 1 (3).

32. Provisions respecting employees of the dissolved company.—(1) Every person employed in the dissolved company prior to the 1st day of September, 1958, and still in its employment immediately before the commencement of this Act shall, as from such commencement, become an employee of the Institute, shall hold his office or service therein by the same tenure and upon the same terms and conditions and with the same rights and privileges as to pension and gratuity as he would have held the same under the dissolved company if this Act had not been passed, and shall continue to do so unless and until his employment in the Institute is terminated or until his remuneration, terms and conditions of employment are duly altered by the Institute.

(2) Notwithstanding anything contained in the Industrial Disputes Act, 1947, or in any other law for the time being in force, the transfer of the services of any

employee of the dissolved company to the Institute shall not entitle any such employee to any compensation under that Act or other law, and no such claim shall be entertained by any Court, Tribunal or other authority.

CHAPTER IX MISCELLANEOUS

33. Appeals.—(1) Any member of the Institute aggrieved by any order of the Council imposing on him any of the penalties referred to in clause (a) or clause (b) of sub-section (4) of Section 21, may, within thirty days of the date on which the order is communicated to him, prefer an appeal to the High Court:

Provided that the High Court may entertain any such appeal after the expiry of the said period of thirty days, if it is satisfied that the member was prevented by sufficient cause from filing the appeal in time.

(2) The High Court may, on its own motion or otherwise, after calling for the records of any case, revise any order made by the Council under sub-section (2) or sub-section (4) of Section 21 and may—

- (a) confirm, modify or set aside the order;
- (b) impose any penalty or set aside, reduce, confirm or enhance the penalty imposed by the order;
- (c) remit the case to the Council for such further enquiry as the High Court considers proper in the circumstances of the case;
- (d) pass such other order as the High Court thinks fit:

Provided that no order of the Council shall be modified or set aside unless the Council has been given an opportunity of being heard and no order imposing or enhancing a penalty shall be passed unless the person concerned has been given an opportunity of being heard.

Explanation.—In this section “High Court” and “member of the Institute” have the same meanings as in Section 21.

34. Alteration in the Register and cancellation of certificate.—(1) Where an order is made under this Act reprimanding a member, a record of the punishment shall be entered against his name in the Register.

(2) Where the name of any member is removed, the certificate of practice granted to him under this Act shall be recalled and cancelled.

35. Directions of the Central Government.—(1) The Central Government may from time to time issue such directions to the Council as in the opinion of the Central Government are conducive to the fulfilment of the objects of this Act and in the discharge of its functions, the Council shall be bound to carry out any such directions.

(2) Directions issued under sub-section (1) may include directions to the Council to make any regulations or to amend or revoke any regulations already made.

(3) If, in the opinion of the Central Government the Council has persistently made default in giving effect to the directions issued under this section, the Central Government may, after giving an opportunity to the Council to state its case, by order, dissolve the Council, whereafter a new Council shall be constituted in accordance with the provisions of this Act with effect from such date as may be specified by the Central Government.

(4) Where the Central Government passes an order under sub-section (3) dissolving the Council, it may, pending the constitution of a new Council in accordance with the provisions of this Act, authorise any person or body of persons to take over the management of the affairs of the Institute and to exercise such functions as may be specified in this behalf by the Central Government.

36. Protection of action taken in good faith.—No suit, prosecution or other legal proceeding shall lie against the Central Government or the Council in respect of anything which is in good faith done or intended to be done in pursuance of this Act or of any regulations or orders made thereunder.

37. Maintenance of branch offices.—(1) Where a cost accountant in practice or a firm of such cost accountants has more than one office in India, each one of such offices shall be in the separate charge of a member of the Institute :

Provided that the Council may in suitable cases exempt any cost accountant in practice or firm of such cost accountants from the operation of this sub-section.

(2) Every cost accountant in practice or firm of such cost accountants maintaining more than one office shall send to the Council a list of offices and the persons in charge thereof and shall keep the Council informed of any changes in relation thereto.

38. Reciprocity.—(1) Where any country, specified by the Central Government in this behalf by notification in the Official Gazette, prevents persons of Indian domicile from becoming members of any institution similar to the Institute established under this Act or from practising the profession of costs accountancy or subject them to unfair discrimination in that country, no subject of any such country shall be entitled to become a member of the Institute or practise the profession of cost accountancy, in India.

(2) Subject to the provisions of sub-section (1), the Council may prescribe the conditions, if any, subject to which foreign qualifications relating to cost accountancy shall be recognised for the purposes of entry in the Register.

39. Power to make regulations.—(1) The Council may, by notification in the Gazette of India, make regulations for the purpose of carrying out the objects of this Act, and a copy of such regulations shall be sent to each member of the Institute.

(2) In particular, and without prejudice to the generality of the foregoing power, such regulations may provide for all or any of the following matters, namely :—

- (a) the standard and conduct of examinations under this Act;
- (b) the qualifications for the entry of the name of any person in the Register as a member of the Institute;
- (c) the qualification required for the purposes of sub-section (4) of Section 5;
- (d) the conditions under which any examination or training may be treated as equivalent to the examination or training prescribed for members of the Institute;
- (e) the conditions under which any foreign qualification may be recognised;
- (f) the manner in which and the conditions subject to which applications for entry in the Register may be made;
- (g) the fees payable for membership of the Institute and the annual fees payable by associates and fellows of the Institute in respect of their certificates;
- (h) the manner in which elections to the Council and the Regional Councils may be held;
- (i) the particulars to be entered in the Register;
- (j) the functions of Regional Councils;
- (k) the regulation and maintenance of the status and standard of professional qualifications of members of the Institute;
- (l) the carrying out of research in accountancy;

- (m) the maintenance of libraries and publication of books and periodicals relating to cost accountancy and allied subjects;
- (n) the management of the property of the Council and the maintenance and audit of its accounts;
- (o) the summoning and holding of meetings of the Council and committees thereof, the times and places of such meetings, the procedure to be followed thereat and the number of members necessary to form a quorum;
- (p) the manner in which the annual list of members of the Institute shall be published;
- (q) the powers, duties and functions of the President and the Vice-President of the Council;
- (r) the functions of the Standing and other committees and the conditions subject to which such functions shall be discharged;
- (s) the terms of office, and the powers, duties and functions of the Secretary and other employees of the Council;
- (t) the exercise of disciplinary powers conferred by this Act;
- (u) the terms and conditions of service of persons who have become employees of the Institute under Section 32 of this Act;
- (v) the registration and training of students and the fees to be charged therefor; and
- (w) any other matter which is required to be, or may be, prescribed under this Act.

(3) All regulations made by the Council under this Act shall be subject to the condition of previous publication and to the approval of the Central Government.

(4) Notwithstanding anything contained in sub-sections (1) and (2), the Central Government may frame the first regulations* for the purposes mentioned in this section, and such regulations shall be deemed to have been made by the Council, and shall remain in force until they are amended, altered or revoked by the Council.

[*] For the Cost and Works Accountants Regulations, 1959, see G. S. R. 611 published in Gaz. of India, 1959, Extra., Pt. II, S. 3 (i), pages 259-305.

THE FIRST SCHEDULE

(See Sections 21 (4) and 22)

PART I

Professional misconduct in relation to cost accountants in practice

A cost accountant in practice shall be deemed to be guilty of professional misconduct, if he—

- (1) allows any person to practise in his name as a cost accountant unless such person is also a cost accountant in practice and is in partnership with or employed by himself;
- (2) pays or allows or agrees to pay or allow, directly or indirectly, any share, commission or brokerage in the fees or profits of his professional work, to any person other than a member of the Institute or a partner or a retired partner or the legal representative of a deceased partner;

Explanation.—In this item, "partner" includes a person residing outside India with whom a cost accountant in practice has entered into partnership which is not in contravention of item (4) of this Part.

- (3) accepts or agrees to accept any part of the profits of the professional work of a lawyer, auctioneer, broker or other agent who is not a member of the Institute;

- (4) enters into partnership with any person other than a cost accountant in practice or a person resident without India who but for his residence abroad would be entitled to be registered as a member of the Institute under clause (iv) of sub-section (1) of Section 4 or whose qualifications are recognised by the Central Government or the Council for the purpose of permitting such partnerships, provided that the cost accountant shares in the fees or profits of the professional work of the partnership both within and without India;
 - (5) secures, either through the services of a person not qualified to be his partner or by means which are not open to a cost accountant, any professional work;
 - (6) solicits clients or professional work either directly or indirectly, by circular, advertisement, personal communication or interview or by any other means;
 - (7) advertises his professional attainments or services, or uses any designation or expression other than cost accountant on professional documents, visiting cards, letter-heads or sign boards, unless it be a degree of a University established by law in India or recognised by the Central Government or a title indicating membership of the Institute of Cost and Works Accountants of India or of any other institution that has been recognised by the Central Government or may be recognised by the Council;
 - (8) accepts a position as cost accountant previously held by another cost accountant in practice without first communicating with him in writing;
 - (9) charges or offers to charge, accepts or offers to accept in respect of any professional employment fees which are based on a percentage of profits or which are contingent upon the findings or results of such employment, except in cases which are permitted under any regulations made under this Act;
 - (10) engages in any business or occupation other than the profession of cost accountant unless permitted by the Council so to engage;
- Provided that nothing contained herein shall disentitle a cost accountant from being a director of a company unless he or any of his partners is interested in such company as accountant;
- (11) accepts a position as cost accountant previously held by some other cost accountant in practice in such conditions as to constitute under-cutting;
 - (12) allows a person not being a member of the Institute in practice or a member not being his partner to sign on his behalf or on behalf of his firm, any cost or pricing statements or any other statements related thereto.

PART II

Professional misconduct in relation to members of the Institute in service

A member of the Institute (other than a member in practice) shall be deemed to be guilty of professional misconduct, if he being an employee of any company, firm or person—

- (1) pays or allows or agrees to pay directly or indirectly, to any person any share in the emoluments of the employment undertaken by the member;
- (2) accepts or agrees to accept any part of fees, profits or gains from a lawyer, a cost accountant or broker engaged by such company, firm or person or customer of such company, firm or person by way of commission or gratification;
- (3) discloses confidential information acquired in the course of his employment otherwise than as required by any law for the time being in force or as permitted by his employer.

PART III

Professional misconduct in relation to members of the Institute generally

A member of the Institute whether in practice or not shall be deemed to be guilty of professional misconduct, if he—

- (1) includes in any statement, return or form to be submitted to the Council any particulars knowing them to be false;

- (2) not being a fellow styles himself as a fellow;
- (3) does not supply the information called for or does not comply with the requirements asked for by the Council or any of its Committees,

THE SECOND SCHEDULE

(See Sections 21 (5) and 22)

PART I

Professional misconduct in relation to cost accountants in practice requiring action by a High Court

A cost accountant in practice shall be deemed to be guilty of professional misconduct, if he—

- (1) discloses information acquired in the course of his professional engagement to any person other than the client so engaging him without the consent of such client, or otherwise than as required by any law for the time being in force;
- (2) certifies or submits in his name or in the name of his firm a report of an examination of cost accounting and related statements, unless the examination of such statements has been made by him or by a partner or an employee in his firm or by another cost accountant in practice;
- (3) permits his name or the name of his firm to be used in connection with an estimate of cost or earnings contingent upon future transactions in a manner which may lead to the belief that he vouches for the accuracy of the forecast;
- (4) expresses his opinion on cost or pricing statements of any business or any enterprise in which he, his firm or a partner in his firm has a substantial interest, unless he discloses the interest also in his report;
- (5) fails to disclose in a cost or pricing statement a material fact known to him, which is not disclosed in a cost or pricing statement, but disclosure of which is necessary to make such statement not misleading;
- (6) fails to report a material mis-statement known to him to appear in a cost or pricing statement with which he is concerned in a professional capacity;
- (7) is grossly negligent in the conduct of his professional duties;
- (8) fails to obtain sufficient information to warrant the expression of an opinion or makes exceptions which are sufficiently material to negate the expression of an opinion;
- (9) fails to invite attention to any material departure from the generally accepted procedure of costing and pricing applicable to the circumstances;
- (10) fails to keep moneys of his client in a separate banking account or to use such moneys for purposes for which they are intended.

PART II

Professional misconduct in relation to members of the Institute generally requiring action by a High Court.

A member of the Institute, whether in practice or not, shall be deemed to be guilty of professional misconduct, if he—

- (1) contravenes any of the provisions of this Act or the regulations made thereunder;
 - (2) is guilty of such other act or omission as may be specified by the Council in this behalf, by notification in the Gazette of India.
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[THE] COTTON CLOTH ACT, 1918
(ACT XXIII OF 1918)

[The text of the Act printed here is as on 31-3-1970.]

CONTENTS

SECTIONS

- | | |
|---|--|
| <ol style="list-style-type: none"> 1. Short title. 2. Definitions. 3. Power to appoint Controllers 4. Powers of the Controller. 5. Appointment of Advisory Committees. 6. Manufacture and delivery of standard cloth. 7. Delegation of powers. | <ol style="list-style-type: none"> 8. Penalty for disobedience of orders under S. 4. 9. Power to fix prices of standard cloth. 10. Limitation of sale of standard cloth. 11. Grant of licences for sale of standard cloth. 12. Rule-making power. 13. Protection for acts done under the Act. 14. Powers of Act to be cumulative. |
|---|--|

STATEMENT OF OBJECTS AND REASONS

"Owing to the great rise in the price of cotton piece-goods caused by the war, considerable distress has been caused to the poorer classes. It is accordingly proposed to take power to appoint one or more Controllers, with whom will be associated Advisory Committees of persons having expert knowledge of the trade. The Controllers will have authority to require the mills in India to manufacture certain standard varieties of cloth which are in common use

amongst the poorer classes. The standard cloth will be manufactured at controlled prices, which will be so fixed as to allow the mills a reasonable margin of profit; and in order to ensure that the benefit of these prices reaches the general public, the sale of the cloth will be effected under licences granted and at prices fixed by the Local Governments."

—Gazette of India, 1918, Part V, p. 58.

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION

—Adapted by A. O., 1937; A. L. O., 1950; 3 A. L. O., 1956.

[THE] COTTON CLOTH ACT, 1918
(ACT XXIII OF 1918)*

[26th September, 1918.]

An Act to take powers to provide for the cheap supply of cotton cloth to the poorer classes of the community.

WHEREAS it is expedient to take powers for the purpose of encouraging or maintaining the supply, at reasonable rates, to the poorer classes of the community, of cotton cloth manufactured in this country; It is hereby enacted as follows :—

[*] For Report of Select Committee, see Gazette of India, 1918, Pt. V, p. 77; and for Proceedings in Council, see *ibid.*, 1918, Pt. VI, pp. 754, 953, 1000 and 1147.

For Statement of Objects and Reasons, see Gaz. of Ind., 1918, Pt. V, p. 58.

The Act has been declared to be in force in the Khondmals District by the Khondmal Laws Regulation, 1936 (Reg. 4 of 1936), S. 3 and Schedule and in Angul District by the Angul Laws, 1936 (Reg. 5 of 1936), S. 3 and Sch. Both these districts form part of the State of Orissa now. Reg. 5 of 1936 has been repealed by Orissa Act 19 of 1967, S. 2 (15-9-1967).

1. Short title.—This Act may be called THE COTTON CLOTH ACT, 1918.

*[It extends to the whole of India except {the territories which immediately before 1st November, 1956, were comprised in Part B States}.]

[*] The words "It extends to the whole of India except Part B States" were added to section 1 by A. L. O., 1950.

[†] Substituted for "Part B States", by 3 A. L. O., 1956. Immediately before the 1st November, 1956, the following were the Part B States in India: Hyderabad, Jammu and Kashmir, Madhya Bharat, Mysore, Pepsu, Rajasthan, Saurashtra and Travancore-Cochin. Distinction between Part A, Part B and Part C States is no longer obtaining. Of these Part B States, Jammu and Kashmir, Mysore, Rajasthan and Travancore-Cochin (now called Kerala) are full-fledged States now, while Hyderabad, Madhya Bharat, Pepsu and Saurashtra now form parts of the States of Andhra Pradesh, Madhya Pradesh, Punjab and Gujarat respectively.

2. Definitions.—In this Act, unless there is anything repugnant in the subject or context,—

- (a) "Controller" means a Controller appointed under this Act;
- (b) "cotton-cloth" means cotton cloth manufactured in this country; and
- (c) "standard cloth" means any kind of cotton cloth which a Controller may, from time to time, declare to be standard cloth.

Note.—Controller is appointed by the State Government by a notification under S. 3 of the Act. His powers are enumerated in S. 4.

3. Power to appoint Controllers.—The *[State Government] may by notification† in the **[Official Gazette], appoint one or more persons as ‡[it] may think fit to be Controllers for the purposes of this Act, and shall specify in any such notification the area in which any Controller so appointed shall exercise his powers.

[*] Substituted by A. O., 1937 and A. L. O., 1950 successively.

[**] Substituted for 'Gazette of India' by A. O., 1937.

[†] For a notification issued by the Governor-General in Council, see Gaz. of Ind., 1918, Pt. I, page 1558.

[‡] Substituted for "he", by A. O., 1937.

4. Powers of the Controller.—(1) Whenever it appears to a Controller that such a course is necessary or expedient for the purpose of encouraging or maintaining the supply of standard cloth, at reasonable rates to the poorer classes of the community, he may (subject to this Act and the rules made thereunder and to the control of the *[State Government]) make general or special orders regulating or giving directions within the area in which he is empowered, with respect to the manufacture, transport, distribution and sale or purchase of, or other dealings in cotton cloth.

(2) Without prejudice to the generality of the foregoing power, orders may be made by a Controller—

- (a) declaring and defining the classes of standard cloth;
- (b) prescribing distinctive indications which shall be woven into, impressed or otherwise displayed upon, different classes of standard cloth;
- (c) requiring any person, who ordinarily manufactures cotton cloth, to manufacture, or provide for the manufacture of, standard cloth in such quantity, of such quality and by such date as the Controller may direct; and
- (d) fixing the prices to be paid to the manufacturer for standard cloth or for any particular class of standard cloth, and providing for the payment thereof on delivery:

Provided that in fixing prices the Controller shall have regard to the cost of production and to the allowance of a reasonable profit, without necessarily taking into consideration the market-price, and if the Controller is satisfied that the manufacturer has incurred actual loss arising out of forward contracts entered into before the commencement of this Act, and that such loss is immediately attributable to an order under this Act, he may take such loss into account:

Provided further that the Controller may fix different prices in the case of different localities or, if special reasons exist, in respect of different manufacturers in the same locality.

[°] Substituted for 'Provincial Government' by A. L. O., 1950.

Note.—Contravention or non-compliance without reasonable cause of any of the orders made by the Controller under this section, is made punishable under Section 8.

5. Appointment of Advisory Committees.—Where a Controller is appointed in exercise of the power conferred by Section 3, the *[State Government] shall appoint a Committee consisting of such number of persons having knowledge of the cotton or cotton cloth trade as †[it] thinks fit to assist the Controller with their advice in the performance of his duties. Before a Controller issues any order declaring and defining the classes of standard cloth or fixing the prices to be paid to the manufacturer, he shall consult the Committee, and he may consult the Committee on any other matter connected with his duties :

Provided that, if the opinion of the majority of members of the Committee who are present at any meeting is adverse to the issue of any order, the Controller shall, if he does not accept the Committee's advice, refer the matter for the decision of the *[State Government].

[°] Substituted for 'Provincial Government' by A. L. O., 1950.

[†] Substituted for 'he' by A. O., 1937.

6. Manufacture and delivery of standard cloth.—Where, by an order made in the exercise of powers conferred by Section 4, the Controller has directed a manufacturer to manufacture, or provide for the manufacture of, standard cloth and has fixed the price therefor, the manufacturer shall deliver the same at such time and place and in such manner as the Controller may specify from time to time, and the Controller shall pay or cause to be paid to the manufacturer the said price, together with the freight, if any, actually paid by the manufacturer.

7. Delegation of powers.—Subject to the control of the *[State Government], a Controller may, from time to time by order in writing, delegate all or any of his powers subject to such conditions and restrictions as may be prescribed therein.

[°] Substituted for 'Provincial Government' by A. L. O., 1950.

8. Penalty for disobedience of orders under Section 4.—If any person acts in contravention of, or without reasonable cause, fails to comply with, the provisions of any order made under Section 4, or counterfeits upon any cloth a distinctive indication prescribed by the Controller, such person shall be punishable with imprisonment which may extend to six months, or with fine or with both.

9. Power to fix prices of standard cloth.—(1) The *[State Government] shall, if standard cloth is sold in the †[State] by order in writing which shall be notified in the ‡[Official Gazette], fix the price at which alone standard cloth or any class of standard cloth shall be sold to the public.

(2) Orders may be made fixing different prices for different localities or for different methods of sale.

(3) Every such order shall be published in such manner as the *[State Government] may consider to be best adapted for bringing the prices so fixed to the notice of the poorer classes.

[°] Substituted for 'Provincial Government' by A. L. O., 1950.

[†] Substituted for 'Province,' *ibid*.

[‡] Substituted for "Local Official Gazette" by A. O., 1937.

10. Limitation of sale of standard cloth.—(1) No person shall sell or keep, offer or expose for sale to the public standard cloth otherwise than at such price as may be fixed by the *[State Government] and in accordance with the terms and conditions of a licence issued in this behalf.

(2) If any person contravenes the provisions of sub-section (1), he shall be punishable with imprisonment which may extend to six months, or with fine or with both.

[°] Substituted for 'Provincial Government' by A. L. O., 1950.

11. Grant of licences for sale of standard cloth.—A licence for the sale of standard cloth shall be granted by such authority, in such form and subject to such conditions as the °[State Government] may prescribe by rules made under this Act.

[°] Substituted for 'Provincial Government' by A. L. O., 1950.

12. Rule-making power.—(1) The °[State Government] may make rules —

- (a) prescribing the powers and duties of the Controller,
- (b) prescribing the manner in which the Controller's orders shall be published or served, as the case may be, and
- (c) generally giving effect to the provisions of this Act.

(2) The °[State Government] shall, if standard cloth is sold in the °[State] make rules prescribing the authority by which, the form in which and the conditions under which, any licence or class of licences for the sale of standard cloth shall be granted.

(3) Rules made under this Act shall be published in †[° ° °] the ‡[Official Gazette], §[° ° °] and on such publication shall have effect as if enacted in this Act.

[°] Substituted for 'Provincial Government' and 'Province' by A. L. O., 1950.

[†] The words "the Gazette of India or" were repealed by A. O., 1937.

[‡] Substituted for 'Local Official Gazette' by A. O., 1937.

[§] The words "as the case may be" were repealed, *ibid*.

13. Protection for acts done under the Act.—No suit, prosecution or other legal proceeding shall lie against any person for anything which is in good faith done or intended to be done under this Act.

14. Powers of Act to be cumulative.—All powers given by this Act. shall be in addition to and not in derogation of any other powers conferred by or under any enactment, and all such powers may be exercised in the same manner and by the same authority as if this Act had not been made.

[THE] COTTON GINNING AND PRESSING FACTORIES ACT, 1925 (ACT XII OF 1925)

[The text of the Act printed here is as on 1-4-1970]

CONTENTS

SECTIONS

- | | |
|--|---|
| <p>1. Short title, extent and commencement.</p> <p>2. Definitions.</p> <p>3. Maintenance of registers.</p> <p>4. Marking of bales.</p> <p>5. Returns.</p> <p>5-A. Returns from cotton ginning factories.</p> <p>6. Scales and weights.</p> <p>7. Liability of lessee as owner.</p> | <p>8. Liability on transfer of ownership.</p> <p>9. Structural requirements for factories.</p> <p>10. Liability of officers of a company.</p> <p>11. Cognizance of offences.</p> <p>12. Power of the Central Government to make rules.</p> <p>13. Power of the State Government to make rules.</p> <p>14. Power to reject unmarked bales in fulfilment of contracts.</p> <p>15. Protection for acts done under Act.</p> |
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STATEMENT OF OBJECTS AND REASONS

"The Indian Cotton Committee which was appointed in 1917 in Chapter XVI of their Report recommended certain measures, including the licensing of cotton ginning and pressing factories, to prevent such malpractices as damping, mixing and adulteration, which are injurious to the quality and reputation of Indian cotton. The recommendations of the Committee, however, involved an excessive amount of official interference. The object of the present Bill is to put the trade in a position to protect itself by providing for the marking of bales and the record of ownership, and by

providing further that unmarked bales are not tenderable in fulfilment of a contract, if marked bales are demanded by the purchaser.

The Bill also makes provision for the maintenance of registers for statistical returns, for the use of correct scales and weights, and for the structural improvement of ginning and pressing factories. The Bill is based on the recommendations of the Indian Central Cotton Committee, and is supplementary to the Cotton Transport Act, 1923."

—Gazette of India, 1924, Part V, p. 115.

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION

- Amended by Acts 14 of 1939; 9 of 1942; 3 of 1951; Reg. 7 of 1963.
- Adapted by A. O., 1937; A. C. A. O., 1948; A. L. O., 1956; 3 A. L. O., 1956; Bom. A. L. O., 1957; Maha. A. L. O., 1961.
- Amended in
 - Maharashtra by Bom. Acts 4 of 1936; 20 of 1938; 53 of 1949; 8 of 1954; 27 of 1956; 20 of 1958; Maha. Act 1 of 1962.
 - Gujarat by Act 23 of 1968.
 - Hyderabad by Act 33 of 1954.
 - Madhya Pradesh by C. P. Acts 24 of 1936; 33 of 1939; 1 of 1942; 13 of 1947; 47 of 1947; M. P. Act 23 of 1958.
 - Mysore by Mys. Act 21 of 1961.
 - Rajasthan by Raj. Act 10 of 1957.
 - Tamil Nadu by T. N. Acts 25 of 1948; 10 of 1953; 23 of 1965.
 - Extended by Acts 59 of 1949; 30 of 1950.
 - " in Bombay by Bom. Act 4 of 1950; Maha. Act 1 of 1962.
 - " " Madhya Pradesh Act 12 of 1950.
 - " " Mysore by Act 21 of 1961.
 - " " Punjab by Punj. Act 5 of 1950.
 - Repealed in part by Bom. Act 53 of 1949; Mys. Act 21 of 1961; Maha. Act 1 of 1962.
 - Repealed in—
 - Pepsu by Punjab Act 18 of 1958;
 - Punjab by Punj. Act 2 of 1955, S. 23.
 - Uttar Pradesh by U. P. Act 9 of 1949, S. 2.

COGNATE ACTS AND PROVISIONS

- (1) Boilers Act, 5 of 1923.
- (2) Factories Act, 63 of 1948.
- (3) Punjab Cotton Ginning and Pressing Factories Act, 2 of 1955.
- (4) U. P. Cotton Ginning and Pressing Act, U. P. Act 9 of 1949.

[THE] COTTON GINNING AND PRESSING FACTORIES ACT, 1925
(ACT XII OF 1925)*

[18th March, 1925.]

An Act to provide for the better regulation of cotton ginning
and cotton pressing factories.

WHEREAS it is expedient to provide for the better regulation of cotton ginning and cotton pressing factories:

It is hereby enacted as follows:—

[*] For Statement of Objects and Reasons, see Gaz. of Ind., 1924, Pt. V, page 115. This Act has been extended to the new Provinces and Merged States by the Merged States (Laws) Act, 1949 (59 of 1949), S. 3 (1-1-1950) and to the Union Territories

of Manipur, and Tripura by the Union Territories (Laws) Act, 1950 (30 of 1950), S. 3 (16-4-1950). Vindhya Pradesh, to which also the said Act was extended by this Act, now forms part of Madhya Pradesh—See Act 37 of 1956, S. 9(1)(e).

It has been extended to the States merged in the State of—

- (i) Bombay: see Bom. Act 4 of 1950;
- (ii) Madhya Pradesh: see M. P. Act 12 of 1950;
- (iii) Punjab: see Punj. Act 5 of 1950.

It had been partially extended to Berar by the Berar Laws Act, 1941 (4 of 1941). It has now been extended to the Union Territory of Pondicherry by Reg. 7 of 1963 (w. e. f. 1-10-1963). It has been uniformly applied to the whole of Maharashtra by Maharashtra Act 1 of 1962 and Guj. Act 23 of 1968.

The Act is repealed in its application to the State of—

- (1) Punjab by Punj. Act 2 of 1955, S. 23, read with Punj. Act 18 of 1958, Ss. 4 and 6.
- (2) Uttar Pradesh by U. P. Act 9 of 1949, S. 2.

STATE AMENDMENTS

Gujarat:

Amendment in the long title and Preamble is the same as in Maharashtra — Bom. Act 20 of 1958, S. 2 (19-2-1958) and Act 11 of 1960, S. 87 and Guj. Act 23 of 1968, S. 2 (2) (9-12-1968).

Maharashtra:

In its application to the State of Maharashtra in the long title and Preamble, after the word “factories” insert the words and brackets: “(including the fixation of reasonable rates of charge for the ginning and pressing of Cotton in certain areas, and for matters connected therewith)”.—Bom. Act 20 of 1958, S. 2 (19-2-1958).

1. **Short title, extent and commencement.**—(1) This Act may be called THE COTTON GINNING AND PRESSING FACTORIES ACT, 1925.

•[(2) It extends to the whole of India †[except the State of Jammu and Kashmir].]

(3) It shall come into force on such †date as the §[Central Government] may, by notification in the §[Official Gazette], appoint.

[°] Substituted for the former sub-section (2), by A. L. O., 1950.

[†] Substituted for “except Part B States,” by the Part B States (Laws) Act, 1951 (3 of 1951), S. 3 and Sch. (1-4-1951).

[‡] The Act came into force on 8th August, 1925; see General Rules and Orders, Vol. V, page 625.

[§] Substituted for ‘Governor-General in Council’ and ‘Gazette of India’, respectively, by A. O., 1937.

STATE AMENDMENTS

Gujarat:

Same as in Maharashtra — C. A. 11 of 1960, S. 87 and Guj. Act 23 of 1968, Section 2 (2).

Maharashtra:

Sub-section (2) of S. 1 of the Cotton Ginning and Pressing Factories (Bombay Amendment) Act, 1936 (Bom. Act IV of 1936),^{°°} runs as follows:—

“(2) •[• • • •] The •[State Government] may by notification in the Official Gazette extend the provisions of this Act •[to any area of the State of Bombay†] with effect from such date as the •[State Government] may appoint in the said notification.”

[°°] The Act has now been extended to the whole State of Maharashtra by Maha. Act 1 of 1962 (1-7-1963).

[°] Omission and amendments by substitution are made by A. L. O., 1950.

[†] With effect from 1-5-1960, the State of Bombay has been divided into the States of Gujarat and Maharashtra — See Act 11 of 1960, Ss. 3, 4.

2. **Definitions.**—In this Act, unless there is anything repugnant in the subject or context,—

- (a) “bale” means any pressed package of cotton of whatever size or density;
- (b) “cotton” means ginned or unginned cotton, or cotton waste;
- (c) “cotton ginning factory” means any place where cotton is ginned or where cotton fibre is separated from cotton seed by any process whatever involving the use of steam, water or other mechanical power or of electrical power;
- (d) “cotton pressing factory” means any factory as defined in the *Indian Factories Act, 1911, in which cotton is pressed into bales;
- (e) “cotton waste” means droppings, strippings, fly and other waste products of a cotton mill or of a cotton ginning factory or of a cotton pressing factory, but does not include yarn waste;
- (f) “Indian Central Cotton Committee” means the Indian Central Cotton Committee constituted under the Indian Cotton Cess Act, 1923,† and includes any sub-committee appointed by it to perform any function of the Indian Central Cotton Committee under this Act; and
- (g) “occupier” includes a managing agent or other person authorized to represent the occupier;
- (h) “prescribed” means prescribed by or under rules made under this Act.

[°] Now see the Factories Act, 1948 (63 of 1948), S. 2 (m).

[†] The Cotton Committee has been dissolved under S. 14 of this Act, resulting in the repeal of that Act—See S. O. 882 dated 18-3-1966, G. I., 1966, Pt. II, S. 3 (ii), p. 815.

STATE AMENDMENTS

Andhra Pradesh:

In the State of Andhra Pradesh, except the Hyderabad area thereof.
Same as that of Tamil Nadu.

To the Hyderabad area of the State of Andhra Pradesh, the amendments made by Hyderabad Act 33 of 1954 apply. These are the same as in Maharashtra except the following—

In clause (d) for the figures ‘1911’ after the words “Factories Act” substitute the figures ‘1948’ — Hyderabad Act 33 of 1954, S. 2 (17-11-1954), read with Andh. Pra. A. L. O., 1957.

Gujarat:

(i) Same as that of Maharashtra — Act 11 of 1960, S. 87 and Guj. Act 23 of 1968, S. 2 (2) (9-12-1968).

(ii) In clause (b), for the words “unginned cotton,” substitute the words “unginned cotton including kapas”—Guj. Act 23 of 1968, S. 4 (9-12-1968).

Madhya Pradesh:

Same as that of Maharashtra — C. P. and Berar Act 24 of 1936, S. 2 (31-3-1937) read with M. P. Act 23 of 1958, Ss. 3 (1) and 6.

Maharashtra:

In its application to the whole State of Maharashtra in Section 2—

- (i) after the word, comma and dash ‘context,—’ the following shall be inserted namely—

“(aa) ‘admixture of cotton’ means a prescribed mixture of different varieties of cotton;”

- (ii) after clause (f) the following clause shall be inserted, namely:—

“(ff) ‘licence’ means a licence granted under Section 2A,” and

- (iii) after clause (h) the following clause shall be inserted, namely:—

“(i) ‘season’ means such period as may from time to time be prescribed.” — Bombay Act IV of 1936, Section 2 and Maha. Act 1 of 1962, S. 2 (b) (1-7-1963).

Mysore:

Amendments by insertion of clauses (aa), (ff) and (i) are the same as in Maharashtra; after clause (g), the following clause is inserted:

"(gg) 'Owner' includes any person authorised in prescribed manner to represent the owner." — Mys. Act 21 of 1961, S. 3 (16-8-69).

Note.—Clause (a) in the principal Act is relettered as (aa) and thereafter comes clause (a) which is the same as (aa) in Maharashtra.

Rajasthan:

Same as that of Maharashtra. — Rajasthan Act 10 of 1957, S. 2 (1-2-1963).

Tamil Nadu:

In its application to the State of Tamil Nadu, in S. 2,—

- (i) the existing clause (a) shall be relettered as clause (a-1) and in the clause so relettered, after the word 'cotton' insert the words "or cotton waste";
- (ii) before clause (a-1) relettered as above, insert the following, namely,—
"(a) 'admixed cotton' means a mixture of different varieties of cotton;"
- (iii) in clause (b) omit the comma and words, "or cotton waste;"
- (iv) in clause (d), for the words "cotton is pressed" substitute the words "cotton or cotton waste is pressed;"
- (v) after clause (e), insert the following—
"(e-1) 'foreign substance' means a substance other than cotton lint, and includes cotton waste, but does not include cotton leaf or cotton seed;"
- (vi) after clause (f), insert the following —
"(f-1) 'licence' means a licence granted under S. 2-A sub-section (1),"
- (vii) after clause (g), insert the following—
"(g-1) 'owner' includes any person authorised to represent the owner." —
T. N. Act 25 of 1948, S. 2 and T. N. Act 10 of 1953, S. 2 (10-6-1953);
and T. N. Acts 22 of 1957 and 39 of 1931, S. 3.

Sections 2-A and 2-B

Andhra Pradesh:

In the State of Andhra Pradesh, except the Hyderabad area thereof, S. 2A is the same as that of Tamil Nadu.

To the Hyderabad area of the State of Andhra Pradesh, Sections 2A and 2B as inserted by Hyderabad Act 33 of 1954 shall apply, namely,—

"2-A. Licence for working cotton ginning factory or cotton pressing factory.—

(1) No cotton ginning factory or cotton pressing factory shall be worked without a licence granted to the owner thereof by such authority, in such form, subject to such conditions and on payment of such fee as may be prescribed.

(2) Whoever contravenes the provisions of sub-section (1) shall be punishable with fine which may extend to five hundred rupees or, if he has previously been convicted of an offence under sub-section (1), to fifteen hundred rupees.

(3) No licence for which the prescribed fee has been paid shall be refused, suspended or cancelled except on the ground that the owner or person in charge of the factory concerned has been convicted for the contravention of the provisions of Section 3-A :

Provided that no licence shall be suspended or cancelled under this sub-section until after the expiration of the season in which the said owner or person has so been convicted."

"2-B. Control of rates chargeable for ginning and pressing cotton.—(1) The Government may, by notification, declare that in any local area specified in such notification no owner or person in charge of a cotton ginning or cotton pressing factory situated in such local area shall—

- (i) charge or caused to be charged, for the ginning or pressing of cotton, rates in excess of such maxima as may be fixed by the rate-fixing committee of such local area under sub-section (6); or

- (ii) refuse to accept or cause to be so refused cotton tendered by any person for ginning or pressing, if the tenderer is prepared to pay charges at rates lawfully leviable; or
- (iii) impose as a condition for ginning or pressing of cotton tendered by any person for the purpose, the surrender of cotton seed or lint in whole or part in lieu of the charges lawfully leviable :

Provided that where a cotton ginning or cotton pressing factory carries on the process of ginning or pressing cotton exclusively for its owner or person in charge as a part of his normal trade, the Government may exempt such factory from the operation of clauses (ii) and (iii) subject to such conditions as may be prescribed.

(2) There shall be a rate fixing committee for each local area specified in the notification under sub-section (1). Such committee shall consist of the Collector of the District, who shall be the Chairman of the committee, and the following members, namely,—

- (a) two representatives of cotton growers of the local area;
- (b) two representatives of owners of cotton ginning and cotton pressing factories in the local area;
- (c) one non-official possessing special or technical knowledge of cotton ginning and pressing or cotton trade to be nominated by the Director, Commerce and Industries of the State;
- (d) the Chief Inspector of Factories and Boilers of the State or such other officer as he may nominate.

(3) The two representatives referred to in clause (a) of sub-section (2) shall be selected by the District Board from amongst the cotton growers of that area.

(4) The two representatives referred to in clause (b) of sub-section (2), shall be elected by the owners of cotton ginning and cotton pressing factories in the local area from amongst themselves.

(5) If the representatives of cotton growers or of owners of cotton ginning and cotton pressing factories in any local area referred to in clauses (a) and (b) of sub-section (2) are not selected or elected, as the case may be, within such time as may be prescribed, the Collector shall nominate such representatives from amongst the cotton growers or the owners of cotton ginning and cotton pressing factories as the case may be, from that local area.

(6) Every rate fixing committee shall fix the maximum rates for ginning or pressing cotton within its local area.

(7) The Government may make rules—

- (i) providing for and regulating the selection and election of the representatives referred to in clauses (a) and (b) of sub-section (2), the manner of selection and election, the term of office of the members of the committee, the preparation of voters' list where necessary, the filling of any casual vacancies and all matters connected with such selection and election;
- (ii) laying down the principles to be observed and the procedure to be followed by the committee in fixing the maximum rates and the rates so fixed by the committee shall be duly made known by the Collector to all concerned in the local area in such manner as may be prescribed;
- (iii) providing for the conditions of exempting from the operation of clauses (ii) and (iii) of sub-section (1).

(8) The provisions of Section 13 shall apply to the making of rules under sub-sections (1), (5) and (7).

(9) Whoever contravenes the provisions of sub-section (1) shall be punishable with fine which may extend to five hundred rupees"—Hyd. Act 33 of 1954, S. 3 (17-11-1954), read with An. P. A. L. O., 1957.

Gujarat:

Same as that of Maharashtra — See Act 11 of 1960, S. 87 and Guj. Act 23 of 1968, S. 5 (9-12-1968) with this difference that in clause (b) of S. 2A (3), for the words

"with fine which may extend to," the words "with rigorous imprisonment which may extend to six months and with fine which may extend to" are substituted.

Madhya Pradesh:

After Section 2, the following sections shall be inserted, namely,—

"2-A. Licence for working cotton ginning factory or cotton pressing factory.—

(1) No cotton ginning factory or cotton pressing factory shall be worked without a licence granted to the owner thereof by such authority, in such form, subject to such conditions and on payment of such fee, as may be prescribed.

(2) Whoever contravenes the provision of sub-section (1) shall be punishable with fine which may extend to five hundred rupees or, if he has previously been convicted of an offence under sub-section (1), to fifteen hundred rupees.

(3) No licence for which the prescribed fee has been paid shall be refused, suspended or cancelled except on the ground that the owner or person in charge of the factory concerned has been convicted for the contravention of the provisions of Section 3-A:

Provided that no licence shall be suspended or cancelled under this sub-section until after the expiration of the season in which the said owner or person has been so convicted." — C. P. and Berar Act 24 of 1936, S. 3 (31-3-1937) read with M. P. Act 23 of 1958, Ss. 3 (1) and 6.

"2-B. Control of rates chargeable for ginning and pressing cotton.—(1) The State Government may, by notification declare that in any local area specified in such notification no owner or person in charge of a cotton ginning or cotton pressing factory situated in such local area shall—

- (i) Charge or cause to be charged for the ginning or pressing of cotton, rates in excess of such maxima as may be fixed by the rate fixing committee of such local area under sub-section (6); or
- (ii) refuse to accept or cause to be so refused cotton tendered by any person for ginning or pressing if the tenderer is prepared to pay charges at rates lawfully leviable; or
- (iii) impose as a condition precedent to the acceptance of cotton for ginning or pressing tendered by any person for the purpose the surrender of cotton seed or lint in whole or part in lieu of the charges lawfully leviable :

Provided that where a cotton ginning or cotton pressing factory carries on the process of ginning or pressing cotton exclusively for its owner or person in charge as a part of his normal trade, the State Government may exempt such factory from the operation of clauses (ii) and (iii) subject to such conditions as may be prescribed.

(2) There shall be a rate fixing committee for each local area specified in the notification under sub-section (1). Such committee shall consist of the Deputy Commissioner of the district, who shall be the chairman of the committee, and the following members, namely :—

- (a) two representatives of cotton growers of the local area;
- (b) two representatives of owners of cotton ginning and cotton pressing factories in the local area;
- (c) one non-official possessing special or technical knowledge of cotton ginning and pressing or of cotton trade to be nominated by the Director of Industries of the State;
- (d) the Chief Inspector of Factories and Boilers of the State;

(3) The two representatives referred to in clause (a) of sub-section (2) shall be elected by cotton growers whose names are for the time being included in the voters' lists of the cotton growers' electorates formed for the constitution of market committees for the management of any cotton markets established or deemed to be established in the local area under the Central Provinces and Berar Cotton Market Act, 1932 :

Provided that, if there is no such cotton market established in the local area, the said two representatives shall be selected by the District Council from amongst the cotton growers of that area.

(4) The two representatives referred to in clause (b) of sub-section (2), shall be elected by the owners of cotton ginning and cotton pressing factories in the local area from amongst themselves.

(5) If the representatives of cotton growers or of owners of cotton ginning and cotton pressing factories in any local area referred to in clauses (a) and (b) of sub-section (2) are not elected or selected, as the case may be, within such time as may be prescribed, the Deputy Commissioner shall nominate such representatives from amongst the cotton growers or the owners of cotton ginning and cotton pressing factories, as the case may be, from that local area.

(6) Every rate fixing committee shall fix the maximum rates for ginning or pressing cotton within its local area.

(7) The State Government may make rules—

- (i) providing for and regulating the election and selection of the representatives referred to in clauses (a) and (b) of sub-section (2), the manner of election and selection, the term of office of the members of the committee, the preparation of voters' lists, where necessary, the filling of any casual vacancies and all matters connected with such election and selection;
- (ii) laying down the principles to be observed and the the procedure to be followed by the committee in fixing the maxima rates and the rates so fixed by the committee shall be duly made known by the Deputy Commissioner to all concerned in the local area in such manner as may be prescribed;
- (iii) providing for conditions of exemption from the operation of clauses (ii) and (iii) of sub-section (1).

(8) The provisions of Section 13 shall apply to the making of rules under sub-sections (1), (5) and (7).

(9) Whoever contravenes the provisions of sub-section (1) shall be punishable with fine which may extend to five hundred rupees"—C. P. and Berar Act 47 of 1947, S. 2 (5-12-1947) read with M. P. Act 23 of 1958, Ss. 3 (1) and 6.

Maharashtra:

In its application to the whole State of Maharashtra after Section 2, the following section shall be inserted namely—

"2-A. Licence for working cotton ginning factory or cotton pressing factory.—(1) No cotton ginning factory or cotton pressing factory shall be worked without a licence granted to the owner thereof by such authority, in such form, subject to such conditions and on payment of such fee, as may be prescribed.

(2) (a) A licence for which the prescribed fee has been paid shall be liable to be refused only on the ground that the owner or person in charge of the cotton ginning or cotton pressing factory in respect of which a licence is applied for has been convicted of an offence punishable under this Act.

(b) A licence shall be liable to be suspended, withdrawn or cancelled only on the ground that the owner or person in charge of the cotton ginning or cotton pressing factory in respect of which a licence was granted has been convicted of an offence punishable under this Act:

Provided that no licence shall be suspended, withdrawn or cancelled under this clause until after the expiration of the season in which the said owner or person has been so convicted.

(3) If any person works a cotton ginning or cotton pressing factory in respect of which a licence has not been granted or has been suspended, withdrawn or cancelled, such person shall be punishable—

- (a) on a first conviction, with fine which may extend to five hundred rupees and, if the offence has continued for more than one day, with an additional fine which may extend to one hundred rupees for every day subsequent to the first day during which the offence has continued; and

- (b) on every subsequent conviction, with fine which may extend to fifteen hundred rupees and, if the offence has continued for more than one day, with an additional fine which may extend to two hundred rupees for every day subsequent to the first day during which the offence has continued." — Bom. Act IV of 1936, S. 3 and Maha. Act 1 of 1962, S. 2 (b) (1-7-1963).

Mysore:

After Section 2 of the principal Act, the following sections shall be inserted, namely :—

"2-A. Licence for working cotton ginning factory or cotton pressing factory.—

(1) No cotton ginning factory or cotton pressing factory shall be worked without a licence granted to the owner thereof by such authority, in such form, subject to such conditions and on payment of such fee, as may be prescribed.

(2) (a) A licence for which the prescribed fee has been paid shall be liable to be refused only on the ground that the owner or person in charge of a cotton ginning or cotton pressing factory in respect of which a licence is applied for, has been convicted of an offence punishable under this Act :

(b) A licence shall be liable to be suspended, withdrawn or cancelled only on the ground that the owner or person in charge of the cotton ginning or cotton pressing factory in respect of which a licence was granted, has been convicted of an offence punishable under this Act :

Provided that no licence shall be suspended, withdrawn or cancelled under this clause, until after the expiration of the season in which the said owner or person has been so convicted.

(3) If any person works a cotton ginning or cotton pressing factory in respect of which a licence has not been granted or has been suspended, withdrawn or cancelled, such person shall be punishable—

(a) on a first conviction, with fine which may extend to five hundred rupees, and if the offence has continued for more than one day, with an additional fine, which may extend to one hundred rupees for every day subsequent to the first day during which the offence has continued; and

(b) on every subsequent conviction, with fine which may extend to fifteen hundred rupees, and if the offence has continued for more than one day, with an additional fine which may extend to two hundred rupees for every day subsequent to the first day during which the offence has continued.

2-B. Control of rates chargeable for ginning and pressing cotton.—(1) The State Government may, by notification in the Official Gazette, declare that in any local area specified in such notification no owner or person in charge of cotton ginning or cotton pressing factory situated in such local area, shall—

(i) charge or cause to be charged, for the ginning or pressing of cotton, rates in excess of such maxima as may be fixed by the Rate Fixing Committee of such local area under sub-section (5); or

(ii) refuse to accept or cause to be so refused cotton tendered by any person for ginning or pressing if the tenderer is prepared to pay charges at rates lawfully leviable; or

(iii) impose as a condition precedent to the acceptance of cotton for ginning or pressing tendered by any person for the purpose, the surrender of cotton seed or lint in whole or in part in lieu of the charges lawfully leviable :

Provided that where a cotton ginning or cotton pressing factory carries on the process of ginning or pressing cotton exclusively for its owner or person in charge as a part of his normal trade, the State Government may exempt such factory from the operation of clauses (ii) and (iii) subject to such conditions as may be prescribed.

(2) There shall be a Rate Fixing Committee for each local area specified in the notification under sub-section (1). Such Committee shall consist of the Director of Agriculture or any other officer subordinate to him as may be nominated by the Govern-

ment, who shall be the Chairman of the Committee, and the following members, namely:—

- (a) two representatives of cotton growers of the local area elected in such manner as may be prescribed;
- (b) two representatives of owners of cotton ginning and cotton pressing factories in the local area;
- (c) one non-official, possessing special or technical knowledge of cotton ginning and pressing or of cotton trade to be nominated by the Director of Industries and Commerce in Mysore; and
- (d) the Chief Inspector of Factories in Mysore or such other officer subordinate to the Chief Inspector as may be authorised by the State Government.

(3) The two representatives referred to in clause (b) of sub-section (2), shall be selected by the owners of cotton ginning and cotton pressing factories in the local area from amongst themselves.

(4) If the representatives of cotton growers or of owners of cotton ginning and cotton pressing factories in any local area referred to in clauses (a) and (b) of sub-section (2) are not elected or selected, as the case may be, within such time as may be prescribed, the Deputy Commissioner of the District shall nominate such representatives from amongst the cotton growers or the owners of cotton ginning and cotton pressing factories, as the case may be, from that local area.

(5) Every Rate Fixing Committee shall fix the maximum rates for ginning or pressing cotton within its local area.

(6) Whoever contravenes the provisions of sub-section (1), shall, on conviction be punishable with fine, which may extend to five hundred rupees." — Mys. Act 21 of 1963, S. 4 (w. e. f. 16-8-1969).

Rajasthan:

After Section 2, insert the following section, namely,—

"2-A. License for working cotton ginning or pressing factory.—(1) No cotton ginning factory or cotton pressing factory shall be worked without a licence granted to the owner thereof by such authority, in such form, subject to such conditions and on payment of such fee, as may be prescribed.

(2) A licence for which the prescribed fee has been paid shall be liable to be refused only on the ground that the owner or person in charge of a cotton ginning factory or a cotton pressing factory in respect of which a licence is applied for has been convicted of an offence punishable under this Act

(3) A licence shall be liable to be suspended, withdrawn or cancelled only on the ground that the owner or person in charge of the cotton ginning factory or the cotton pressing factory in respect of which the licence was granted has been convicted of an offence punishable under this Act :

Provided that no licence shall be suspended, withdrawn or cancelled under this sub-section until after the expiration of the season in which the said owner or person has been so convicted.

(4) If any person works a cotton ginning factory or a cotton pressing factory in respect of which a licence has not been granted or has been suspended, withdrawn or cancelled, such person shall be punishable—

- (a) on a first conviction, with fine which may extend to five hundred rupees and, if the offence has continued for more than one day, with an additional fine which may extend to one hundred rupees for every day subsequent to the first day during which the offence has continued, and
- (b) on every subsequent conviction, with fine which may extend to fifteen hundred rupees and, if the offence has continued for more than one day, with an additional fine which may extend to two hundred rupees for every day subsequent to the first day during which the offence has continued." — Rajas. Act 10 of 1957, S. 3 (1-2-1963).

Tamil Nadu:

In its application to the State of Tamil Nadu, after Section 2, insert the following :—

"2-A. Licence for working cotton ginning or pressing factory.—(1) No cotton ginning or pressing factory shall be worked without a licence granted to the owner thereof, by such authority, in such form, subject to such conditions, and on payment of such fee, as may be prescribed.

(2) A licence for which the prescribed fee has been paid shall be refused only on ground that the owner or person in charge of the factory has been convicted of an offence punishable under this Act.

(3) A licence shall be suspended or cancelled only on the ground that the owner or person in charge of the factory has been convicted of an offence punishable under this Act.

(4) Whoever works a cotton ginning or pressing factory—

(a) in respect of which no licence has been granted, or the licence granted in respect of which has been suspended or cancelled, or

(b) in contravention of any of the conditions of the licence granted in respect thereof, shall be punishable with fine which may extend to five hundred rupees, and in the case of a second or subsequent conviction, with fine which may extend to one thousand five hundred rupees."—T. N. Act 25 of 1948, S. 3 and T. N. Acts 22 of 1957 and 39 of 1961, S. 3.

3. Maintenance of registers.—(1) The owner of every cotton ginning factory shall cause to be maintained at the factory in such form, if any, as may be prescribed, a ginning register containing a record of all cotton ginned in the factory and of the names of the persons for whom and the dates on which the cotton has been ginned and of the amount ginned for each person.

(2) The owner of every cotton pressing factory shall cause to be maintained at the factory in such form, if any, as may be prescribed, a press register containing a daily record of the number of bales pressed in the factory, the serial number of each bale, and the name of the person for whom it has been pressed.

(3) The owner or the person in charge of a cotton-ginning or cotton-pressing factory shall be bound to produce any ginning register or press register maintained under this section when required to do so by any person appointed by the State Government in this behalf, and the owner or person in charge of any cotton-pressing factory shall be bound to furnish to the Indian Central Cotton Committee^a if so required by it in writing, a copy, certified as correct by the owner or person in charge of the factory, of the entry in any press register maintained at the factory relating to any specified bale.

(4) No register required to be maintained by this section shall be destroyed until after the expiration of three years from the date of the last entry therein.

(5) If—

(a) in any factory any register required by this section to be maintained is not maintained or is maintained in any form other than the form, if any, prescribed for the purpose, or

(b) any entry in any such register is proved to be false in any material particular, or

(c) any such register is destroyed before the expiration of the period referred to in sub-section (4),

the owner of the factory shall be punished with fine which may extend to fifty rupees or, if he has previously been convicted of any offence under this sub-section, to five hundred rupees.

(6) If the owner or the person in charge of any factory fails to produce any register, or to furnish a certified copy of any entry, when required to do so under sub-section (3), or furnishes a certified copy of an entry knowing or having rea-

son to believe such copy to be false, he shall be punished with fine which may extend to fifty rupees or, if he has previously been convicted of any offence under this sub-section, to five hundred rupees.

[°] Said Committee is dissolved—See S. O. 882 of 1966.

OBJECTS AND REASONS

Sub-section (1).—"It will be more convenient for the owner to maintain not a daily record of the amount of cotton ginned on each day but a record of the dates on which cotton received from any individual was ginned and the total amount ginned for the individual, as the process of ginning may continue for some days."—S. C. R.

STATE AMENDMENTS

Andhra Pradesh:

In its application to the Hyderabad area of the State,—

Omit the full stop at the end of sub-section (2) of Section 3 and add the following words thereafter: "and the prescribed particulars of the cotton-ginning factory where it has been ginned as supplied by such person."—Hyd. Act 33 of 1954, S. 4 (17-11-1954) read with Andh. Pra. A. L. O., 1957.

Gujarat:

(a) Same as in Maharashtra (i).

(b) In sub-sections (5) and (6), for the words "fifty rupees", substitute "two hundred rupees".—Bom. Act 4 of 1936 read with Act 11 of 1960, S. 87 and Guj. Act 23 of 1968, Section 2 (2) (9-12-1968).

Madhya Pradesh:

Same as in Maharashtra—C. P. and Berar Act 24 of 1936, S. 4 (31-3-1937) read with Madh. Pra. Act 23 of 1958, Ss. 3(1) and 6.

Maharashtra:

In its application to the whole State of Maharashtra, in Section 3—

(i) in sub-section (2),

(1) the word 'and' shall be omitted, and

(2) the following words shall be added at the end:—

"and the prescribed particulars as supplied by such person of the cotton-ginning factory where it has been ginned."—Bom. Act 4 of 1936, Section 4 and Maha. Act 1 of 1962, S. 2 (b) (1-7-1963).

(ii) In sub-sections (5) and (6), for the words "shall be punished", the words "shall, on conviction, be punishable" shall be substituted—Bom. Act 4 of 1936, S. 12 and Maha. Act 1 of 1962, S. 2 (b) (1-7-1963).

Mysore:

Same as in Maharashtra—Mys. Act 21 of 1961, S. 5 (w.e.f. 16-8-1969).

Rajasthan:

In Section 3—

(i) in sub-section (2), the word 'and' shall be omitted and at the end the following words shall be added, namely, "and the prescribed particulars as supplied by such person of the cotton-ginning factory where it has been ginned;"

(ii) in sub-sections (5) and (6), for the words "shall be punishable", the words "shall, on conviction, be punishable" shall be substituted.—Rajasthan Act 10 of 1957, Section 4 (1-2-1963).

Sections 3-A to 3-F

Andhra Pradesh:

In the State of Andhra Pradesh, excluding the Hyderabad area thereof, amendments are the same as those of Tamil Nadu.

To the Hyderabad area of the State of Andhra Pradesh, the amendments made by Hyderabad Act 33 of 1954 and extracted below apply.

After Section 3, the following new sections shall be inserted, namely:—

“3-A. Prohibition of watering, etc., of cotton.—(1) The Government may, by notification, declare that in any area specified in such notification, no cotton which is ginned or pressed in a cotton-ginning or cotton-pressing factory shall contain any admixture of cotton.

(2) Any owner or person in charge of a cotton-ginning or cotton-pressing factory who in such factory gins or presses or allows to be ginned or pressed cotton which he knows or has reason to believe—

(a) is watered or contains foreign substance or cotton waste, or

(b) when such factory is in an area specified under sub-section (1) contains an admixture of cotton,

shall be punishable with fine which may extend to five thousand rupees.

(3) A Court trying an offence under sub-section (2) shall presume cotton to be watered which is certified by the prescribed authority to contain moisture in excess of the moisture that such cotton might reasonably be expected to contain considering where and when such cotton has been picked, collected, stored, conveyed, left, ginned or pressed.

(4) Any owner of a cotton-pressing factory who knowing or having reason to believe that any cotton contains seed in excess of the prescribed proportion, presses or allows such cotton to be pressed in such factory shall be punishable with fine which may extend to five thousand rupees.

3-B. Penalty for watering, etc., of cotton.—Any owner of cotton who does any of the following acts, that is, who knowingly makes or causes to be made wet any cotton which is ginned and which is being or is intended to be pressed in a cotton-pressing factory, or mixes or causes to be mixed therewith, seed, foreign substance or cotton waste, or in any area specified in sub-section (1) of Section 3-A makes any admixture of cotton or abets or knowingly allows or connives at any such act shall be punishable with fine which may extend to five thousand rupees.

3-C. Examination of cotton packages or bales.—(1) The Government or any gazetted officer authorised by it in this behalf may on its or his own motion or on receipt of a complaint that there has been a contravention of the provisions of Section 3-A or Section 3-B in respect of any cotton, package or of any bale and in the case of a complaint on payment of the prescribed fee by the complainant, cause such cotton or the contents of such package or bale to be examined by the prescribed person or body.

(2) A certificate given by such person or body after examination of the cotton or the contents of the package or bale under sub-section (1) shall be admissible in evidence and be presumptive proof of the facts mentioned therein until the contrary is proved.

3-D. Entry and inspection.—(1) The Government may authorise any Gazetted Officer to enter into and inspect, at any reasonable time, any cotton-ginning or cotton-pressing factory for the purpose of ascertaining whether there is any contravention therein of any of the provisions of this Act or of any rule made thereunder or of any of the conditions subject to which a licence has been granted in respect of such factory and to seize all things in respect of which an offence punishable under this Act appears to have been committed.

(2) The owner or the person in charge of every cotton-ginning or cotton-pressing factory shall give every reasonable assistance to the inspecting officer in the performance of his duties under sub-section (1).

(3) The owner or the person in charge of such factory shall, in every instance, be permitted to attend during the inspection and the things seized during such inspection shall be sealed in the prescribed manner.”—Hyd. Act 33 of 1954, S. 5 (17-11-1954) read with Andh. Pra. A. L. O., 1957.

Gujarat:

Same as that of Maharashtra—Bom. Acts 4 of 1936 and 20 of 1938, read with Act 11 of 1960, S. 87 and Guj. Act 23 of 1968, Ss. 2 (2), 7, 8, 9 (9-12-1968).

Madhya Pradesh:

For existing Section 3-A, substitute the following, namely:—

“3-A. Prohibition of watering, etc., of cotton.—(1) The State Government may, by notification, declare that in any area specified in such notification, no cotton which is ginned or pressed in a cotton-ginning or cotton-pressing factory shall contain any admixture of cotton.

(2) Any owner or person in charge of a cotton-ginning or pressing factory who in such factory gins or presses or allows to be ginned or pressed cotton which he knows or has reason to believe—

(a) is watered or contains foreign substance or cotton waste, or

(b) when such factory is in an area specified under sub-section (1) contains an admixture of cotton,

shall be punishable with fine which may extend to fifteen hundred rupees.

(3) A Court trying an offence under sub-section (2) shall presume cotton to be watered which is certified by the prescribed authority to contain moisture in excess of the moisture that such cotton might reasonably be expected to contain considering where and when such cotton has been picked, collected, stored, conveyed, left, ginned or pressed.

(4) Any owner of a cotton-pressing factory who, knowing or having reason to believe that any cotton contains seed in excess of the prescribed proportion, presses or allows such cotton to be pressed in such factory shall be punishable with fine which may extend to fifteen hundred rupees.”

“3-AA. Penalty for watering, etc., of cotton.—Any owner of cotton who does any of the following acts, that is, who knowingly makes or causes to be made wet any cotton which is ginned and which is being or is intended to be pressed in a cotton-pressing factory, or mixes or causes to be mixed therewith seed, foreign substance or cotton waste or in any area specified in sub-section (1) of Section 3-A makes any admixture of cotton, or abets or knowingly allows or connives at any such act shall be punishable with fine which may extend to fifteen hundred rupees.”—C. P. and Berar Act 13 of 1947, Ss. 2 and 3 (1-10-1947) read with M. P. Act 23 of 1958, Ss. 3(1) and 6.

“3-B. Examination of cotton, packages or bales.—(1) The State Government or any gazetted Officer authorized by it in this behalf may on its or his own motion or on receipt of a complaint that there has been a contravention of the provisions of Section 3-A or Section 3-AA in respect of any cotton, package or of any bale and in the case of a complaint, on payment of the prescribed fee by the complainant, cause such cotton or the contents of such package or bale to be examined by the prescribed person or body.

(2) A certificate given by such person or body after examination of the contents of any bale under sub-section (1) shall be admissible in evidence and be presumptive proof of the facts mentioned therein until the contrary is proved.”

“3-C. Entry and inspection.—(1) The State Government may authorise any gazetted officer to enter into and inspect, at any reasonable time, any cotton-ginning or cotton-pressing factory for the purpose of ascertaining whether there is any contravention therein of any of the provisions of this Act or of any rule made thereunder or of any of the conditions subject to which a licence has been granted in respect of such factory and to seize all things in respect of which an offence punishable under this Act appears to have been committed.

(2) The owner or the person in charge of every cotton-ginning or cotton-pressing factory shall give every reasonable assistance to the inspecting officer in the performance of his duties under sub-section (1).

(3) The owner or the person in charge of such factory shall, in every instance be permitted to attend during the inspection and the things seized during such inspection shall be sealed in the prescribed manner.”—C. P. and Berar Act XXIV of 1936, S. 5 as amended by C. P. and Berar Act 13 of 1947, Section 4 and read with M. P. Act 23 of 1958, Ss. 3(1) and 6.

Maharashtra:

In its application to the whole State of Maharashtra, after Section 3, the following new sections shall be inserted, namely:—

“3-A. Prohibition against watering, etc., of cotton.—(1) The State Government may by notification in the Official Gazette declare that in any area specified in such notification, no cotton which is ginned or pressed in a cotton-ginning or cotton-pressing factory shall contain any admixture of cotton.

(2) Any owner of a cotton-ginning or cotton-pressing factory or any person in charge of such factory—

(a) who knowing or having reason to believe that any cotton is watered or contains seed in excess of the prescribed proportion or contains any foreign substance, gins or presses or allows such cotton to be ginned or pressed in such factory, or

(b) who in any area specified in the notification under sub-section (1) gins or presses or allows to be ginned or pressed any cotton which he knows or has reason to believe to contain an admixture of cotton,

shall, on conviction, be punishable with fine which may extend to five thousand rupees.

(3) Any owner of cotton who knowingly waters any cotton which is ginned and which is being, or is intended to be, pressed in a cotton-pressing factory, or mixes seed or foreign substance with such cotton, or in any area specified in sub-section (1) makes any admixture of cotton, or abets or knowingly allows or connives at any such watering, mixing or admixture of cotton, shall, on conviction, be punishable with fine which may extend to five thousand rupees.

***Explanation.—**For the purposes of this section, cotton shall be deemed to be watered—

(a) if it contains moisture in excess of the normal quantity, or

(b) if the prescribed authority certifies that it contains caked material or patches due to deliberate watering.

For the purposes of clause (a), the normal quantity of moisture in any given quantity of cotton is the amount of moisture that such cotton is reasonably expected to have, regard being had to the place or places at or to which, and the time or times of the year in which, such cotton is picked, collected, stored, conveyed, left ginned or pressed. A certificate given by the prescribed authority as to the normal quantity of moisture that a given quantity of such cotton should have and the quantity of moisture that it possesses shall be evidence of such matter, until the contrary is proved; and if the latter quantity exceeds the former, it shall be evidence, until the contrary is proved, that the cotton contains moisture in excess of the normal quantity.”—Bom. Act 4 of 1936, S. 5, as amended by Bom. Act 53 of 1949, S. 2 and Sch. I (28-11-1949) and Maha. Act 1 of 1962, Ss. 2(b) and 3 (1-7-1963)

[*] Substituted by Maha. Act 1 of 1962, S. 3 (1-7-1963): same substitution is made in Gujarat by Guj. Act 23 of 1968, S. 7 (9-12-1968).

“3-AA. Penalty for making any cotton wet.—Any owner of cotton who knowingly makes or causes to be made any cotton which is ginned and which is being or is intended to be pressed in a cotton-pressing factory, wet or mixes or causes to be mixed, seed, foreign substance or cotton waste with such cotton, or in any area specified in sub-section (1) of Section 3-A makes any admixture of cotton, or abets or knowingly allows or connives at any such act shall, on conviction, be punishable with fine which may extend to five thousand rupees.”—Bom. Act 20 of 1938, S. 3. (21-11-1938).

“3-B. Examination of cotton, packages or bales.—(1) The State Government
* [or any Government servant authorised by it in this behalf (being a Government

servant not below such rank as may be prescribed)] may on its or his own motion or on receipt of a complaint that there has been a contravention of the provisions of Section 3-A or Section 3-AA in respect of any cotton, package or of any bale and in the case of a complaint, on payment of the prescribed fee by the complainant, cause such cotton or the contents of such package or bale to be examined by the prescribed person or body.

(2) A certificate given by such person after examination of the contents of any bale under sub-section (1) shall be admissible in evidence and the presumptive proof of the facts mentioned therein until the contrary is proved.

[°] Substituted by Maharashtra Act 1 of 1962, Section 4.

3-C. Entry and inspection.—(1) The State Government may authorise °[any Government servant not below such rank as may be prescribed] to enter into and inspect, at any reasonable time, any cotton-ginning or cotton-pressing factory for the purpose of ascertaining whether there is any contravention therein of any of the provisions of this Act or of any rule made thereunder or of any of the conditions subject to which a licence has been granted in respect of such factory and to seize all things in respect of which an offence punishable under this Act appears to have been committed.

(2) The owner or the person in charge of every cotton-ginning or cotton-pressing factory shall give every reasonable assistance to the inspecting officer in the performance of his duties under sub-section (1).

(3) The owner or the person in charge of such factory shall, in every instance, be permitted to attend during the inspection and the things seized during such inspection shall be sealed in the prescribed manner.”—Bom. Act 4 of 1936, S. 5 and Maharashtra Act 1 of 1962, S. 2 (b) (1-7-1963).

[°] Substituted by Maharashtra Act 1 of 1962, Section 5.

Mysore:

In its application to the State of Mysore, after Section 3 of the principal Act, the following new sections shall be inserted, namely:—

“3-A. Prohibition against watering, etc., of cotton.—(1) The State Government may by notification in the official Gazette declare that in any area specified in such notification no cotton which is ginned or pressed in a cotton-ginning or cotton-pressing factory shall contain any admixture of cotton.

(2) Any owner of a cotton-ginning or cotton-pressing factory or any person in charge of such factory—

(a) who, knowing or having reason to believe that any cotton is watered or contains seed in excess of the prescribed proportion or contains any foreign substance, or cotton waste, gins or presses or allows such cotton to be ginned or pressed in such factory, or

(b) who in any area specified in the notification under sub-section (1), gins or presses or allows to be ginned or pressed any cotton which he knows or has reason to believe to contain an admixture of cotton, shall, on conviction, be punishable with fine which may extend to five thousand rupees.

Explanation.—For the purposes of this section, cotton shall not be deemed to be watered, unless such cotton contains moisture in excess of normal quantity. The normal quantity of moisture in any given quantity of cotton is the amount of moisture that such cotton is reasonably expected to have, regard being had to the place or places as or to which, and the time or times of the year in which such cotton has been picked, collected, stored, conveyed, left, ginned, or pressed. A certificate given by the prescribed authority as to the normal quantity of moisture that a given quantity of such cotton should have and the quantity of moisture that it possesses shall be evidence of such matters until the contrary is proved, and if the latter quantity exceeds the former, it shall be evidence until the contrary is proved that the cotton is watered.

3-B. Penalty for making any cotton wet.—Any owner of cotton, or any other person who knowingly makes or causes to be made any cotton which is ginned and which is being or is intended to be pressed in a cotton-pressing factory, wet, or mixed or causes to be mixed seed, foreign substance or cotton waste with such cotton, or in any area, specified in sub-section (1) of Section 3-A makes any admixture of cotton, abets or knowingly allows or connives at any such act shall, on conviction, be punishable with fine, which may extend to five thousand rupees.

3-C. Examination of cotton, packages or bales.—(1) The State Government or any gazetted officer authorised by it in this behalf, may, on its or his own motion, or on receipt of a complaint that there has been a contravention of the provisions of Section 3-A or Section 3-B in respect of any cotton, packages, or of any bale and in the case of a complaint, on payment of the prescribed fee by the complainant, cause such cotton, or the contents of such package or bale to be examined by the prescribed person or body.

(2) A certificate given by such person after examination of the contents of any bale under sub-section (1), shall be admissible in evidence and be presumptive proof of the facts mentioned therein until the contrary be proved.

3-D. Entry and inspection.—(1) The State Government may authorise any gazetted officer, to enter into and inspect, at any reasonable time, any cotton-ginning or cotton-pressing factory, for the purpose of ascertaining whether there is any contravention therein of any of the provisions, of this Act or any rule made thereunder or of any of the conditions subject to which a licence has been granted, in respect of such factory and to seize all things in respect of which an offence punishable under this Act appears to have been committed.

(2) The owner or the person in charge of every cotton-ginning or cotton-pressing factory shall give every reasonable assistance to the inspecting officer in the performance of his duties under sub-section (1).

(3) The owner or the person in charge of such factory shall, in every instance, be permitted to attend during the inspection, and the things seized during such inspection shall be sealed in the prescribed manner.”—Mys. Act 21 of 1961, Section 6 (w.e.f. 16-8-1969).

Rajasthan :

After Section 3, insert the following sections, namely :—

“3-A. Prohibition against watering, etc., of cotton.—(1) The State Government may, by notification in the Rajasthan Gazette, declare that in any area specified in such notification, no cotton which is ginned or pressed in a cotton-ginning or cotton-pressing factory shall contain any admixture of cotton.

(2) Any owner of a cotton-ginning or cotton-pressing factory or any person in charge of such factory—

(a) who knowing or having reason to believe that any cotton is watered or contains seed in excess of the prescribed proportion or contains any foreign substance or cotton waste, gins or presses or allows such cotton to be ginned or pressed in such factory, or

(b) who in any area specified in the notification under sub-section (1) gins or presses or allows to be ginned or pressed any cotton which he knows or has reason to believe to contain an admixture of cotton,

shall, on conviction, be punishable with fine which may extend to five thousand rupees.

Explanation.—For the purpose of this section cotton shall not be deemed to be watered, unless such cotton contains moisture in excess of the normal quantity. The normal quantity of moisture in any given quantity of cotton is the amount of moisture that such cotton is reasonably expected to have, regard being had to the place or places at or to which, and the time or times of the year in which such cotton has been picked, collected, stored, conveyed, left, ginned or pressed. A certificate given by the prescribed authority as to the normal quantity of moisture that a given quantity of such cotton should have and the quantity of moisture that it possesses shall be evidence of such matters until the contrary is proved; and if the

latter quantity exceeds the former, it shall be evidence, until the contrary is proved, that the cotton is watered.

3-AA. Penalty for making any cotton wet.—Any owner of cotton who knowingly makes or causes to be made any cotton, which is ginned and which is being or is intended to be pressed in a cotton-pressing factory, wet, or mixes or causes to be mixed seed, foreign substance or cotton waste with such cotton, or in any area specified in sub-section (1) of Section 3-A makes any admixture of cotton, or abets or knowingly allows or connives at any such act shall, on conviction, be punishable with fine which may extend to five thousand rupees.

3-B. Examination of cotton, packages or bales.—(1) The State Government or any gazetted official authorised by it in this behalf may on its or his own motion or on receipt of a complaint that there has been a contravention of the provisions of Section 3-A or Section 3-AA in respect of any cotton, package or of any bale and in the case of a complaint, on payment of the prescribed fee by the complainant, cause such cotton or the contents of such package or bale to be examined by the prescribed person or body.

(2) A certificate given by such person after examination of the contents of any bale under sub-section (1) shall be admissible in evidence and be presumptive proof of the facts mentioned therein until the contrary is proved.

3-C. Entry and inspection.—(1) The State Government may authorise any gazetted officer to enter into and inspect, at any reasonable time, any cotton-ginning or cotton-pressing factory for the purpose of ascertaining whether there is any contravention therein of any of the provisions of this Act or of any rule made thereunder or of any of the conditions subject to which a licence has been granted in respect of such factory and to seize all things in respect of which an offence punishable under this Act appears to have been committed.

(2) The owner or the person in charge of every cotton-ginning or cotton-pressing factory shall give every reasonable assistance to the inspecting officer in the performance of his duties under sub-section (1).

(3) The owner or the person in charge of such factory shall in every instance, be permitted to attend during the inspection and the things seized during such inspection shall be sealed in the prescribed manner.”—Rajas. Act 10 of 1957. Section 5 (1-2-1963).

Tamil Nadu:

In its application to the State of Tamil Nadu, after Section 3, insert the following sections, namely:—

“3-A. Admixed cotton not to be ginned or pressed in notified areas.—(1) The State Government may, by notification in the Fort St. George Gazette, direct that no admixed cotton shall be ginned or pressed in a cotton-ginning or -pressing factory situated in any specified area.

(2) Any owner or person in charge of a factory who, in contravention of, a notification issued under sub-section (1), gins or presses, or allows to be ginned or pressed, in such factory any cotton which he knows or has reason to believe to be admixed cotton, shall be punishable with fine which may extend to one thousand five hundred rupees.

3-B. Watered or impure cotton not to be ginned or pressed.—Any owner or person in charge of a cotton-ginning or -pressing factory who, knowing or having reason to believe that any cotton is watered, or has been mixed with cotton leaf or cotton-seed, or contains any foreign substance, gins or presses, or allows to be ginned or pressed, such cotton in the factory, shall be punishable with fine which may extend to one thousand five hundred rupees.

3-C. Presumptions in certain cases.—(1) (a) For the purposes of Section 3-B. cotton shall not be deemed to be watered °[if it contains—

- (i) moisture in excess of the normal quantity; or
- (ii) cakes or patches.]

(b) The normal quantity of moisture in any given quantity of cotton is the amount of moisture which such cotton may reasonably be expected to contain, regard being had to the variety of the cotton, and the place or places at or to which, and the time or times of the year in which, such cotton was picked, collected, stored, conveyed, left, ginned or pressed.

(c) A certificate given by the prescribed authority as to the presence of moisture in excess of the normal quantity in a given quantity of cotton or as to the presence of cakes or patches shall, until the contrary is proved, be presumed to be correct.

(2) (a) For the purposes of Section 3-B, no variety of cotton shall be deemed to be mixed with cotton leaf or cotton-seed unless such cotton contains cotton leaf or seed in excess of the quantity prescribed for such variety of cotton.

(b) A certificate given by the prescribed authority as to the quantity of cotton leaf or seed which a given quantity of any cotton actually contains shall be evidence thereof and shall, until the contrary is proved, be presumed to be correct, and if the quantity specified in the certificate exceeds the limit prescribed under clause (a) for cotton of that variety, it shall be presumed, until the contrary is proved, that the cotton has been mixed with cotton leaf or seed in excess of the limit so prescribed.

[°] Substituted by T. N. Act 23 of 1965, S. 2 (1-9-1965).

3-D. Owner not to mix different varieties of cotton or to water, etc., cotton.—
Any owner of cotton who knowingly—

- (a) mixes one variety with another variety of cotton, in any area specified in a notification issued under Section 3-A, sub-section (1), or
- (b) waters any ginned cotton which is being, or is intended to be, pressed in a cotton-pressing factory, or
- (c) mixes with ginned cotton any foreign substance, cotton leaf or cotton-seed, or
- (d) abets, or allows the commission of, any of the acts specified in the foregoing clauses.

shall be punishable with fine which may extend to one thousand five hundred rupees.

3-E. Examination of cotton packages or bales.—(1) The State Government or any officer authorized by them in this behalf may—

- (a) suo motu, if such Government or officer has reason to believe that there has been a contravention of the provisions of Sections 3-A, 3-B, 3-D in respect of a cotton or package or bale of cotton, or
- (b) on receipt of a complaint from any person that there has been such a contravention in respect of any such cotton or package or bale of cotton and on payment of the prescribed fee by the complainant,

cause such cotton or the contents of such package or bale to be examined by the prescribed authority.

(2) A certificate given by such authority in respect of any such cotton or the contents of any such package or bale, shall be evidence of the facts stated therein, and shall, until the contrary is proved, be presumed to be correct.

3-F. Entry and inspection.—(1) The State Government may authorize any officer to enter and inspect, at any reasonable time, any cotton-ginning or pressing factory for the purpose of ascertaining whether there is any contravention therein of any of the provisions of this Act, or of any rule made thereunder, or of any of the conditions subject to which a licence has been granted in respect of such factory, and to seize and remove all things in respect of which an offence punishable under this Act appears to have been committed.

(2) The owner or person in charge of the factory shall give every reasonable assistance to the inspecting officer in the performance of his duties under sub-section (1).

(3) The owner or person in charge of the factory shall be permitted to be present during the inspection; and the things seized during such inspection shall be sealed in the prescribed manner.—T.N. Act 25 of 1948, S. 4 as amended by T. N. Act 10 of 1953, Ss. 3, 4 and 5 (10-6-1953) and T. N. Act 23 of 1965, S. 2 (1-9-1966), read with T. N. Acts 22 of 1957 and 39 of 1961, S. 3.

4. Marking of bales.—(1) The owner of every cotton-pressing factory shall cause every bale pressed in the factory to be marked in such manner as may be prescribed, before it is removed from the press-house, with a serial number and with the mark prescribed for the factory.

(2) If any bale is removed from the press-house of any cotton-pressing factory without having been marked as required by sub-section (1), the owner of the factory shall be punished with fine which may extend to fifty rupees.

STATE AMENDMENTS

Gujarat:

(i), (ii) and (iii) same as that of Maharashtra.

(iv) In sub-section (2), for the words "fifty rupees", substitute the words "two hundred rupees".—Act 11 of 1960, S. 87 and Guj. Act 23 of 1968, S. 10 (9-12-1968).

Maharashtra:

In its application to the whole State of Maharashtra,—

(i) in sub-section (2) of Section 4, for the words "shall be punished", the words "shall, on conviction, be punishable" shall be substituted.—Bom. Act 4 of 1936, Section 12.

(ii) in sub-section (1), for the words "every bale pressed", substitute "every bale stocked or pressed";

(iii) in sub-section (2), for the words "bale is removed", substitute the words "bale is stocked or removed".—Maharashtra Act 1 of 1962, S. 6 (1-7-1963).

Mysore:

In its application to the State of Mysore, in sub-section (2) of Section 4, for the words "shall be punished", substitute the words "shall, on conviction, be punishable".—Mys. Act 23 of 1961, Section 7 (w.e.f. 16-8-1969).

Rajasthan:

Same as that of Maharashtra.—Rajas. Act 10 of 1957, S. 6 (1-2-1963).

Note.—Any bale marked in accordance with the provisions of this section shall, within the meaning of the Evidence Act, 1872, be presumed for all purposes between the parties to a contract for the purchase of baled cotton, to have been so marked before leaving the factory in which it was pressed, see sub-section (2) of Section 14.

5. Returns.—(1) The owner of every cotton-pressing factory shall submit to the prescribed authority, within such time and in such form as may be prescribed, weekly returns showing the total number of bales of cotton pressed during the preceding week and from the commencement of the season to the end of that week, and the approximate average net weight of the bales pressed in that week.

(2) The *[State Government] shall compile from the weekly returns, and shall publish in such manner as *[it thinks fit], a statement showing the total number of bales pressed in the State during the week and from the commencement of the season to the end of the week, to which the returns relate:

Provided that the number of bales pressed in any individual factory shall not be published.

(3) If default is made in submitting any return as required by sub-section (1), the owner of the factory shall be punished with fine which may extend to fifty rupees.

(4) Where the owner of a cotton pressing factory, has notified to the prescribed authority that the work of pressing bales in that factory has been suspended, it shall not be necessary for the owner to submit returns under sub-section (1) until such work has been resumed,

Explanation.—In this section “season” means the period notified in this behalf by the State Government in the †[Official Gazette.]

[°°] Substituted for “Provincial Government” by A. L. O., 1950.

[°] Substituted for “the Governor-General in Council may direct” by A. L. O., 1937.

[†] Substituted for ‘Local Official Gazette’ by A. O., 1937.

OBJECTS AND REASONS

“The return required is a weekly and progressive return for the season.....The weight to be shown is the average net weight of the bales pressed in that week. We have also made it clear that the owner is not obliged to submit a blank return when the factory is closed, if he has given due notice of the fact. The amount of the fine has been reduced to Rs. 50, as the offence is no more serious than other offences for which the same penalty has been inflicted.” — S. C. R.

STATE AMENDMENTS

Andhra Pradesh:

In its application to the pre-reorganisation State of Andhra Pradesh, excluding the transferred territories, the amendment is the same as that of Tamil Nadu.

To the Hyderabad region of the State of Andhra Pradesh, the following amendment made by Hyd. Act 33 of 1954 applies; namely—

For Sections 5 and 5-A, substitute the following section, namely,—

“5. Returns.—(1) The owner of every cotton ginning factory shall submit to the prescribed authority, within such time and in such form as may be prescribed weekly returns showing the quantity of cotton ginned in the factory during the preceding week and from the commencement of the season to the end of that week.

(2) The Government shall compile from the weekly returns submitted under sub-section (1) and shall publish, in such manner as it thinks fit, a statement showing the total quantity of cotton ginned in the State during the week and from the commencement of the season to the end of the week to which the returns relate :

Provided that the quantity of cotton ginned in any individual factory shall not be published.

(3) The owner of every cotton pressing factory shall submit to the prescribed authority, within such time and in such form, as may be prescribed, weekly returns showing the total number of bales of cotton pressed during the preceding week and from the commencement of the season to the end of that week, and the approximate average net weight of the bales pressed in that week.

(4) The Government shall compile from the weekly returns submitted under sub-section (3), and shall publish, in such manner as it thinks fit, a statement showing the total number of bales pressed in the State during the week and from the commencement of the season to the end of the week to which the returns relate :

Provided that the number of bales pressed in any individual factory shall not be published.

(5) If default is made in submitting any return as required by sub-section (1) or sub-section (3), the owner of the factory shall be punishable with fine which may extend to fifty rupees.

(6) Where the owner of a cotton ginning factory or a cotton pressing factory has notified to the prescribed authority that the work of ginning cotton or pressing bales in that factory has been suspended, it shall not be necessary for the owner to submit

returns under sub-section (1) or sub-section (3) until such work has been resumed." — Hyd. Act 33 of 1954, S. 6 (17-11-1954) read with An. P. A. L. O., 1957.

Gujarat:

Same as in Maharashtra, except the following differences.

(i) For sub-section (1), substitute the following:—

"(1) The owner of every cotton ginning factory shall submit to the prescribed authority, within such time and in such form as may be prescribed, weekly returns showing the quantity of cotton ginned in the factory during the preceding week and from the commencement of the season to the end of the week."

(ii) in sub-sections (2) and (4), for the words "in the Bombay area of the State of Gujarat" the words "in the State" shall be substituted;

(iii) in sub-section (5), for the words "fifty rupees," the words "two hundred rupees" shall be substituted — Act 11 of 1960, S. 87; Guj. A. L. (8th Am.) Order, 1961; Guj. Act 23 of 1968, S. 11 (9-12-68).

Madhya Pradesh:

For Section 5, the following section shall be substituted, namely:—

"5. Returns.—(1) The owner of every cotton ginning factory shall submit to the prescribed authority, within such time and in such form, as may be prescribed, weekly returns showing the quantity of cotton ginned in the factory during the preceding week and from the commencement of the season to the end of that week.

(1-A) The State Government shall compile from the weekly returns submitted under sub-section (1), and shall publish, in such manner as it thinks fit, a statement showing the total quantity of cotton ginned in the State during the week and from the commencement of the season to the end of the week to which the returns relate:

Provided that the quantity of cotton ginned in any individual factory shall not be published.

(2) The owner of every cotton pressing factory shall submit to the prescribed authority, within such time and in such form, as may be prescribed, weekly returns showing the total number of bales of cotton pressed during the preceding week and from the commencement of the season to the end of that week, and the approximate average net weight of the bales pressed in that week.

(3) The State Government shall compile from the weekly returns submitted under sub-section (2), and shall publish, in such manner as it thinks fit, a statement showing the total number of bales pressed in the State during the week and from the commencement of the season to the end of the week to which the returns relate:

Provided that the number of bales pressed in any individual factory shall not be published.

(4) If default is made in submitting any return as required by sub-section (1), or sub-section (2) the owner of the factory shall be punishable with fine which may extend to fifty rupees.

(5) Where the owner of a cotton ginning factory or a cotton pressing factory has notified to the prescribed authority that the work of ginning cotton or pressing bales in that factory has been suspended, it shall not be necessary for the owner to submit returns under sub-section (1) or sub-section (2) until such work has been resumed".—C. P. Act 24 of 1936, S. 6 (31-3-1937) read with M. P. Act 23 of 1958, Ss. 3 (1) and 6.

Maharashtra:

In its application to the whole State of Maharashtra for Section 5, the following shall be substituted, namely:—

"5. Returns.—(1) The owner of every cotton ginning factory shall submit to the prescribed authority, within such time and in such form, as may be prescribed, monthly returns showing the quantity of cotton ginned in the factory during the period ending on the last Friday of the preceding month and from the commencement of the season up to and inclusive of such last Friday.

(2) The State Government shall compile from the returns submitted under sub-section (1), and shall publish in such manner as the Central Government may direct, a statement showing the total quantity of cotton ginned in the State, excluding the transferred territories during the period referred to in sub-section (1) and from the commencement of the seasons to the end of such period to which the returns relate :

Provided that the quantity of cotton ginned in an individual factory shall not be published.

(3) The owner of every cotton pressing factory shall submit to the prescribed authority, within such time and in such form, as may be prescribed, weekly returns showing the total number of bales of cotton pressed during the preceding week and from the commencement of the season to the end of that week, and the approximate average net weight of the bales pressed in that week.

(4) The State Government shall compile from the weekly returns submitted under sub-section (3), and shall publish in such manner as it thinks fit, a statement showing the total number of bales pressed in the State during the week and from the commencement of the season to the end of the week to which the returns relate :

Provided that the number of bales pressed in any individual factory shall not be published.

(5) If default is made in submitting any return as required by sub-section (1) or sub-section (3), the owner of the factory shall, on conviction, be punishable with fine which may extend to fifty rupees.

(6) Where the owner of a cotton ginning or cotton pressing factory has notified to the prescribed authority that the work of ginning cotton or pressing bales in that factory has been suspended, it shall not be necessary for the owner to submit returns under sub-section (1) or sub-section (3) until such work has been resumed." — Bom. Act IV of 1936, S. 6; Bom. Act 27 of 1956 and Central Act Maha. (Amendment) A. L. O., 1961 and Maha. Act 1 of 1962, Ss. 2 (b) and 5 (1-7-1963).

Mysore:

In its application to the State of Mysore, for Section 5 of the principal Act, substitute the following namely :—

"5. Returns.—(1) The owner of every cotton ginning factory shall submit to the prescribed authority within such time and in such form as may be prescribed, monthly returns, showing the quantity of cotton ginned in the factory during the preceding month and from the commencement of the season to the end of that month.

(2) The State Government shall compile from the monthly returns submitted under sub-section (1), and shall publish in such manner as it thinks fit a statement showing the total quantity of cotton ginned in the State during the month and from the commencement of the season to the end of the month to which the returns relate:

Provided that the quantity of cotton ginned in an individual factory shall not be published.

(3) The owner of every cotton pressing factory shall submit to the prescribed authority, within such time and in such form, as may be prescribed, weekly returns showing the total number of bales of cotton pressed during the preceding week and from the commencement of the season to the end of that week and approximate average net weight of the bales pressed in that week.

(4) The State Government shall compile from the weekly returns submitted under sub-section (3) and shall publish a statement showing the total number of bales pressed in the State during the week and from the commencement of the season to the end of the week to which the returns relate :

Provided that the number of bales pressed in any individual factory shall not be published.

(5) If default is made in submitting any return as required by sub-section (1) or sub-section (3), the owner of the factory shall, on conviction, be punishable with fine which may extend to fifty rupees.

(6) Where the owner of a cotton ginning or cotton pressing factory has notified to the prescribed authority that the work of ginning cotton or pressing bales in that factory has been suspended, it shall not be necessary for the owner to submit returns under sub-section (1) or sub-section (3) until such work has been resumed." — Mys. Act. 21 of 1961, S. 8 (w. e. f. 16-8-1969).

Rajasthan:

For Section 5, substitute the following section, namely :—

"5. Returns.—(1) The owner of every cotton ginning factory shall submit to the prescribed authority, within such time and in such form, as may be prescribed, monthly returns showing the quantity of cotton ginned in the factory during the preceding month and from the commencement of the season to the end of that month.

(2) The State Government shall compile from the monthly returns submitted under sub-section (1), and shall publish, in such manner as it thinks fit, a statement showing the total quantity of cotton ginned in the State during the month and from the commencement of the season to the end of the month to which the returns relate :

Provided that the quantity of cotton ginned in an individual factory shall not be published.

(3) The owner of every cotton pressing factory shall submit to the prescribed authority within such time and in such form, as may be prescribed, weekly returns showing the total number of bales of cotton pressed during the preceding week and from the commencement of the season to the end of that week and the approximate average net weight of the bales pressed in that week.

(4) The State Government shall compile from the weekly returns submitted under sub-section (3), and shall publish in such manner as it thinks fit, a statement showing the total number of bales pressed in the State during the week and from the commencement of the season to the end of the week to which the returns relate :

Provided that the number of bales pressed in any individual factory shall not be published.

(5) If default is made in submitting any return as required by sub-section (1) or sub-section (3), the owner of the factory shall, on conviction, be punishable with fine which may extend to fifty rupees.

(6) Where the owner of a cotton ginning or cotton pressing factory has notified to the prescribed authority that the work of ginning cotton or pressing bales in that factory has been suspended, it shall not be necessary for the owner to submit returns under sub-section (1) or sub-section (3) until such work has been resumed" — Rajas. Act 10 of 1957, S. 7 (1-2-1963).

Tamil Nadu:

In Section 5, sub-section (1) omit the words "of cotton." — T. N. Act 10 of 1953, S. 6 (10-6-1953) and T. N. Acts 22 of 1957 and 39 of 1961, S. 3.

*[5A. Returns from cotton ginning factories.—(1) This section shall be in force in †[the territories which, immediately before the 1st November, 1956, were comprised in Part C States] only; but the State Government of ‡[any State] may, by notification in the Official Gazette, bring this section into force §[in the territories where it is not in force].

(2) The owner of every cotton ginning factory shall submit to the prescribed authority, within such time and in such form as may be prescribed, weekly returns showing the quantity of cotton ginned in the factory during the preceding week and from the commencement of the season to the end of that week.

(3) The State Government shall compile from the weekly returns so submitted, and shall publish in such manner as it thinks fit, a statement showing the total quantity of cotton ginned in the State during the week and from the commencement of the season to the end of the week, to which the returns relate:

Provided that the quantity of cotton ginned in any individual factory shall not be published.

(4) If default is made in submitting any return as required by sub-section (2), the owner of the factory shall be punished with fine which may extend to fifty rupees.

(5) The provisions of sub-section (4) of Section 5 apply to cotton ginning factories and the returns referred to in sub-section (2) of this section as they apply to cotton pressing factories and the returns referred to in sub-section (1) of Section 5, and "season" in this section means the season as notified for the purposes of Section 5.]

[*] Inserted by the Cotton Ginning and Pressing Factories (Amendment) Act, 1942 (9 of 1942), S. 2.

[†] Substituted for "Part C States" by 3 A. L. O., 1956. Immediately before the 1st of November, 1956, the following were the Part C States, namely, Ajmer, Bhopal, Coorg, Delhi, Himachal Pradesh, Kutch, Manipur, Tripura and Vindhya Pradesh. Of these, Ajmer has merged in Rajasthan; Bhopal and Vindhya Pradesh with M. P., Coorg with Mysore and Kutch with Gujarat. Others are Union territories now.

[‡] Substituted for 'any other State,' *ibid.*

[§] Substituted for 'in the State,' *ibid.*

STATE AMENDMENTS

Andhra Pradesh:

In Hyderabad area, Section 5 is substituted for Sections 5 and 5-A. For text of substituted S. 5, see under that section.

Gujarat:

In sub-section (4), for the words "fifty rupees," the words "two hundred rupees" are substituted — Act 11 of 1960, S. 87 and Guj. Act 23 of 1968, S. 12 (9-12-1968).

Section 5-B

Gujarat:

Section 5-B is the same as in Maharashtra with the following differences—

- (a) in sub-section (1) for the words "Commissioner" read "Superintending Agricultural Officer of the Division" at both the places;
- (b) in sub-section (2), for 'in the notification' read "in the order notified," and for "Collector" read "Cotton Superintendent" at both the places where it occurs; similarly for "Commissioner" read "Superintending Agricultural Officer of the Division;"
- (c) in sub-section (3) for the word "Commissioner" read the words "Cotton Superintendent." — Guj. Act 23 of 1968, S. 13 (9-12-1968).

Maharashtra:

In its application to the whole State of Maharashtra, after Section 5-A, insert the following new section, namely,—

"5-B. Power to regulate rates for ginning and pressing in certain areas.—(1) If the Commissioner is of opinion that it is necessary so to do, for the purpose of securing the ginning or pressing of cotton in any local area at reasonable rates of charge, he may by an order published in the Official Gazette direct that no owner or person in charge of any cotton ginning factory or cotton pressing factory in such local area shall—

- (i) charge or cause to be charged, for the ginning or pressing (or both) of cotton rates in excess of such maxima as may be fixed by the rate fixing committee of such local area under sub-section (6); or
- (ii) without reasonable excuse refuse to accept or cause to be so refused, cotton tendered by any person for ginning or pressing if the tenderer is prepared to pay charges at rates lawfully leviable; or
- (iii) impose as a condition precedent to the acceptance of cotton for ginning or pressing tendered by any person for the purpose, surrender of cotton seed or lint in whole or in part in lieu of the charges lawfully leviable.

Provided that where a cotton ginning factory or cotton pressing factory carries on the process of ginning or pressing cotton exclusively for its owner or person in charge as part of his normal trade, the Commissioner may exempt such factory from the operation of clauses (ii) and (iii) subject to such conditions as may be prescribed.

(2) There shall be appointed a rate-fixing committee in each local area specified in the order notified under sub-section (1), which shall consist of—

- (a) the Collector of the District;
- (b) two representatives of the growers of cotton of such local area;
- (c) two representatives of the owners of cotton ginning or cotton pressing factories in the local area;
- (d) one person (not being a Government servant) who possesses special knowledge of, or experience in, the ginning and pressing of cotton or of the cotton trade, to be nominated by the Collector of the district in consultation with the Commissioner.

(3) The Collector shall be the Chairman of the Committee.

(4) The representatives referred to in clauses (b) and (c) of sub-section (2) shall be appointed in such manner as may be prescribed.

(5) The term of the office of the non-official members of the Committee, the manner in which the members may resign and casual vacancies filled up, and the procedure regarding the work of the committee shall be such as may be prescribed.

(6) Every rate fixing committee shall fix the maximum rates for ginning or pressing cotton within its local area, having regard to such matters as may be prescribed.

(7) If any person gins or presses cotton at a rate exceeding the rate fixed by the committee under the provisions of this section or contravenes the provisions of any order made under sub-section (1) he shall, on conviction, be punished with fine which may extend to Rs. 500." — Bom. Act 20 of 1958, S. 3 (19-2-1958) and Maha. Act 1 of 1962, S. 2 (b) (1-7-1963).

6. Scales and weights.—(1) No scales or weights shall be used in any cotton ginning or cotton pressing factory other than the scales or weights, if any, prescribed by the ^{*}[Central Government] as standard for the district in which the factory is situated.

(2) If in any factory any scale or weight is used in contravention of the provisions of sub-section (1), the owner of the factory shall be punished with fine which may extend to fifty rupees or, if he has been previously convicted of any offence under this sub-section, to five hundred rupees.

[^{*}] Substituted for "Local Government" by A. O., 1937.

STATE AMENDMENTS

Andhra Pradesh:

In its application to the pre-reorganisation State of Andhra Pradesh, excluding the Hyderabad area, the amendment is the same as that of Tamil Nadu.

Gujarat:

In its application to the State of Gujarat, in Section 6, (2), for the words "fifty rupees," substitute "two hundred rupees" — Guj. Act 23 of 1968, S. 14 (9-12-1968).

Other amendments in the section are the same as those in Maharashtra—C. A. 11 of 1960, S. 87 and Guj. Act 23 of 1968, S. 2 (2) (9-12-1968).

Maharashtra:

In its application to the whole State of Maharashtra, in Section 6,—

- (i) in sub-sec. (1) after the words 'other than' the words and figures 'the standard weights and measures, weighing and measuring instruments authorised under the Bombay Weights and Measures Act, 1932, in districts or areas in which Parts II, III, V and VI of that Act are in force or elsewhere 'other than' shall be inserted

(ii) in sub-section (2), for the words 'shall be punished' the words 'shall, on conviction, be punishable' shall be substituted. — Bom. Act IV of 1936, Sections 7 and 12 and Maha. Act I of 1962 S. 2 (b) (1-7-1963).

Mysore:

For Section 6, substitute the following :—

"6. Scales and weights to be used in factories.—(1) No scales or weights shall be kept or used in any cotton ginning or pressing factory other than scales or weights prescribed by the Central Government and notified by the State Government in this behalf.

(2) If in any such factory any scales or weights not prescribed or notified are kept or used, the owner of the factory shall on conviction be punishable with fine, which may extend to fifty rupees, or in case he has been convicted previously of any offence under this sub-section or sub-section (3), with fine which may extend to five hundred rupees.

(3) The owner or person in charge of any such factory shall produce the scales and weights kept or used therein at the factory on demand by any officer appointed by the State Government in this behalf, and if the owner or person in charge fails to do so he shall on conviction be punishable with fine which may extend to fifty rupees; or in case he has been convicted previously of any offence under sub-section (2) or this sub-section, with fine which may extend to five hundred rupees." — Mys. Act 23 of 1961, Section 9 (w. e. f. 16-8-1969).

Rajasthan:

In sub-section (2) of Section 6, for the words "shall be punished" the words "shall, on conviction, be punishable" shall be substituted—Rajas. Act 10 of 1957, S. 8. (1-2-1963).

Tamil Nadu:

For Section 6 substitute the following section, namely :—

"6. Scales and weights to be used in factories.—(1) No scales or weights shall be kept or used in any cotton ginning or pressing factory other than scales or weights prescribed by the Central Government or notified by the State Government, in this behalf.

(2) If in any such factory, any scales or weights not so prescribed or notified are kept or used, the owner of the factory shall be punishable with fine which may extend to fifty rupees, or in case he has been convicted previously of any offence under this sub-section or sub-section (3), with fine which may extend to five hundred rupees.

(3) The owner or person, in charge of any such factory shall produce the scales and weights kept or used therein, at the factory on demand by any person appointed by the State Government in this behalf; and if the owner or person in charge fails to do so, he shall be punishable with fine which may extend to fifty rupees; or in case he has been convicted previously of any offence under sub-section (2) or this sub-section, with fine which may extend to five hundred rupees." — T. N. Act 25 of 1948, Section 5 and T. N. Acts 22 of 1957 and 39 of 1961, S. 3.

7. Liability of lessee as owner.—(1) Where the owner of a cotton-ginning or pressing factory has leased the factory for a period of not less than one month, in the case of a cotton-ginning factory, or three months in the case of a cotton-pressing factory, and the lessor retains no interest in the management or profits of the factory and notice of the lease has been given by the lessor and the lessee to the prescribed authority, the lessee shall be deemed to be the owner of the factory, from the date of the notice and for the period of the continuance of the lease, for the purposes of Section 3, in respect of the registers maintained or to be maintained from that date and for that period, and for the purposes of Sections 4, 5, * [5A] and 6.

(2) On the termination of the lease the lessee shall hand over to the lessor the registers maintained under Section 3, and the lessor shall forthwith report to

the prescribed authority any default of the lessee in complying with the provisions of this sub-section or in maintaining the registers in accordance with the provisions of Section 3.

(3) If default is made in handing over any register or making any report as required by this section, the lessor or the lessee, as the case may be, shall be punished with fine which may extend to fifty rupees.

[*] Inserted by the Cotton Ginning and Pressing Factories (Amendment) Act, 1942 (9 of 1942), Section 3 (14-3-1942).

OBJECTS AND REASONS

"Where the owner has leased his factory and has nothing to do with the management thereof, the responsibility of maintaining and producing registers is on the lessee during the period of the lease. This section accordingly throws the responsibility on the lessee and makes due provision for the transfer of the registers at the end of the lease. The owner is still responsible for producing the old registers."—See S. C. R.

STATE AMENDMENTS

Andhra Pradesh:

(i) In its application to the pre-reorganisation State of Andhra Pradesh, excluding the Hyderabad area thereof, the amendment is the same as that of Tamil Nadu.

(ii) In its application to the Hyderabad area of the State of Andhra Pradesh, the amendment made by Hyderabad Act, 33 of 1954 is applicable.

In sub-section (1) of Section 7, for the figures, letter and word "4, 5, 5-A and 6" after the words "for the purpose of sections", substitute the figures, letters and words "2-B, 3-A, 3-B, 3-D, 4, 5 and 6".—Hyd. Act 33 of 1954, Section 7 (17-11-1954) read with Andh. Pra. A. L. O., 1957.

Gujarat:

(1) In its application to the State of Gujarat, in sub-section (3) of Section 7, for the words "fifty rupees", substitute "two hundred rupees".—Guj. Act 23 of 1968, Section 15 (9-12-1968).

(2) Other amendments are the same as in Maharashtra—C.A. 11 of 1960, S. 87 and Guj. Act 23 of 1968, Section 2 (2).

Madhya Pradesh:

In sub-section (1) of Section 7, after the words "for the purposes of sections", insert the figures and letters "2-B, 3-A, 3-AA, 3-C".—C. P. and Berar Acts 24 of 1936, Section 7 (31-3-1937), 13 of 1947, Section 5 and 47 of 1947, Section 3 (5-12-1947) read with M. P. Act 23 of 1958, Section 3(1) and Section 6.

Maharashtra:

(1) In its application to the whole State of Maharashtra, in Section 7—

(i) in sub-section (1) after the words "for the purposes of sections", insert the figures and letters "3-A, 3-C";

(ii) in sub-section (3), for the words "shall be punished", substitute the words "shall, on conviction, be punishable".—Bom. Act 4 of 1936, Ss. 8 and 12.

(2) In its application to the whole State of Maharashtra, after the figure and letter "5-A", insert the figure and letter "5-B".—Bom. Act 20 of 1958, S. 5 (2) (19-2-1958) and Maharashtra Act 1 of 1962, S. 2 (b) (1-7-1963).

Mysore:

In its application to the State of Mysore, in Section 7,—

(i) in sub-section (1), after the words "for the purposes of sections", insert the figures and letters "3-A, 3-D"; and

(ii) in sub-section (3), for the words "shall be punished", substitute the words "shall, on conviction, be punishable".—Mys. Act 21 of 1961, Section 10, (w.e.f. 16-8-1969).

Rajasthan:

In Section 7—

- (i) in sub-section (1), after the words “for the purposes of section”, insert the figures and letters “3-A, 3-C”; and
- (ii) in sub-section (3), for the words “shall be punished,” substitute the words “shall, on conviction, be punishable.”—Rajas. Act 10 of 1957, S. 9 (1-2-1963).

Tamil Nadu:

In Section 7, sub-section (1), for the words and figures “for the purposes of Sections “4, 5”, substitute the words, figures and letters “for the purposes of Sections 3-A, 3-B, 3-F, 4, 5”. — T. N. Act 25 of 1948, S. 6; T. N. Acts 22 of 1957 and 39 of 1961, S. 3.

8. Liability on transfer of ownership.—(1) On a transfer of the ownership of a cotton-ginning or pressing factory, the transferor shall hand over to the transferee the registers maintained under Section 3, and the transferee shall forthwith report to the prescribed authority any default of the transferor in complying with the provisions of this sub-section or in maintaining the registers in accordance with the provisions of Section 3.

(2) If default is made in handing over any register or making any report as required by sub-section (1), the transferor or the transferee, as the case may be, shall be punished with fine which may extend to fifty rupees.

STATE AMENDMENTS

Gujarat:

(i) Same as in Maharashtra—C.A. 11 of 1960, S. 87 and Guj. Act 23 of 1968, Section 2 (2).

(ii) In sub-section (2), for the words “fifty rupees”, substitute the words “two hundred rupees”.—Guj. Act 23 of 1968, Section 16 (9-12-1968).

Maharashtra:

In sub-section (2) of Section 8, for the words “shall be punished”, the words “shall, on conviction, be punishable” shall be substituted.—Bom. Act 4 of 1936, S. 12 and Maharashtra Act 1 of 1962, S. 2 (b) (1-7-1963).

Mysore:

In its application to the State of Mysore, in sub-section (2) of Section 8, for the words “shall be punished”, substitute the words “shall, on conviction, be punishable”.—Mys. Act 21 of 1961, S. 11 (w.e.f. 16-8-1969).

Rajasthan:

Same as that of Maharashtra — Raj. Act 10 of 1957, S. 10 (1-2-1963).

9. Structural requirements for factories.—(1) In the case of cotton-ginning factories the construction of which is commenced after the commencement of this Act—

- (a) gin-houses shall be provided with separate entrances and exits for the bringing in of unginced and the taking out of ginned cotton respectively, and
- (b) the factories shall be constructed in accordance with plans and specifications approved by the prescribed authority:

Provided that nothing in this sub-section shall apply to any factory in which only roller gins are used where the number of such gins is not more than four.

*[(1A) In any cotton-ginning factory, whether erected before or after the commencement of this Act—

- (a) no structural alterations or additions, the construction of which commenced after the 27th day of February, 1939, shall be made so as to

Section 9 — Note 1

(1) A building constructed for the purpose of being used as a factory does not become a factory until it is actually so

used and no prosecution under S. 9 (3) of the Act lies for non-compliance with provisions of Section 9. 1937 Mad WN 1335 (1337).

- minimise the degree of compliance of the factory as a whole with the requirements set forth in clauses (a) and (b) of sub-section (1), and
- (b) every structural addition (whether actually attached to any existing structure in the factory or not), the construction of which commenced after the last-mentioned date, shall be constructed in accordance with plans and specifications approved by the prescribed authority:

Provided that nothing in this sub-section shall apply to any factory in which after any alteration or addition has been made, only roller gins are used where the number of such gins is not more than four.]

(2) Within such period after the commencement of this Act as may be prescribed, the owner of every cotton-pressing factory in which cotton is handled on the ground floor shall cause the press-house to be paved or provided with other suitable flooring to the satisfaction of the prescribed authority.

(3) If the owner of any factory fails to comply with any provision of this section, which is applicable to the factory, he shall be punished with fine which may extend to one hundred rupees.

(4) (a) Where the owner of a factory has been convicted under sub-section (3), the prescribed authority may serve on the owner of the factory an order in writing directing that such alterations shall be made in the factory, before a specified date, as in the opinion of the said authority are necessary to secure compliance with the provisions of sub-section (1), *[sub-section (1A)] or sub-section (2), as the case may be.

(b) Where the alterations are not made in accordance with the order served under clause (a) of this sub-section, the prescribed authority may serve on the owner and on the occupier, if any, of the factory an order in writing directing that the work of ginning or pressing cotton in such factory shall be suspended until the alterations have been made in accordance with the order served under cl. (a) of this sub-section and the owner and the occupier, if any, shall be jointly and severally liable to fine which may extend to fifty rupees for each day on which cotton is ginned or pressed in the factory in contravention of the order served under this clause.

[*] Inserted by the Cotton Ginning and Pressing Factories (Amendment) Act, 1939 (14 of 1939), S. 2 (28-3-1939).

STATE AMENDMENTS

Andhra Pradesh:

In its application to the pre-reorganisation State of Andhra Pradesh, excluding the Hyderabad area thereof, the amendments made in this section are the same as those of Tamil Nadu.

Gujarat:

In sub-section (2) of Section 9,—

- (a) for the words “the owner of every cotton-pressing factory”, substitute “the owner of every cotton-pressing or cotton-ginning factory”; and
- (b) for the words “shall cause the press-house”, substitute the words and the brackets “shall cause the press-house or, as the case may be, the gin-house (including any place used for storing cotton)”.—Guj. Act 23 of 1968, Section 17 (9-12-1968).

Maharashtra:

(1) In sub-section (3) of Section 9, for the words “shall be punished”, substitute the words “shall, on conviction, be punishable”.—Bom. Act 4 of 1936, S. 12 and Maharashtra Act 1 of 1962, S. 2 (b) (1-7-1963).

(2) and (3) same as in Gujarat—Maharashtra Act 1 of 1962, S. 9 (1-7-1963).

Mysore:

In its application to the State of Mysore, in sub-section (3), amendment made is the same as in Maharashtra.—Mys. Act 21 of 1961, S. 11 (w.e.f. 16-8-1969).

Pondicherry:

Sub-section (1-A) shall have effect as if for the words and figures 'after the 27th day of February 1939,' the words 'after the date of commencement of this Act,' were substituted. — Reg. 7 of 1963, S. 2 and Sch. (1-10-1963).

Rajasthan:

Same as that of Maharashtra.—Raj. Act 10 of 1957, S. 11 (1-2-1963).

Tamil Nadu:

In its application to the State of Tamil Nadu —

In Section 9,—

(i) in sub-section (1),—

(a) omit the word 'and' at the end of clause (a) and after clause (b) insert the following clause, namely:—

“(c) a kapas opener shall be installed and worked for the purpose of freeing the kapas, before ginning from foreign substances other than cotton waste”;

(b) omit the Proviso;

(ii) in sub-section (1-A)—

(a) for clause (a), substitute the following:—

“(a) no structural alterations or additions shall be made so as to diminish the degree of compliance of the factory as a whole—

(i) with the requirements set forth in clauses (a) and (b) of sub-section (1), if the alterations or additions commenced after the 27th February 1939 and before the 31st March 1949, or

(ii) with the requirements set forth in clauses (a), (b) and (c) of sub-section (1), if the alterations or additions commenced on or after the 31st March 1949;

(b) in clause (b), for the words “last-mentioned date”, substitute the date “27th February 1939”;

(c) omit the Proviso.—T. N. Act 25 of 1948, S. 7.

(iii) in sub-section (2), for the words “cotton is handled”, substitute the words “cotton or cotton waste is handled”;

(iv) in clause (b) of sub-section (4)—

(a) for the words “ginning or pressing cotton”, substitute the words “ginning or pressing cotton or cotton waste; and

(b) for the words “cotton is ginned or pressed”, substitute the words “cotton or cotton waste is ginned or pressed”. — T. N. Acts 10 of 1953, S. 7 (19-6-1953); 22 of 1957 and 39 of 1961, S. 3.

10. Liability of officers of a company.—Where the person guilty of an offence under this Act is a company, every director, manager, secretary and other officer thereof who is knowingly a party to the default shall also be guilty of the like offence and is liable to the like punishment.

11. Cognizance of offences.—(1) No prosecution under this Act shall be instituted except by or with the previous sanction of the District Magistrate or a Chief Presidency Magistrate or a Magistrate of the first class specially empowered in this behalf by the °[State Government].

(2) No offence punishable under this Act shall be tried by any Court inferior to that of a Presidency Magistrate or of a Magistrate of the first class.

[°] Substituted by A. L. O., 1950, for “Provincial Government”.

STATE AMENDMENTS

Gujarat:

In its application to the State of Gujarat, in sub-section (1), for the words “the Commissioner of Police in Greater Bombay and the District Magistrate elsewhere” (as substituted by Bom. Act 8 of 1954), substitute the words “the Director of Agriculture but in

Note.—Chief Magistrate and Magistrates in the City of Ahmedabad have been invested with the powers of a Chief Presidency Magistrate and Presidency Magistrates respectively — See Guj. Act 19 of 1961, S. 14 (3) (4-11-1961).

In its application to the whole State of Maharashtra, in sub-section (1) of Section 11, for the words beginning with the words "the District Magistrate" and ending with the words "State Government", substitute the words "the Commissioner of Police in Greater Bombay and the District Magistrate elsewhere".—Bom. Act 8 of 1954, S. 2 and Sch., Part II (10-2-1954) and Maha. Act 1 of 1962, S. 2 (b) (1-7-1963).

Note.—With effect from 1-7-1965, Commissioners of Police have also been appointed in the Cities of Nagpur and Poona—See Maharashtra Govt. Gaz., 8-7-1965, Pt. I (CS), pp. 412 and 410, respectively.

Gujarat:

Maharashtra:

“11-A. Power of Magistrate to pass sentence.—Notwithstanding anything contained in Section 32 of the Code of the Criminal Procedure, 1898, a Presidency Magistrate or a Magistrate of the first Class may pass any sentence provided for any offence punishable under this Act and the provisions of the said Code shall be deemed to have been amended accordingly.”—Bom. Act 4 of 1936, S. 9 and Maha. Act 1 of 1962, S. 2 (b) (1-7-1963).

Excluding the words "a Presidency Magistrate or," Section 11-A is the same as that of Maharashtra—Rajas. Act 10 of 1957, S. 12 (1-2-1963).

(a) the allotment of a special mark to be used by each pressing factory for the purpose of the marking of bales;

(b) the manner in which bales shall be marked; and

†[(c) the standard weights and scales to be used in cotton-ginning and cotton-pressing factories in any part of ‡[the territories to which this Act extends] and the inspection of the same.]

[°°] Substituted for "Governor-General in Council" by A. O., 1937 (1-4-1937).

[^o] For such rules, see Gazette of India, 1925, Pt. I, p. 728.

[†] Substituted by A. O., 1937 for the original clause.

[1] Substituted for "Part A States and Part C States" by the Part B States (Laws) Act, 1951 (3 of 1951), S. 3 and Sch. (1-4-1951).

13. Power of the State Government to make rules.—The *[State Government] may, by notification in the *[Official Gazette], make rules consistent with this Act to provide for all or any of the following matters, namely:—

(a) the forms in which registers, records and returns are to be maintained or submitted, and the inspection of records and registers;

(b) the appointment of the authority to whom and the time within which the returns required by [Sections 5 and 5A] shall be made;

• • • • • []

- (d) the appointment of authorities for the purposes of Sections 7, 8 and 9;
- (e) the manner of service of orders made under S. 9;
- (f) the powers of entry and inspection which may be exercised by District Magistrates or by any officer specially empowered in this behalf by the "[State Government];
- (g) any other matter which is to be or may be prescribed or for which provision is necessary in order to carry out the purposes of this Act.

[*] Substituted by A. L. O., 1950, for "Provincial Government" and "Local Official Gazette".

[†] Substituted for "section 5" by the Cotton Ginning and Pressing Factories (Amendment) Act, 1942 (9 of 1942), S. 4 (14-3-1942).

[‡] Clause (c) was repealed by A. O., 1937. See now clause (c) of S. 12.

STATE AMENDMENTS

Andhra Pradesh:

(i) In its application to the pre-reorganisation State of Andhra Pradesh, excluding the Hyderabad area thereof, the amendment made in this section is the same as that of Tamil Nadu.

(ii) In its application to the Hyderabad area of the State of Andhra Pradesh, the amendment made by Hyd. Act 33 of 1954 is applicable, namely,—

For Section 13, substitute the following section, namely:—

"13. Power of the Government to make rules.—(1) The Government may by notification in the Jarida make rules consistent with this Act to provide for all or any of the following matters, namely:—

- (a) the forms in which registers, records and returns are to be maintained or submitted, and the inspection of records and registers;
- (aa) what shall constitute an admixture of cotton;
- (ab) the period which shall from time to time constitute a season;
- (ac) the authority by whom, the forms in which, the conditions subject to which and the fee on payment of which, a licence may be granted under sub-section (1) of Section 2-A;
- (ad) the particulars of the cotton-ginning factory to be entered in the register maintained under sub-section (2) of Section 3;
- (ae) the proportion of seed which may be contained in cotton;
- (af) the person authorised to give a certificate regarding the quantity of moisture contained in any cotton and other matters specified in Section 3-A;
- (ag) the person or body authorised to examine the cotton or the contents of that package or bale under Section 3-C;
- (ah) the procedure for making a complaint and causing the cotton or the contents of the package or bale to be examined and the fee for examination of the same under sub-section (1) of Section 3-C;
- (ai) the manner in which things seized shall be sealed under Section 3-D;
- (b) the appointment of the authority to whom and the time within which the returns required by Section 5 shall be made;
- (c) the appointment of authorities for the purposes of Sections 7, 8 and 9;
- (d) the manner of service of orders made under Section 9;
- (e) the powers of entry and inspection which may be exercised by Collectors or by any officer specially empowered in this behalf by the Government;
- (f) any other matter which is to be or may be prescribed or for which provision is necessary in order to carry out the purposes of this Act.

(2) The rules to be made under sub-section (1) shall be subject to the condition of previous publication."—Hyd. Act 33 of 1954, S. 8 (17-11-1954) read with Andh Pra. A. L. O., 1957.

Gujarat:

In its application to the State of Gujarat amendments in the section are the same as in Maharashtra, except—

(a) for cl. (ag) in sub-section (1), substitute “(ag) the rank of the Government servant for the purposes of sub-section (1) of Sections 3-B and 3-C;”;

(b) in cl. (c), insert the following after sub-clause (iii):—

“(iv) the conditions subject to which a factory may be exempted from the operation of clauses (ii) and (iii) of sub-section (1) of Section 5-B;”;

(c) for sub-section (3), substitute the following:—

“(3) All rules made under this section shall be laid for not less than thirty days before the State Legislature as soon as possible after they are made and shall be subject to rescission by the State Legislature or to such modification as the State Legislature may make during the session in which they are so laid, or the session immediately following.

(4) Any rescission or modification so made by the State Legislature shall be published in the Official Gazette and shall thereupon take effect.”—Act 11 of 1960, S. 87 and Guj. Act 23 of 1968, Ss. 2 (2) and 19 (9-12-1968).

Madhya Pradesh:

(i) In Section 13, after cl. (a), the following clauses shall be inserted, namely:—

“(aa) what shall constitute an admixture of cotton;

(ab) the period which shall from time to time constitute a season;

(ac) the authority by whom, the form in which, the conditions subject to which and the fee on payment of which, a licence may be granted under sub-section (1) of Section 2-A;

(ad) the particulars of the cotton-ginning factory to be entered in the register maintained under sub-section (2) of Section 3;

(ae) the proportion of seed which may be contained in cotton;

(af) the person authorised to give a certificate regarding the quantity of moisture contained in any cotton and other matters specified in Section 3-A;

(ag) the person or body authorized to examine bales under Section 3-B;

(ah) the procedure for making a complaint and causing the contents of a bale to be examined and the fee for examination of the contents of a bale under sub-section (1) of Section 3-B.

(ai) the manner in which the things seized shall be sealed under Section 3-C.”

(ii) Section 13 shall be renumbered as sub-section (1) of that section and after the sub-section so renumbered, the following sub-sections shall be added, namely:—

“(2) The rules to be made under sub-section (1) shall be subject to the condition of previous publication.

(3) A copy of the draft of the proposed rules shall be laid on the table of the Legislative Assembly of the Province. The Provincial Government shall give the Assembly an opportunity of discussing them and shall take into consideration any resolution concerning the same which may be passed by the Assembly before finally publishing them in the Official Gazette.”—C. P. Act 24 of 1936, Ss. 8 and 9 (31-3-1937) read with M. P. Act 23 of 1958, Ss. 3 (1) and 6.

Maharashtra:

(1) In its application to the whole State of Maharashtra, in Section 13, after cl. (a), the following clauses shall be inserted, namely:—

“(aa) What shall constitute an admixture of cotton;

(ab) the period which shall from time to time constitute a season;

(ac) the authority by whom, the form in which, the conditions subject to which and the fees on payment of which, a licence may be granted under sub-section (1) of Section 2A;

- (ad) the particulars of the cotton-ginning factory to be entered in the register maintained under sub-section (2) of Section 3;
- (ae) the proportion of seed which may be contained in cotton;
- (af) the person authorised to give a certificate regarding the quantity of moisture contained in any cotton and other matters specified in Section 3-A;
- *[(ag) The rank of the Government servant for the purposes of sub-section (1) of Sections 3-B and 3-C];
- (ah) the procedure for making a complaint and causing the contents of a bale to be examined and the fee for examination of the contents of a bale under sub-section (1) of Section 3-B;
- (ai) the manner in which the things seized shall be sealed under Section 3-C."

(2) Section 13 shall be renumbered as sub-section (1) of that section and after the sub-section so renumbered, the following sub-section shall be added, namely:—

"(2) The rules to be made under sub-section (1) shall be subject to the condition of previous publication.

(3) All rules made by the State Government under this Act shall be laid for not less than thirty days before each House of the State Legislature as soon as possible after they are made and shall be subject to such modifications as the State Legislature may make during the session in which they are so laid or session immediately following and publish in the Official Gazette."—Bom. Act 4 of 1936, Section 10 and Maharashtra Act 1 of 1962, Sections 2 (b) and 10 (1-7-1963).

(3) In its application to the whole of the State of Maharashtra, in sub-section (1) of Section 13, after cl. (b), insert the following clause, namely:—

"(c)[(i) prescribing conditions subject to which a factory may be exempted from the operation of clauses (ii) and (iii) of sub-section (1) of Section 5-B]

(ii) prescribing the manner in which the representatives referred to in cls. (b) and (c) of sub-section (2) of Section 5-B shall be appointed, and

(iii) prescribing the term of office of the members of the committee, the manner of their resigning and filling up of casual vacancies and the procedure regarding the work of the committee under sub-section (5) of that section; and

(iv) the matters which a rate-fixing committee should have regard to when arriving at the maximum rate of the ginning or pressing of cotton within the local area."—Bom. Act 20 of 1958, S. 4 and S. 5 (3) (19-2-1958) and Maharashtra Act 1 of 1962, Ss. 2 (b) and 10 (1-7-1963).

[°] Substituted by Maharashtra Act 1 of 1962, Section 10 (1-7-1963).

Mysore:

In its application to the State of Mysore, in Section 13—

(1) for the words "State Government may by notification", substitute the words "State Government may, subject to the condition of previous publication, by notification."

(2) after clause (a), insert the following clauses, namely:—

"(i) clauses (aa) to (ai) are the same as in Maharashtra, with the following variations: cl. (ag) is as follows:—

"(ag) the person authorised to examine bales under Section 3-C;"

(ii) in clauses (ah) and (ai), for S. 3-B and S. 3-C, substitute S. 3-C and S. 3-D respectively;

(3) after clause (b), insert the following clauses, namely:—

"(ba) providing for and regulating the election and selection of the representatives referred to in clauses (a) and (b) of sub-section (2) of Section 2-B, the manner of election and selection, the term of office of the members of the committee, preparation of voters' lists, where necessary, the filling of any casual vacancies and all matters connected with such election and selection;

- (bb) laying down the principles to be observed and the procedure to be followed by the committee in fixing the maximum rates and the manner of publication of the rates so fixed by the committee to all concerned in the local area;
- (bc) providing for conditions of exemption from the operation of the clauses (ii) and (iii) of sub-section (1) of Section 2-B;—Mys. Act 21 of 1961, Section 12 (w.e.f. 16-8-1969).

Rajasthan:

Same as that in (1) of Maharashtra—Rajas. Act 10 of 1957, S. 13 (1-2-1963).

Tamil Nadu:

In Section 13, after cl. (a), insert the following clauses, namely:—

- “(a-1) the specification of what shall constitute different varieties of cotton for the purposes of S. 2, cl. (a), S. 3-D, cl. (a), or other purposes;
- (a-2) the postponement of the application of rules made under this Act, to cotton ginning or pressing factories in any specified area; and the exemption of factories in any specified area from the operation of such rules;
- (a-3) the procedure for making a complaint under S. 3-E and the investigation thereof;”—T. N. Acts 25 of 1948, S. 8 and 10 of 1953, S. 8 (10-6-1953).

14. Power to reject unmarked bales in fulfilment of contracts.—*[(1)] After the expiration of one year from the commencement of this Act, any person who has made a contract for the purchase of baled cotton may require that no bales other than bales, marked †[with the mark prescribed under Section 4 for the factory in which they were pressed,] shall be supplied in fulfilment of such contract, and, if he does so require, no bale not so marked shall be tenderable in fulfilment of the contract.

†[* ° ° ° ° ° * * * * * *]

*[(2) Any bale marked in accordance with the provisions of Section 4 shall, within the meaning of the Indian Evidence Act, 1872, be presumed for all purposes as between the parties to a contract for the purchase of baled cotton, to have been so marked before the leaving the factory in which it was pressed.]

[*] Section 14 was re-numbered as sub-section (1) of that section and sub-section (2) was inserted by the Cotton Ginning and Pressing Factories (Amendment) Act, 1939 (14 of 1939), S. 3 (28-3-1939).

[†] Substituted for “in accordance with section 4,” *ibid.*

[‡] Proviso was omitted, *ibid.*

STATE AMENDMENTS**Andhra Pradesh:**

In its application to the pre-reorganisation State of Andhra Pradesh, excluding the Hyderabad area, the amendment made in this section is the same as that of Tamil Nadu.

Tamil Nadu:

In sub-sections (1) and (2) of Section 14, for the words “baled cotton” substitute the word ‘bales.’—T. N. Act 10 of 1953, S. 9 (10-6-1953) and T. N. Acts 22 of 1957 and 39 of 1961, S. 3.

15. Protection for acts done under Act.—No suit or other legal proceeding shall be instituted against any person in respect of anything which is in good faith done or intended to be done under this Act.

STATE AMENDMENTS**Section 16****Andhra Pradesh:**

In its application to the pre-reorganisation State of Andhra Pradesh, excluding the Hyderabad area, Section 16 is the same as that of Tamil Nadu.

In Hyderabad area of the State, Sec. 16 is the same as that of Maharashtra.—Hyd. Act 33 of 1954, S. 9 (17-11-1954).

Gujarat

Section 16 in Gujarat is the same as in Maharashtra — Act 11 of 1960, Section 87 and Guj. Act 23 of 1968, S. 2 (2) (9-12-1968).

Madhya Pradesh:

Section 16 is the same as that of Maharashtra — C. P. and Berar Act 24 of 1936, S. 10 (31-3-1937) and M. P. Act 23 of 1958.

Maharashtra:

In its application to the whole State of Maharashtra, after Section 15 the following section shall be added, namely :—

“16. **Penalty.**—Whoever contravenes any of the provisions of this Act or any rule made thereunder or any of the conditions subject to which a licence has been granted to him shall, on conviction, if no other penalty is already provided in this Act for such contravention, be punishable with fine which may extend to five hundred rupees or, if he has previously been convicted of an offence under this Act or any rule made thereunder, with fine which may extend to fifteen hundred rupees.” — [Bombay Act IV of 1936, S. 11] and Maha. Act I of 1962, S. 2 (b).

Mysore:

In its application to the whole State of Mysore, after Section 15 of the principal Act, add the following section, namely :—

“16. **Penalty in cases not otherwise provided for.**—Whoever contravenes any of the provisions of the Act or any rules made thereunder or any of the conditions subject to which a licence has been granted to him shall, on conviction if no other penalty is already provided in this Act for such contravention be punishable with fine which may extend to five hundred rupees, or, if he has previously been convicted of an offence under this Act or any rule made thereunder, with fine which may extend to fifteen hundred rupees.”—Mys. Act 21 of 1961, S. 13 (w.e.f. 16-8-1969).

Rajasthan:

Section 16 is the same as that of Maharashtra — Rajas. Act 10 of 1957, S. 14.

Tamil Nadu:

After Section 15, add the following section, namely :—

“16. **Penalty in cases not otherwise provided for.**—Whoever contravenes any of the provisions of this Act or any rule made thereunder or any of the conditions subject to which a licence has been granted to him shall, if no other penalty is provided in this Act for such contravention, be punishable with fine which may extend to five hundred rupees and in the case of a second or subsequent conviction, with fine which may extend to one thousand five hundred rupees.”—T. N. Act 25 of 1948, S. 9 and T. N. Acts 22 of 1957 and 39 of 1961, S. 3.

STATE AMENDMENTS

Section 17.

Andhra Pradesh:

In its application to the pre-reorganisation State of Andhra Pradesh, excluding the Hyderabad area thereof, Section 17 is the same as that of Tamil Nadu.

Gujarat

Same as in Maharashtra, except that for the words “District Magistrate,” words “Director of Agriculture or the District Magistrate” are substituted — Act 11 of 1960, S. 87; Guj. Act 23 of 1968, Ss. 2 (2) and 20 (9-12-1968)

Maharashtra:

In its application to the whole State of Maharashtra, after Section 16 the following section shall be added, namely :—

"17. Compounding offences, etc.—(1) The District Magistrate may accept from any person whose licence is liable to be suspended, withdrawn or cancelled under this Act, or who is reasonably suspected of having committed an offence under this Act, a sum of money in lieu of such suspension, withdrawal or cancellation or by way of composition for the offence which may have been committed, as the case may be.

(2) On payment by such person of such sum to the District Magistrate, such person, if in custody, shall be set at liberty and if criminal proceedings shall have been instituted against such person, the composition shall be held to amount to an acquittal." — Bombay Act IV of 1936, S. 11 and Maha. Act 1 of 1962, S. 2 (b) (1-7-1963).

Rajasthan:

Section 17 is the same as that of Maharashtra.—Rajas. Act 10 of 1957, S. 14 (1-2-1963).

Tamil Nadu:

After Section 16, add the following section, namely:—

"17. Compounding of offences etc.—(1) Any officer empowered by the State Government in this behalf may accept from any person whose licence is liable to be suspended or cancelled under this Act, or who has committed or is reasonably suspected of having committed an offence punishable under this Act, a sum of money in lieu of such suspension or cancellation or by way of composition for the offence which has been or may have been committed.

(2) The composition of an offence under sub-section (1) shall have the effect of an acquittal of the offender; and, if he is in custody, he shall be set at liberty."—T. N. Act 25 of 1948, S. 9 and T. N. Acts 22 of 1957 and 39 of 1961, S. 3.

[THE] COTTON TEXTILES CESS ACT, 1948 (ACT VII OF 1948)

[The text of the Act printed here is as on 1-4-1970.]

CONTENTS

SECTIONS

1. Short title, extent and commencement.
2. Definitions.
3. Levy of cess.
4. Effect on contracts.
5. Payment of cess.

6. Penalty for non-payment.
7. Recovery of cess and penalty.
8. Power of inspection, entry and search.
9. Penalty for evasion of cess or failure to comply with order under Section 8.

STATEMENT OF OBJECTS AND REASONS

"The Government of India have recently relaxed their controlled prices of cotton textiles, and are now leaving the fixation of prices to the industry, who have assured Government that they will fix reasonable prices. Government have decided to collect from mills or stock-

holders, for the benefit of the public revenues, the difference between the old and the new prices of cloth. At present Government have no power to collect this cess, and the Bill is designed to give them this power."

—Gaz. of Ind., 7-2-1948, Pt. V, p. 77.

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION

—Adapted by A. L. O., 1950; S A. L. O., 1956.

COGNATE ACTS AND PROVISIONS

(1) Lac Cess Act, 24 of 1930.

(2) Salt Cess Act, 49 of 1953.

[THE] COTTON TEXTILES CESS ACT, 1948
(ACT VII OF 1948)*

[1st March, 1948.]

An Act to impose a cess on †[the manufacture of certain cotton textiles].

WHEREAS it is expedient to impose a cess on †[the manufacture of certain cotton textiles];

It is hereby enacted as follows:—

[°] For Statement of Objects and Reasons, see Gaz. of Ind., 7-2-1948, Pt. V, p. 77.

[†] Substituted for "certain cotton textiles manufactured in the Provinces of India." by A. L. O., 1950.

1. Short title, extent and commencement.—(1) This Act may be called THE COTTON TEXTILES CESS ACT, 1948.

(2) It extends to the whole of India, except °[the territories which, immediately before the 1st November, 1956, were comprised in Part B States].

(3) It shall be deemed to have come into force on the 31st day of December, 1947.

[°] Substituted for "Part B States," by 3 A. L. O., 1956. Immediately before the 1st November, 1956, the following were the Part B States in India: Hyderabad, Jammu and Kashmir, Madhya Bharat, Mysore, Pepsu, Rajasthan, Saurashtra and Travancore-Cochin.

Since Constitution (Seventh Amendment) Act 1956, division of territories of India into Part A, Part B and Part C States no longer exists. The territories are now divided into States and Union Territories only. Of the then Part B States, Jammu and Kashmir, Mysore, Rajasthan and Travancore-Cochin (now known as Kerala) have become full-fledged States; Hyderabad, Madhya Bharat, Pepsu and Saurashtra have now merged with Andhra Pradesh, Madhya Pradesh, Punjab and Gujarat respectively.

2. Definitions.—In this Act, unless there is anything repugnant in the subject or context,—

(a) "cloth" and "yarn" mean respectively the cloth and yarn of which prices fixed by any order made under Section 3 or continued by Section 17 of the Essential Supplies (Temporary Powers) Act, 1946, were in force immediately before the commencement of this Act;

(b) "producer" means a person engaged in the production of cloth or yarn or both by power as defined in clause (f) of Section 2 of the Factories Act, 1934.*

[°] See now the Factories Act, 1948 (63 of 1948), S. 2 (g).

3. Levy of cess.—The Central Government may, by notification* in the Official Gazette, levy on any cloth or yarn held in stock by a producer or a wholesale dealer on such date as the Central Government may fix in this behalf a cess at such rate as may be specified in the notification.

[°] See Notification No. 90/4 Tex. I/48 (i), dated the 2nd March, 1948, published in Gaz. of Ind., Extra., 2-3-1948, page 407.

4. Effect on contracts.—Where before the date mentioned in Section 3 a producer or wholesale dealer has made a contract of sale in respect of any cloth or yarn on which a cess is levied under that section, it shall be lawful for him to charge the amount of the cess to the buyer in addition to the contract price.

NOTE.—Under this section the producer or the wholesale dealer is enabled to pass on the incidence of the cess levied on him to the buyer by adding the same to the contract price, though the liability to pay the cess to the prescribed authority is on the producer or the wholesale dealer as the case may be.

5. **Payment of cess.**—The cess shall be paid by the producer or the whole-sale dealer as the case may be to such authority within such time and in such manner as may be specified in the notification.

6. **Penalty for non-payment.**—If any cess payable under this Act is not paid as prescribed, it shall be deemed to be in arrears and the authority appointed in this behalf by the Central Government may, after such enquiry as he deems fit, impose on the producer or the dealer a penalty not exceeding the amount of cess in arrears.

7. **Recovery of cess and penalty.**—The amount of cess in arrears and any sum imposed as penalty under Section 6 shall, without prejudice to any other liability incurred under this Act be recovered as arrears of land revenue.

8. **Power of inspection, entry and search.**—Any authority authorized by the Central Government in this behalf may, with a view to securing compliance with this Act—

- (a) require any producer or dealer to furnish to such authority such information relating to his business as that authority may specify;
- (b) inspect or cause to be inspected any books or other documents belonging to or under the control of such producer or dealer;
- (c) enter and search or authorize any person to enter and search any premises and seize or authorize any person to seize any cloth or yarn in respect of which he has reason to believe that a contravention of this Act has been or is about to be committed.

9. **Penalty for evasion of cess or failure to comply with order under Section 8.**—(1) Whoever evades or attempts to evade the payment of cess payable by him under this Act or fails to comply with any order issued to him under clause (a) of Section 8 or furnishes any information which is false and which he knows or has reasonable cause to believe to be false or does not believe to be true, shall be punishable with imprisonment which may extend to 6 months or with fine which may extend to two thousand rupees or with both.

(2) Any Court trying any offence under this Act may order that any cloth or yarn together with the packages or coverings thereof in respect of which the Court is satisfied that an offence under this Act has been committed shall be forfeited to the Central Government.

[THE] COTTON TEXTILE COMPANIES (MANAGEMENT OF UNDERTAKINGS AND LIQUIDATION OR RECONSTRUCTION) ACT, 1967 (ACT XXIX OF 1967)

[The text of the Act printed here is as on 31-3-1970.]

CONTENTS

SECTIONS

- | | |
|--|---|
| 1. Short title, extent and commencement. | 6. Provisions where Central Government decides to follow the course specified in Section 4 (2). |
| 2. Definitions. | 7. Preparation of inventory of assets and liabilities and list of members and creditors of a managed company. |
| 3. Power of Central Government to call report on the affairs and working of managed company. | 8. Stay of suits and other proceedings. |
| 4. Decision of Central Government in relation to managed company. | 9. Protection of action taken in good faith. |
| 5. Provisions where Government decides to follow the course specified in Section 4 (1). | 10. Power to make rules. |
| | 11. Power to remove difficulties. |

STATEMENT OF OBJECTS AND REASONS

"The cotton textile industry provides one of the basic necessities of life and affords gainful employment to millions of people. Over the last few years, this vital industry has been passing through difficult times. Some mills have already have to close down and the continuing economic operation of many others is beset with many difficulties. These difficulties have been aggravated in many cases by the heavy burden of past debts. The taking over of the management of these mills for a limited time and then restoring them to original owners has not remedied the situation. Steps are, therefore, necessary to bring about a degree of rationalisation of the financial and managerial structure of such units with a view to their rehabilitation, so that production and employment may not suffer.

2. While keeping such financially weak textile mills in operation, the provisions contained in the Bill enable Government to consider their compulsory liquidation or their reconstruction.

3. Where liquidation is called for, provision has been made for the sale of the undertaking concerned as a running concern at or above a reserve price which will be fixed by Government after taking into account the financial condition of the companies and other relevant factors. If no satisfactory offer is received, the undertaking will be purchased by the Government at the reserve price fixed by it.

4. Where reconstruction is appropriate, Government would prepare a suitable scheme for the purpose. Such a scheme may, inter alia, provide for the appointment of a new Board of Directors, the reduction of the interests or rights of the members and creditors and for the acquiring of controlling interest in the company by Government. Any loans and advances made to the company after the Government had started running the undertaking would not however be subject to reduction."

—Gaz. of Ind., 20-11-1967, Pt. II-S. 2, Ext., p. 1114.

[THE] COTTON TEXTILE COMPANIES (MANAGEMENT OF UNDERTAKINGS AND LIQUIDATION OR RECONSTRUCTION) ACT, 1967

(ACT 29 OF 1967)*

[23rd December, 1967].

An Act to provide in the public interest for the liquidation of cotton textile companies while keeping the undertaking thereof as running concerns, or for the reconstruction of cotton textile Companies, in certain cases and for matters connected therewith.

Whereas cotton textile industry is an important industry in the country;

And whereas adequate and improved production of cloth is not only essential for the life of the community but also contributes in the earning of foreign exchange substantially;

And whereas quite a large number of ancillary industries depend and flourish on the cotton textile industry;

And whereas conditions in the cotton textile industry have tended to deteriorate due to lack of modernisation and other reasons;

And whereas on account of mismanagement certain cotton textile mills are threatened with closure;

And whereas the closure of the cotton textiles mills will affect prejudicially the production of cotton textiles and the interests of labour;

Be it enacted by Parliament in the Eighteenth Year of the Republic of India as follows :—

[*] For Statement of Objects and Reasons, see Gaz. of Ind., 20-11-1967, Pt. II, S. 2, Ext., p. 1114.

1. Short title, extent and commencement.—(1) This Act may be called THE COTTON TEXTILE COMPANIES (MANAGEMENT OF UNDERTAKINGS AND LIQUIDATION OR RECONSTRUCTION) ACT, 1967.

(2) It extends to the whole of India except the State of Jammu and Kashmir.

(3) It shall come into force on such date* as the Central Government may, by notification in the Official Gazette, appoint.

[*] The date so appointed is 8-1-1968, see Gaz. of Ind., 8-1-1968, Pt. II, S. 3 (ii), Ext., page 27.

2. Definitions.—In this Act, unless the context otherwise requires,—

- (a) “cotton textiles” means yarn or fabrics made either wholly or partially of cotton;
- (b) “Court” means the High Court having jurisdiction in relation to the place at which the registered office of a textile company is situate;
- (c) “current assets” means bank balances and cash and includes such other assets or reserves as are expected to be realised in cash or sold or consumed within a short period of time in the ordinary course of business such as stock-in-trade, amounts due from sundry debtors for sale of goods and for services rendered, advance tax payments and bills receivable, but does not include sums credited to a provident fund, a pension fund, a gratuity fund or any other fund for the welfare of the employees, maintained by a textile company;
- (d) “current liabilities” means liabilities which must be met on demand or within a period of twelve months from the date they are incurred;
- (e) “Industries Act” means the Industries (Development and Regulation) Act, 1951;
- (f) “prescribed” means prescribed by rules made under this Act;
- (g) “textile company” means a company as defined in the Companies Act, 1956, engaged wholly or mainly in the manufacture of cotton textiles;
- (h) words and expressions used but not defined in this Act and defined in the Companies Act, 1956, shall have the meanings respectively assigned to them in that Act.

3. Power of Central Government to call for report on the affairs and working of managed company.—Where the management of the undertaking of a textile company has been taken over under Section 18A of the Industries Act,* the Central Government may, at any time during the continuance of such management, call for a report on the affairs and working of the undertaking from the person or body of persons authorised to take over the management of the undertaking (hereinafter referred to as the authorised person) and in submitting the report the authorised person shall take into account the inventory and the lists of members and creditors prepared under Section 7.

[*] That is the Industries (Development and Regulation) Act, 1951 (65 of 1951).

4. Decision of Central Government in relation to managed company.—(1) If the Central Government on receipt of the report from the authorised person is satisfied that the financial condition and other circumstances of the textile company are such that the textile company is not in a position to meet its current liabilities out of its current assets, that Government may, if it considers it necessary or expedient in the public interest, by order, decide that the undertaking of the textile company should be sold as a running concern as provided in Section 5 and proceedings should simultaneously be started for the winding* up of the textile company.

(2) Notwithstanding anything contained in sub-section (1), if the Central Government on receipt of the report from the authorised person is satisfied that—

- (a) in the public interest, or
 - (b) in the interest of the shareholders, or
 - (c) to secure the proper management of the textile company,
- it is necessary so to do, the Central Government may, by order, decide to prepare a scheme for the reconstruction of the textile company.

(3) For the removal of doubt, it is hereby declared that nothing contained in this section shall be construed as preventing the Central Government from exercising the powers conferred on it by Section 18F† of the Industries Act† in respect of a textile company the management of whose undertaking has been taken over under Section 18A† of that Act but such powers shall not be exercised after the making of an order under sub-section (1), or, as the case may be, under sub-section (2) of this section.

[*] Pt. VII of the Companies Act, 1956 consisting of Ss. 425 to 560, deals with winding up of Companies.

[†] Act 65 of 1951.

[‡] Section enables the Central Government to assume management or control of Industrial undertaking in certain cases. S. 18F speaks of the power of Central Government to cancel notified order under S. 18A.

5. Provisions where Government decides to follow the course specified in Section 4 (1).—(1) The provisions hereinafter laid down shall apply where the Central Government decides that the course specified in sub-section (1) of Section 4 should be followed:—

(a) the decision of the Central Government that the course specified in sub-section (1) of Section 4 should be followed in relation to any textile company shall be deemed to be a ground specified in Section 433 of the Companies Act, 1956, for the presentation of an application for the winding up of the textile company;

(b) the authorised person shall, as soon as may be, after the decision specified in sub-sec. (1) of Sec. 4 has been taken by the Central Government, present by petition an application to the Court for the winding up of the textile company on the ground that in the opinion of the Central Government it is necessary or expedient in the public interest that while the undertaking of the textile company should continue to be managed as a running concern, the company itself should be wound up;

(c) the authorised person shall, in addition to discharging his functions of management of the undertaking as a running concern under the Industries Act, function as Official Liquidator, until it is sold or purchased in pursuance of this section, in the winding up proceedings of the textile company as if he were an Official Liquidator appointed under Section 448 of the Companies Act, 1956, and thereafter the Official Liquidator referred to in that section shall function as the Official Liquidator in the said proceedings;

(d) the authorised person shall make a report to the Central Government as to what should be the reserve price for the sale of the undertaking as a running concern, and in making such a report, he shall have regard to—

(i) the financial condition of the textile company on the date of the order under Section 4—

(1) as disclosed in its books of account,

(2) as disclosed in its balance-sheets and profit and loss accounts during a period of five years immediately before the said date;

(ii) the condition and nature of the plant, machinery, instruments and other equipment from the point of view of their suitability for profitable use in the running of the undertaking;

(iii) the total amount of liability on account of secured and unsecured debts including overdrafts, if any, drawn on banks, liabilities on

account of terminal benefits to the employees and other borrowings and liabilities of the textile company; and

- (iv) other relevant factors including the factor that the undertaking will be sold free from all encumbrances, and notice of such price shall be given in such manner as may be prescribed to the members and creditors of the textile company requiring them to make representations within a specified time to the Central Government through the authorised person and the Central Government after considering the representations received and the report of the authorised person, determine the reserve price;
- (e) the authorised person shall thereafter, with the permission of the Court, invite tenders from the public in such manner as may be determined by the Court for the sale of the undertaking as a running concern subject to the condition that it will be sold to the person offering the highest price which shall not be less than the reserve price determined under clause (d):

Provided that the Court shall not refuse permission if it is satisfied that the textile company is not in a position to meet its current liabilities out of its current assets:

- (f) the undertaking shall be sold to the highest bidder as a running concern only if the price offered by him therefor is not less than the reserve price;
- (g) where no offer of price is equal to or more than the reserve price, the undertaking shall be purchased by the Central Government at the reserve price;
- (h) the amount realised from the sale of the undertaking as a running concern together with any other sum which may be realised from any contributory, purchaser or any other person from whom any money is due to the textile company shall be utilised in accordance with the provisions of the Companies Act, 1956, in discharging the liabilities of the textile company and distributing the balance, if any, amongst the members of the company;
- (i) in other respects, the provisions* of the Companies Act, 1956, relating to winding up by the Court shall, as far as may be, apply.

(2) When any undertaking is sold to any person under clause (f), or purchased by the Central Government under clause (g), of sub-section (1), there shall be transferred to and vested in the purchaser, free from all encumbrances, all such assets relating to the undertaking as are referred to in sub-clause (i) of clause (a) of Section 7 and existing at the time of the sale or purchase.

[*] Sections 425 to 560, both inclusive.

6. Provisions where Government decides to follow the course specified in Section 4 (2).—(1) Where in any case the Central Government decides that the course specified in sub-section (2) of Section 4 should be followed, it shall cause to be prepared by the authorised person a scheme for the reconstruction of the textile company in accordance with the provisions hereinafter contained and the authorised person shall submit the same for its approval.

(2) The scheme for the reconstruction of the textile company may contain provisions for all or any of the following matters, namely:—

- (a) the constitution, name and registered office, the capital, assets, powers, rights, interests, authorities and privileges, the liabilities, duties and obligations of the company on its reconstruction;
- (b) any change in the Board of directors, or the appointment of a new Board of directors of the company on its reconstruction and the autho-

rity by whom, the manner in which and the other terms and conditions on which, such change or appointment shall be made and in the case of appointment of a new Board of directors or of any director, the period for which such appointment shall be made;

- (c) the vesting of controlling interest in the reconstructed textile company in the Central Government either by the appointment of additional directors or by the allotment of additional shares;
- (d) the alteration of the memorandum and articles of association of the company on its reconstruction to give effect to such reconstruction;
- (e) subject to the provisions of the scheme, the continuation by or against the company on its reconstruction of any action or proceedings pending against the company immediately before the date of its reconstruction;
- (f) the reduction of the interest or rights which the members and creditors have in or against the company before its reconstruction to such extent as the Central Government may consider necessary in the public interest or in the interests of the members and creditors or for the maintenance of the business of the company:

Provided that nothing contained in this clause shall be deemed to authorise the reduction of the interest or rights of any creditor (including Government) in respect of any loan or advance made by that creditor to the company after the date on which the management of the undertaking of the company has been taken over under Section 18A of the Industries Act;

- (g) the payment in cash or otherwise to the creditors in full satisfaction of their claim—
 - (i) in respect of their interest or rights in or against the company before its reconstruction; or
 - (ii) where their interest or rights aforesaid in or against the company has or have been reduced under clause (f), in respect of such interest or rights as so reduced;
- (h) the allotment to the members of the company for shares held by them therein before its reconstruction [whether their interest in such shares has been reduced under clause (f) or not], of shares in the company on its reconstruction and where it is not possible to allot shares to any members, the payment in cash to those members in full satisfaction of their claim—
 - (i) in respect of their interest in shares in the company before its reconstruction, or
 - (ii) where such interest has been reduced under clause (f), in respect of their interest in shares as so reduced;
- (i) the offer by the Central Government to acquire by negotiations with the members of the company their respective shares on payment in cash to those members who may volunteer to sell their shares to the Central Government in full satisfaction of their claim—
 - (i) in respect of their interest in shares in the company before its reconstruction, or
 - (ii) where such interest has been reduced under clause (f), in respect of their interest in shares as so reduced;
- (j) the conversion of any debentures issued by the company after the taking over of the company under Section 18A of the Industries Act* or of any loans obtained by the company after that date or of any part of such debentures or loans, into shares in the company and the allotment of those shares to such debenture-holders or creditors, as the case may be;

[*] i.e., The Industries (Development Regulation) Act, 65 of 1951.

- (k) the increase of the capital of the company by the issue of new shares and the allotment of such new shares to the Central Government;
- (l) the continuance of the services of such of the employees of the company as the Central Government may specify in the scheme in the company itself on its reconstruction on such terms and conditions as the Central Government thinks fit;
- (m) notwithstanding anything contained in clause (1), where any employees of the company whose services have been continued under clause (1) have, by notice in writing given to the company at any time before the expiry of one month next following the date on which the scheme is sanctioned by the Court, intimated their intention of not becoming employees of the company on its reconstruction, the payment to such employees and to other employees whose services have not been continued on the reconstruction of the company, of compensation, if any, to which they are entitled under the Industrial Disputes Act, 1947 and such pension, gratuity, provident fund and other retirement benefits ordinarily admissible to them under the rules or authorisations of the company immediately before the date of its reconstruction;
- (n) any other terms and conditions for the reconstruction of the company;
- (o) such incidental, consequential and supplemental matters as are necessary to secure that the reconstruction shall be fully and effectively carried out.

(3) (a) A copy of the scheme as approved by the Central Government shall be sent in draft to the company and to the creditors thereof for suggestions and objections, if any, within such period as the Central Government may specify for this purpose.

(b) The Central Government may make such modifications, if any, in the draft scheme as it may consider necessary in the light of the suggestions and objections received from the company and from any members or creditors of the company.

(4) The scheme shall thereafter be placed before the Court for its sanction and the Court if satisfied that the scheme is in the public interest or in the interests of the shareholders or for securing the proper management of the company and that the scheme is designed to be fair and reasonable to the members and creditors of the company, may, after giving an opportunity to the company and to its members and creditors of showing cause, sanction the scheme without any modification or with such modification as it may consider necessary.

(5) The scheme as so sanctioned by the Court shall come into force on such date as the Court may specify in this behalf:

Provided that different dates may be specified for different provisions of the scheme.

(6) The sanction accorded by the Court under sub-section (4) shall be conclusive evidence that all the requirements of this section relating to the reconstruction of the company have been complied with, and a copy of the sanctioned scheme certified by the Court to be a true copy thereof, shall, in all legal proceedings (whether original or in appeal or otherwise), be admitted as evidence to the same extent as the original scheme.

(7) On and from the date of the coming into operation of the scheme or any provision thereof, the scheme or such provision shall be binding on the company and also on all the members and other creditors and employees of the company and on any other person having any right or liability in relation to the company.

(8) On the coming into operation of the scheme or any provision thereof, the authorised person shall cease to function, and the management of the reconstructed company shall be assumed by the Board of Directors as provided in the scheme.

(9) Copies of the scheme shall be laid before each House of Parliament, as soon as may be, after the scheme has been sanctioned by the Court.

(10) The provisions of this section and of any scheme made thereunder shall have effect notwithstanding anything contained in Sections 391 to 394-A (both inclusive) of the Companies Act, 1956.

7. Preparation of inventory of assets and liabilities and list of members and creditors, of a managed company.—For the purposes of this Act, the authorised person shall, as soon as may be, after taking over the management of the undertaking of a textile company under Section 18-A of the Industries Act,—

(a) prepare a complete inventory of—

(i) all property, movable and immovable, including lands, buildings, works, workshops, stores, instruments, plant, machinery, automobiles and other vehicles, stocks of yarn, thread, cloth or fabric, in course of production, storage or transit, raw materials, chemicals, dyes, cotton, cash balances, cash in hand, deposits in bank or with any other person or body or on loan, reserve funds, investments and book debts and all other rights and interests arising out of such property as were, immediately before the date of taking over of the undertaking in the ownership, possession, power or control of the textile company, whether within or without India; and all books of account, registers, maps, plans, sections, drawings, records, documents or titles of ownership of property, and all other documents of what ever nature relating thereto; and

(ii) all borrowings, liabilities and obligations of whatever kind of the textile company including liability on account of terminal benefits to its employees subsisting immediately before the said date;

(b) prepare separately a list of members, and a list of creditors, of such textile company as on the date of taking over of the management of the undertaking showing separately in the list of creditors, the secured creditors and the unsecured creditors:

Provided that where the management of the undertaking of a textile company has been taken over under the said Section 18-A before the commencement of this Act, the aforesaid functions shall be performed by the authorised person within six months from such commencement.

8. Stay of suits and other proceedings.—In the case of a textile company in respect of which an order under Section 4 has been made, no suit or other legal proceeding shall be instituted or continued against the textile company except with the previous permission of the Central Government or any officer or authority authorised by that Government in this behalf.

9. Protection of action taken in good faith.—(1) No suit, prosecution or other legal proceedings shall lie against the Central Government, the authorised person or any officer or authority for anything which is in good faith done or intended to be done in pursuance of this Act or any rule, order, notification or scheme made thereunder.

(2) No suit or other legal proceedings shall lie against the Central Government, the authorised person or any officer or authority for any damage, loss or injury caused or likely to be caused by anything which is in good faith done or intended to be done in pursuance of this Act or any rule, order, notification or scheme made thereunder.

10. Power to make rules.—(1) The Central Government may, by notification^o in the Official Gazette, make rules to carry out the purposes of this Act.

(2) Every rule made by the Central Government under this Act shall be laid, as soon as may be after it is made, before each House of Parliament while it is in

session for a total period of thirty days which may be comprised in one session or in two successive sessions, and if, before the expiry of the session in which it is so laid or the session immediately following, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

[*] For Cotton Textile Companies (Management of Undertakings and Liquidation or Reconstruction) Rules, 1968, see Gazette of India, 30-3-1968, Pt. II, S. 3 (i), p. 653.

11. Power to remove difficulties.—(1) If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by order published in the Official Gazette, make such provisions, not inconsistent with the provisions of this Act, as appear to it to be necessary or expedient for the removal of the difficulty:

Provided that no such order shall be made after the expiration of three years from the commencement of this Act.

(2) Every order made under sub-section (1) shall be laid, as soon as may be after it is made, before each House of Parliament.

[THE] COTTON TRANSPORT ACT, 1923 (ACT III OF 1923)

[The text of the Act printed here is as on 1-4-1970.]

CONTENTS

SECTIONS

1. Short title and extent.
2. Definitions.
3. Power to issue notification prohibiting import of cotton into protected area.
4. Refusal to carry unlicensed cotton.

5. Procedure where cotton arrives at notified area.
6. Penalties.
7. Power to make rules.
8. Previous approval of State Legislature to issue of notifications and rules.
9. Protection for acts done under Act.

STATEMENT OF OBJECTS AND REASONS

"The Indian Cotton Committee, which was appointed in 1917, brought to notice (1) that the practice of adulterating long staple cotton with short staple was very prevalent at the gins and press-houses in certain long staple areas, the object being to secure for the mixture the higher prices offered for long staple; (2) that, owing to the consequent mixture of seed, there was considerable deterioration in the cultivation of many of the superior varieties of cotton; (3) that soft cotton waste was also used for the purpose of adulteration with "kapas" (the natural floss); and (4) that short staple cotton was frequently railed to a long staple area and re-booked thence, even without mixing, as long staple cotton.

2. As instances of (1) and (2), the Committee quoted the imports of short staple cotton into the Broach tract, the result of which has been that Broach cotton has largely lost its former reputation. Other superior varieties of cotton are threatened with the same fate. The practice described under (4)

above is facilitated by the trade custom whereby cotton is bought and sold on the name and reputation of the area where it purports to have been grown; i.e., on the name of the railway station from which the bales are last booked.

3. These malpractices are exercising so serious and dangerous an influence on the industry as a whole, that the necessity of taking Governmental action has become a matter of immediate importance. The Bill provides a remedy by enabling Local Governments to prevent inferior cotton or cotton waste, as defined, from being imported, except under licence, into areas which it is desired to protect.

The principal provisions of the Bill are as follows:—

1. Local Governments are empowered, with the previous consent of the Provincial Legislature, to define the areas and to notify the stations which should be regarded as protected. Consignments of cotton are not allowed to any such

notified station except from other notified stations in the same area

2. It is necessary to make certain exceptions to the prohibition in favour, for instance, of millowners within the area requiring extraneous cotton and of purchasers of cotton waste for industrial purposes. Local Governments are ac-

cordingly empowered to frame rules for a licensing system and to appoint the authorities for the issue of licenses.

3. Station masters or other railway servants responsible for the delivery of goods or parcels are prohibited under penalties from delivering cotton improperly consigned to their stations."

—Gazette of India, 1922, Part V, p. 213.

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION

—Amended by Act 34 of 1925; 22 of 1960; A. C. A. O., 1948; A. L. O., 1950; 3 A. L. O., 1956.

—Amended in Madras by Mad. Act 15 of 1948.

—Adapted by A. O., 1937; A. L. O., 1950; 3 A. L. O. 1956; Bom. A. L. O., 1957.

—Extended by Act 20 of 1954; Reg. 7 of 1963.

—in Bombay by Bom. Act 4 of 1950.

—in Madhya Pradesh by M. P. Act 12 of 1950.

—in Punjab by Punj. Act 5 of 1950.

—in Tamil Nadu by T. N. Act 35 of 1949.

[THE] COTTON TRANSPORT ACT, 1923

(ACT III OF 1923)*

[23rd February, 1923.]

An Act to provide for the restriction and control of the transport of cotton in certain circumstances.

WHEREAS it is expedient for the purpose of maintaining the quality and reputation of the cotton grown in certain areas, †[* * *] to enable the restriction and control of the transport by rail and the import of cotton into those areas; It is hereby enacted as follows:

[*] For Statement of Objects and Reasons, see Gazette of India, 1922, Pt. V, p. 213.

This Act has been extended to the States merged in the following States:—

Bombay (now Maharashtra and Gujarat): See Bombay Merged States (Laws) Act, 1950 (Bom. Act 4 of 1950), S. 3 and Sch. II (30-3-1950).

Madhya Pradesh: See Madhya Pradesh Merged States Laws (State) Act, 1950 (M. P. Act 12 of 1950), S. 3 and Sch. II (3-4-1950).

Punjab: See Punjab Merged States (Laws) Act, 1950 (Punj. Act 5 of 1950), S. 3 and Sch. II (15-4-1950). Punjab is now divided into the States of Haryana and Punjab and the Union Territory of Chandigarh. Some part of Punjab has been transferred to the Union Territory of Himachal Pradesh as well—See Act 31 of 1966.

Tamil Nadu: See Madras Merged States (Laws) Act, 1949 (Mad. Act 35 of 1949), S. 3 and Sch. I (1-1-1950).

The Act has been extended also to the absorbed areas of Shahda, Nandurbar and Taloda Talukas of the West Khandesh District and Dohad Taluka and the Jhalod Mahal of the Panch Mahal District in the State of Bombay: See the Absorbed Areas (Laws) Act, 1954 (20 of 1954), S. 3 and Sch. II (30-4-1954). Bombay State now stands divided into two States, Gujarat and Maharashtra. Of the absorbed areas, those of Dohad Taluka and Jhalod Mahal of the Panch Mahal District are now in Gujarat State and the others in the Maharashtra State.

The Act was partially extended to Berar by the Berar Laws Act, 1941 (4 of 1941).

The Act has been extended to the Union Territory of Pondicherry by Reg. (7 of 1963), (w.e.f. 1-10-1963).

[†] The words "in the Provinces" were omitted by A. L. O., 1950.

OBJECTS AND REASONS

The Preamble.—"As one of the objects of the Bill is to check the practice of sending pressed bales from one cotton tract to another, ordinarily producing a better quality

of cotton, so that it may be rebooked from a railway station in that tract and thereby appear as if it were cotton grown in that area of better quality, we think the purpose of the Bill would be more correctly stated as the maintenance of the quality and reputation of the cotton grown in British India, and we have amended the Preamble accordingly. This also removes any difficulty which might arise in interpreting the terms inferior and superior varieties."—J. C. R.

1. Short title and extent.—(1) This Act may be called THE COTTON TRANSPORT ACT, 1923.

(2) *^[It extends to the whole of India except the State of Jammu and Kashmir.]

[°] Substituted for the original section, as amended by 3 A. L. O., 1956, by the Cotton Transport (Amendment) Act, 1960 (22 of 1960), S. 2 (23-8-1960).

2. Definitions.—In this Act, unless there is anything repugnant in the subject or context,—

- (a) "certified copy", in relation to licence, means a copy of the licence certified in the manner described in Section 76 of the Indian Evidence Act, 1872, by the authority by which the licence was granted;
- (b) "cotton" means every kind of unmanufactured cotton, that is to say, ginned and unginned cotton, cotton waste and cotton-seed;
- (c) "cotton waste" means droppings, strippings, fly and other waste products of a cotton-mill other than yarn waste;
- (d) "licence" means a licence granted under this Act;
- (e) "notified station" means a railway station specified in a notification under Section 3;
- (f) "prescribed" means prescribed by rules made under this Act; and
- (g) "protected area" means an area into which the import of cotton or of any kind of cotton has been prohibited *^[wholly or partly] by a notification under Section 3.

[°] Inserted by the Cotton Transport (Amendment) Act, 1925 (24 of 1925), S. 2.

OBJECTS AND REASONS

"We have made it clear in the definition of the expression "cotton" contained in sub-clause (b) that the enumeration of the various kinds of cotton referred to is exhaustive. We have also made a slight alteration in this sub-clause and in sub-clause (g) in connection with the proposals to which we refer in our remarks on clause (3)."—J. C. R.

3. Power to issue notification prohibiting import of cotton into protected area.—(1) The *^[State Government] may, for the purposes of maintaining the quality or reputation of the cotton grown in any area in the *^[State], by notification in the †^[Official Gazette], prohibit the import of cotton or of any specified kind of cotton into that area ‡^[by rail, road, river and sea, or by any one or more of such routes] save under, and in accordance with the conditions of, a licence:

Provided that no such notification shall be deemed to prohibit the import into any protected area of packages containing any kind of cotton and not exceeding ten pounds§ avoirdupois weight.

(2) Any such notification may prohibit the delivery to, and the taking of delivery by, any person, at any specified railway station situated in the protected area, of any cotton, the import of which ‡^[by rail] into that area is prohibited when such cotton has been consigned from a railway station not situated in that area, unless such person holds a licence for the import ‡^[by rail] of the cotton into that area.

[°] Substituted for "Provincial Government" and "Province" by A. L. O., 1950.

[†] Substituted for "Local Official Gazette" by A. O., 1937.

[‡] Inserted by the Cotton Transport (Amendment) Act, 1925 (34 of 1925), S. 3.

[§] In view of the adoption of metric system of weights and measures, this needs to be amended.

STATE AMENDMENTS

Gujarat:

Same as that of Maharashtra—Act 11 of 1960, S. 87.

Maharashtra:

In sub-section (1), after the words "in the State", insert the words "to which this Act extends"—Bom. A. L. O., 1957.

Note.—The Act now extends to the whole of India except the Jammu and Kashmir State and hence the amendment by addition of the words has become meaningless.

OBJECTS AND REASONS

"We are impressed with the necessity of enabling a Local Government to prohibit the import into protected areas of all or any of the kinds of cotton specified in clause 2. In famine times it might, for instance, be necessary for a Local Government to permit the import into such an area of cotton-seed which is extensively used as cattle food. This decision necessitates a considerable number of consequential alterations throughout the Bill, e.g., in sub-clause (2) of this clause and in clauses 4, 5 and 7, in addition to those in clause 2 referred to above.

We have further provided in sub-clause (1) of this clause for the exemption from the provisions of the Act of all cotton which is consigned in packages not exceeding ten pounds in weight. This alteration is intended to secure the free movement of samples of cotton. The Upper India Chamber of Commerce advocated the exemption from the Bill of small parcels such as are ordinarily sent as samples and might in fact be despatched by parcel post."—J. C. R.

4. Refusal to carry unlicensed cotton.—(1) Notwithstanding anything contained in the Indian Railways Act, 1890, or any other law for the time being in force, the station master of any railway station or any other railway servant responsible for the booking of goods or parcels at that station may refuse to receive for carriage at, or to forward or allow to be carried on the railway from, that station any cotton consigned to a notified station, being cotton of a kind of which the delivery at such notified station has been prohibited unless both stations are in the same protected area, or unless the consignor produces a certified copy of a licence for the import of the cotton [°][by rail] into the protected area in which such notified station is situated.

(2) Every certified copy of a licence when so produced shall be attached to the invoice or way-bill, as the case may be, and shall accompany the consignment to its destination, and shall there be dealt with in the prescribed manner.

(3) Where by or under any law in force in the territories of any State in India the import [°][by rail] into any area, or the delivery at any railway station, of cotton or of any kind of cotton has been prohibited, the [†][Central Government] may, by notification[‡] in the [§][Official Gazette], declare that the provisions of sub-section (1) shall apply in respect of cotton consigned to any such station as if such area and such station were respectively a protected area and a notified station, and as if any licence granted under such law were a licence granted under this Act.

[[°]] Inserted by Cotton Transport (Amendment) Act, 1925 (34 of 1925), S. 4.

[[†]] Substituted for "Governor-General in Council" by A. O., 1937.

[[‡]] For such notifications: See General Statutory Rules and Orders, Vol. 5, p. 90.

[[§]] Substituted for "Gazette of India" by A. O., 1937.

5. Procedure where cotton arrives at notified station.—(1) Where any cotton, the import of which [°][by rail] into any protected area has been prohibited, has been consigned to and arrives at a notified station in any such protected area, the station master or other railway servant responsible for the receipt and delivery to the consignee of goods or parcels, as the case may be, at that station shall, unless both the notified station and the railway station from which the cotton has been consigned are situated in the same protected area, refuse to deliver the cotton until

he is satisfied that the consignee holds a licence for the import of the cotton [°][by rail] into the protected area in which such notified station is situated; and, if he is not so satisfied, or if within fourteen days the consignee or some person acting on his behalf does not appear in order to take delivery, shall return the cotton to the railway station from which it was consigned, together with an intimation that delivery of the cotton has been refused or has not been taken, as the case may be.

(2) Any station master or other railway servant receiving any cotton returned under sub-section (1), or returned with a like intimation from a railway station specified in a notification under sub-section (3) of Section 4, shall cause to be served on the consignor in any manner authorised by Section 141 of the Indian Railways Act, 1890, a notice stating that the cotton has been so returned and requiring the consignor to pay any rate, terminal or other charges due in respect of the carriage of the cotton to and from the railway station to which it was consigned, and such charges shall be deemed to be due from the consignor for all the purposes of Section 55 of that Act.

[[°]] Inserted by the Cotton Transport (Amendment) Act, 1925 (34 of 1925), S. 5.

OBJECTS AND REASONS

"We are of opinion that fourteen days is a sufficient period to allow for the removal by the consignee from the station of destination of cotton which is covered by a licence."—J. C. R.

6. Penalties.—Any person who, in contravention of the provisions of this Act or of [°]notification or rule made hereunder, knowingly takes delivery of any cotton from a notified station or imports, or attempts to import, any cotton into a protected area, and any station master or other railway servant who, in contravention of the provisions of sub-section (1) of Section 5, without reasonable excuse, the burden of proving which shall lie upon him, delivers any cotton to a consignee or other person, shall be liable to a fine not exceeding one thousand rupees, and upon any subsequent conviction to imprisonment which may extend to three months, or to fine which may extend to five thousand rupees, or to both.

[[°]] For such notifications, see General Statutory Rules and Orders, Vol. V, p. 90.

OBJECTS AND REASONS

"We have made it clear that an innocent contravention of the Act is not to be punishable.

We have further considered with care the proposal supported by the Local Government of Bombay and others that the Bill should provide for the confiscation of cotton in respect of which an offence under this clause has been committed, and we have by a majority decided not to make any alteration in this respect. We think that the difficulties which would arise in connection with the seizure and identification of cotton after its arrival at a press or other place of destination would result in any such provision proving ineffectual, unless powers are given to the police and other officials which we are disinclined to provide until experience shows that they are necessary."—J. C. R.

Note.—The expression "knowingly takes delivery" shows that innocent contravention of the Act is not punishable.

7. Power to make rules.—(1) The [°][State Government] may, by notification in the †[Official Gazette], make rules to provide for any of the following matters, namely:—

- (a) the prevention of the import into a protected area by road, river or sea, save under and in accordance with the conditions of a licence, of cotton the import of which into that area has been prohibited ‡[wholly or partly] by a notification under Section 3;
- §[(b) the terms and conditions to be contained in licences, the authorities by which they may be granted and the fees which may be levied in respect thereof; and]
- (c) the manner in which licences and certified copies thereof shall be dealt with on and after the delivery of the cotton to which they relate.

(2) Any such rules may provide that any contravention thereof or of the conditions of any licence, not otherwise made punishable by this Act, shall be punishable with fine which may extend to five hundred rupees.

[°] Substituted for the words "Provincial Government" by A. L. O., 1950.

[†] Substituted for "local official Gazette" by A. O., 1937.

[‡] Inserted by the Cotton Transport (Amendment) Act, 1925 (34 of 1925), S. 6.

[§] Substituted for original clause by the Cotton Transport (Amendment) Act, 1960 (22 of 1960), S. 3 (23-8-1960).

STATE AMENDMENT

Tamil Nadu:

In sub-section (2) of Section 7, for the words "five hundred rupees", substitute the words "ten thousand rupees".—T. N. Act 15 of 1948, S. 2 (6-8-1948).

8. Previous approval of °[State] Legislature to issue of notifications and rules.—No notification under Section 3 or rule under Section 7 shall be issued by the †[State Government] †[° ° °] unless it has been laid in draft before §[the Legislative Assembly of the °†[State],] and has been approved by a Resolution °†[of that Assembly] either with or without modification or addition, but upon such approval being given the notification or rule, as the case may be, may be issued in the form in which it has been so approved:

°§[Provided that if the ††[State Legislature] has two †§[Houses], the notification must be laid in draft before, and be approved by Resolutions of, both †§[Houses] either without modifications or additions, or with modifications or additions, approved by both †§[Houses].]

[°] Substituted for "Provincial" by A. L. O., 1950.

[†] Substituted for "Provincial Government" by A. L. O., 1950.

[‡] The words "of any Part A State" were omitted by 3 A. L. O., 1956.

[§] Substituted for "the Legislative Council of the Province" by A. O., 1937.

[°†] Substituted for "Province" by A. L. O., 1950.

[°†] Substituted for "of the Legislative Council" by A. O., 1937.

[°§] Proviso inserted by A. O., 1937.

[††] Substituted for "Provincial Legislature" by A. L. O., 1950.

[†§] Substituted for "Chambers" by A. L. O., 1950.

Note.—This provision makes it obligatory on the State Government to obtain previous approval of the State Legislature to the notification under Section 3, prohibiting import of cotton into protected area.

9. Protection for acts done under Act.—No suit or other legal proceeding shall be instituted against any person in respect of anything which is in good faith done or intended to be done under this Act.

[THE] COUNTESS OF DUFFERIN'S FUND ACT, 1957 (ACT LXIII OF 1957)

[The text of the Act printed here is as on 1-4-1970.]

STATEMENT OF OBJECTS AND REASONS

"The National Association for Supplying Medical Aid by Women to the Women of India was established in 1885 with the object of imparting medical education to women rendering medical relief, and supplying nurses and midwives for hospitals and private work. In 1888, the Association was registered as a Society under the Societies Regis-

tration Act, 1860 (21 of 1860). The fund which was raised by public subscriptions both in India and the United Kingdom, was known as "The Countess of Dufferin's Fund" and was managed by the Association. After partition it became necessary to wind up the Association. The Association passed a resolution to this effect on the 19th April 1948. This Bill seeks to provide for the transfer of the assets and liabilities of the Association to the Central Government. It also seeks to provide for the validation of all action taken since the 19th April 1948."—Gaz. of Ind., Extra., 6-12-1957, Pt. II-Sec. 2, p. 932.

[THE] COUNTESS OF DUFFERIN'S FUND ACT, 1957
(ACT LXIII OF 1957)*

[27th December, 1957.]

An Act to provide for the transfer of the Fund known as the Countess of Dufferin's Fund to the Central Government.

Be it enacted by Parliament in the Eighth Year of the Republic of India as follows:—

[*] For Statement of Objects and Reasons, see Gaz. of Ind., Extra., 6-12-1957, Pt. II, Sec. 2, p. 932.

1. Short title.—This Act may be called THE COUNTESS OF DUFFERIN'S FUND ACT, 1957.

2. Definitions.—In this Act, unless the context otherwise requires,—

- (a) "Association" means the National Association for Supplying Medical Aid by Women to the Women of India, being a society registered under the Societies Registration Act, 1860;
- (b) "Fund" means all property, movable or immovable, of or belonging to the Association.

3. Dissolution of Association and transfer of Fund.—On the commencement of this Act—

- (a) the Association shall stand dissolved;
- (b) the Fund shall vest in the Central Government; and
- (c) all the debts and liabilities of the Association shall be transferred to the Central Government and shall thereafter be discharged and satisfied by it out of the Fund.

4. Validation of certain acts done before the commencement of this Act.—Notwithstanding anything contained in any law for the time being in force, all acts and things done, before the commencement of this Act, by any person acting or purporting to act in pursuance of the Resolutions passed at the extraordinary general meeting of the Association held on the 19th day of April 1948, shall be valid and shall be deemed always to have been valid and no suit or other proceeding shall be instituted, maintained or continued against any person whatever on the ground that any such act or thing was not done in accordance with law.

Note.—After partition of India, it became necessary to wind up the Association and in pursuance of this the Association passed a resolution on the 19th April, 1948. This section provides for validation of acts done after the resolution and before the commencement of this Act, in pursuance of that resolution.

[THE] COURT-FEES ACT, 1870

(ACT VII OF 1870)

[The text of the Act printed here is as on 1-4-1970.]

CONTENTS

CHAPTER I PRELIMINARY

SECTIONS

1. Short title.

Extent of Act.

Commencement of Act.

1-A. Definition of "appropriate Government".

2. [Repealed.]

CHAPTER II

FEEs IN THE HIGH COURTS AND IN THE COURTS OF SMALL CAUSES AT THE PRESIDENCY-TOWNS

3. Levy of fees in High Courts on their original sides.

Levy of fees in Presidency Small
Cause Courts.

4. Fees on documents filed etc. in High Courts in their extraordi- nary jurisdiction :

in their appellate jurisdiction :
as Courts of reference and revi-
sion.

5. Procedure in case of difference as to necessity or amount of fee.

CHAPTER III

FEEs IN OTHER COURTS AND IN PUBLIC OFFICES

6. Fees on documents filed, etc., in Mufassal Courts or in public offices.

7. Computation of fees payable in certain suits;

(i) for money;

(ii) for maintenance and annui-
ties;

(iii) for other movable property
having a market-value;

(iv) (a) for movable property
of no market-value;

(b) to enforce a right to
share in joint family pro-
perty;

(c) for a declaratory decree
and consequential relief;

(d) for an injunction;

(e) for easements;

(f) for accounts;

(v) for possession of land, houses
and gardens;

Proviso as to Bombay Presi-
dency;

for houses and gardens;

(vi) to enforce a right of pre-
emption;

(vii) for interest of assignee of
land-revenue;

(viii) to set aside an attachment;

(ix) to redeem;
to foreclose;

(x) for specific performance;

(xi) between landlord and ten-
ant.

8. Fee on memorandum of appeal against order relating to com- pensation.

9. Power to ascertain net profits or market-value.

10. Procedure where net profits or market-value wrongly estimated.

11. Procedure in suits for mesne pro- fits or account when amount de- creed exceeds amount claimed.

12. Decision of questions as to valua- tion.

13. Refund of fee paid on memoran- dum of appeal.

14. Refund of fee on application for review of judgment.

15. Refund where Court reverses or modifies its former decision on ground of mistake.

16. [Repealed.]

17. Multifarious suits.

18. Written examinations of com- plainants.

19. Exemption of certain documents.

CHAPTER III-A

PROBATES, LETTERS OF ADMINIS- TRATION AND CERTIFICATES OF ADMINISTRATION

19-A. Relief where too high a court- fee has been paid.

19-B. Relief where debts due from a deceased person have been paid out of his estate.

19-C. Relief in case of several grants.

19-D. Probates declared valid as to trust-property though not cover- ed by court-fee.

19-E. Provision for case where too low a court-fee has been paid on probates, etc.

19-F. Administrator to give proper security before letters stamped under Section 19-E.

19-G. Executors, etc. not paying full Court-fee on probates, etc., with- in six months after discovery of underpayment.

SECTIONS

- 19-H. Notice of applications for probate or letters of administration to be given to Revenue-authorities, and procedure thereon.
- 19-I. Payment of court-fees in respect of probates and letters of administration.
- 19-J. Recovery of penalties, etc.
- 19-K. Sections 6 and 28 not to apply to probates or letters of administration.

CHAPTER IV

PROCESS-FEES

20. Rules as to cost of processes. Confirmation and publication of rules.
21. Tables of process-fees.
22. Number of peons in District and subordinate Courts.
Number of peons in Mufassal Small Cause Courts.
23. Number of peons in Revenue Courts.
24. [Repealed.]

CHAPTER V

OF THE MODE OF LEVYING FEES

25. Collection of fees by stamps.
26. Stamps to be impressed or adhesive.
27. Rules for supply, number, renewal and keeping accounts of stamps.
28. Stamping documents inadvertently received.
29. Amended document.
30. Cancellation of stamp.

STATEMENT OF OBJECTS AND REASONS

"The rates of Stamp fees leviable in Court and offices established beyond the local limits of the ordinary original civil jurisdiction of the High Courts of Judicature at Fort William, Madras and Bombay, and in proceedings on the appellate side of such High Courts, were, as fixed by Act XXVI of 1867, to a great extent tentative.

The experience gained of their working during the two years in which they have been in force, seems to be conclusive as to their repressive effect on the general litigation of the country.

It is, therefore, thought expedient to make a general reduction in the rates

CHAPTER VI

MISCELLANEOUS

31. [Repeal.]
32. [Repealed.]
33. Admission in criminal cases of documents for which proper fee has not been paid.
34. Sale of stamps.
35. Power to reduce or remit fees.
36. Saving of fees to certain officers of High Courts.

SCHEDULE I

Ad Valorem Fees.
Table of Rates of Ad Valorem Fees
Leviable on the Institution of Suits.

SCHEDULE II

Fixed Fees.

SCHEDULE III

Form of Valuation.

ANNEXURE A.— Valuation of the Movable and Immovable Property of Deceased.

ANNEXURE B.— Schedule of Debts etc.

APPENDIX I.— The Bihar Entertainments Duty, Court-fees and Stamp (Surcharge Amendment) Act, 1948.
The Orissa Court-fees (Surcharge) Amendment Act, 1947.

APPENDIX II.— The Andhra Pradesh Court-fees and Suits Valuation Act 1956.

The Bombay Court-fees Act 1959.
The Himachal Pradesh Court-fees Act 1968.

The Jammu and Kashmir Court-fees Act 1977 Smt.

The Kerala Court-fees and Suits Valuation Act 1959.

The Mysore Court-fees and Suits Valuation Act 1958.

The Rajasthan Court-fees and Suits Valuation Act 1961.

The Tamil Nadu Court-fees and Suits Valuation Act 1955.

now chargeable on the institution of civil suits, and to revert to the principle of maximum fee which obtained under the former law.

It is proposed also to reduce the valuation fixed by the existing law for the computation of the fee leviable on suits relating to land under temporary settlement or land exempt from the payment of revenue to the Government which is believed to be, at least relatively, excessive, as compared with the valuation of permanently settled land; and to provide for the valuation of suits relating to mere parcels of land, which, though forming part of estates under settlement, bear no specific allot-

ment of any portion of the assessment of Government revenue on such estates, at the estimated selling price of such land, as was the rule in those cases under Act X of 1862.

The want of some fixed valuation applicable to certain classes of suits, as for example, suits instituted between landlord and tenant to recover a right of occupancy or enforce ejectment, or suits for maintenance or for an annuity, the subject-matter of which, though not absolutely indeterminable, is certainly not susceptible of ready determination, has given rise to much uncertainty and variety in the procedure adopted by the several Courts in such cases; and the amendment of the existing law in this respect is felt to be urgently called for.

In deference to the strong objections entertained by the local authorities in certain Provinces to the retention of the fee imposed on the presentation of certain petitions in the Criminal Courts, it is proposed to reduce the amount of such fee from one rupee to eight annas.

The uniform exaction of a fee of eight annas in the case of all petitions addressed to a Revenue Officer or a Magistrate, works harshly in its application to such communications when presented by persons having dealings or transactions with the Government in relation to such transactions. Equitable considerations require that petitions of this kind should be excepted from the operation of the general rule, and the Bill makes suitable provision for such cases.

The ad valorem fee now chargeable on summary suits instituted under Act XVI of 1838 and the Bombay Act (5 of 1864) is represented as working unsatisfactorily, and the substitution of a fixed rate is recommended.

It is to be observed that an award in such cases is liable to be set aside by a judgment passed in regard to the same matter in a regular suit; hence, it appears more equitable to treat these summary suits as miscellaneous applications and to subject them to a similar fixed institution fee.

As the bill provides for a considerable reduction of the fees heretofore chargeable on civil suits of small amount, it seems unnecessary to maintain the present distinction between the Courts of Cantonment Joint Magistrates and other Civil Courts in respect of the amount of fee leviable on the institution of such suits.

It is proposed also to exempt suits instituted in a Military Court of Requests from the payment of any fee. The constitution of such Courts is peculiar; they form no part of the regular machinery employed in the general administration of justice, the pre-

sent measure therefore is inapplicable to them. Moreover, the suitor in such Courts is placed at this disadvantage as compared with suitors in the ordinary Civil Courts that, although he may gain his case, he is unable to recover the costs which he has incurred in prosecuting his claim; hence the incidence of the taxation imposed by the levy of an institution fee in such cases is inequitable.

Suits for the restitution of wives, which are of common occurrence in the Punjab, are held to be somewhat excessively taxed under the present law, which prescribes that in suits the money value of the subject-matter of which cannot be estimated, a fixed fee of Rs. 10 shall be levied; the Bill substitutes for that rate in such cases a special fee of Rs. 5.

The clause in Act XXVI of 1867, exempting Advocates of a High Court from the obligation of presenting to any Court a written authority empowering them to act in any case pending in such Court, is excluded from the Bill. Such a provision appears to be beyond the scope of an enactment for regulating the levy of Court-fees. It is moreover, open to the objection that it conflicts with Section 18 of the Civil Procedure Code, and consequently creates some doubt as to the intention of the Legislature.

As some measures of compensation for the loss of revenue which is expected to result from the general reduction of fees, it is proposed to discontinue the refund of any portion of the amount levied on the first institution of suits, and also to raise the fees heretofore chargeable on probates and letters of administration granted under the Indian Succession Act, and on certificates issued under Act XXVII of 1860, to the ad valorem rates leviable under the English law in like cases.

The abolition of refunds is justified by the consideration that for all practical purposes in the majority of cases, the plaintiff, whose suit has not gone beyond the stage at which under the present law he is entitled to recover a moiety of the institution fee, has gained as much through the Court's agency as the suitor whose case has proceeded to a decision, and that, therefore, on the principle on which all Court-fees are adjusted, the former should contribute in equal proportion with the latter to the maintenance of the Courts from whose action both derive an equal benefit.

In lieu of the existing rates of process-fees, which vary according to the distance of the Court by which the processes are issued from the place where they are to be served or executed, it is proposed to levy, by means of stamps,

a uniform rate in all cases. All suitors will thus be required to contribute in equal proportion to the maintenance of the establishment employed in the serving of processes, without reference to the length of time occupied in each service and the consequent amount of work rendered on behalf of each person at whose instance any process is served or executed.

Such a provision is in accordance with the modern system under which the charges in the Postal and Electric and Telegraph Departments are regulated, and is also more equitable to the general community.

The incorporation of the High Court-Fees Act (XV of 1868) with, and the transfer of so much of the provisions of the Parsi Marriage and Divorce Act, 1865, the Native Converts' Marriage Dissolution Act, 1866, the Punjab Tenancy Act, 1868, the Indian Divorce Act, and the Indian Income-tax Act, as relate to the levy of stamp fees in judicial proceedings, to the present Bill appear to be conducive to public conveni-

ence, as the whole of the existing law relative to fees leviable in all Courts of justice will thus be contained in one enactment.

With the same object this Bill purports to effect a complete re-arrangement of the provisions of the existing law on this subject, a similiar classification of instruments chargeable with Court-fees to that which obtains in the General Stamp Act having been adopted, and the rules for determining the value of the subject-matter of certain suits being transferred from the Schedule where they are to be found in Act XXVI of 1867, to the body of the proposed Act.

Lastly, that for the future there may be no confusion between stamp-revenue proper and the revenue derived from what have heretofore been termed judicial stamps' the proceeds of the proposed enactment are to be designated Court-fees, and the Bill is entitled accordingly."

—Gazette of India, 1869, Part V, page 57.

ACT HOW AFFECTED BY SUBSEQUENT LEGISLATION

Year	Number of Act	Short title of Act	Particulars.
1870	Act VII	Court-fees Act, 1870	
	Act XIV	Repealing Act, 1870	Repealed by Act XII of 1873.
	Act XX	Court-fees Act (1870) Amendment Act, 1870	Repealed by Act I of 1938.
1871	Act VIII	Indian Registration Act, 1871	Repealed by Act III of 1877.
1872	Act XV	Indian Christian Marriage Act, 1872	
1875	Act XIII	Probate and Administration Act, 1875	Repealed by Act I of 1988.
1884	Act XVIII	Punjab Courts Act, 1884	Repealed in Punjab by Punjab Act VI of 1918.
1887	Act XVII	Punjab Land Revenue Act, 1887	
1889	Act VI	Probate and Administration Act, 1889	Repealed by Act XXXIX of 1925.
	Act VII	Succession Certificate Act, 1889	Repealed by Act I of 1938.
	Act XIII	Cantonments Act, 1889	Repealed by Act XV of 1910.
1890	Act VIII	Guardians and Wards Act, 1890	
1891	Act XII	Amending Act, 1891	Repealed by Act I of 1938.
1899	Act XI	Court-fees Amendment Act, 1899	Do.
	Act XXV	Punjab Courts Act, 1899	Repealed by Punjab Act VI of 1918.
1901	Act X	Court-fees (Amendment) Act, 1901	Repealed by Act I of 1938.
	N. W. F. P. Reg. VII.	North-West Frontier Province Law and Justice Regulation, 1901.	
1905	Act VI	Court-fees (Amendment) Act, 1905...	Repealed by Act I of 1938.
1908	Act V	Code of Civil Procedure, 1908	
1910	Act VII	Court-fees (Amendment) Act, 1910.	Repealed by Act I of 1938.
1911	Act XIV	Court-fees (Amendment) Act, 1911.	Do.
	Punjab		
1912	Act I	Punjab Courts (Amendment) Act, 1912	Repealed by Punjab Act VI of 1918.
1914	Act XVII	Second Repealing and Amending Act, 1914.	Repealed by Act I of 1938.
	Punjab		
	Act III	Punjab Courts Act, 1914	Repealed by Punjab Act VI of 1938.
1917	Act XXIV	Repealing and Amending Act, 1917...	Repealed by Act I of 1938.

Year	Number of Act	Short title of Act	Particulars
1918	Punjab Act VI ...	Punjab Courts Act, 1918	Repealed by Act I of 1938. Do. Do.
1919	Act XVIII ...	Repealing and Amending Act, 1919.	
1920	Act XXXVIII ...	Devolution Act, 1920	
1922	Act XIX ...	Court-fees (Amendment) Act, 1922.	
	Assam Act II ...	Assam Court-fees (Amendment) Act, 1922.	Came into force on 3-5-1922.
	Assam Act IV ..	Assam Court-fees (Amendment No. II) Act, 1922.	
	Bengal Act IV .	Bengal Court-fees (Amendment) Act, 1922.	Came into force on 29-3-1922.
	Bengal Act VI ..	Bengal Court-fees (Amendment No. II) Act, 1922.	Came into force on 26-7-1922.
	Bihar and Orissa Act II ...	Bihar and Orissa Court-fees (Amendment) Act, 1922.	Repealed in Orissa by Ori. Act 11 of 1967, S. 2
	Bombay Act I ...	Court-fees (Bombay Amendment) Act, 1922.	Spent.
	Madras Act V ...	Madras Court-fees (Amendment) Act, 1922.	Came into force on 30-3-1922 and 17-4-1922. Repealed in Orissa by Ori. Act 11 of 1967, S. 2.
	Punjab Act VII ...	Court-fees (Punjab Amendment) Act, 1922.	Came into force on 23-11-1922
1923	U. P. Act XII ...	U. P. Board of Revenue Act, 1922.	Repealed by Act I of 1938. Do.
	Act XI ...	Repealing and Amending Act, 1923.	
	Act XVIII ...	Code of Criminal Procedure (Amendment) Act 1923.	
1926	Bombay Act III ...	Court-fees (Bombay Amendment) Act, 1926.	Spent.
	Punjab Act I ...	Punjab Court-fees (Amendment) Act, 1926.	
1930	Punjab Act VI ...	Punjab Court-fees (Second Amendment) Act, 1926.	Came into force on 25-7-1930.
	Act XXXI ...	Ajmer-Merwara Court-fees (Amendment) Act, 1930.	
1931	Bombay Act I ...	Court-fees (Bombay Amendment) Act, 1931.	Spent.
1932	Assam Act III ...	Assam Court-fees (Amendment) Act, 1932.	
	Bombay Act II ...	Bombay Finance Act, 1932	Came into force on 30-3-1932.
	U. P. Act III ...	U. P. Court-fees (Amendment) Act, 1932.	Spent
1933	U. P. Act III .	U. P. Court-fees (Amendment) Act, 1933	
1934	U. P. Act X ...	U. P. Court-fees (Amendment) Act, 1934.	
1935	Bengal Act VII ...	Court-fees (Bengal Amendment) Act, 1935.	Came into force on 2-5-1935.

Year	Number of Act	Short title of Act	Particulars
1936	Bengal Act XI ..	Court-fees (Bengal Second Amendment) Act, 1935.	Repealed in Part by Bengal Act VI of 1938.
	C. P. & Berar Act XVI ..	Court-fees C. P. and Berar (Amendment) Act, 1935.	Came into force on 21-5-1935. Repealed in Orissa by Ori. Act 11 of 1967.
	Assam Act XIV ..	Assam Court-fees (Amendment) Act, 1936.	Came into force on 1-1-1937.
	Bengal Act I ..	Court-fees (Bengal) Third (Amendment) Act, 1935.	
1937	U. P. Act II ..	U. P. Court-fees (Amendment) Act, 1936.	Came into force on 2-4-1936.
	A. O. ...	Government of India (Adaptation of Indian Laws) Order	
1938	C. P. & Berar Act IX ...	C. P. and Berar Court-fees (Amendment) Act, 1938.	Came into force on 17-4-1938.
1939	Sind Act I ...	Bombay Finance (Sind Amendment) Act, 1938.	Came into force on 31-3-1938.
	U. P. Act XIX ...	U. P. Court-fees (Amendment) Act, 1938	Came into force on 9-1-1939.
	Bihar Act XVII ...	Bihar Court-fees (Amendment) Act, 1939	
	Orissa Act V ...		Came into force on 31-10-1939.
1940	Punjab Act IV ...	Court-fees Punjab (Amendment) Act, 1939	
	Sind Act X ...	Court-fees (Sind Amendment) Act, 1939	Came into force on 18-5-1939.
	C. P. & Berar Act XVI ...	C. P. and Berar Court-fees (Amendment) Act, 1940	Came into force on 6-12-1940.
	Bengal Act III ..	Bengal Local Self-Government (Amendment) Act 1941	Came into force on 15-5-1941.
1941	C. P. & Berar Act IX ...	C. P. and Berar Court-fees (Amendment) Act, 1941	Came into force on 9-5-1941.
	U. P. Act IX ...	Court-fees (U. P. Amendment) Act, 1941	Came into force on 19-6-1941.
	N.W.F.P. Act VIII ...	Court-fees (N.W.F.P. Amendment) Act, 1942	Came into force on 27-11-1942.
	Punjab Act I ...	Court-fees (Punjab Amendment) Act, 1942	
1943	U. P. Act XIV ...	Court-fees (U. P. Amendment) Act, 1942	Came into force on 16-7-1942.
	Bihar Act IX ..	Bihar Court-fees (War Surcharge Amendment) Act, 1943	Came into force on 11-11-1943.
	Bombay Act XV ...	Bombay Increase of Court-fees Act, 1943	Came into force on 29-12-1943.
	U. P. Act III ...	Court-fees (U. P. Amendment) Act, 1943	Came into force on 1-9-1943.

Year	Number of Act	Short title of Act	Particulars
	U. P. Act VIII ...	Court-fees (U. P. Second-Amendment) Act, 1943	Came into force on 1-8-1943.
1944	U. P. Act V ..	Court-fees (U. P. Amendment) Act, 1944	Came into force on 7-10-1944.
1945	Madras Act XVII ..	Court-fees (Madras Amendment) Act, 1945.	Came into force on 1-9-1945.
	Orissa Act IV ...	Orissa Court-fees (Surcharge Amendment) Act, 1945	Came into force on 7-9-1945.
1946	C. P. & Berar Act III ...	C. P. and Berar Finance (Annual) Act, 1946	Came into force on 27-3-1946 and 1-4-1946.
1947	Assam Act XVIII ...	Assam Court-fees (Amendment) Act, 1947	Came into force on 17-12-1947.
	Bombay Act XXIV ...	Court-fees (Bombay Amendment) Act, 1946	Came into force on 14-5-1947.
	C. P. & Berar Act III ...	C. P. and Berar Finance (Annual) Act, 1947	Ss. 2, 3 and 4 repealed by C. P. and Berar Act VII of 1948.
	N. W. F. P. Act I ...	Court-fees (N.W.F.P. Amendment) Act, 1946.	Came into force on 17-1-1947.
	Orissa Act XX ...	Orissa Court-fees (Surcharge Amendment) Act, 1947	Came into force on 12-7-1947.
1948	---	Indian Independence (Adaptation of Central Acts and Ordinances) Order, 1948	Came into force on 23-3-1948.
	Bihar Act XXV ---	Bihar Entertainments Duty, Court-fees and Stamp (Surcharge Amendment) Act, 1948	Came into force on 1-4-1948.
	Bombay Act XIII	Bombay Increase of Court-fees (Repeal and Re-enactment) Act, 1948.	Came into force on 24-3-1948.
	C. P. & Berar Act VII ...	C. P. and Berar Court-fees (Amendment) Act, 1948	Came into force on 31-3-1948.
	C. P. & Berar Act LX ...	C. P. and Berar Court-fees (Second Amendment) Act, 1948	Came into force on 15-10-1948.
	U. P. Act XIV ...	U. P. Court-fees (Amendment) Act, 1948	Came into force on 1-4-1948.
1949	Bombay Act XXXIV ...	Court-fees (Bombay Amendment) Act, 1949	Came into force on 14-10-1949.
	East Punjab Act XXVI ---	Court-fees (East Punjab Amendment) Act, 1949	Came into force on 1-4-1950.
1950	---	Adaptation of Laws Order, 1950	Came into force on 26-1-1950.
	Assam Act VIII ...	Assam Court-fees (Amendment) Act, 1950	Came into force on 1-4-1950.
	M. P. Act IV ...	Madhya Pradesh Court-fees (Amendment) Act, 1950	Came into force on 24-3-1950.
	M. P. XXXVIII ...	Madhya Pradesh Court-fees (Second Amendment) Act, 1950	Came into force on 17-11-1950.

Year.	Number of Act.	Short title of Act	Particulars
1951	Raj. Ordinance IX...	Rajasthan Court-fees Act (Adaptation) Ordinance, 1950	Came into force on 1-3-1950. Rep. by Raj Act 23 of 1961.
	U. P. Act IX ...	Uttar Pradesh Court-fees (Remission) Act, 1950	Came into force on 16-3-1950.
	M. P. Act XIII ...	Madhya Pradesh Court-fees (Amendment) Act, 1951	Came into force on 6-4-1951.
	M. P. Act XXII ...	Court-fees (Madhya Pradesh Amendment) No. 2 Act, 1951	Came into force on 21-9-1951.
1952	Orissa Act XXVII ...	Orissa Court-fees (Surcharge Amendment) (Amendment) Act, 1951.	Came into force on 23-8-1951.
	H. P. Act IV ...	Court-fees (Himachal Pradesh Amendment) Act, 1952	Came into force on 1-1-1953.
1953	U. P. Act XXV ...	Uttar Pradesh Court-fees Amendment Act, 1952	Came into force on 1-11-1952.
	Act XLIV ...	Manipur Court-fees (Amendment) and Validation Act, 1953	Came into force on 23-12-1953.
1954	Bihar Act IX ...	Bihar Finance Act, 1953	Came into force on 1-4-1953.
	M. P. Act IX ...	Court-fees (Madhya Pradesh Amendment) Act, 1953	Came into force on 15-4-1953.
	Punjab Act XXXI ...	Court-fees (Punjab Amendment) Act, 1953	Came into force on 13-5-1953.
	Assam Act XXVII ...	Assam Court-fees (Amendment) Act, 1954	Came into force on 8-9-1954.
1955	Bombay Act XII ...	Court-fees (Bombay Amendment) Act, 1954	Came into force on 1-4-1954.
	Bombay Act LVIII ...	Bombay Amending Act, 1954	
	H. P. Act II ...	Court-fees (Himachal Pradesh Amendment) Act, 1953	Came into force on 27-2-1954.
	Punjab Act XXXV ...	Court-fees (Punjab Amendment) Act, 1954	
1956	Assam Act XXII ...	Assam Court-fees (Amending) Act, 1955	Came into force on 28-12-1955.
	Madras Act XIV ...	Madras Court-fees and Suits Valuation Act, 1955	Came into force on 19-5-1955. Repeals the Central Act.
	Madras Act XXXVI ...	Madras Repealing and Amending Act, 1955	
	Pepsu Act XXIV ...	Pepsu Court-fees (Amendment) Act, 1955	Came into force on 1-1-1956.
1956		Adaptation of Laws (No. 2) Order, 1956	Came into force on 1-5-1956.
		Adaptation of Laws (No. 3) Order, 1956	Came into force on 1-6-1956.
		Bombay Adaptation of Laws (State and Concurrent Subjects) Order, 1956.	Came into force on 1-11-1956.
		Kerala Adaptation of Laws Order, 1956.	Came into force on 1-11-1956.

Year	Number of Act	Short title of Act	Particulars
1957	Act LXVIII ..	Union Territories (Laws) Amendment Act, 1956	Came into force on 1-11-1956.
	Andhra Act VII ...	Andhra Court-fees and Suits Valuation Act, 1956.	Came into force on 1-5-1956. Repeals the Central Act.
	Punjab Act XIV ..	Court-fees (Punjab Amendment) Act, 1956.	
	Regn. II ...	Court-fees (Andaman and Nicobar Islands Amendment) Regulation, 1957.	Came into force on 1-8-1957.
	M. P. Act XVIII ...	M. P. Taxation Laws (Amendment) Act, 1957.	
	Orissa Act XIII ...	Court-fees (Orissa Amendment) Act, 1957.	Came into force on 24-7-1957.
	Punjab Act V ...	Punjab Laws (Extension No. 1) Act, 1957.	Came into force on 3-4-1957.
	Punjab Act XIX ...	Court-fees (Punjab Amendment) Act, 1957.	Came into force on 13-7-1957.
	U. P. Act XXVIII ...	U. P. Court-fees (Amendment) Act, 1957.	
	Assam Act III ...	Assam Court-fees (Amendment) Act, 1958.	Came into force on 1-4-1958.
1958	Assam Act XIX ...	Assam Court-fees (Second Amendment) Act, 1958.	Came into force on 18-6-1958.
	Bihar Act VII ..	Court-fees (Bihar Amendment) Act, 1958.	Came into force on 1-4-1958.
	M. P. Act XV ...	Court-fees (M. P. Amendment) Act, 1958.	Came into force on 3-7-1958.
	Orissa Act XVI ...	Court-fees (Orissa Amendment) Act, 1958.	
	Orissa Act XVII ...	Orissa Court-fees (Surcharge Amendment) (Amendment) Act, 1958.	
	Punjab Act XIV ...	Court-fees (Punjab Amendment) Act, 1958.	Came into force on 25-4-1958.
	Rajasthan Act XI ...	Rajasthan Court-fee and Stamp Duty Laws (Extension) Act, 1958.	Came into force on 1-4-1958.
	U. P. Act XX ...	U. P. Court-fees (Amendment) Act, 1958.	
	U. P. Act XLIV ...	U. P. Court-fees (Second Amendment) Act, 1958.	Came into force on 1-4-1959.
	Bombay Act XXXVI ...	Bombay Court-fees Act, 1959.	Came into force on 1-8-1959. Repeals the Central Act.
1959	U. P. Act X ...	Court-fees (Uttar Pradesh Amendment) Act, 1959.	
	W. B. Act XXIII ...	Court-fees (W. B. Amendment) Act 1959.	Came into force on 21-12-1959.
	Assam Act XII ...	Assam Court-fees (Amendment) Act, 1960	Came into force on 1-4-1960.

Year	Number of Act	Short title of Act	Particulars
1961	Punjab Act XX ... Act XXXIII ...	Court-fees (Punjab Amendment) Act, 1960 Union Territories (Stamp and Court- fees Laws) Act, 1961.	Came into force on 13-5-1960. —
1963	U. P. Act IV ... Assam Act VIII ...	Court-fees (U. P. Sanshodhan) Adhiniyam, 1961 Assam Court-fees (Amendment) Act, 1963	Came into force on 17-3-1961. Came into force on 1-4-1963.
1964	U. P. Act XIV ... W. B. Act XVIII ... M. P. Act III ...	U. P. Taxation Laws (Amendment) Act, 1963 Court-fees (W. B. Amendment) Act, 1963 Court-fees (M. P. Amendment) Act, 1964	Came into force on 25-5-1963. Came into force on 3-5-1963. Came into force on 1-4-1964.
1966	Goa Act V ... M. P. Act XII ...	Court-fees (Goa, Daman and Diu Amendment) Act, 1966 Court-fees (M. P. Amendment) Act, 1966	Came into force on 15-6-1966. Came into force on 1-4-1966.
1967	Central Act XXVIII ... Orissa Act XI ...	Court-fees (Delhi Amendment) Act, 1967 Court-fees (Orissa Amendment) Act, 1967	Came into force on 16-12-1967. Came into force on 20-7-1967.
1968	Central Act XXVI ... President Act VII ...	Pondicherry (Extension of Laws) Act, 1968 Court-fees (W. B. Amendment) Act, 1968	Came into force on 28-3-1968.

COGNATE ACTS AND PROVISIONS

- (1) A. P. Court-fees and Suits Valuation Act, 7 of 1956.
- (2) Bombay Court-fees Act, 36 of 1959.
- (3) H. P. Court-fees Act, 8 of 1968.
- (4) J. and K. Court-fees Act, 7 of 1977 Svt.
- (5) Kerala Court-fees and Suits Valuation Act, 10 of 1960.
- (6) Mysore Court-fees and Suits Valuation Act, 16 of 1958.
- (7) Rajasthan Court-fees and Suits Valuation Act, 23 of 1961.
- (8) Tamil Nadu (Madras) Court-fees and Suits Valuation Act, 14 of 1955.

[THE] COURT-FEES ACT, 1870 (ACT VII of 1870)*

[11th March, 1870.]

CHAPTER I PRELIMINARY

1. Short title.—This Act may be called THE COURT-FEES ACT, 1870.

Extent of Act.—It extends to †[the whole of India except †[the territories which immediately before the 1st November, 1956 were comprised in Part B States];].

Commencement of Act.—And it shall come into force on the first day of April, 1870.

[*] For Statement of Objects and Reasons, see Gazette of India, 1869, Pt. V, p. 57; for proceedings in Council, see *ibid*, Supplement, pp. 1179 and 1452; *ibid*, 1870, Supplement, pp. 52, 378 and 421.

SECTION 1 — SYNOPSIS

1. Validity of local amendments.
2. Rules by High Court.
3. Scope and object of the Act.
4. Defects of drafting in the Act.
5. Interpretation of fiscal statutes — General.

6. Interpretation of the Act.

7. Retrospective effect of provisions as to Court-fees.

8. Escape and evasion.

9. "Commencement."

1. Validity of local amendments. — (1) Amendment by a Provincial Legislature

The Act has been locally amended in several States. For a list of the amending enactments, see under the heading "Act how affected by subsequent legislation". In this Manual the State amendments have been, wherever available, given in their appropriate places along with the provisions of the principal Act. Some States have, however, repealed the Central Act and enacted in its place their own Acts.

These are given in Appendix II after the Central Act.

The Act has been declared inapplicable to proceedings before officers making a settlement and in certain other cases under the Santhal Parganas Settlement Regulation (3 of 1872), S. 8, as amended by the Santhal Parganas Justice and Laws Regulation, 1899 (3 of 1899).

It has also been declared inapplicable to—

- (1) proceedings before Nyaya Panchayats under (i) Andaman and Nicobar Islands Gram Panchayats Regulation (4 of 1961)—See S. 117; (ii) Assam Panchayat Act (24 of 1959)—See S. 114 (2) (1-10-1959); (iii) West Bengal Panchayat Act (1 of 1957)—See S. 96 (1) (a) (20-1-1959);
- (2) proceedings under M. P. Anusmit Jana Jati Rini Sahayata Adhiniyam (12 of 1967)—See S. 23.
- (3) Proceedings under Laccadive, Minicoy and Amindivi Islands Land Revenue and Tenancy Regulation (6 of 1965)—See S. 113; and

The Act has been extended to the new Provinces and merged States by the Merged States (Laws) Act, 1949 (59 of 1949), S. 3 (1-1-1950) and to the Union Territories of Manipur, Tripura and Vindhya Pradesh by the Union Territories (Laws) Act, 1950 (30 of 1950), S. 3 (16-4-1950). Vindhya Pradesh now forms part of the State of Madhya Pradesh—See Act 37 of 1956, S. 9 (1) (e).

Section 1 — Note 1 (contd.)

is not ultra vires. AIR 1924 Cal 115 (116) = 50 Cal 597.

2. Rules by High Court. — (1) Provisions like Section 122, Civil P. C., which empower Courts to make rules to regulate procedure, enable them to levy Court-fees, as the power to regulate procedure includes the power to impose fees in Courts. AIR 1922 Mad 421 (422) = 45 Mad 849 ** AIR 1935 Rang 460 (463) = 13 Rang 156.

3. Scope and object of the Act. — (1) The Court-fees Act was passed not to arm a litigant with a weapon of technicality against his opponent, but to secure revenue for the benefit of the State. AIR 1918 PC 188 = 43 Bom 507 = 46 Ind App 24 ** AIR 1955 Cal 258 (261) (DB).

[See also AIR 1955 Mad 382 (384) = ILR (1955) Mad 1179 (DB).]

(2) Court-fee is a Crown debt. AIR 1925 Mad 433 (433) ** AIR 1936 Mad 602 (603) = 59 Mad 872 ** (1906) 33 Cal 1040 (1045).

(3) The Government has to pay court-fees as much as any other party. (1902) 25 Mad 457 (467) (DB).

(4) No court-fee is payable on an appeal to the Government which is referred by the Government to the High Court for disposal. (1899) 22 Mad 162 (163). (Where an appeal was preferred to the Government under Rule 22 of the Agency Rules framed under Act XXIV

of 1839 against the decision of the Agent to the Governor at Vizagapatam and the appeal was referred by the Government to the High Court for disposal, Court-fee was not chargeable on the appeal.)

(5) The Act has nothing to do with the question in what Court a proceeding should be instituted. AIR 1932 All 413 (414) (DB).

(6) No rules framed in Tripura under Suits Valuation Act, 1887 or Court-fees Act, 1870—Courts of Tripura held guided only by provisions of Court-fees Act as made applicable to Tripura State. AIR 1968 Tripura 11.

4. Defects of drafting in the Act. — (1) The Act is notorious for its bad drafting. AIR 1937 Mad 46 (48) = ILR (1937) Mad 284 (DB) ** AIR 1925 All 787 (788) = 47 All 756 (DB) ** AIR 1925 Pat 392 (394, 396) = 4 Pat 336 (FB) ** (1890) 12 All 129 (165, 166) (FB) ** AIR 1959 Punj 629 (631, 632) = ILR (1959) Punj 1770. (It is an artificial statute and there is hardly any principle involved in its scheme.)

5. Interpretation of fiscal statutes — General. — (1) When two constructions are equally possible, that construction which is favourable to the subject must be adopted. AIR 1939 All 466 (471) = ILR (1939) All 770 (FB) ** AIR 1946 Cal 524 (525) = ILR (1946) 2 Cal 547 ** AIR 1946 Pat 401 (402) = 25 Pat 194 ** AIR 1935 Bom 256 (257) = 59 Bom 469

The Act has been extended also to the areas merged in Orissa: see Orissa Act 4 of 1950, S. 4 and Schedule; to the merged States in Punjab; see Punjab Act 5 of 1950, S. 3 and Sch. II; to the transferred territories in Punjab: see Punjab Act 5 of 1957, S. 4 and Sch. II; and to the Districts of Banaras, Rampur and Tehri-Garhwal of Uttar Pradesh, from 1-2-1950; see Notifications Nos. 405/XVII, 404/XVII and 403/XVII published in Uttar Pradesh Gazette Extraordinary dated 29-1-1950.

The Act has been partially extended to the merged States in Madhya Pradesh: see M. P. Act 12 of 1950, S. 3 (1) and Sch. II.

The Act has been extended to the Union Territories as under:—

- (1) Goa, Daman and Diu—See Reg. 11 of 1963, S. 3 (w.e.f. 3-9-1964).
- (2) Dadra and Nagar Haveli—See Reg. 6 of 1963, S. 3 (w.e.f. 1-7-1965).
- (3) Pondicherry—See Act 28 of 1968, S. 3 and Schedule, Pt. II (w.e.f. 18-12-1968).

Note.—Act as in force in the Union Territory of Andaman and Nicobar Islands on 1-8-1966 has been extended.

- (4) Laccadive, Minicoy and Amindivi Islands—See Reg. 8 of 1965, S. 3 (1).
- (5) Delhi—Act as amended by Punjab Acts 26 of 1949; 31 of 1953; 19 of 1957 and 14 of 1958 has been extended to the Union Territory of Delhi by S. R. O. 422 dated 21-3-1951 and G. S. R. 842 of 1959 with effect from 1-8-1959—See Gazette of India, 25-8-1959, Pt. II, S. 3 (i) page 1039.
- (6) Manipur and (7) Tripura—Act as in force in the State of Assam has been extended to these territories by G.S.Rs. Nos. 1119 and 1120 dated 29-6-1963, (w.e.f. 15-7-1963)—See Gazette of India, 1-7-1963, Pt. II, Sec. 3 (i), Extra., pp. 501 and 531.

It has been made applicable to the State of Rajasthan on and from 3-4-1958—See Rajasthan Ordinance 9 of 1950, S. 3 and Raj. Act 11 of 1958, S. 2.

Section 1 — Note 5 (contd.)

(SB) ** AIR 1934 Lah 530 = 15 Lah 501
 (SB) ** AIR 1929 Mad 60 (63) = 52 Mad 194 (FB) ** AIR 1931 Nag 156 (158) = 26 Nag LR 175 (SB) ** AIR 1946 Nag 30 (35) = ILR (1945) Nag 975 (DB) ** AIR 1931 Oudh 99 (103) = 6 Luck 601 (SB) ** AIR 1937 Pat 550 (553) = 16 Pat 600 (SB) ** AIR 1921 PC 184 (186, 187) ** AIR 1958 Pat 587 (589) (FB). (But that cannot be a ground for so construing it even when there is no scope for any equivocation in the section or any doubt as to its implication.) ** AIR 1958 Mad 291 (294) = ILR (1958) Mad 711 (DB) ** AIR 1958 Pat 201 (203) ** AIR 1957 Punj 226 (233) = ILR (1957) Punj 1253 (DB). (Rule is subject to the overriding rule against impairment of obligation.) ** 1957 MPLJ 278 (279) (DB) (Nag) ** AIR 1956 SC 202 (206, 207) = 1955-2 SCR 1076 ** AIR 1956 Mad 179 (181) ** AIR 1953 Bom 436 (436, 437) = ILR (1954) Bom 165 (DB) ** AIR 1952 Mys 80 (81) = ILR (1952) Mys 344 ** AIR 1952 Nag 378 (381) = ILR (1953) Nag 332 (DB). (AIR 1950 Nag 169 = ILR (1950) Nag 403 (FB), Foll.) ** (1949) 27 Mys LJ 98 (111) (FB) ** ILR (1958) Bom 961 (DB).

(2) To ascertain whether two constructions are equally possible the ordi-

nary rules of construction of statutes are to be applied. AIR 1924 Mad 420 (430) = 47 Mad 262 (FB).

(3) The maxim that clear words are necessary in order to tax a subject does not mean that words are to be unduly restricted against the taxing authority. It simply means that in taxing Act one has to look merely at what is clearly said. AIR 1924 Mad 420 (430) = 47 Mad 262 (FB) ** AIR 1955 Cal 258 (261) (DB).

(4) It is not open to the Court to narrow or whittle down the operation of the Act by seeming considerations of hardship or business convenience or the like. AIR 1924 Mad 420 (430) = 47 Mad 262 (FB) ** AIR 1957 Andh Pra 706 (710) = ILR (1955) Andhra 401 (DB) ** AIR 1955 Andhra 140 (140, 141).

(5) In construing fiscal enactments, the letter of the law is of paramount importance and not the spirit of the Act or the intention of the law. AIR 1929 Mad 769 (772) (FB) ** AIR 1934 Pat 178 (180) = 13 Pat 336 (SB) ** AIR 1940 PC 183 (185) = ILR (1940) Kar (PC) 371 = 67 Ind App 394 = ILR (1941) Mad 89 ** AIR 1946 Oudh 61 (62) = 21 Luck 245 (DB) ** AIR 1930 All 49 (52, 53) (FB) ** AIR 1931 Cal 193 (196, 201) = 58 Cal

The Act has now been repealed in the following States and Union Territories:—

- (1) Andhra Pradesh—By Andhra Pradesh Court-fees and Suits Valuation Act, 1956 (A. P. Act 7 of 1956), S. 79 (w.e.f. 1-5-1966).
- (2) Gujarat—By the Bombay Court-fees Act, 1959 (Bom. Act 36 of 1959) (as adapted by Gujarat A. L. O., 1960), S. 49 and Sch. IV (w.e.f. 1-8-1959 and 1-5-1960).
- (3) Jammu and Kashmir—By Jammu and Kashmir Court-fees Act, 1977 (Jammu and Kashmir Act 7 of 1977 Svt.).
- (4) Kerala—By Kerala Court-fees and Suits Valuation Act, 1960 (Ker. Act 10 of 1960), S. 87 (w.e.f. 1-2-1962).
- (5) Maharashtra—By Bombay Court-fees Act, 1959 (Bom. Act 36 of 1959), S. 49 and Sch. IV (1-8-1959).
- (6) Mysore—By Mysore Court-fees and Suits Valuation Act, 1958 (Mys. Act 16 of 1958), S. 79 (w.e.f. 15-8-1960).
- (7) Rajasthan—By Rajasthan Court-fees and Suits Valuation Act, 1961 (Raj. Act 23 of 1961), S. 74 (1-11-1961).
- (8) Tamil Nadu—By T. N. Court-fees and Suits Valuation Act, 1955 (T. N. Act 14 of 1955), S. 87 (19-5-1955).
- (9) Himachal Pradesh—By Himachal Pradesh Court-fees Act, 1968 (Him. Pra. Act 8 of 1968), S. 44 (29-10-1968). Act applies to whole of Himachal Pradesh including the territories transferred to it from Punjab.

[†] Substituted for “all the provinces of India” by A. L. O., 1950.

[‡] Substituted for “Part B States” by 2 A. L. O., 1956. Since the Constitution (Seventh Amendment) Act, 1956, division of territories of India into Part A, Part B and Part C States has vanished. The territories of India are now divided into States and Union Territories. There are now 17 States and 10 Union Territories.

Section 1 — Note 5 (contd.)

33 (FB) ** AIR 1929 Lah 609 (612) = 10 Lah 657 (FB) ** AIR 1955 Andhra 140 (140, 141) ** AIR 1952 Him Pra 60 (60, 61) ** AIR 1952 Nag 378 (381) = ILR (1952) Nag 332 (DB) ** AIR 1954 Him Pra 52 (53, 54).

[See however AIR 1951 Mad 1012 (1013). (Rule of strict construction requires no more than that the language shall be so construed that no case shall be held to fall within it unless it falls both within the reasonable meaning of its terms and within the spirit and scope of the enactment.)]

(6) A subject is entitled, if he can, in any legal manner, to circumvent the incidence of a taxing Act. AIR 1928 Mad 929 (930) (DB) ** AIR 1928 Mad 543 (544) = 51 Mad 455 (FB).

[But see AIR 1943 Mad 146 (148) = ILR (1943) Mad 819.]

(7) A statute like a taxing statute is a legal document using legal words. A tax imposition must be in clear language and if not always explicit at least by necessary and compelling implication. AIR 1969 Cal 71 (75) (DB).

6. Interpretation of the Act.— (1) This Act is a taxing statute and is subject to the interpretation applicable to such enactments. AIR 1958 Pat 560 (561) ** AIR 1953 Bom 436 (436, 437) = ILR (1954) Bom 165 (DB) ** AIR

1952 Nag 378 (381) = ILR (1953) Nag 332 (DB) ** AIR 1969 Bom 66 (68) = 70 Bom LR 359. (Its provisions are to be strictly construed in favour of subject litigant.) ** AIR 1969 Delhi 130 (132). (Interpretation should be liberal.) ** AIR 1959 Pat 186 (DB). (Must be construed strictly and in favour of subject.)

(2) Act is fiscal statute — Strict construction should be placed on terms used therein. AIR 1957 All 90 (91) = 1956 All WR (HC) 793 (DB).

(3) It is only when the enactment like the Court-fees Act is capable of more than one interpretation that the law shall have to be given that meaning which is more favourable to the subject. ILR (1961) 1 All 17. (But if the enactment has been worded in such words which are not at all ambiguous the Court cannot give any benefit to litigants on the ground of equity, fair play or good conscience.)

(4) The Act must not be construed so as to furnish a chance of escape and evasion by placing any unduly strained construction on its language. AIR 1938 Oudh 1 (6) = 13 Luck 628 (FB) ** AIR 1956 Mad 179 (181) ** AIR 1952 Nag 378 (381) = ILR (1953) Nag 332 (DB).

(5) Courts should put a liberal interpretation on fiscal statutes like the

STATE AMENDMENT

Delhi:

For sub-sections (2) and (3) of Punjab Act, 26 of 1949 the following is substituted, namely:—

“(2) It shall come into force on the 1st day of April 1951”.

This means amendments effected by Punj. Act 26 of 1949 have come into force in Delhi with effect from 1-4-1951. Amendments made by this Act have been noted below relevant provisions. Amendments made by other Punjab Acts came into effect in Delhi on 1-8-1959—See S.R.O. 422 dated 21-3-1951 and G.S.R. dated 21-7-1959.

Section 1 — Note 6 (contd.)

Court-fees Act, so as to lessen and not add to the burden of litigation. This of course does not mean that where a provision is clear and explicit, it should not be enforced; while dealing with fiscal statutes letter of the law is of paramount importance. AIR 1959 Punj 629 (631, 632) = ILR (1959) Punj 1770.

(6) The Act must be strictly construed and unless the liability for a fee is clear from the language of the Act it must be held that such liability does not exist. (1909) 32 All 19 (24) (FB) ** AIR 1928 Nag 316 (318) = 24 Nag LR 142 ** AIR 1933 All 488 (490) = 55 All 791 (FB) ** AIR 1914 Low Bur 247 (248) = 7 Low Bur Rul 359 (DB) ** AIR 1938 Mad 498 (499) = ILR (1938) Mad 981 (DB) ** AIR 1938 Oudh 1 (7) = 13 Luck 628 (FB) ** AIR 1934 Pat 571 (572) = 14 Pat 4 (SB) ** AIR 1928 Lah 113 (114) = 8 Lah 730 (DB) ** AIR 1927 Bom 643 (643) = 52 Bom 61 (DB) ** AIR 1924 Cal 881 (884) (DB) ** AIR 1924 Cal 953 (955) (DB) ** (1886) 9 Mad 146 (148) (FB) ** AIR 1938 Cal 785 (788) = ILR (1939) 1 Cal 152 (DB) ** AIR 1922 Upp Bur 14 (15) = 4 Upp Bur Rul 72 ** AIR 1925 Pat 392 (400) = 4 Pat 336 (FB) ** AIR 1958 Mad 291 (294) = ILR (1958) Mad 711 (DB) ** AIR 1958 Pat 201 (203) ** AIR 1957 Punj 32 (34) = ILR (1957) Punj 142 (DB) ** AIR 1956 Mad 179 (181) ** AIR 1954 Mad 543 (548, 549) = ILR (1954) Mad 643 (DB) ** AIR 1949 Nag 97 (101, 102) = ILR (1948) Nag 117 ** AIR 1946 Nag 30 (35) = ILR (1945) Nag 975 (DB).

(7) The provisions of the Court-fees Act must be interpreted strictly and any demand of Court-fee which must necessarily be deemed to be in furtherance of the provisions of the Act must be strictly scrutinised. There should be a rule to justify the demand. No rule is necessary if the demand is not to be made. AIR 1959 All 37 (40, 41) = ILR (1957) 2 All 349.

(8) In Court-fee matters there is no power to apply analogies. (1936-43) Tax Dec 103 (106) (Nag) ** AIR 1956 Mad 179 (181).

(9) The Act is to be construed and applied as it is without any regard to considerations of hardship or inconvenience or reasonableness of the pro-

visions. 1936-43 Tax Dec 100 (101) (Nag) ** AIR 1958 Pat 587 (589) (FB) ** AIR 1955 Andhra 140 (Pr. 3) ** AIR 1952 Mys 80 (Pr. 6) = ILR (1952) Mys 344 ** AIR 1953 Nag 11 (12) ** AIR 1934 Lah 958 (960) = 15 Lah 893 (DB) ** (1890) 12 All 129 (137) (FB) ** AIR 1941 All 357 (358) = ILR (1941) All 469 ** AIR 1929 Pat 731 (732) = 8 Pat 906 (DB) ** AIR 1914 Lah 214 (217) = 1913 Pun Re No. 11 (FB). (History of the Act cannot be considered when meaning is clear.) ** AIR 1930 Nag 73 (76, 77) (DB) ** (1891) 14 Mad 480 (483) (DB).

(10) The language of the Act must be construed in its popular sense. AIR 1920 Pat 593 (594) = 4 Pat L Jour 700 (DB).

(11) Where any provision is ambiguous, an interpretation which has been uniformly followed for a long time is to be applied. (1907) 34 Cal 954 (969) (FB) ** (1882) 8 Cal 593 (597) (FB) ** (1909) 1 Ind Cas 670 (673) (DB) (Cal). (But not so when a construction is clearly wrong.)

(12) Mere long practice which is clearly against the law cannot be treated as valid and binding in the application of the law of court-fees. (1890) 12 All 129 (135) (FB).

(13) A special provision in the Act is to be regarded as the one applicable to a case rather than one which is of more general nature. AIR 1932 Mad 605 (608) = 56 Mad 212 (DB) ** (1898) 21 Mad 269 (269, 270) (DB).

(14) Headings of chapters and schedules are only guides for the construction and cannot override the express provisions under those headings. AIR 1925 All 787 (789) = 47 All 756 (DB) ** AIR 1926 Cal 638 (639) ** AIR 1932 Cal 346 (348) = 59 Cal 528.

(15) The schedule to the Act neither impose nor confer any power to impose Court-fees. AIR 1941 Nag 129 (131) ** AIR 1923 Pat 137 (138) = 2 Pat 198 (DB) ** (1910) 6 Nag LR 164 (166).

[But see AIR 1931 All 351 (352) = 52 All 1029. (Schedule 1, Article 1 is a substantive provision of law.)]

(16) In the undermentioned case decided by the High Court of Andhra Pradesh under Andhra Court-fees and Suits Valuation Act (7 of 1956) it is held that the Schedule is a part of that Act and the liability imposed in the

Section 1 — Note 6 (contd.)

Schedule is equally binding. AIR 1958 Andh Pra 267 (269).

(17) The Act has no preamble and it is for the Judges to decide what its objects were from the enacting clauses. (1890) 12 All 129 (164) (FB).

(18) General Clauses Act, 10 of 1897, only applies to construction of Acts of Governor-General in Council and the regulations made pursuant to those Acts and it is not applicable to rules that may be framed. AIR 1924 Mad 257 (260) = 46 Mad 685 (SB).

7. Retrospective effect of provisions as to Court-fees.— (1) The Court-fee payable on a plaint is to be determined with reference to the law in force at the time of the institution of the suit although the law in force at the time of the accrual of the cause of action might have been different. (1913) 25 Mad L Jour 205 (218) (DB) ** AIR 1958 Andh Pra 267 (269) ** AIR 1967 Guj 154 ** AIR 1963 Andh Pra 68. (Plaint returned for presentation to proper Court — Suit deemed to be instituted on date of re-presentation — Court-fee payable according to law prevailing at that date.)

(2) Act is not a substantive law but a procedural law and has retrospective effect. AIR 1967 Goa 120.

(3) A change in the law as to Court-fees subsequent to the institution of the suit and before its disposal cannot affect the Court-fees payable on the plaint in the suit. AIR 1933 Sind 354 (354) = 27 Sind LR 240 (DB) ** AIR 1926 Nag 71 (72) (DB) ** AIR 1924 Cal 731 (733) = 51 Cal 216 (DB) ** AIR 1950 Pat 470 (471) (DB) ** AIR 1968 Goa 58 (61).

[See also AIR 1951 Orissa 8. (10) = ILR (1950) Cut 368 (DB).]

(4) The Court-fee leviable for any document is to be calculated according to the law that is in force at the time when the document is filed, exhibited or recorded in or is received or furnished. AIR 1960 Raj 85 (86) = ILR (1959) 9 Raj 1066.

(5) The rules stated above apply also to other proceedings. 1936-43 Tax Dec 100 (101) (Nag). (Cross-objections.) ** (1878) 3 Cal 733 (735). (Testator dying before Court-fees Act — Application for probate afterwards — Court-fee must be paid.) ** AIR 1926 Mad 159 (159). (Application for leave to sue as pauper.) ** AIR 1941 All 298 (300) = ILR (1941) All 558 (DB). (Law changed after appeal was preferred — The Court-fee is not affected.)

[See also AIR 1954 Vindh Pra 47 (48, 49).]

(6) Change in law as to Court-fees between date of suit and date on which appeal is filed — Law in force

at the latter date will govern the Court-fee payable on appeal. AIR 1941 All 298 (300) = ILR (1941) All 558 (DB).

[But see AIR 1958 Andh Pra 267 (269) ** AIR 1956 Nag 281 (284) = ILR (1956) Nag 296 (DB) ** AIR 1955 Andhra 221 (222, 227) = ILR (1955) Andhra 102 (FB) ** AIR 1955 Bom 287 (289, 290) = ILR (1955) Bom 530 ** AIR 1955 Bom 332 (333) = ILR (1955) Bom 540 (DB) ** AIR 1955 Nag 46 (46, 47) ** AIR 1954 Vindh Pra 5 (5) ** AIR 1956 All 413 (414) ** AIR 1955 Punj 223 (224) = ILR (1955) Punj 896 (DB) ** AIR 1954 Raj 170 (171, 172) = ILR (1953) 3 Raj 782 (DB) ** AIR 1954 Trav-Co 48 (48) = ILR (1952) Trav-Co 557 (DB).]

(7) Where Court-fee has been paid according to a certain practice which is subsequently authoritatively declared to be erroneous, during the pendency of the suit, the Court will be entitled to levy additional Court-fee that would be due under the new ruling. AIR 1920 Pat 592 (593) (DB).

(8) Court-fee for appeal made to depend on the value of the plaint — Change in the law of Court-fee subsequent to the institution of the suit, and before the appeal filed — The value of the plaint must be fixed with reference to the law at the time of the institution of the suit and not the filing of the appeal. AIR 1933 All 20 (21) = 54 All 1092. (Application for review.) ** AIR 1924 Cal 881 (884) (DB). (Review.) ** AIR 1941 All 134 (135) = ILR (1940) All 793.

(9) When a change in the law takes place pending a proceeding things to be done in future in such proceeding will be affected by the change. 1886 Bom PJ 25 (DB) ** (1870) 14 Suth WR 167 (167).

(10) A change in the law of Court-fee pending an application for probate will affect the Court-fee payable on a probate. AIR 1927 Bom 643 (643) = 52 Bom 61 (DB) ** 1900 Pun Re No. 26, p. 91 (91) (DB).

(11) Plaint or memorandum of appeal returned for some fundamental defect and afterwards re-presented. Change in the law as to Court-fees in the interval will not affect the Court-fee payable. (1967) 7 Suth WR 461 (462). (Appeal.) ** AIR 1923 Pat 150 (151, 152) = 2 Pat 264. (Appeal.) ** AIR 1926 Cal 355 (356) (DB). (Plaint.) [But see (1871) 16 Suth WR 47 (48) (DB).]

(12) Where after a right of appeal has arisen, there is a change in the law of Court-fees which would have the effect of taking away the right of appeal to the particular tribunal, such change will not deprive the appellant of the right of appeal to that tribunal.

*[1A. Definition of “appropriate Government”.—In this Act “the appropriate Government” means, in relation to fees or stamps relating to documents presented or to be presented before any officer serving under the Central Government, that Government, and in relation to any other fees or stamps, the †[State] Government.]

[*] Inserted by A. O., 1937. The expression “Appropriate Government” occurs in Sections 26, 27, 34 and 35.

[†] Substituted by A. L. O., 1950, for “Provincial”.

STATE AMENDMENTS

Section 1-B

Madhya Pradesh:

After Section 1-A, insert the following:—

“1-B. Definition of memorandum of cross-objection.—In this Act, unless there is anything repugnant in the subject or context, “memorandum of appeal” shall include “memorandum of cross-objection” and “suit” shall include an appeal from a decree.”—C. P. and Berar Act 9 of 1941, S. 2 (9-5-1941) and M. P. Act 18 of 1957, S. 3 (2) and Sch. Pt. B-I.

Manipur and Tripura:

(i) In its application to the Union Territories of Manipur and Tripura, throughout the Act, for the words “Appropriate Government” and “State Government”, substitute the words “Central Government” and “the Chief Commissioner”, respectively; and

Section 1 — Note 7 (contd.)

AIR 1927 Mad 977 (979) = 50 Mad 857 (FB).

(13) Where a subsequent enactment confers upon a party a right of appeal against an order retaining to Court-fee which he had not under the previous law, he can exercise the right of appeal even if his suit was filed before the enactment. AIR 1941 All 298 (300) = ILR (1941) All 558 (DB).

(14) Order under Order 21, Rule 63, Civil Procedure Code, before Andhra Court-fees and Suits Valuation Act — Suit to set aside after Act in nature of appeal and is governed by Old Act, that is the Court-fees Act (1870) and Suits Valuation Act (1887). (1959) 2 Andh WR 330.

(15) A writ proceeding is an independent original proceeding and not a continuation of any previous proceeding and therefore no question of any vested right can arise in respect of the Court-fee payable on the writ petition. AIR 1958 Andh Pra 267 (269).

(16) Suit for declaration of right to indemnity decreed under old Portuguese law — Proceeding for realization of indemnity amount — Held, on facts that proceeding was an independent proceeding and not continuation of the suit and hence was governed by provisions of Court-fees Act, 1870. AIR 1967 Goa 120 (122).

8. Escape and evasion.— (1) A party is entitled if he can in a legal manner to circumvent the provisions of this Act. AIR 1931 Lah 633 (633, 634) ** (1904) 28 Bom 567 (572) (DB).

(2) A Court cannot sanction any irregularity, the effect of which would be to perpetrate a fraud on the Government revenue and to deprive the State of what is legitimately its due. AIR 1934 Lah 235 (236) (DB) ** AIR 1917 Oudh 182 (185) (DB).

9. “Commencement.”— (1) A provision as to Court-fees expressed to come into force from a certain day will apply to all proceedings instituted on and after such day. AIR 1924 Mad 257 (258, 259) = 46 Mad 685 (SB). (Gazette received after office hours — Held enhanced fees applied to suit already filed on that day.)

Section 1-A — Note 1

(1) A plaint was originally instituted in the Small Cause Court at Simla (Punjab), with Court-fee stamps pertaining to the Punjab Government. The plaint was subsequently returned for presentation to a Himachal Court. It was then presented to the Subordinate Judge of Theog and decreed by him in due course. It was contended that the latter Court could not proceed with the suit, because the plaint bore Punjab Stamps and not Himachal Stamps. It was held, that so far as the case was concerned, having regard to its peculiar circumstances and the practice which was in vogue in the Himachal State prior to July, 1953, of using stamps of other States, the objection as to Court-fee should be overruled and credit should be given to the plaintiff for the Court-fee paid in the Simla Court. AIR 1956 Him Pra 38 (39).

(ii) For Section 1-A, substitute the following:—

"1-A. Definitions.—In this Act,—

- (a) "Chief Commissioner" means the "Chief Commissioner" of the Union Territory of Manipur/Tripura; and
- (b) "Official Gazette" means the Manipur/Tripura Gazette (w.e.f. 15-7-1963)—See G.S.Rs. 1119 and 1120 dated 29-6-1963, Gazette of India, 1-7-1963, Pt. II, S. 3 (i), pp. 501 and 531.

2°. "Chief Controlling Revenue authority" defined. [Repealed by A. O., 1937.]

[Cf. Bom. Act 36 of 1959, S. 2; Jammu and Kashmir Act 7 of 1977 Svt., S. 2.]

[°] The Original Section 2 relating to repeal of enactments was repealed by the Repealing Act, 1870 (14 of 1870). A section defining "Chief Controlling Revenue authority" was added by Section 2 of the Court-fees (Amendment) Act, 1901 (10 of 1901), and was slightly amended by the Repealing and Amending Act, 1917 (24 of 1917). For the definition of the "Chief Controlling Revenue authority", see now the General Clauses Act, 1897 (10 of 1897), Section 3 (10).

STATE AMENDMENTS

Andaman and Nicobar:

After Section 1-A insert the following section:—

"2. Definitions.—In this Act, unless the context otherwise requires,—

- (a) "appeal" includes a cross-objection;
- (b) "State Government" in relation to the Andaman and Nicobar Islands means the Administrator thereof;
- (c) "suit" includes an appeal from a decree except in Section 8-A."—Reg. II of 1957, Section 2 (1-8-1957).

Orissa:

For Section 2 the following section was substituted, viz.:—

"2. In this Act, unless there is anything repugnant in the subject or context,—

- (1) "Appeal" includes a cross-objection;
- (2) "Suit" includes an appeal from a decree except in Section 8-A."—Orissa Act 5 of 1939 (30-10-1939).

Pondicherry:

Act as in force on 1-8-1966 in the Union Territory of Andaman and Nicobar Islands has been extended to the Union Territory of Pondicherry with effect from 18-12-1968. In Section 2 so extended for cl. (b), substitute the following:—

- (b) "State Government" in relation to the Union Territory of Pondicherry means the Administrator thereof."—See the Pondicherry (Extension of Laws) Act, 1968 (26 of 1968), Section 3 and Sch. Pt. II (18-12-1968).

Uttar Pradesh:

2. Definitions.—In this Act, unless there is anything repugnant in the subject or context,—

- (i) "Appeal" includes a cross-objection;
- (ii) "Collector" includes any officer, not below the rank of a Deputy Collector, appointed by the Collector, with the previous sanction of the Chief Controlling Revenue Authority, to perform the functions of a Collector under this Act;

Section 2 (Orissa) — Note 1

(1) The definition of the word 'suit' in Section 2, Clause (ii) has to be read subject to the overriding clause in section itself — "Unless there is anything repugnant in the subject or context". The word 'sued' in Schedule II, Arti-

cle 1, Clause (d) can never mean appeal. ILR (1962) Cut 929.

Section 2 (U. P.) — Note 1

(1) The term 'suit' includes a first or second appeal unless there be anything repugnant in the subject or context of the enactment. 1966 All WR (HC) 247 ** 1958 All WR (HC) 356.

- (iii) "Revenue" means land revenue, as recorded in the Collector's register, and does not include cesses of any kind;
- (iv) "Suit" includes a first or second appeal from a decree in a suit and also a Letters Patent Appeal.—U. P. Act 19 of 1938 as amended by U. P. Act 9 of 1941.

West Bengal:

2. In this Act, unless there is anything repugnant in the subject or context,—
 - (1) 'appeal' includes a cross-objection;
 - (2) 'Chief Controlling Revenue Authority' means the Board of Revenue;
 - (3) 'Collector' includes any officer not below the rank of Sub-Deputy Collector appointed by the Collector to perform the functions of a Collector under this Act;
 - (4) 'Suit' includes an appeal from a decree except in Section 8-A.—Court-fees (Bengal Amendment) Act, 1935 (7 of 1935), Section 3.

CHAPTER II

FEES IN THE HIGH COURTS AND IN THE COURTS OF SMALL CAUSES AT THE PRESIDENCY-TOWNS

3. Levy of fees in High Courts on their original sides.—The fees payable for the time being to the clerks and officers (other than the Sheriffs and attorneys) of * [the High Courts other than those of Kerala, Mysore and Rajasthan], or chargeable in each of such Courts under No. 11 of the First, and Nos. 7, 12, 14 † [*] 20 and 21 of the Second, Schedule to this Act annexed;

SECTION 3 — SYNOPSIS

1. Scope.
2. Court-fees on the Original Side of Chartered High Courts.
3. Court-fees in appeals from the Original Side of Chartered High Courts.
4. "Fees payable to clerks and officers of the High Courts."
5. Writ jurisdiction.
6. Fees payable under the Presidency-Towns Insolvency Act.
7. Clause (2).
8. Fees chargeable in Presidency Small Cause Courts — Clause (3).

1. Scope.— (1) The language of the section does not purport to prescribe the Court-fee to be paid in any Court. It only purports to lay down the mode of collecting Court-fees. But the second clause of the section impliedly prescribes the Court-fees to be paid in certain cases in Chartered High Courts. AIR 1931 Mad 457 (459).

(2) Sections 3 and 4 read with Schedules I and II are the charging provisions under the Act. AIR 1970 Delhi 44 (49) (DB).

(3) The effect of Sections 3 and 4 is that in certain cases coming before the Chartered High Court, the Court-fees Act itself prescribes the fee leviable (Section 4 and Clause (2) of Section 3). In all other cases coming before that Court the Court-fees Act lays down only the mode of collecting the Court-

fee (Section 3, Clause 1.) In the case of the Presidency Small Cause Courts also, it merely prescribes the mode of collecting the fee (Section 3, Cl. 3). AIR 1931 Mad 457 (458, 459) ** AIR 1925 Pat 392 (398) = 4 Pat 336 (FB).

(4) The section is not a charging section in regard to the fees mentioned in Clause (1). It only prescribes the mode of collection in regard to them. The section assumes that the fees are made payable, apart from this Act, by means of rules made under the powers conferred by the enactments mentioned in this clause. AIR 1931 Mad 457 (459).

(5) The section must be given a reasonably wide construction and that if a particular fee could have been imposed under any of the enactments mentioned in this clause it must be deemed as made payable by virtue of the power conferred by them although the High Court actually purports to impose such fee under a power derived from some other source. AIR 1938 Cal 755 (756) = ILR (1939) 1 Cal 56. (Fees payable under Rules made under Section 112 of the Presidency Towns Insolvency Act held to be covered by this section.)

(6) The words 'the said High Courts' in Section 5 refer to the High Courts mentioned in the preceding Sections 3 and 4. Chapter II in which both Sections 3 and 5 fall expressly relates to High Courts for Part A States. AIR

Levy of fees in Presidency Small Cause Courts
and the fees for the time being chargeable in the Courts of Small Causes at the Presidency towns, and their several offices, shall be collected in manner hereinafter appearing.

[Cf. Bom. 36 of 1959, S. 3 (Maharashtra and Gujarat).]

[*] Substituted for "the High Courts for Part A States" by 2 A. L. O., 1956.

[†] The number "16" was repealed by the Amending Act, 1891 (12 of 1891).

[‡] See the Presidency Small Cause Courts Act, 1882 (15 of 1882), Chap. X.

STATE AMENDMENTS

Andaman and Nicobar:

In Chapter II, for the existing heading of the chapter, substitute the heading "Fees payable in Courts and in Public Offices".—Reg. II of 1957, S. 3 (1-8-1957).

Manipur and Tripura:

(i) In Chapter II, for the heading, the following shall be substituted:—

"Fees in the Judicial Commissioner's Court."

(ii) For Section 3, the following shall be substituted:—

"3. Levy of fees in Judicial Commissioner's Court.—The fees payable for the time being to the clerks and officers of the Court of Judicial Commissioner, Manipur/Tripura or chargeable in that Court under No. 11 of the First, and Nos. 7, 12 and 20 of the Second Schedule to this Act annexed shall be collected in manner hereinafter appearing." (w.e.f. 15-7-1963.)—See G.S.Rs. 1119 and 1120 dated 29-6-1963, Gazette of India, 1-7-1963, Pt. II, S. 3 (i), pp. 501 and 531.

Pondicherry:

Same as in Andaman and Nicobar—See Act 26 of 1968, S. 3 and Sch. Pt. II (18-12-1968).

West Bengal:

For the heading "Fees in the High Courts and in the Courts of Small Causes at the Presidency Towns" the heading 'Fees payable in Courts and in public offices' shall be substituted—Bengal Act 7 of 1935.

Section 3 — Note 1 (contd.)

1956 Pepsu 53 (54) = ILR (1956) Patiala 200.

(7) The powers of the High Court to make rules regarding Court-fees are not confined to those conferred by the enactments specified in Clause (1) of this section. AIR 1935 Rang 460 (462) = 13 Rang 156. (Power under Letters Patent.)

[See also AIR 1954 Mad 143 (144) = ILR (1954) Mad 643 (DB).]

2. Court-fees on the Original Side of Chartered High Courts.—

(1) In regard to the ordinary original jurisdiction of a Chartered High Court the fees prescribed by this Act are not applicable except in certain specified cases. AIR 1935 Rang 460 (461) = 13 Rang 156
** AIR 1922 Mad 421 (421, 422) = 45 Mad 849.

[See also AIR 1925 Mad 1216 (1216). (Fees-rules framed by High Court apply only to cases coming before it in the exercise of its ordinary original jurisdiction.)]

(2) Court-fees on the plaints filed on the original side of the Madras High Court are leviable under Chapter III of the Act and the levy of these fees is authorised by Order II, Rule 1 of the High Court-fees Rules, 1933. As a result of this rule, Section 7 (iv) (a) (b)

(c), (d), (e) and (f) of the Act along with the provisions as well as Article 17-B of Schedule II apply to suits filed on the original side of the High Court. AIR 1958 SC 245 (249, 250) = 1958 SCR 1021.

(3) Any rule made by the High Court will not have any legal authority if the appropriate legislature made law on the subject. AIR 1954 Mad 543 (544-548) (DB). (No rule made by Madras Legislature in respect of Court-fee payable on original side of High Court — High Court can prescribe Court-fee payable on original side if provisions of Article 225 of Constitution conferred such power on it.)

(4) Rules on the original side of Calcutta High Court dispense with instantaneous payment of Court-fees either at the time when the deposition is being taken or at the time when the document as being tendered as an exhibit on practical grounds of administration. AIR 1956 Cal 619 (620, 621).

3. Court-fees in appeals from the original side of Chartered High Courts.—

(1) The provisions mentioned in the first clause empower the High Court to prescribe Court-fees for appeals from the original side. AIR 1922 Mad 421 (422) = 45 Mad 849.

[But see AIR 1935 Rang 460 (462) = 13 Rang 156. (High Court's power to

4. Fees on documents filed, etc., in High Courts in their extraordinary jurisdiction.—No document of any of the kinds specified in the First or Second Schedule to this Act annexed, as chargeable with fees, shall be filed, exhibited or recorded in, or shall be received or furnished by, any of the said High Courts in any case coming before such Court in the exercise of its extraordinary original civil jurisdiction;

or in the exercise of its extraordinary original criminal jurisdiction;
in their appellate jurisdiction:

or in the exercise of its jurisdiction as regards appeals from the *[judgments (other than judgments passed in the exercise of the ordinary original civil jurisdiction of the Court) of one] or more Judges of the said Court, or of a division Court;

or in the exercise of its jurisdiction as regards appeals from the Courts subject to its superintendence;

as Courts of reference and revision.

or in the exercise of its jurisdiction as a Court of reference or revision;

unless in respect of such document there be paid a fee of an amount not less than that indicated by either of the said schedules as the proper fee for such document.

[Cf. Andhra Pradesh Act 7 of 1956, S. 4; Bom. Act 36 of 1959, S. 5 (1); Ker. Act 10 of 1960, S. 4; T.N. Act 14 of 1955, S. 4; Mys. Act 16 of 1958, S. 4; Him. Pra Act 8 of 1968, S. 4.]

[°] Substituted for "judgment of two" by the Court-fees (Amendment) Act, 1922 (19 of 1922), Section 2.

Section 3 — Note 3 (contd.)

impose such fees does not arise under the provisions mentioned.))

4. "Fees payable to clerks and officers of the High Courts."— (1) These words are not intended to be perquisites of the officers. AIR 1938 Cal 755 (756) = ILR (1939) 1 Cal 56.

[But see AIR 1922 Mad 421 (422) = 45 Mad 849. ("Section 3, Court-fees Act, clearly points to the fee which is to be taken by the officer as a perquisite" — Reference to Section 3 is an obvious error for Section 15 of the High Court's Charter Act.))]

5. Writ jurisdiction.— (1) Sections 3 and 4 are the charging sections and the Schedules simply provide the rates etc. — Petition under Article 226 does not come under Section 4 — Even Section 3 does not apply to cases coming before High Court under Art. 226, Constitution — Court-fee payable is not under Clause (e) of Article 1 of Schedule II but under Rule 40, Chapter VIII of Rules of Courts. AIR 1960 All 179.

6. Fees payable under the Presidency Towns Insolvency Act.— (1) Fees payable under Rules made by the High Court under Section 112 of the Presidency Towns Insolvency Act are covered by this section. AIR 1938 Cal 755 (757) = ILR (1939) 1 Cal 56.

7. Clause (2).— (1) This section, and not Section 4, applies to the question of Court-fees on probate granted by a Chartered High Court

[See however observations in AIR 1944 All 119 (120) = ILR (1944) All 229 (DB) and in AIR 1916 Mad 512 (513) = 38 Mad 988.]

(2) This section, and not Section 6, applies to Court-fees payable in a Chartered High Court in an application for letters of administration. It was, however, assumed in AIR 1935 All 442 (450) = 57 All 881 (DB) that Sec. 6 applies.

8. Fees Chargeable in Presidency Small Cause Courts — Clause (3).—

(1) The fees leviable in such Courts are charged under other enactments, for instance, Chapter 10 of the Presidency Small Cause Courts Act of 1882. 1912 Pun LR No. 202, p. 647 (650) (FB).

Section 4 — Note 1

(1) The section is a prohibition against the use of improperly stamped or unstamped documents and in that sense may be said to make the fees on those documents "payable" under this chapter for the purpose of Section 5. AIR 1925 Pat 392 (394) = 4 Pat 336 (FB).

(2) Before a document can be filed in the High Court it must bear the Court-fee chargeable within the first Schedule or second Schedule of the Act. AIR 1970 Delhi 44 (49) (DB).

(3) The word "case" must be confined to judicial or quasi-judicial cases as opposed to transactions. 1912 Pun LR No. 202, p. 647 (648) (FB).

STATE AMENDMENTS

Delhi

(1) In its application the Union Territory of Delhi, in Section 4,—

(i) in the marginal heading to the first paragraph, for the words “in High Courts in their extraordinary jurisdiction”, substitute the words “in the High Court of Delhi in its ordinary or extraordinary jurisdiction”;

(ii) in the first paragraph, for the words “any of the said High Courts in any case coming before such Court in the exercise of its extraordinary original civil jurisdiction”, substitute the words “the High Court of Delhi in any case coming before that Court in the exercise of its ordinary or extraordinary original civil jurisdiction”;

(iii) in the third paragraph, for the words “other than”, substitute the word “including”;

(iv) after the fifth paragraph “or in the exercise of its jurisdiction as a Court of reference or revision”, insert the following paragraphs, namely:—

“in the exercise of jurisdiction to issue writs, etc.

or in the exercise of its jurisdiction to issue directions, orders or writs under the Constitution of India;

in the exercise of any other jurisdiction,

or in the exercise of its jurisdiction in any other matter;”—See Act 28 of 1967, Section 2 (16-12-1967).

(2) Section 4 of the Court-fees (Delhi Amendment) Act, 1967 (28 of 1967), reads thus:

“4. Levy of fees in certain suits, etc., instituted before the commencement of this Act.—(1) Notwithstanding anything contained in the principal Act as amended by this Act, fees shall be levied in suits or other proceedings instituted on or after 31st October, 1966, and pending immediately before the 7th October, 1967 in the High Court of Delhi by virtue, and in the exercise, of its ordinary original jurisdiction as if the principal Act, as amended by this Act, had been in force on the respective dates on which such suits or proceedings were instituted.

Section 4 — Note 1 (contd.)

(4) Suits transferred under Sec. 39 of the Presidency Small Cause Courts Act to the High Court from the Presidency Small Cause Courts come within the extraordinary original civil jurisdiction of the High Court. The Court-fees payable in such cases are those prescribed by this Act. AIR 1925 Mad 1216 (1216). (High Court Fee — Rules apply only to cases coming under its ordinary original jurisdiction.)

(5) If the High Court makes any rules regarding Court-fees for cases coming before it in the exercise of its extraordinary original civil jurisdiction, which are inconsistent with the provisions of this section, such rules would be ultra vires. AIR 1931 Mad 457 (459).

(6) Where a suit is transferred to the High Court from the Madras City Civil Court, the Court-fee payable is that in cases coming under the ordinary original civil jurisdiction of the High Court. AIR 1931 Mad 457 (460).

(7) A Division Court must consist at least of two Judges of a High Court. AIR 1922 Pat 13 (13) = 1 Pat 384.

(8) A Division Court is not the same as a Division Bench of the High Court. (DB). (Appellate Side Rules of the

AIR 1922 Pat 13 (13) = 1 Pat 384. (No Division Court was ever constituted in the Patna High Court.) ** AIR 1922 All 164 (165) = 44 All 13. (No Division Courts have ever been constituted in the Allahabad High Court.)

(9) Under Clause (4) of this section, the Court-fees payable in cases coming before a Chartered High Court in the exercise of its jurisdiction as regards appeals from the Courts subject to its superintendence are governed by this Act. AIR 1925 Pat 392 (394) = 4 Pat 336 (FB) ** (1890) 12 All 129 (139) (FB).

(10) This section does not apply to an appeal to the High Court from the decision of the District Judge acting under Section 14, Central Provinces Local Fund Audit Act. AIR 1941 Nag 129 (130).

(11) Though this section makes the Court-fees prescribed by this Act payable, in a Chartered High Court, in appeals from Subordinate Courts, the High Court under its rule-making powers under the Government of India Act and otherwise can impose any other fee that it may deem fit. AIR 1932 Cal 160 (160) = 58 Cal 1389

(2) Any fees levied in respect of suits or other proceedings instituted before the High Court of Delhi by virtue, and in the exercise, of its ordinary original jurisdiction, on or after the 31st day of October, 1966, and disposed of before 7th October, 1967, shall be deemed to have been levied in accordance with law."

Punjab, Haryana and Chandigarh:

(i) In marginal heading to the first paragraph, for the words "in High Courts in their extraordinary jurisdiction", substitute the words "in High Court of Punjab and Haryana in its extraordinary jurisdiction".

(ii) In the first paragraph—

(a) for the words "any of the said High Courts", substitute the words "the High Court of Punjab and Haryana"; and

(b) after the sub-paragraph "or in the exercise of its jurisdiction as a Court of reference or revision", insert the following sub-paragraph, namely:—

"in the exercise of jurisdiction to issue writs, etc., or in the exercise of its jurisdiction to issue directions, orders or writs under the Constitution of India;"—Punjab Act 20 of 1960, S. 2 (13-5-1960) as amended by Punjab A. L. O., 1968, para 4 and Schedule (w.r.e.f. 1-11-1966): Act 31 of 1966, S. 38 (1-11-1966).

Uttar Pradesh:

In Section 4—

(a) in the marginal heading to the first clause in its application to the Uttar Pradesh, for the words "in High Courts in their extraordinary jurisdiction", substitute the words "in the High Courts in their ordinary or extraordinary jurisdiction";

(b) for the words "any of the said High Courts", substitute the words "the High Court of Judicature at Allahabad";

(c) between the words "in the exercise of its" and the words "extraordinary original civil jurisdiction", insert the words "ordinary or";

(d) between the words "in the exercise of its" and the words "extraordinary original criminal jurisdiction", insert the words "ordinary or";

Section 4 — Note 1 (contd.)

Calcutta High Court — Additional fee on affidavits.)

(12) No Court-fee is payable under this Act in respect of a reference under Section 66 of the Income-tax Act. AIR 1933 Sind 148 (150) = 27 Sind LR 243 (DB).

(13) An application made by the appellant under R. 13 of Chapter 13 of the Rules of the Allahabad High Court for the translation and printing of such parts of the record of the trial Court as are considered necessary at the hearing of the appeal, is "filed in or received by" the High Court in a case coming before it in the exercise of its jurisdiction "as regards appeals from the Courts subject to its superintendence." AIR 1955 All 510 (511) = ILR (1955) 2 All 93 (FB). (AIR 1954 All 812, Overruled.)

(14) Every document which falls within the purview of Sec. 4 must bear the Court-fee prescribed by the relevant provision; and so the question as to whether a particular document falls within Section 4 and as such must pay the Court-fees prescribed for it must be decided solely by reference

to the relevant provisions of the Act. If a copy of a statement made in a criminal Court is filed it must bear the Court-fees prescribed by Article 9. The proceeding in a criminal Court is a judicial proceeding. Hence if a copy of an order or judgment delivered in a criminal proceeding is intended to be filed before High Court in a Criminal Appeal it clearly attracts the provisions of Article 9. AIR 1960 SC 128 (130, 131) = 1960 Cri LJ 171 = (1960) 1 SCR 935.

(15) Memorandum of appeal should be properly stamped as required by Section 4. AIR 1969 Pat 359 (363) = 1969 BLJR 299 (DB).

(16) Under this section, the High Court has full power to refuse to accept a memo of appeal which is insufficiently stamped. AIR 1951 All 64 (67, 68) = ILR (1952) 1 All 461 (FB) ** AIR 1957 Andh Pra 6 (10) = ILR (1956) Andhra 610 (DB) ** AIR 1957 Punj 32 (34) = ILR (1957) Punj 142 (DB) ** AIR 1950 All 499 (499, 500) (DB) ** (1964) 68 Cal WN 536. (Government filing memorandum of Appeal with deficit Court-fees — Deficit payment due to Office procedure and not lack of

(e) after the sub-paragraph "or in the exercise of its jurisdiction as a Court of reference or revision", add the following sub-paragraphs:—

In the exercise of jurisdiction to issue writs, etc.—"Or in the exercise of its jurisdiction to issue directions, orders, or writs under the Constitution of India;

In the exercise of any other jurisdiction.—"Or in the exercise of jurisdiction in any other matter."—U. P. Act X of 1959, Ss. 2 and 3 (4-9-1959).

(f) at the end of the existing section, add the following explanation:—

"Explanation.—Where the amount of fee prescribed in the Schedules contains any fraction of a rupee below * [twenty-five naye paise] or above * [twenty-five naye paise] but below * [fifty naye paise,] or above * [fifty naye paise] but below * [seventy-five naye paise] or above * [seventy-five naye paise] but below one rupee, the proper fee shall be an amount rounded off to the next higher quarter of a rupee as hereinafter appearing in the said Schedules."—U. P. Acts XXV of 1952, Section 2 (1-11-1952) and *XX of 1958, Section 2.

Section 4 — Note 1 (contd.)

funds — Filing of deficit fees out of time could not be allowed.)

(17) Section 149, Civil P. C. is exception to rule contained in this section. AIR 1966 Punj 332 (333) (DB).

(18) Section 4 is not subject to, or controlled by, the provisions of, and principles underlying Section 6 as it stands amended in Section 6 (2) in U. P. Section 6 (2) does not apply to the High Court and, therefore, the High Court is not bound to give thereunder time even at least once to make good the deficiency when an insufficiently stamped memorandum of appeal is presented to it. AIR 1951 All 64 (66) = ILR (1952) 1 All 461 (FB). (AIR 1935 All 620 = 57 All 983 (FB). Expl.)

(19) Claim not properly stamped cannot be filed or received — Even if filed and received it will remain invalid unless it is properly stamped — Fact that plaint was held to be a valid document by Court receiving it neither precludes appellate Court from judging its validity nor absolves it from the duty of doing so — If it finds it invalid by reason of not being properly stamped it has to ignore the plaint unless and until it is properly stamped — Power of appellate Court to direct payment of Court-fee is not dependent upon whether the document may be or intended to be 'used' in appeal. AIR 1968 All 216 (222, 223) (FB). (AIR 1957 All 63 and AIR 1962 All 268, Overruled.)

(20) Land acquisition — Compensation award in favour of Zamindar and tenant — Reference to District Judge awarding compensation to Zamindar alone — Appeal by tenant — Appellant ought to pay *ad valorem* Court-fee on the sum claimed and disallowed. 1961 Jab LJ 412 = 1961 MPC 439 = 1961 MPLJ 953.

(21) A document is exhibited for the purpose of being taken into consideration in deciding some question or other

in respect of the proceeding in which it is filed. AIR 1956 Cal 619 (619).

(22) When a suit is transferred under Clause 13 of the Letters Patent, it is transferred under an order of the Court and there can be no question of the High Court 'receiving' the plaint in the sense contemplated in Section 4 and therefore Section 4 cannot be said to require the plaint of the transferred suit to be stamped with fees prescribed by the Act. (The Court-fee paid in the original Court at the time of the institution of the suit is the fee properly payable under the Act). AIR 1955 Cal 258 (261, 262, 263) (DB).

(23) Provisions of Order 44, Rule 1, C. P. C. are specific provisions contrary to Section 4, Court-fees Act and they will supersede that of that section — So only in cases governed by O. 44, Rule 1, memo of appeal may be presented without being stamped — But as special appeals filed under the Letters Patent and the Rules of the High Court are not governed by O. 44, Rule 1, there is no specific provision contrary to that contained in Sec. 4. Hence Section 4 will prevail and Court-fee will be paid on each memo of appeal. AIR 1965 All 79 (DB).

(24) The High Court has no statutory or inherent jurisdiction to make any order either for refund of Court-fees or for the issue of a certificate for such refund in the case of a suit transferred to the High Court in its Extraordinary Original Civil Jurisdiction under Cl. 13 of Letters Patent. AIR 1955 Cal 52 (56).

(25) The Tribunal appointed under Section 4 of, and functioning under, the Displaced Persons (Debts Adjustment) Act, 1951, is a Court within the meaning of the Court-fees Act and under Section 4, fourth paragraph, a Court subject to the superintendence of the High Court. AIR 1956 Bom 563 (566) = ILR (1956) Bom 211.

(26) Both the Assistant Endowments Commissioner and the Endowments

5. Procedure in case of difference as to necessity or amount of fee.—When any difference arises between the officer whose duty it is to see that any fee is paid under this Chapter and any suitor or attorney, as to the necessity of paying a fee or the amount thereof, the question shall, when the difference arises in any of the said High Courts, be referred to the taxing officer, whose decision thereon shall be final, except when the question is, in his opinion, one of general importance, in which case he shall refer it to the final decision of the Chief Justice of such High Court, or of such Judge of the High Court as the Chief Justice shall appoint either generally or specially in this behalf.

When any such difference arises in any of the said Courts of Small Causes, the question shall be referred to the Clerk of the Court, whose decision thereon shall be final, except when the question is, in his opinion, one of general importance, in which case he shall refer it to the final decision of the first Judge of such Court.

The Chief Justice shall declare who shall be taxing officer within the meaning of the first paragraph of this section.

[Cf. Bom. Act 36 of 1959, S. 4 (1) and (2); Him. Pra. Act 8 of 1968, S. 5; Jammu and Kashmir Act 7 of 1977 Svt. S. 5; Mad. Act (now called Tamil Nadu Act) 14 of 1955, S. 11.]

STATE AMENDMENTS

Manipur and Tripura:

In application to the said Union territories in Section 5,—

- (i) in paragraph 1, for the words 'in any of the said High Courts', substitute the words "in the Court of the Judicial Commissioner for Manipur/Tripura"; and
- (ii) for the words "the Chief Justice of such High Court, or of such Judge of the High Court as the Chief Justice shall appoint either generally or specially in this behalf", substitute the words "Judicial Commissioner";
- (iii) omit paragraph 2; and
- (iv) in paragraph 3 for the words 'The Chief Justice', substitute the words 'The Judicial Commissioner' (w.e.f. 15-7-1963)—See G.S.Rs. 1119 and 1120, Gaz. of India., 1-7-1963, Pt. II, Sec. 3 (i), pp. 501 and 531

Section 4 — Note 1 (contd.)

Commissioner while exercising powers under Sections 41 and 44 (1) of the Orissa Hindu Religious Endowments Act are 'Courts subject to the superintendence of the High Court' as required by Section 4 of the Court-fees Act. 28 Cut LT 257 = ILR (1962) Cut 354. (Certified copies of orders under Sections 41 and 44 of Orissa Act cannot be filed in second appeal under Sec. 44 (2), unless fee as required by Section 4 of Court-fees Act is paid.)

(27) High Court acting under Article 226 of Constitution exercises "jurisdiction" within meaning of Section 4, Court-fees Act as amended by the U. P. Act 10 of 1959, and not "power". AIR 1960 All 462 (FB).

(28) Court-fee imposed by Amendment is not a tax but a fee — Section 4 and Schedule 2, Article 1 (e) as amended by Court-fees (U. P. Amendment) Act (10 of 1959) are within legislative competence of U. P. Legislature. AIR 1960 All 462 (FB).

(29) Section 4 of the Court-fees Act prohibits the acceptance of the document by the High Court of a memorandum of appeal and when such a docu-

ment is taken, it is not taken as a memo of appeal by which an appeal is deemed to have been filed but merely as a defective document on the basis of which, after the defect has been removed, an appeal might come into existence. AIR 1964 All 552 (553, 555, 556, 557) = 1964 All LJ 537 = ILR (1964) 2 All 565 = 1964 All WR (HC) 334 (FB).

(30) Petition under Article 226 of Constitution does not come under Section 4 — Court-fee payable is not under Cl. (e) of Art. 1 of Sch. II but under Rule 40, Chapter VIII of Rules of Court. AIR 1960 All 179 (181 to 184).

SECTION 5 — SYNOPSIS

1. Scope and object.
2. Section 5 and Section 12.
3. "When any difference arises."
4. "Officer whose duty it is to sec."
5. "Any fee is paid under this Chapter".
6. "Any of the said High Courts."
7. Taxing officer.

Section 5 — Synopsis (contd.)

8. Matters for decision of Taxing Officer under this section.
9. Fees in subordinate Courts.
10. Finality of Taxing Officer's decision.
11. Reference by taxing officer.
12. Decision of Taxing Judge — Finality.
13. Reference to Bench.
14. Enquiry by Taxing Officer or Taxing Judge.
15. Powers and duties under this section.
16. Objection as to court-fee on appeal if can be taken after admission of appeal.

1. **Scope and object.** — (1) The object of the section is to secure payment of court-fees prior to litigation and to afford as little scope as possible for litigation over the payment. AIR 1925 Cal 1201 (1204) = 52 Cal 871 (DB).

(2) Although the question of Court-fee is primarily between the party and the Crown, the opposite party can raise an objection in regard to it. AIR 1943 Pat 102 (103, 104) = 21 Pat 720.

(3) Payment of Court-fee as a source of revenue is a matter primarily between the State and the subject. If the State has realised the Court-fee it is hardly proper for the opposing litigant to raise objections on the score of Court-fee for the purpose of shutting out or obstructing adjudication of disputes. AIR 1959 Punj 629 (632) = ILR (1959) Punj 1770.

(4) The procedure laid down in Section 5 will be necessary to be followed in those cases only where a document is claimed to be chargeable with Court-fee under Chap. II of the Act. Should any document be not chargeable with Court-fee under Chap. II, Sec. 5 cannot interpose nor will it be necessary to refer the matter to the taxing officer or to the Taxing Judge under its provisions. Petition under Art. 226 does not come under Chapter II. AIR 1960 All 179 (182).

(5) Chief Justice and Taxing Judge deciding reference under Section 5 are not *persona designata*. AIR 1969 All 484 (FB). (AIR 1927 Bom 643 Diss. from.)

2. **Section 5 and Section 12.** — (1) This section corresponds to Section 12. Whereas this section deals with the question of court-fees in Chartered High Courts and Presidency Small Cause Courts, Section 12 deals with the Court-fees to be paid in other Courts. AIR 1935 Pat 396 (397) = 14 Pat 658 (SB) ** AIR 1925 Pat 392 (392) = 4 Pat 336 (FB)

(2) Scope of S. 12 is narrower than that of S. 5 — S. 5 makes a decision as to the necessity of paying a fee or the amount thereof final while S. 12 makes a decision on every question relating to

valuation for determining the amount of any fee payable on plaint or memorandum of appeal final. AIR 1953 SC 28 (32) = 1953 SCR 197.

3. **"When any difference arises."** — (1) For the applicability of the section, there must be a difference between a suitor or his attorney and the officer of the Court regarding the court-fee. AIR 1925 Pat 392 (403) = 4 Pat 336 (FB).

[But see AIR 1925 Cal 1201 (1202, 1205) = 52 Cal 871 (DB).]

(2) When an appeal is preferred and the Stamp Reporter makes a report that the court-fee paid is not sufficient a difference within the meaning of this section arises although the additional court-fee as stated by the Stamp Reporter to be due is paid by the appellant. (1890) 12 All 129 (158) (FB).

(3) It may be presumed, from the very fact that a matter had been disposed of by the Taxing Officer, that there had been a difference and that the matter had been referred to him under this section. (1890) 12 All 129 (158) (FB).

(4) Failure to take objection to the Stamp Reporter's report within the period fixed by the High Court, prevents the party in default from raising the question afterwards. It will not prevent the Court from considering the question at the time of deciding whether the proceeding should be dismissed for failure to pay the requisite court-fee. AIR 1934 All 56 (57) (DB).

4. **"Officer whose duty it is to see. . . ."** — (1) Stamp Reporter is an "Officer". AIR 1925 Pat 392 (394) = 4 Pat 336 (FB).

(2) Chief Inspector of Stamps is an "Officer". AIR 1932 All 319 (320) (DB).

(3) The Officer who has to ensure that the court-fee has been duly paid is the Deputy Registrar, Appellate Side, and the Taxing Officer is the Master. AIR 1930 Mad 597 (597) = 53 Mad 510 (DB).

5. **"Any fee is paid under this Chapter."** — (1) A fee payable under the schedules will be a fee payable under Chap. II, if it is a fee payable in a Chartered High Court by virtue of S. 3 or S. 4. AIR 1923 Pat 137 (138) = 2 Pat 198 (DB) ** AIR 1925 Pat 392 (396) = 4 Pat 336 (FB).

(2) The fee payable under Art. 11 of Schedule I in respect of a probate of a will is covered by this section and an order by the Taxing Officer that no fee is payable in the particular case will be one within this section. (1899) 26 Cal 407 (407) ** AIR 1925 Cal 1201 (1202 to 1205) = 52 Cal 871 (DB).

(3) A fee payable in a Chartered High Court under rules made by virtue of the power of the High Court under the Indian High Courts Act 1861, or the Government of India Act of 1935, would be a fee payable under Chap. II.

Section 5 — Note 5 (contd.)

AIR 1922 Mad 421 (422) = 45 Mad 849. (Fee on appeal from Original Side of High Court.) ** AIR 1927 Mad 940 (941). (Fees in suits on Original Side of High Court).

(4) This section cannot be utilised to test the legality of any fees prescribed by the High Court by virtue of its powers under the enactments referred to in Section 3. AIR 1938 Cal 755 (756) = ILR (1939) 1 Cal 56.

6. "Any of the said High Courts." —

(1) The expression "High Courts" is not confined to the High Courts in the three Presidency Towns as the Court of Small Causes referred to in the section are AIR 1925 All 787 (789) = 47 All 756 (DB).

(2) The words "the said High Court" in S. 5 refer to the High Courts mentioned in the preceding Sections 3 and 4. AIR 1956 Pepsu 53 (54) = ILR (1956) Patiala 200.

7. Taxing Officer. — (1) In the Madras High Court the Master is the Taxing Officer. AIR 1930 Mad 597 (597) = 53 Mad 540 (DB).

(2) In the Patna and Orissa High Courts the Registrar is the Taxing Officer. AIR 1925 Pat 392 (394) = 4 Pat 336 (FB) ** AIR 1951 Orissa 8 (9) = ILR (1950) Cut 368 (DB).

(3) In the Calcutta High Court the Registrar, Appellate Side, is the Taxing Officer. (1910) 37 Cal 914 (917) (DB).

(4) The Registrar is an officer of the High Court and forms part of it and, when he is appointed the Taxing Officer under Section 5 of the Court-fees Act, he does not cease to be so. Under Art. 227 of the Constitution the High Court, cannot exercise jurisdiction over itself and the tribunal amenable to it under that Article, must be apart from it. The Registrar acting under S. 5 of the Court-fees Act cannot, therefore, be regarded as a tribunal whose orders are revisable by the High Court under Art. 227. AIR 1959 Cal 317 (318) = 63 Cal WN 339 (DB).

8. Matters for decision of Taxing Officer under this section. — (1) The words "amount thereof" are wide enough to confer on the Taxing Officer jurisdiction to decide not only questions of valuation of a suit or other proceeding but also questions relating to the category under which the suit will fall for purposes of court-fee. On both questions his decision will be final and cannot be questioned by the Court. AIR 1925 Pat 392 (403) = 4 Pat 336 (FB) ** AIR 1923 Pat 137 (138) = 2 Pat 198 (DB) ** (1890) 12 All 129 (153) (FB) ** (1910) 32 All 59 (62) ** AIR 1927 Bom 643 (646) = 52 Bom 61 (DB).

[See also AIR 1937 Mad 46 (47, 51) = ILR (1937) Mad 284 (DB). (Decision of Taxing Officer that ad valorem fees

are payable in respect of a matter is final.)]

(2) A question as to whether duty on a probate should be calculated according to the law at the date of the application for probate or at the date of the grant of probate is a question relating to the "amount" of fee. AIR 1927 Bom 643 (645, 646) = 52 Bom 61 (DB).

(3) A Taxing Officer under this section must decide the question of court-fee with reference to the plaint or memorandum of appeal as presented. He cannot say that a particular relief is not necessary. (1890) 12 All 129 (161) (FB). (One of the two declarations sufficient.) ** ('36-43) Tax Dec (Nag) 51 (52). (Mere declaration.) ** ('36-43) Tax Dec. (Nag) 64 (66).

[But see AIR 1943 Pat 102 (106) = 21 Pat 728.]

(4) The Taxing Officer is not bound to accept the valuation given in the memorandum of appeal but is entitled to enquire into such valuation himself and come to his own independent conclusion even at variance with the conclusion of the lower Courts. AIR 1925 Pat 392 (396) = 4 Pat 336 (FB). (AIR 1923 Pat 137 = 2 Pat 198 (DB), Approved.)

(5) The Taxing Officer's power of deciding as to the "necessity of paying a fee" would enable him to issue a certificate that no fee is payable on a probate for which application is made to the High Court. AIR 1925 Cal 1201 (1203) = 52 Cal 871 (DB).

(6) A Taxing Officer has jurisdiction to decide if he has power under this section to demand additional court-fee on an appeal after the appeal has been admitted. AIR 1943 Pat 102 (105) = 21 Pat 720.

9. Fees in subordinate Courts. — (1) The Taxing Officer or the Taxing Judge has no power to decide any question as to the court-fees payable in the lower Courts. AIR 1935 All 817 (818) = 58 All 146 (FB). (Per Bennet J. in order of referred.) ** AIR 1951 Orissa 8 (9) = ILR (1950) Cut 368 (DB) ** AIR 1945 Pat 81 (82) = 23 Pat 749 ** AIR 1935 Cal 338 (339, 344) (DB) ** AIR 1934 All 805 (806) = 57 All 71 (DB). (Dissenting from AIR 1925 All 184.) ** AIR 1934 Rang 268 (269) = 12 Rang 335 ** AIR 1925 Pat 392 (395) = 4 Pat 336 (FB) ** AIR 1937 Pat 514 (516) = 16 Pat 491 ** AIR 1927 Cal 775 (775) (DB).

(2) The Taxing Officer has power to decide all questions as to the court-fee payable in the High Court and he can decide such questions untrammelled by the consideration that his decision would be inconsistent with the view taken by the lower Courts as to the valuation of the matter. AIR 1920 Pat 593 (593) = 4 Pat L Jour 700 (DB). (The terms of

Section 5 — Note 9 (contd.)

Section 5 are imperative and contain no restrictions on the power of Taxing Officer.) ** AIR 1951 Orissa 150 (152) = ILR (1950) Cut 497.

(3) The question of court-fee payable in lower Courts is to be decided by the Bench hearing the appeal. The decision of the Bench on such question is unfettered by the Taxing Judge's decision which is final only as regards court-fee on appeal to the High Court. Regarded as decision laying down general principles, the Taxing Judge's decision is merely that of a single Bench and not binding on a Division Bench. AIR 1945 Pat 81 (82) = 23 Pat 749.

10. Finality of Taxing Officer's decision. — (1) The finality of the decision of the Taxing Officer applies not only to the litigant who contested the correctness of the taxation by the taxing clerk but also the respondent who was not a party to the decision by the Taxing Officer. (1897) 20 All 11 (17) (FB). (Section 12 is in contrast.) ** AIR 1937 Mad 46 (51) = ILR (1937) Mad 284 (DB). (20 Mad 398, Foll.) ** AIR 1930 Mad 597 (598) = 53 Mad 540 (DB).

(2) The word "final" has the same meaning as it has under Section 12. (1890) 12 All 129 (152) (FB) ** AIR 1927 Bom 643 (646) = 52 Bom 61 (DB).

[See however AIR 1937 Mad 46 (51) = ILR (1937) Mad 284 (DB). (The order of the Court under Section 12 is subject to the revisional jurisdiction of the High Court [See Section 12 (ii)] — Taxing Officer's order under this section cannot be reversed.)]

(3) The word "final" denotes that the decision of the Taxing Officer cannot be questioned in appeal, revision or review AIR 1943 Bom 441 (442) ** ('36-43) Tax Dec. (Nag) 108 (109). (It cannot be reviewed under inherent powers of Court.) ** ('36-43) Tax Dec (Nag) 57 (58) ** AIR 1917 Pat 100 (100) = 3 Pat L Jour 92 (DB) ** AIR 1937 Mad 46 (51) = ILR (1937) Mad 284 (DB). (Under Section 12 the order is subject to revision. No revision lies under this section.) ** AIR 1923 Pat 137 (138) = 2 Pat 198 (DB) ** AIR 1927 Bom 643 (645, 646) = 52 Bom 61 (DB) ** (1890) 12 All 129 (160) (FB).

(4) Decision of Taxing Officer, on issue of court-fee payable, cannot be referred to Taxing Judge. AIR 1966 All 227.

(5) Where the intention of the Taxing Officer is not to decide the matter finally but merely to express an opinion and refer the question to the Taxing Judge, the Taxing Judge has jurisdiction to go into the matter. ('36-43) Tax Dec (Nag) 57 (58).

(6) The finality is not merely a temporary finality for the purpose of the preliminary proceedings in connection

with getting an appeal or other proceeding filed. AIR 1937 Mad 46 (51) = ILR (1937) Mad 284 (DB).

(7) Where once the question of court-fee on an appeal has been decided by the Taxing Officer, it cannot be re-opened at the hearing of the appeal before this section and cannot be questioned AIR 1920 Pat 593 (593) = 4 Pat L Jour 700 (DB).

[See AIR 1918 Pat 210 (210) = 3 Pat L Jour 443. (Case was followed in AIR 1939 Pat 83 = 17 Pat 687 (DB).]

(8) However wrong the order of the Taxing Officer may be, it is final under this section and cannot be questioned by the Court. 1907 Pun Re No. 39 p. 168 (170) (DB) ** AIR 1935 Cal 338 (339) (DB) ** AIR 1937 Mad 46 (51) = ILR (1937) Mad 284 (DB) ** AIR 1925 Pat 392 (394) = 4 Pat 336 (FB) ** AIR 1932 All 319 (320) (DB) ** AIR 1920 Pat 593 (593) = 4 Pat L Jour 700 (DB). (Even though the decision involves the determination of valuation of suit in lower Court.)

[But see (1892) 15 All 117 (118) (FB) ** AIR 1922 Bom 172 (172) = 46 Bom 840 (DB).]

(9) An accidental slip or an arithmetical mistake made in the Taxing Officer's decision can be corrected. ('36-43) Tax Dec. (Nag) 108 (110).

(10) In order to be final under this section, the decision of the Taxing Officer must be one on the merits. AIR 1934 All 56 (57, 58) (DB). (Refusal to consider on ground of delay.) ** AIR 1925 Cal 1201 (1203) = 52 Cal 871 (DB). (Question must have been raised and the Taxing Officer must have applied his mind to it.) ** (1898) 21 Mad 269 (270) (DB).

(11) The mere fact that an appeal is admitted does not necessarily involve a decision that the court-fee paid is sufficient and therefore does not preclude the question as to sufficiency of court-fee being raised at the hearing of the appeal. AIR 1943 Pat 102 (105) = 21 Pat 720.

(12) An ex parte order against the suitor without any opportunity being given to him to be heard will not be final under this section. AIR 1925 Pat 392 (403) = 4 Pat 336 (FB).

[See however 1903 All WN 214 (215).]

(13) Where, in spite of notice, a party remains absent, he cannot afterwards contest the order of the Taxing Officer passed in his absence. AIR 1946 Mad 257 (257).

(14) When there is no decision by the Taxing Officer under this section, and excess court-fee has been paid by a litigant by mistake or under an order of Court, the High Court has inherent power to direct the issue of a certificate to enable the party to obtain a refund from the revenue authorities. AIR 1930

Section 5 — Note 10 (contd.)

All 471 (471) = 52 All 546 (DB) ** AIR 1918 Pat 496 (497) = 3 Pat L Jour 452 (DB) ** AIR 1932 Lah 219 (220) ** AIR 1932 Mad 438 (439) = 55 Mad 641 (DB) ** AIR 1915 Low Bur 70 (71) = 8 Low Bur Rul 155 ** AIR 1928 Pat 35 (35, 36) = 6 Pat 599 (DB)

11. Reference by Taxing Officer. — (1) The section leaves it absolutely to the judgment of the Taxing Officer whether a reference to the Judge must be made. There is no provision for compelling him to make the reference. AIR 1937 Mad 46 (48) = ILR (1937) Mad 284 (DB).

(2) The Taxing Judge has no power to entertain a taxing matter unless the Taxing Officer considers that the question is of general importance and then chooses to refer it to the Taxing Judge. ('36-43) Tax Dec (Nag) 57 (58) ** AIR 1951 All 499 (500) (DB).

(3) The Taxing Judge can decide only the point referred to him in the order and not any other point not referred. ('36-43) Tax Dec (Nag) 94 (95).

(4) Where there was a conflict of decisions in the same High Court on a question of court-fees on a memorandum of appeal from a decree for mesne profits it was held that the Taxing Officer acted rightly in referring the question to the Judge under this section. AIR 1933 Pat 81 (83) = 12 Pat 188.

(5) Where the jurisdiction of the Taxing Officer to decide a matter or make an order is being questioned, he can refer the question under this section, if he thinks the question to be of general importance. AIR 1943 Pat 102 (105) = 21 Pat 720.

(6) In references under this section, the Taxing Officer should avoid referring abstract question of law. The question to be referred to the Court should be whether the particular suitor has to pay a court-fee or additional court-fee. This can be done by referring the whole case of court-fee arising in a particular case to the Court. 1965 All LJ 909.

12. Decision of Taxing Judge—Finality. — (1) The decision of the Taxing Judge under this section is not liable to be set aside in appeal, revision or reference. 1903 All WN 214 (215) ** AIR 1958 SC 245 (249) = 1958 SCR 1021 ** AIR 1954 Mad 1126 (1128) (DB) ** AIR 1927 Bom 643 (647) = 52 Bom 61 (DB).

(2) See also Note 9.

13. Reference to Bench. — (1) A Bench of Judges may be appointed to answer a reference under this section. AIR 1935 Pat 396 (397) = 14 Pat 658 (SB) ** (1894) 4 Mad L Jour 22 (22) (DB). (Judgment by a Division Bench on reference under Section 5.) ** AIR 1946 Lah 280 (284) = ILR (1947) Lah 47 (FB). (In order of reference.)

[But see AIR 1914 Cal 40 (46). (Doubt expressed with reference to 9 Beng LR 30 where a reference was heard by a Bench of two Judges.) ** AIR 1951 Orissa 265 (266) = ILR (1950) Cut 365 (DB).]

(2) Word 'Judge' occurring in Section 5, Court-fees Act can be read as 'Judges' — Taxing Judge or Chief Justice can make reference under Section 5 to a larger Bench. AIR 1969 All 484 (FB). (AIR 1951 All 499 and (1911) ILR 33 All 20, **Overruled**, AIR 1951 Orissa 265, **Diss. from**.)

(3) The Chief Justice can appoint himself as the Taxing Judge under this section. AIR 1923 Mad 362 (362) = 46 Mad 592.

(4) It is not necessary that the Chief Justice must specify the Judge to dispose of a reference before it is made; he can specify the Judge on receiving the reference. Even if he has specified a Judge to dispose of references generally, he has the power to specify another Judge to dispose of a particular reference even after the reference has been made; in that event the particular Judge becomes the Judge to whom the reference is to be made. AIR 1957 All 207 (212) (DB). (Per Desai J.)

(5) The section does not prescribe any form in which the order of the Chief Justice appointing a Judge or constituting a Bench to hear a matter should be passed. The order might be a general or special one. It might be written or even an oral one. AIR 1957 All 207 (209) (DB).

(6) No assumption can be made, from the practice in the Madras High Court to refer disputes as to proper court-fees arising between suitors on the Original Side and the Registry to the Chamber Judge, that the Chamber Judge on the Original Side was appointed generally to deal with such disputes. AIR 1958 SC 245 (249) = 1958 SCR 1021.

(7) The section provides that the question is to be referred to the final decision of the Chief Justice, etc. This implies that such Judge shall not have power to refer the matter further to another Bench for disposal. AIR 1924 Pat 161 (161) = 3 Pat 146 ** AIR 1957 Andh Pra 766 (768, 769) ** AIR 1951 All 499 (500) (DB) ** AIR 1951 Orissa 265 (266) = ILR (1950) Cut 365 (DB) ** AIR 1933 Pat 81 (83) = 12 Pat 188 ** (1911) 33 All 20 (23).

[But see AIR 1935 Pat 396 (397) = 14 Pat 658 (SB).]

(8) The Judge to whom the question has been referred can refer to a Full Bench any question of law which may be involved and dispose of the reference in accordance with the opinion of the Full Bench. AIR 1932 All 485 (485) = 54 All 812 (FB).

Section 5 — Note 13 (contd.)

[But see AIR 1957 Andh Pra 766 (768, 769).]

(9) When there is no question of a reference by a Taxing Officer under this section, a reference by the Bench (before which a case may come) to a larger Bench or to a Full Bench is not precluded. (1907) 30 Mad 96 (97) (FB).

(10) Taxing Officer decided that a certain court-fee be paid on a memo of appeal — Appellant failed to pay the same — Case placed before a Bench for orders — Order of the Taxing Officer attacked before the Bench as being ultra vires — The matter may be referred by such Bench to a Full Bench. AIR 1925 Pat 392 (393) = 4 Pat 336 (FB).

(11) Where the question about the adequacy of the Court-fees leviable on the appellant's memorandum of appeal is properly referred by the Master to the Chief Justice of the Madras High Court and has been decided by the Division Bench of the High Court in pursuance of the requisite order made by the Chief Justice in that behalf, the decision reached by the Division Bench must be held to be final under this section. AIR 1958 SC 245 (251) = 1958 SCR 1021.

14. Enquiry by Taxing Officer or Taxing Judge. — (1) The parties should be called upon to produce in such manner as may be convenient, evidence to enable the Taxing Officer to decide the question of court-fee. It should not be decided merely on the allegations in the plaint. AIR 1925 Pat 392 (397) = 4 Pat 336 (FB) ** AIR 1951 Orissa 150 (152) = ILR (1950) Cut 497.

(2) Though the question of court-fee is primarily one between the appellants and the Crown, the respondents can also be heard. AIR 1943 Pat 102 (103, 104) = 21 Pat 720.

15. Powers and duties under this section. — (1) The Taxing Officer or Taxing Judge has no power to dispose of the proceeding if the requisite court-fee is not paid and if the fee is not paid as required, the matter must be laid before the Court for orders. See AIR 1925 Pat 392 (393) = 4 Pat 336 (FB) ** (1875) 24 Suth WR 258 (258) (DB). (No power to return petition of appeal when stamp insufficient.) ** (1910) 32 All 59 (63). (No power to allow time for paying deficit in court-fee.)

(2) The Taxing Officer has no power to ask an appellant to the High Court to deposit any sum of money in Court as a condition precedent to having his case tried. The only power he has is to direct the appellant to pay court-fee. AIR 1928 Pat 29 (30) = 6 Pat 602 (DB).

(3) A Taxing Judge is bound to follow the law as laid down by a Division

Bench of the High Court whether he is acting administratively or judicially. (1940) 42 Pun LR 101 (102).

(4) It is not the Taxing Officer's duty to advise parties as to the stamp required under the Court-fee Act or to give them notice that they had not sufficiently stamped documents which that Act requires to be stamped. (1890) 12 All 129 (136) (FB).

(5) It is not for the Taxing Judge to see whether the suit is properly framed. AIR 1943 Nag 70 (72) = ILR (1943) Nag 440 ** (1936-43) Tax Dec (Nag) 51 (52) ** AIR 1924 Cal 183 (184).

(6) The Taxing Officer must see that the appellant does not escape liability by vague and indefinite statements of facts or by adopting such expedients, as for instance bringing essentially a title suit in the guise of a partition suit. AIR 1943 Pat 102 (106) = 21 Pat 720 (720).

[But see (1890) 12 All 129 (161) (FB)]

16. Objection as to court-fee on appeal if can be taken after admission of appeal. — (1) Where the memorandum of appeal is simply admitted without any objection being taken to the court-fee paid, an objection as to court-fee can be raised at the hearing of the appeal. (1898) 21 Mad 269 (270) (DB) ** (1910) 37 Cal 914 (917) (DB) ** AIR 1925 All 787 (788) = 47 All 756 (DB) ** AIR 1930 Mad 597 (598) = 53 Mad 540 (DB) ** AIR 1943 Pat 102 (105) = 21 Pat 720.

[But see (1897) 20 Mad 398 (401) (DB).]

(2) Objection as to court-fee can be taken by the respondent to the appeal. AIR 1925 All 787 (788) = 47 All 756 (DB) ** AIR 1930 Mad 597 (598) = 53 Mad 540 (DB) ** AIR 1943 Pat 102 (104) = 21 Pat 720.

(3) Even after an appeal has been admitted, it is open to the Taxing Officer to consider the question of court-fee on the appeal and require additional court-fee to be paid. AIR 1933 Pat 234 (235, 236) = 12 Pat 694 ** AIR 1943 Pat 102 (104, 105) = 21 Pat 720.

(4) A Taxing Officer can refer the question of court-fee on an appeal to the Taxing Judge under this section even after admission of the appeal. AIR 1943 Pat 102 (105) = 21 Pat 720 (720) ** AIR 1934 All 807 (808).

(5) Stamp Reporter first made a mistake and reported that the court-fee paid on the memorandum of appeal was sufficient — He can revise his report and refer the matter to the Taxing Officer. AIR 1943 Pat 102 (104, 105) = 21 Pat 720 ** AIR 1933 Pat 234 (235, 236) = 12 Pat 694 ** AIR 1951 Orissa 150 (152) = ILR (1950) Cut 497 ** AIR 1951 Orissa 8 (9) = ILR (1950) Cut 368 (DB).

(6) The question of court-fee, raised before a Taxing Officer and decided by

CHAPTER III

FEES IN OTHER COURTS AND IN PUBLIC OFFICES

6. Fees on documents filed, etc., in Mufassal Courts or in public offices.—Except in the Courts hereinbefore mentioned, no document of any of the kinds specified as chargeable in the First or Second Schedule to this Act annexed shall be filed, exhibited or recorded in any Court of Justice, or shall be received or furnished by any public officer, unless in respect of such document there be paid a fee of an amount not less than that indicated by either of the said schedules as the proper fee for such document.

[Cf. A. P. Act 7 of 1956, S. 4; Bom. Act 36 of 1959, S. 5(1); Hima. Pra. Act 8 of 1968, S. 6; Jammu and Kashmir Act 7 of 1977 Svt., S. 6; Ker. Act 10 of 1960, S. 4; Mad. (Tamil Nadu) Act 14 of 1955, S. 4; Mys. Act 16 of 1958, S. 4.]

STATE AMENDMENTS

Andaman and Nicobar:

(1) The word and figure "CHAPTER III" and the heading "Fees in other Courts and in Public Offices" occurring before section 6 shall be omitted.

Section 5 — Note 16 (contd.)

him cannot be re-agitated at the hearing of the appeal. AIR 1937 Mad 46 (47, 51) = ILR (1937) Mad 284 (DB). (Respondent cannot agitate on ground that he was not heard.) ** AIR 1933 Pat 234 (235, 236) = 12 Pat 694 ** AIR 1928 Lah 370 (371) (DB).

SECTION 6 — SYNOPSIS

1. Heading of Chapter.
2. Scope and applicability.
3. "Document of any of the kinds specified."
4. Probates and letters of administration.
5. "Received."
6. "Furnished."
7. Power of Court to question valuation given by party.
8. "Amount not less than that indicated by either of the said schedules as the proper fee."
9. U. P. State Amendments.

1. **Heading of Chapter.** — (1) The heading of Chapter III of which this is the first section is not an accurate heading. If the heading were accurate, all the sections in the chapter would refer only to Courts other than Chartered High Courts and Presidency Small Cause Courts. This is not the case. For instance, Sections 7 and 8 are general in terms and refer to fees payable "under this Act", and not only to those "under this chapter". (See also the wording of Section 12). When there is inconsistency between the heading of a chapter and a section therein, the latter is to prevail. AIR 1925 All 787 (789) = 47 All 756 (DB) ** AIR 1932 Cal 346 (348) = 59 Cal 528.

2. **Scope and applicability.** — (1) The fees payable in the Madras City Civil Court are governed by this section. (1912) 35 Mad 567 (568) (FB).

(2) This section does not make provisions with regard to Chartered High Courts. AIR 1928 Sind 87 (88) = 23 Sind LR 91 (DB).

(3) The provision in Section 6 of the Court-fees Act about payment of court-fees must mean payment to the Government of the State. The adequacy of the amount of court-fee payable in a particular State must be judged in accordance with the Court-fees Act as amended and applicable in the particular State. AIR 1960 Bom 96 (98, 99) = 61 Bom LR 996.

(4) The Judge of the High Court who constitutes the Board under the Bihar Land Reforms Act (30 of 1950) and to whom appeals under Section 17 of that Act lie is a public officer. Thus the petition of appeal cannot be received by reason of this section by the Board without payment of Court-fees prescribed either in Schedule I or in Sch. II. AIR 1958 Pat 235 (236) = 36 Pat 507.

(5) The failure to pay the prescribed court-fees on a plaint will not affect the jurisdiction of the Court to entertain the suit. AIR 1918 PC 188 (191) = 43 Bom 507 = 46 Ind App 24 ** (1913) 24 Mad L Jour 658 (659) (DB) ** AIR 1952 Madh B 147 (Pr 6).

(6) Where a plaint is unstamped or is on the face of it understamped, then under S. 6 of the Court-fees Act the Court may refuse to receive it. AIR 1949 Nag 263 (264, 265) = ILR (1948) Nag 932.

(7) Court-fee on plaint found insufficient — Court should not dismiss suit on merits without calling upon plaintiff to pay additional Court-fee — Failure to supply deficient Court-fees — Plaint has to be rejected. AIR 1957 Ker 85.

(8) Government also is bound to pay court-fees like any other litigant in suits filed by the Government and, if successful can recover the same as costs. (1902) 25 Mad 457 (497) (DB).

(2) Section 6 of the Act shall be renumbered as sub-section (1) thereof and after sub-section (1) as so renumbered, add sub-section (2) as follows:—

[Note.—This sub-section (2) is the same as that of West Bengal.]—Reg. II of 1957, Ss. 4 and 5 (1-8-1957).

Manipur and Tripura:

In application to the said Union territories, in S. 6, for the words “Except in the Courts hereinbefore mentioned”, substitute the words “Except in the Court of the Judicial Commissioner for Manipur/Tripura” (w.e.f. 15-12-1963)—See G.S.Rs. 1119 and 1120, Gaz. of Ind., 1-7-1963, Pt. II, Sec. 3(i), pp. 501 and 531.

Orissa:

Section 6 has been renumbered as S. 6(1) and the following inserted as S. 6(2):—

“(2) Notwithstanding anything contained in sub-section (1), the State Government may by notification, direct that a copy of a document, specified as chargeable in Schedules I and II to this Act annexed, shall be furnished by a Public Officer without payment of the fee indicated by either of the said Schedules as the proper fee for such copy and the copy so furnished shall be chargeable with the requisite fee only when it is filed, exhibited or recorded in any Court of justice or received by a public officer as mentioned in sub-section (1).”—Orissa Act 5 of 1939, S. 4 (31-10-1939).

Section 6 — Note 2 (contd.)

(9) The court-fee payable on a document has to be ascertained under the provisions of the Court-fees Act, at the time when the document is required to be filed, exhibited or received in a Court and if the document is not adequately stamped at the crucial date, it has no validity. AIR 1950 Bom 234 (235, 236).

(10) Under this section the Court is directed not to accept a document which is not properly stamped but it has been held that the section has to be read along with S. 149, Civil P. C. and when an insufficiently stamped document is filed in Court, the Court has jurisdiction under the latter section to grant time for making good the deficiency. AIR 1956 All 663 (664, 665) = ILR (1956) 1 All 156 (DB).

(11) This section does not concern itself with the mode or manner in which a document comes before a Court; the terms of the section are explicit and require that in respect of a document coming before it, a fee as prescribed must be paid. Thus, the fact that it is not by reason of a voluntray act on the part of the plaintiff but in pursuance of an order of the Court that the plaint was transferred is not relevant in considering the application of this section. AIR 1950 Bom 234 (235, 236).

(12) When objection is taken by the Court-fee Examiner to the correctness of the Court-fee paid by a party in a suit or appeal and when the party contests the view taken by the Court-fee Examiner, the Court has a duty to consider the nature of the objections raised by the Court-fee Examiner, the explanation offered by the party concerned or his answers to the objection raised by the Court-fee Examiner, and the Court concerned must also pass an order setting

out all these aspects and express clearly its view as to whether it accepts the opinion of the Court-fee Examiner or whether it accepts the stand taken by the party concerned. AIR 1967 Ker 85 (87) = 1965 Ker LJ 1038.

(13) Where the plaint is considered as sufficiently stamped at the initial stage by the Court, the question of the applicability of S. 6 does not arise. But if at a later stage the question of Court-fee is raised by the defendant this may be tried as a preliminary issue and if the Court in such a case comes to a finding that the plaint has been insufficiently stamped S. 6 read with O. 7 R. 11, Civil Procedure Code comes into play. AIR 1960 Pat 527 (529) = 1960 BLJR 505.

(14) S. 149, Civil P. C. is exception to rule contained in this section. AIR 1966 Punj 332 (332) = 1965 Cur LJ 578 (DB).

3. “Document of any of the kinds specified.” — (1) An oral application to the Court, where such is allowed, does not require any court-fee under this section (1870) 2 NWPHCR 418 (418) (DB).

(2) If a document does not fall under any of the categories listed in the first or second schedule as being chargeable with fees this section will not apply. AIR 1926 Cal 638 (639).

[See also AIR 1937 Nag 6 (8). (Section 6 refers to Schedules.)]

(3) No court-fee is necessary on an application by a witness for return of documents filed by him in obedience to a summons. (1871) 15 Suth WR 237 (237) (SB).

(4) Applications not required by the Civil Procedure Code to be in writing do not fall within the scope of this section. (1870) 2 NWPHCR 418 (418) (DB).

Pondicherry:

Same as in Andaman and Nicobar—See Act 26 of 1968, S. 3 and Schedule, Pt. II, (18-12-1968).

Uttar Pradesh:

The whole of Section 6, as successively amended by the U. P. Acts 2 of 1936, 19 of 1938, 9 of 1941, 25 of 1952 and 20 of 1958 is reproduced below:

"6. (1) Except in Courts hereinbefore mentioned, no document of any of the kinds specified as chargeable in the First or Second Schedule to this Act annexed shall be filed, exhibited, or recorded in any Court of Justice, or shall be received or furnished by any public officer, unless in respect of such document, there be paid a fee of an amount not less than that indicated by either of the said Schedules as the proper fee for such document:

Provided that where such document relates to any suit, appeal or other proceeding under the United Provinces Tenancy Act, 1939, or the United Provinces Land Revenue Act, 1901, the fee payable shall be three quarters of the fee indicated in either of the said Schedules except where the amount or value of the subject-matter of the suit, appeal or proceeding to which it relates exceeds Rs. 500;

Section 6 — Note 3 (contd.)

(5) A written statement is not liable to court-fee as not being covered by the first or second schedule. (1883) 12 Cal LR 367 (368) (DB).

(6) A memorandum of objections filed under O. 41 R. 26 of the Civil Procedure Code in regard to findings returned by the lower Court on remand is not liable to court-fee. AIR 1936 Oudh 180 (181) = 11 Luck 704 (DB) ** AIR 1932 All 526 (526, 527) = 54 All 465 ** AIR 1928 Pat 85 (85).

(7) No court-fee is payable on a claim filed by a creditor against the estate of a deceased in pursuance of a public notice inviting such claims, in an administration suit, after a preliminary decree for administration has been passed. AIR 1931 Mad 683 (683, 684) = 55 Mad 626 (DB).

(8) No court-fee is payable on a memorandum of appeal in an appeal to the Government preferred under Rule 22 of the Agency Rules framed by the Government under Act XXIV of 1839 and referred to the High Court under that rule by the Government. (1899) 22 Mad 162 (163).

4. Probates and letters of administration. — (1) Probates or letters of administration are documents of the kind specified in Art. 11 of Sch. 1 and would have been covered by this section. But S. 19K expressly provides that nothing in this section or S. 28 shall apply to probates or letters of administration. (1912) 15 Ind Cas 621 (622) (DB) (Cal).

[But see AIR 1935 All 449 (450) = 57 All 881 (DB).]

(2) The liability for duty on probate or letters of administration does not depend on whether such probate or letters of administration are necessary under the law to entitle a person to get possession or deal with the estate of the

deceased. AIR 1935 All 449 (450) = 57 All 881 (DB).

5. "Received." — (1) A transfer of suits from the Original Side to the City Civil Court under Section 8 of Madras Act (10 of 1955) cannot be brought within the scope of the word 'received' occurring in this section. AIR 1958 Mad 291 (294) = ILR (1958) Mad 711 (DB).

(2) Partition suit of two properties — Transferred from City Civil Court to High Court — Section 14 of Madras City Civil Court Act applicable — Plaintiff would be bound to pay court-fees on scale for the time being in force in High Court as a Court of ordinary original civil jurisdiction — Under Section 6 it has to be paid separately on each items of properties, as relief regarding two items of property related to two distinct causes of action. (1963) 76 Mad LW 257.

6. "Furnished." — (1) With reference to the grant of a certificate under Act XXVII of 1860, it was held that the "furnishing" is made at the time when the Court determines to grant the certificate (when it is to be drawn up ready to be issued to the party). The "furnishing" does not refer to the time at which the certificate is actually issued to the applicant by the office. (1872) 17 Suth WR 489 (490) (DB).

(2) When a Court adjudged a person to be entitled to a certificate of guardianship under Act XL of 1858, such person substantially obtained the certificate although it might not be drawn up or issued at the time. (1890) 17 Cal 347 (357) = 16 Ind App 195 (PC). (Reversing ('86) 12 Cal 542.)

7. Power of Court to question valuation given by party. — (1) It is the duty of the Court to enquire into the proper valuation of a suit when it has grounds to consider that the valuation given by the party is not correct. AIR 1925 Pat

Provided further that the fee payable in respect of any such document as is mentioned in the foregoing proviso shall not be less than one and one-fourth of that indicated by either of the said Schedules before the first day of May 1936.

Explanation.—Where the amount of fee prescribed in the Schedule contains any fraction of a rupee below twenty-five naye paise, or above twenty-five naye paise but below fifty naye paise, or above fifty naye paise but below seventy-five naye paise, or above seventy-five naye paise but below one rupee, the proper fee shall be an amount rounded off to the next higher quarter of a rupee as hereinafter appearing in the said Schedules.

(2) Notwithstanding the provisions of sub-section (1), a Court may receive a plaint or memorandum of appeal in respect of which an insufficient fee has been paid but no such plaint or memorandum of appeal shall be acted upon unless the plaintiff or the appellant, as the case may be, makes good the deficiency in court-fee within such time as may from time to time be fixed by the Court.

(3) If a question of deficiency in court-fee in respect of any plaint or memorandum of appeal is raised by an officer mentioned in S. 24-A, the Court shall, before proceeding further with the suit or appeal, record a finding whether the court-fee paid is sufficient or not. If the Court finds that the court-fee paid is insufficient, it shall call upon the plaintiff or the appellant, as the case may be, to make good the deficiency within such time as it may fix, and in case of default shall reject the plaint or memorandum of appeal:

Provided that the Court may, for sufficient reasons to be recorded, proceed with the suit or appeal if the plaintiff or the appellant, as the case may be, gives security to the satisfaction of the Court, for payment of the deficiency in court-fee within such further time as the Court may allow. In no case, however, shall judgment be delivered unless the deficiency in court fee has been made good, and if the deficiency is not made good within such time as the Court may from time to time allow, the Court may dismiss the suit or appeal.

Section 6 — Note 7 (contd.)

392 (396, 397) = 4 Pat 336 (FB) **
AIR 1930 Cal 65 (66, 67) = 57 Cal 587 (DB).

8. "Amount not less than that indicated by either of the said schedules as the proper fee." — (1) Plaint so worded that the plaint could be read both as falling under Section 39 of the Specific Relief Act for adjudging a written instrument void or voidable and as falling under Section 42 of the same Act for a mere declaration — Fee must satisfy both schedules — A fixed fee of Rs. 10 under Sch. II, Art. 17 will not be enough. An ad valorem fee under Sch. 1, if such fee is higher than the fee of Rs. 10 must be paid. AIR 1935 All 817 (833, 834) = 58 All 146 (FB).

9. U. P. State Amendments. — (1) Under sub-section (2) added by the amendments the Court is authorised to receive an insufficiently stamped plaint or memorandum of appeal and grant time to the party to make good the deficiency. (1940) 15 Luck. 390 (391) (DB).

(2) It is imperatively necessary that the provisions of clauses (2), (3) and (4) of Section 6 as amended should be faithfully followed. AIR 1941 All 55 (56) (DB).

(3) Sub-section (3) of Section 6 provides an objection to be raised by a Chief Inspector of Stamps and sub-section

(4) gives another and separate right to the party to raise that question by means a written statement or an application later on. In the first case it will be decided in accordance with sub-section (3) and in the second case it will be decided if there is evidence necessary, after taking the evidence, as an issue in the case. Therefore even though upon the office report, the Court decides in the absence of the respondent that the Court-fee paid by the appellant is sufficient, the respondent can again agitate the question, and the Court can again consider the same and decide that the Court-fee paid is insufficient and direct the appellant to make good the deficiency within a certain time. AIR 1960 All 372 (373). (AIR 1941 Mad 626 and AIR 1949 Mad 395. Dissented from.)

(4) No doubt, a defendant has been given by Section 6 (4) a right to raise the issue, but he can exercise that right so far as the Court trying the issue is concerned only until such time as any decision on it has not been recorded. If after hearing the proper Revenue Authority, such as the Chief Inspector of Stamps, the Court adjudicates upon that question and records a finding; and its finding is not challenged by the Revenue Authority as provided in Section 6B(1) within the period of limitation allowed

(4) Whenever a question of the proper amount of court-fee payable is raised otherwise than under sub-section (3), the Court shall decide such question before proceeding with any other issue.

(5) In case the deficiency in court-fee is made good within the time allowed by the Court, the date of the institution of the suit or appeal shall be deemed to be the date on which the suit was filed or the appeal presented.

(6) In all cases in which the report of the officer referred to in sub-section (3) is not accepted by the Court, a copy of the finding of the Court together with a copy of the plaint, shall forthwith be sent to the Chief Inspector of Stamps."

West Bengal:

(1) By Bengal Act 7 of 1935, for the heading of this chapter, namely, "Fees in other Courts and in Public Offices" the heading "Computation of fees" was substituted.

(2) By the same Act, S. 6 was transferred from Chap. III and inserted after S. 5 in Chap. II and S. 6 as thus transferred was renumbered as sub-section (1), of Section 6 and in that section as so renumbered, for the words "be paid", the words "has been paid" were substituted.

(3) To the said section as so renumbered and amended, the following sub-section was added. [Note.—The sub-section reproduced below is as further amended by S. 2 of the Bengal Act 1 of 1936] namely:

"(2) Notwithstanding anything contained in sub-section (1) or in any other Act, a Court may receive a plaint or memorandum of appeal in respect of which an insufficient fee has been paid subject to the condition that the plaint or memorandum of appeal shall be rejected unless the plaintiff or appellant, as the case may be, pays to the Court within a time to be fixed by the Court such reasonable sum on account of the court-fees as the Court may direct."

Section 6 — Note 9 (contd.)

by law, that finding is conclusive on the question of sufficiency of court-fee, so far as that Court is concerned and the matter cannot be re-agitated by the defendant before that Court. AIR 1950 All 520 (523) = ILR (1951) 2 All 735 (DB).

(5) Objection as to court-fee raised by the defendant in a suit for partition — Court decided the question of court-fee along with the merits of the case and embodied everything in a single judgment and added a direction that the decree be drawn up after the deficiency is made good — Procedure adopted by the Court is in flagrant violation of the provisions of Section 6, Cl. (4) as amended in United Provinces. AIR 1941 All 55 (56) (DB).

(6) Where on a report of the Munshim of the Court that the court-fee paid on a memorandum of appeal is sufficient, the Court decides that it is sufficient and admits the appeal, the order is only provisional and not final and will not preclude the Court from considering and adjudicating upon an objection as to inadequacy of court-fee raised by the Inspector of Stamps or by the respondent who had not yet been heard on the point. AIR 1942 Oudh 385 (386).

(7) Revision application by the Chief Inspector of Stamps should state date on which order of lower Court was received. AIR 1946 All 355 (356) (FB).

(8) The only penalty against appellant not paying deficient court-fee is re-

jection of appeal — Deficiency cannot be recovered from him. AIR 1946 All 355 (356) (FB).

(9) Proceeding with the receivership application amounts to "proceeding with the suit", within the meaning of Section 6 (3) as amended in the Uttar Pradesh. Hence, if there is an objection that the plaint is not properly stamped, the Court ought not to take any action upon it so as to give relief to the plaintiff by way of an interim injunction or an order of appointment of a receiver or otherwise before it decides the issue of the court-fee. AIR 1952 All 279 (284) = ILR (1953) 1 All 170 (DB).

(10) Section 28 of the Act is not to be treated as a justification for flouting the provisions of Sections 4 and 6 and no Court is deliberately to receive a document insufficiently stamped except in the circumstances mentioned in Section 6 (2). No time can be given for making good a deficiency of any Court fee except as permitted by Section 6 (2), and it follows that a High Court has no power to give time for making good a deficiency in the Court-fee; it must refuse to receive the document. AIR 1964 All 552 (555, 557) (FB).

(11) Plaint not properly stamped cannot be filed or received — Even if filed and received it will remain invalid unless it is properly stamped — Fact that plaint was held to be a valid document by court receiving it neither precludes appellate Court from judging its validity nor absolves it from the duty of doing

STATE AMENDMENTS

Sections 6-A, 6-B, 6-C

Uttar Pradesh:

6-A. (1) Any person called upon to make good a deficiency in court-fee may appeal against such order as if it were an order appealable under Section 104 of the Code of Civil Procedure.

The party appealing shall file with the memorandum of appeal, a certified copy of the plaint together with that of the order appealed against.

(2) In case an appeal is filed under sub-section (1), and the plaintiff does not make good the deficiency, all proceedings in the suit shall be stayed, and all interim orders made including an order granting an injunction or appointing a receiver, shall be discharged.

(3) A copy of the memorandum of the appeal together with a copy of the plaint and of the order appealed against shall be sent forthwith by the appellate Court to the Chief Inspector of Stamps.

(4) If such order is varied or reversed in appeal, the appellate Court shall, if the deficiency has been made good before the appeal is decided, grant to the appellant a certificate, authorising him to receive back from the Collector such amount as is determined by the appellate Court to have been paid in excess of the proper court-fee.

Section 6 — Note 9 (contd.)

so — If it finds it invalid by reason of not being properly stamped it has to ignore the plaint unless and until it is properly stamped — Power of appellate Court to direct payment of court-fee is not dependent upon whether the document may be or intended to be "used" in appeal. AIR 1968 All 216 (222, 223) (FB). (AIR 1957 All 63 and AIR 1962 All 268, Overruled.)

Sections 6A to 6C (U. P. State Amendment) — Note 1

(1) Where in a partition suit, on objection by the defendant regarding court-fee, the Court passes a judgment in plaintiff's favour and orders that the decree should not be drawn up till the deficient court-fee is paid and the plaintiff appeals without paying the deficiency in court-fee, his appeal is only against an order under Section 6-A but not against a decree as no decree has been drawn up. AIR 1941 All 55 (56) (DB).

(2) It is not open to the defendant in an appeal by the plaintiff to file cross-objections to the effect that the plaintiff should have been called upon to pay a higher amount of court-fee. AIR 1942 Oudh 391 (391) = 18 Luck 256 (DB) ** AIR 1954 All 188.

(3) When an appeal lies against an order directing payment of court-fees, incidental orders which led up to it can be set right. AIR 1941 All 298 (300) = ILR (1941) All 558 (DB).

(4) Suit filed before the coming into force of the amendment — Order regarding court-fee passed against the plaintiff subsequently can be appealed against under Section 6-A (1). AIR 1941 All 298 (300) = ILR (1941) All 558 (DB).

(5) The Chief Inspector of Stamps is incompetent to make a reference to the

High Court under Section 6-D. He is only entitled under Section 6-B within the prescribed period to move the prescribed Court by an application in writing for revision. A letter sent by the Chief Inspector containing a statement of his opinion and not bearing a stamp cannot be considered to be an application in writing for revision under Section 6-B. AIR 1941 All 369 (370) = ILR (1941) All 585 (DB).

(6) Appeal under Section 45 (2), U. P. Encumbered Estates Act — District Judge directing payment of ad valorem court-fee and granting time to make good deficiency — Section 46, U. P. Encumbered Estates Act, does not apply — Remedy is by appeal under Section 6-A, Court-fees Act. AIR 1943 Oudh 213 (214) (DB).

(7) Decision of appeal regarding court-fee under Section 6-A (U. P.). Court-fees Act — Order demanding additional court-fee — Decision of appellate Court is a case decided within Section 115. AIR 1960 All 590.

(8) The order demanding court-fee may be said to be a 'case decided' within Section 115, Civil P. C. But since under Section 6-A an appeal is provided for the plaintiff, no revision is maintainable in High Court at his instance. AIR 1952 All 644 (Prs. 6, 7, 8) (DB).

(9) There is nothing in Section 12 to indicate that if the Chief Inspector of Stamps has not taken any steps under Section 6-B, the matter becomes final and that it cannot be considered again by the superior Court under Section 12. AIR 1949 All 324 (325) = ILR (1949) All 710 (DB).

[See also AIR 1968 All 216 (FB). (Question or deficiency of court-fee raised by Inspector of Stamps — Trial Court holding court-fee paid sufficient — No revision under the sec-

(5) The Court may make such order for the payment of costs of such appeal as it deems fit, and where such costs are payable to the Government, they shall be recoverable as arrears of land revenue.

6-B. (1) If the order of the Court passed under sub-section (3) of Section 6 is at variance with the opinion of the officer by whom the question of deficiency in court-fee has been raised, the Chief Inspector of Stamps may, within three months from the date of receipt of such order, move, by an application in writing, the Court to which an appeal lies from a decree in the suit or appeal in which such order has been passed, for revision of such order.

(2) If such Court is of opinion that the proper court-fee has not been paid on the plaint or the memorandum of appeal to which such order relates, it shall record a declaration to that effect and determine the amount of deficiency in court-fee. No appeal shall lie from such order:

Provided that no such declaration shall be made until the party liable to pay the court-fee has had an opportunity of being heard.

(3) The Court, while recording a declaration under sub-section (2) may make such order for the payment of costs as it deems fit. Where such costs are payable to the Government, they shall be recoverable in the manner laid down in sub-section (4) for the recovery of deficiency in court-fee.

(4) When a declaration has been recorded under sub-section (2), the Court recording the same shall, unless the suit or appeal has come up in appeal before such Court, in which case the deficiency in court-fee shall be recovered in the manner laid down in sub-section (ii) of Section 12, send forthwith a copy of such declaration to the Court which passed the order under sub-section (3) of Section 6. Such Court shall, if the suit or appeal is still pending before it, follow the procedure prescribed in sub-section (3) of Section 6. If the suit or appeal has already been disposed of, the Court shall forward a copy of such declaration to the Collector who shall recover the deficiency from the party concerned as if it were an arrear of land revenue.

6-C. (1) When the Chief Controlling Revenue Authority is of opinion that the court-fee paid on any document filed in any Civil Court in a pending suit, appeal or other proceeding is insufficient, and that the question is one of general importance and no action under S. 6-B has been taken, it may refer the case, with its own opinion thereon, to the High Court to which such Civil Court is subordinate.

(2) Every such case shall be decided by not less than two Judges of the High Court to which it is referred.

(3) The High Court upon the hearing of any such case shall decide the question raised thereby and shall deliver its judgment thereon containing the grounds on which the decision is founded.

**Section 6-A to 6-C (U. P. Amend.) —
Note 1 (contd.)**

tion filed by Inspector of Stamps -- Suit decreed -- Order of trial Court on question of Court-fee does not become final.)]

(10) Inspector of Stamps filing report regarding insufficient Court-fee on plaint -- Court holding that Court-fee paid was sufficient -- High Court has no power to direct plaintiff to make good any deficiency of Court-fee on plaint -- Failure of Chief Inspector to file revision under Section 6-B of Court-fees Act against decision of lower Court would disentitle him to raise same question in appeal filed by a defendant against decree in suit. 1964 All LJ 944.

(11) In an appeal under Section 6-A the decision of the trial Court relating to the valuation of the subject-matter

of the suit for the purposes of determining the amount of court-fee payable is final between the parties and cannot be challenged in appeal. However, the High Court has power to interfere under Section 115 of Civil P. C. 1957 All L Jour 53 (54).

(12) The revisional jurisdiction under Section 6-B of the Court-fees Act is much wider than the jurisdiction under Section 115, Civil P. C. Under the former provision, the High Court can interfere if it is of opinion that proper Court-fee had not been paid on the memorandum of appeal to which the order under revision relates. AIR 1965 All 298 (300) = 1964 All LJ 977.

(13) Judges hearing reference under Section 6-C act in official capacity and not as *persona designata*. AIR 1969 All 484 (486) (FB).

(4) If the High Court finds that the court-fee paid was insufficient, the procedure prescribed by sub-section (4) of Section 6-B for realisation of the deficiency shall be followed as if the decision of the High Court were a declaration under that section.—U. P. Acts XIX of 1938, Section 5 and IX of 1941.

West Bengal:

6-A. Document inadmissible unless fees collected by stamp purchased in West Bengal.—Notwithstanding anything contained in this Act or in any other law for the time being in force, no document of any of the kinds specified as chargeable under this chapter shall be filed, exhibited or recorded in any Court of Justice, or shall be received, furnished or acted upon by any such Court or by any public officer, unless, in respect of such document, the stamp referred to in Section 25 has been purchased from a person authorised or appointed to sell stamps in West Bengal.—West Bengal Act 23 of 1959, S. 3 (21-12-1959).

7. Computation of fees payable in certain suits.—The amount of fee payable under this Act in the suits next hereinafter mentioned shall be computed as follows:—

[Cf. A. P. Act 7 of 1956, Ss. 19 to 47; Bom. Act 36 of 1959, S. 6; H. P. Act 8 of 1968, S. 7; Jammu and Kashmir Act 7 of 1977 Svt., S. 7; Madras (Tamil Nadu) Act 14 of 1955, Ss. 23 to 50; Mys. Act 16 of 1958, Ss. 20 to 47.]

STATE AMENDMENTS

Andaman and Nicobar:

Before Section 7, insert the heading, namely, "Chapter III—Computation of fees."—Reg. II of 1957, Section 6 (1-8-1957).

SECTION 7 (GENERAL) — SYNOPSIS

1. Scope.
2. Applicability to High Courts.
3. General rules for determination of court-fees payable in suits.
4. Power of Court to question plaintiff's or appellant's estimate of value of subject-matter.
5. Value for purposes of court-fees and jurisdiction — Distinction.
6. Subject-matter in dispute in appeal.
7. Valuation of appeal — Valuation in lower Court, effect of.
8. Applicability to appeals.
9. Court-fee, a preliminary point.
10. Amendment of plaint and court-fees.
11. Relinquishment of claim for bringing suit or appeal within certain court-fee.
12. Court-fee on costs.

1. Scope. — (1) This section deals with the mode of computing the court-fees payable in the various classes of suits enumerated therein. AIR 1921 Sind 149 (149) = 16 Sind LR 273 (DB) ** AIR 1957 Punj 32 (34) = ILR (1957) Punj 142 (DB). (Section 7 is only a computing section and what has to be paid in cases which fall under Section 7 has to be looked for in Schedules I and II.) ** AIR 1970 Delhi 44 (49) (DB).

(2) If a suit does not come under any of the categories mentioned in this section, the fees payable will be determined in accordance with such of the articles in the two schedules as may be

applicable to the case. AIR 1939 Rang 375 (376) = 1939 Rang LR 474.

(3) The section only applies where ad valorem fee is payable. AIR 1946 All 392 (393) = ILR (1946) All 455 (DB).

(4) The section contemplates three modes of valuation of the subject-matter of a suit: (i) By valuing it according to its market-value (e. g. paras (iii), (iv), (d), (v) (e) etc.), (ii) By ascribing to the subject-matter an artificial value based simply on certain fixed rules of calculation (e. g. para. (v) clauses (a), (b), (c) and (iii) by requiring the plaintiff himself to value the relief he seeks (e. g. para (iv).) see AIR 1939 Cal 155 (156) = ILR (1938) 2 Cal 411 (DB).

(5) The defective drafting of the section has been the subject of comment. AIR 1932 Cal 346 (348) = 59 Cal 528 ** AIR 1925 All 787 (789) = 47 All 756 (DB).

(6) No rules framed in Tripura under Suits Valuation Act, 1887 or Court-fees Act, 1870 — Courts of Tripura held guided only by provisions of Court-fees Act as made applicable to Tripura State. AIR 1968 Tripura 11.

2. Applicability to High Courts. — (1) This section applies to all fees payable under this Act. Hence, it applies to the computation of court-fees on appeals in Chartered High Courts also. AIR 1925 All 787 (789) = 47 All 756 (DB) ** AIR 1937 Mad 46 (50) = ILR (1937) Mad 284 (DB) ** AIR 1932 Cal 346 (348) = 59 Cal 528 ** AIR 1925 Pat 392 (404) = 4 Pat 336 (FB).

Orissa

For the words "in the suits next hereinafter mentioned", the words "in the suits next hereinafter mentioned except suits for relief under Section 14 of the Religious Endowments Act, 1863, or under Section 91 or Section 92 of the Code of Civil Procedure, 1908" were substituted—Orissa Act V of 1939 (31-10-1939).

Pondicherry:

Same as in Andaman and Nicobar—Act 26 of 1968, S. 3 and Sch. Pt. II (18-12-1968).

Section 7 (Gen.) (contd.)

3. General rules for determination of court-fees payable in suits. — (1) The schedules classify suits into different categories for the purpose of court-fees. The first thing to do in determining the court-fee payable on a plaint is to see under which of these categories the suit falls. AIR 1925 Pat 392 (398) = 4 Pat 336 (FB) ** (1908) 35 Cal 202 (205) = 35 Ind App 22 (PC).

(2) If the suit is specially dealt with, it must be held to fall within the specific provision rather than a general one which may also cover the case. (1908) 35 Cal 202 (205, 206) = 35 Ind App 22 (PC) ** AIR 1936 Mad 383 (384) = 59 Mad 882 ** AIR 1932 Mad 605 (608) = 56 Mad 212 (DB).

[See AIR 1945 Bom 474 (474) (DB).]

[See also AIR 1945 All 111 (112, 113) = ILR (1945) All 68.]

(3) A suit under O. 21, R. 103 of the Civil Procedure Code though one for possession of immovable property is governed by Sch. II, Art. 17, cl. (i) and not by para. (v) of this section read with Sch. I, Art. 1. AIR 1933 Nag 362 (364) ** AIR 1927 Pat 140 (141) = 5 Pat 631 (DB).

(4) In determining the category of a suit for the purpose of court-fee, the Court must base its decision as to the court-fee payable on the allegations and prayers in the plaint. The plaintiff's allegations must be assumed to be correct for this purpose. AIR 1943 Mad 474 (475) ** AIR 1958 SC 245 (251) = 1958 SCR 1021 ** AIR 1957 Mad 667 (668) ** AIR 1933 Mad 430 (431) (DB) ** AIR 1957 Nag 53 (54) = ILR (1956) Nag 486 (DB) ** AIR 1956 Tripura 25 (25) ** AIR 1956 Mad 179 (Pr. 7) ** AIR 1955 Mys 143 (Pr. 3) = ILR (1955) Mys 436 ** 1955 BLJR 44 (45) ** AIR 1954 All 722 (Pr. 13) = ILR (1954) 2 All 106 (FB) ** AIR 1954 Trav-Co 178 (Prs. 28, 37) = ILR (1953) Trav-Co 1170 (FB) ** AIR 1953 Mad 513 (Pr. 2) ** AIR 1952 Pepsu 168 (Pr. 6) = ILR (1952) Patiala 319 ** AIR 1951 Pat 633 (Pr. 5a) = 29 Pat 219 (DB) ** AIR 1949 Nag 97 (Pr. 28) = ILR (1948) Nag 117 ** 1949 Trav-Co LR 225 (231) (FB) ** AIR 1963 Cal 46 (50) = 66 Cal WN 828 (SB) ** AIR 1968 Manipur 52 ** AIR 1966 Him Pra 4 ** AIR 1963 All 330 (332, 333, 334, 335) = 1963 All LJ 353 (DB) **

AIR 1959 Madh Pra 430 (431, 432) = 1959 MPLJ 649 ** AIR 1956 Nag 175 (178) = 1956 Nag LJ 271. (Even if plaintiff asks for unnecessary reliefs, so long as he asks for them he should pay court-fee upon them.)

(5) The defendant's allegations and contentions and the evidence in the case are immaterial for determining the category of a suit for court-fee. AIR 1943 Oudh 456 (457) ** AIR 1958 SC 245 (251) = 1958 SCR 1021 ** AIR 1957 Mad 667 (668) ** AIR 1956 Tripura 25 (25) ** AIR 1956 Mad 179 (Pr. 7) ** 1955 BLJR 44 (45) ** AIR 1954 All 722 (Pr. 13) = ILR (1954) 2 All 106 (FB) ** AIR 1954 Trav-Co 178 (Prs. 28, 37) = ILR (1953) Trav-Co 1170 (FB) ** AIR 1953 Hyd 234 (Pr. 2) = ILR (1953) Hyd 89 (DB). (Defence raised by defendant is immaterial.) ** AIR 1953 Mys 108 (Pr. 4) = ILR (1953) Mys 325 (DB). (Denial by defendant of allegation in plaint not material.) ** AIR 1951 Pat 633 (Pr. 5a) = 29 Pat 219 (DB) ** AIR 1949 Nag 97 (Pr. 28) = ILR (1948) Nag 117 ** 1949 Trav-Co LR 225 (231) (FB) ** AIR 1936 Mad 525 (525) ** AIR 1917 Cal 668 (668) (DB) ** AIR 1928 Bom 476 (477, 483) = 52 Bom 904 (DB) ** (1912) 6 Sind LR 72 (74) (DB) ** (1939) 182 Ind Cas 178 (179) (Pat) ** AIR 1933 Mad 431 (432) ** AIR 1927 Pat 140 (141) = 5 Pat 631 (DB) ** AIR 1930 All 443 (443, 444) = 52 All 756 ** AIR 1935 Cal 273 (275) (DB) ** AIR 1968 Punj 302 (304) = 70 Punj LR 87 ** AIR 1968 Manipur 52 ** AIR 1964 Tripura 1 (2). (Plaint and not written statement should be looked into.) ** AIR 1963 All 330 (332, 335) = 1963 All LJ 353 (DB) ** AIR 1959 Madh Pra 430 (431, 432) = 1959 MPLJ 649.

(6) Question of Court-fee payable depends on the form of the action and not on the correctness or falsity of the averments or the possibility or otherwise of his success in the case. AIR 1967 Madh Pra 221 = 1967 MPLJ 242.

(7) The decision of the Court cannot be influenced by the final decision of the suit on the merits. AIR 1958 SC 245 (251) = 1958 SCR 1021 ** AIR 1968 Manipur 52 (53).

(8) At the institution of suit plaintiff in possession but deprived of possession by defendant subsequently during pendency of suit — Plaintiff is not bound to add prayer for possession

Section 7 — Note 3 (contd.)

to his plaint and pay additional court-fee. (1903) 26 All 215 (217) (DB).

(9) Question as to whether a suit comprises distinct subjects for purpose of Section 17, must be determined with reference to plaint. AIR 1928 Pat 274 (275) = 7 Pat 402.

[See AIR 1939 Mad 360 (361) = ILR (1939) Mad 367 (SB).]

(10) Court must look at what plaintiff is actually seeking for in his plaint — Suit as framed not maintainable — Court may give plaintiff opportunity, if it thinks fit, to amend plaint so as to make it sustainable in law. AIR 1938 All 481 (482) = ILR (1938) All 470 (DB) ** (1912) 6 Sind LR 72 (76) (DB).

(11) Plaintiff is not liable to pay any court-fee in excess of amount that is payable on his suit as framed by him, merely because Court thinks that he ought to have framed his suit in a different manner or ought to have included a certain relief which he has not included. AIR 1942 Pat 60 (62) = 20 Pat 780 (DB) ** AIR 1937 Mad 876 (877) ** AIR 1936 Mad 470 (470) ** AIR 1936 Pat 171 (172) = 15 Pat 386 (DB) ** AIR 1965 Pat 486 (487) = 1965 BLJR 538.

[See also AIR 1954 Pat 406 (Pr. 6) (DB). (In construing plaint Court cannot import relief not asked for and ignore relief specifically asked.) ** AIR 1954 Raj 170 (Pr. 4) = ILR (1953) 3 Raj 782 (DB). (In construing plaint Court must take the plaint as it is and not as it ought to have been.) ** 1962 Raj LW 357 = ILR (1962) 12 Raj 766.]

(12) In construing plaint for purpose of court-fee, Court must take into consideration substance and not merely form of relief prayed for. AIR 1927 Lah 499 (500) = 8 Lah 531 (DB) ** AIR 1957 Nag 53 (54) = ILR (1956) Nag 486 (DB) ** (1957) 61 Cal WN 518 (520) (DB) ** AIR 1956 Mad 179 (Pr. 7) ** AIR 1955 Andhra 200 (Pr. 3). (A plaintiff by a clear device and camouflage cannot evade court-fee if in substance the relief he asks for falls under one or other of the provisions of the Court-fees Act.) ** AIR 1955 Him Pra 61 (Pr. 3) ** AIR 1955 Pat 469 (Pr. 3) (DB) ** (1955) 59 Cal WN 726 (728) ** AIR 1954 Mad 1126 (Pr. 3) = ILR (1955) Mad 810 (DB) ** AIR 1954 Raj 170 (Pr. 4) = ILR (1953) 3 Raj 782 (DB) ** AIR 1954 Mad 290 (Pr. 2). (Suit under Section 88 (6C), Criminal P. C. — Relief of release of property from attachment held unnecessary.) ** AIR 1954 Trav-Co 178 (Prs. 28, 37) = ILR (1953) Trav-Co 1170 (FB) ** AIR 1952 Trav-Co 509 (Pr. 6) = ILR (1952) Trav-Co 407 (FB) ** AIR 1949 Nag 97 (Pr. 28) = ILR (1948) Nag 117 ** AIR 1952 Madh B 147 (Pr. 70) ** 1949 Trav-Co LR 225 (231, 232) (FB). (In case of obscurity the plaintiff could be called

upon to clarify doubtful passages.) ** AIR 1946 Bom 363 (365) (DB) ** AIR 1935 Cal 338 (340) (DB) ** (1907) 35 Cal 202 (205, 206) = 35 Ind App 22 (PC) ** AIR 1939 Mad 435 (435) ** AIR 1936 Mad 383 (384) = 59 Mad 882 ** AIR 1930 Nag 73 (75) (DB) ** AIR 1934 Oudh 505 (506) (DB) ** ILR (1962) 12 Raj 766 = 1962 Raj LW 357. (Plaint must be read as a whole and in its substance.)

[See also AIR 1957 Mad 297 (298). (Courts in modern times have to construe the pleadings reasonably, and not extravagantly, and see the real substance of the relief asked for, taking away all the froth and foam, the exaggerations and contradictory claims.) ** ILR (1949) 2 Cal 363 (365). (In considering court-fee payable a general prayer in the plaint, e. g., "for such other relief as the Court might grant" is to be discarded.) ** 1968 Pun LJR 400. (Substance and form of plaint must be considered. AIR 1962 SC 633 and AIR 1955 Pat 17 (FB), Rel. on.) ** AIR 1965 Pat 486 (487) = 1965 BLJR 538. (Court must look to real substance of plaint and not to its ostensible form.) [See however AIR 1928 Mad 929 (930) (DB).]

(13) Plaintiff suing to avoid attachment of his property in execution of a decree passed against another — Value of property and not amount of decree will be value of the suit unless amount of decree is less than value of property. (1907) 35 Cal 202 (207) = 35 Ind App 22 (PC).

[See also AIR 1941 All 295 (297).]

4. Power of Court to question plaintiff's or appellant's estimate of value of subject-matter. — (1) It is not ordinarily open to the Court to allow amendment of the plaint which may help the plaintiff, not really within its jurisdiction, to come within its jurisdiction. AIR 1949 Mad 719 (Pr. 4).

(2) The power of a Court to require the value of a suit to be corrected under O. 7, R. 11, Civil P. C., applies even to cases in which, under S. 7, Para (iv) of this Act the court-fee on the suit is to be computed according to the amount at which the relief sought is valued in the plaint or memorandum of appeal. The provisions of Section 7, para. (iv) are subject to the provisions of O. 7, R. 11. AIR 1939 Nag 50 (56) = ILR (1938) Nag 558 (FB). (AIR 1937 Nag 14, Overruled.) ** AIR 1936 Sind 25 (25) (DB) ** AIR 1937 Sind 241 (241, 242) = 31 Sind LR 442 (FB).

(3) Plaintiff's valuation is prima facie to be accepted as correct unless the Court has reason to think that it is fictitious or that for improper motives the plaintiff has under-valued or over-valued the relief claimed by him. (1907)

Section 7 — Note 4 (contd.)

30 Mad 96 (98) (FB) ** AIR 1939 Nag 50 (56) = ILR (1938) Nag 558 (FB). (AIR 1937 Nag 14, **Overruled.**) ** AIR 1954 All 722 (Pr. 13) = ILR (1954) 2 All 106 (FB).

(4) Subject-matter not capable of being satisfactorily valued in terms of money, plaintiff's valuation is prima facie to be accepted as correct. (1907) 34 Cal 352 (356) (DB).

(5) In respect of suit falling under Section 7 (iv) liberty has been given to the plaintiff to value his claim for the purpose of court-fees. AIR 1958 SC 245 (251) = 1958 SCR 1021.

5. Value for purposes of court-fees and jurisdiction — Distinction. — (1) Court-fee payable being fixed amount — No valuation of suit or appeal is necessary for purpose of ascertaining court-fee payable — But there will have to be a valuation for purposes of jurisdiction. AIR 1925 Pat 392 (398) = 4 Pat 336 (FB) ** (1911) 37 Cal 860 (862) ** (1888) 15 Cal 104 (106, 107) (DB).

(2) Suit for bare declaration of title to property — Court-fee payable on plaint is Rs. 10 under Art. 17 of second schedule but value of suit for purposes of jurisdiction would be real value of property and not amount for which Rs. 10 would be an ad valorem fee under first schedule. AIR 1918 PC 188 (191) = 43 Bom 507 = 46 Ind App 24.

(3) Where a suit falls under Sch. 2, Art. 17 (vi), the valuation for jurisdiction would not be the same as for the purpose of Court-fee. AIR 1966 Pat 441 (444) = 1966 BLJR 672.

(4) Even in those cases in which an ad valorem court-fee is payable, value of a suit or appeal for purpose of court-fees is not always the same as value for purposes of jurisdiction. (1888) 12 Bom 675 (677) (DB).

(5) Where an ad valorem court-fee is payable under Court-fees Act, value of a suit for purposes of court-fees and its value for purposes of jurisdiction are the same. (1888) 12 Bom 675 (677) (DB) ** AIR 1925 All 602 (604) = 47 All 501.

(6) In the absence of any special provisions the question of court-fees and that of valuation for jurisdictional purposes are distinct and fall to be decided separately under the respective enactments dealing with them. (1872) 18 Suth WR 109 (110) = 12 Beng LR 115n (DB) ** (1873) 20 Suth WR 33 (35) = 12 Beng LR 113 (DB) ** (1907) 31 Bom 73 (77) (DB) ** (1880) 4 Bom 515 (527) (FB).

[See also (1860) 7 Moo Ind App 428 (429) (PC).]

(7) Once the plaintiff exercises his option under Section 7(iv) and values his claim for purposes of court-fees that determines the value for jurisdiction

and not vice versa. AIR 1958 SC 245 (252) = 1958 SCR 1021.

(8) Suit for partition — Value of suit for jurisdiction of Court — Value of plaintiffs' share and not that of entire estate determines jurisdiction — Such value not exceeding ten thousand rupees — High Court cannot entertain partition suit. AIR 1962 Bom 4 (7) = 63 Bom LR 552.

6. Subject-matter in dispute in appeal. — (1) Value of the subject-matter of an appeal simply means value of the relief which has been granted or refused by the decree or portion of the decree against which the appeal is preferred. AIR 1941 All 295 (297) ** AIR 1949 Ajmer 23 (Pr. 20.) (Appeal — Court-fee paid on reliefs disallowed by trial Court — Court-fee held adequate.)

(2) Party may confine his appeal to a portion of relief granted or refused and if he does so, it is the value of such portion that will constitute the value of the subject-matter in dispute in the appeal. (1936-1943) Tax Dec (Nag) 36 (37).

(3) Appeal directed against a decree or portion of decree granting any relief against appellant — Value of appeal is value of relief so granted, or such portion thereof as may be in dispute in appeal. AIR 1922 Mad 211 (214) = 45 Mad 246 ** AIR 1925 Mad 323 (324) = 48 Mad 652 ** AIR 1926 Mad 225 (226) (DB).

(4) A filing suit for declaration of title and possession of certain lands with mesne profits — Suit decreed subject to condition that plaintiff must pay certain sum to defendant — Plaintiff appealing from decree — Subject matter in dispute in appeal is relief imposing payment on plaintiff and he is bound to pay court-fee on such amount — Defendant appealing — Defendant is bound to pay court-fee according to value of land and not such value reduced by amount directed to be paid to him by decree. AIR 1922 Mad 211 (214) = 45 Mad 246 ** AIR 1925 Mad 323 (324) = 48 Mad 652.

(5) Suit for redemption of kanom mortgage-decree passed for redemption on payment not only of amount of kanom but also of value of improvements. — Appeal preferred by plaintiff as regards value of improvements — Value of improvements constitute subject-matter in dispute in appeal and court-fee is to be proportionate to such value. AIR 1926 Mad 225 (226) (DB).

(6) Suit for possession and mesne profits decreed in plaintiff's favour — Defendant appealing from whole decree — Claim for mesne profits also forms part of subject-matter of appeal although trial Court has directed their ascertainment in separate proceedings.

Section 7 — Note 6 (contd.)

AIR 1929 Pat 731 (732) = 8 Pat 906 (DB) ** AIR 1919 Pat 471 (472).

(7) A plaintiff sued for dissolution of partnership and accounts — Suit dismissed — Claim for dissolution of partnership and accounts constitutes subject-matter in dispute in appeal. AIR 1921 Sind 149 (151) = 16 Sind LR 273 (DB).

7. Valuation of appeal — Valuation in lower Court, effect of. — (1) Plaintiff sued for accounts, valuing his suit under Section 7 para. (iv) (f) at Rs. 2000 — Suit dismissed — Appeal from the decision — It is not open to him to value his appeal at a lesser amount. AIR 1921 Sind 149 (150) = 16 Sind LR 273 (DB) ** AIR 1933 Rang 410 (1) (410) (DB).

(2) A plaintiff filed suit for accounts, valuing suit at a particular amount under Section 7 para (iv) — Preliminary decree passed merely declaring plaintiff's right to have accounts taken and not granting him any particular sum — Defendant appealed — He must pay court-fee on appeal according to amount at which plaintiff had valued relief in plaint. AIR 1917 Mad 668 (669) = 39 Mad 725 (FB).

[But see AIR 1925 All 787 (790) = 47 All 756 (DB).]

(3) Suit for mesne profits — Decree in plaintiff's favour simply declaring his right in general terms and leaving actual amount to be ascertained in supplemental proceedings — Defendant appealing — He is bound by plaintiff's estimate of relief in the suit. AIR 1929 Pat 731 (732) = 8 Pat 906 (DB).

(4) Suit for royalty and cesses — Trial Court declaring right and appointing Commissioner to ascertain actual amount — Appeal by defendant — Defendant must accept valuation in lower Court. AIR 1930 Pat 605 (607).

(5) Suit for declaration with consequential relief — Decree in favour of plaintiff — Defendant appealed — He is bound by valuation of plaintiff under Section 7, para (iv). (1900) 23 Mad 490 (492) (DB) ** AIR 1932 Lah 132 (133) = 13 Lah 391 (DB).

[See however AIR 1957 Andh Pra 671 (672). (Suit by junior against senior widow and her adopted son — Court-fee paid in suit on reliefs for partition and declaration against adoption — Suit decreed — Appeal by senior widow — Court-fee paid in appeal on relief against portion only. Declaration is purely incidental and the relief superfluous and unnecessary for the purpose of decreeing partition and directing delivery of possession—No court-fee need be paid in the appeal by the senior widow even though a decree has been passed by the lower Court granting that prayer.)]

(6) Plaintiff filed suit for possession of land and damages and for demolition of structures erected by defendant on the land — Suit decreed in its entirety — Defendant appealed — **Held**, that value of subject-matter of appeal could not be less than value of subject-matter of suit as adopted and acted upon by lower Court. AIR 1941 All 295 (297).

(7) Suit decreed by trial Court but dismissed in appeal — Plaintiff preferred second appeal — It is enough if he pays court-fees on valuation adopted in trial Court. AIR 1917 Lah 386 (387) (DB).

(8) Suit in which fixed court-fee was payable erroneously treated, owing to defendant's action, as one in which ad valorem fee is payable and valued at a certain amount for that purpose — Valuation will remain good for purposes of appeal also — Suit decreed and defendant appealing — He cannot turn round and say that he will pay only a fixed court-fee. AIR 1933 Nag 362 (364).

8. Applicability to appeals. — (1) This section applies also to the computation of court-fees on appeals from decrees and not only to original suits. AIR 1925 All 787 (789) = 47 All 756 (DB) ** AIR 1932 Cal 346 (348) = 59 Cal 528 ** AIR 1937 Mad 46 (50) = ILR (1937) Mad 284 (DB) ** AIR 1937 Nag 6 (7) ** AIR 1930 Cal 65 (66) = 57 Cal 587 (DB) ** AIR 1922 Oudh 82 (83) = 25 Oudh Cas 30 (DB) ** (1910) 6 Nag LR 164 (167).

(2) The section will apply to appeals only if subject-matter in dispute in appeal falls within any of the categories mentioned in this section. AIR 1931 Mad 710 (711) ** (1907) 30 Mad 96 (98) (FB).

(3) In the following cases it has been held that this section only applies to suits and not to appeals. AIR 1939 Rang 375 (376) = 1939 Rang LR 474 ** AIR 1931 All 351 (352) = 52 All 1029 ** (1909) 5 Nag LR 130 (132) ** AIR 1914 All 520 (520) = 36 All 40 (FB) ** AIR 1926 Mad 225 (226) (DB).

[See also (1936-43) Tax Dec (Nag) 103 (106) ** (1906) 29 Mad 367 (369) (DB).]

(4) The following cases hold that the provision in para (iv) is an exception to the general provisions of the section and indicates that other paragraphs do not apply to appeals. (1909) 5 Nag LR 130 (132) ** AIR 1939 Rang 375 (376) = 1939 Rang LR 474.

(5) According to the following case paragraph (iv) shows the trend of the Act and is in favour of holding that the other paragraphs apply to appeals also. See AIR 1937 Mad 46 (50) = ILR (1937) Mad 284 (DB).

9. Court-fee, a preliminary point. — (1) The question of court-fee is a preliminary point which ought to be decided by the Court before proceeding to de-

for money;

- (i) In suits for money (including suits for damages or compensation, or arrears of maintenance, of annuities, or of other sums payable periodically)—according to the amount claimed:

Section 7 — Note 9 (contd.)

side the merits of the case. A judgment dismissing a suit on the merits as well as holding that the court-fee paid is not sufficient is not proper. AIR 1938 Lah 311 (312).

10. Amendment of plaint and court-fees. — (1) Plaint amended — Court-fee to be paid is to be calculated on plaint as amended and not on original plaint. (1890) 14 Bom 395 (400, 401) (DB) ** (1885) 9 Bom 355 (357) (DB) ** (192) 15 Mad 15 (18) (DB).

(2) It is entirely in the discretion of Court whether or not to allow amendment of plaint even though plaintiff may be willing to pay additional court-fee that may be necessitated by amendment of plaint. (1876) 1 Mad 40 (44) (DB).

(3) The following cases have held that even where a suit has been deliberately framed as one for mere declaration with a view to avoid paying higher court-fee, it can be allowed to be amended so as to include a prayer for consequential relief. AIR 1924 Pat 310 (311) = 2 Pat 919 (DB) ** (1912) 39 Cal 704 (710) (DB).

(4) Suit for declaration of title with partition as consequential relief — Stamp reporter reporting that in view of prayer, suit fell within Section 7 (iv) (c) — Amendment seeking deletion of prayer for declaration with a view to save court-fees — Amendment can be allowed at plaintiff's own risk as to ultimate fate of suit. AIR 1959 Orissa 16 (17) = 25 Cut LJ 252.

11. Relinquishment of claim for bringing suit or appeal within certain court-fee. — (1) Ad valorem fee payable on plaint or memorandum of appeal according to amount or value of subject-matter — Court-fee paid not sufficient — It is open to plaintiff or appellant to relinquish part of claim so as to bring his suit or appeal within court-fee paid. AIR 1939 Bom 354 (357) (DB) ** AIR 1954 Cal 26 (Pr. 4) (DB) ** AIR 1953 SC 28 (Pr. 8) = 1953 SCR 197 ** AIR 1953 Cal 755 (Pr. 3) = ILR (1954) 1 Cal 296 (DB) ** AIR 1937 Cal 562 (564) (DB) ** AIR 1926 Lah 477 (477, 478) (DB) ** AIR 1931 Mad 716 (716) ** (1904) 27 All 151 (152) (DB) ** (1928) 9 Pat LT 613 615 (DB) ** AIR 1929 All 308 (309) (DB) ** AIR 1927 Lah 543 (543).

[See also AIR 1956 Trav-Co 223 (224) = ILR (1956) Trav-Co. 83 (DB). (At the very early stage when the Court has not yet entertained the appeal there can be no objection in a party seeking permission to withdraw the appeal

memorandum as filed and represent the same with diminished prayers and pay court-fees for the balance of the relief left.)]

[But see AIR 1917 Cal 77 (78) = 44 Cal 352 (DB) ** AIR 1914 Bom 117 (118) (DB).]

(2) A relinquishment by plaintiff made in consequence of erroneous order of Court requiring plaintiff to pay additional court-fee cannot bind him. (1902) 12 Mad L Jour 66 (67) (DB) ** AIR 1953 SC 28 (Pr. 8) = 1953 SCR 197. (Additional relief relinquished, the only relief asked being for declaration — Relief relinquished not concerning proper institution of appeal — Appellate Court cannot throw out appeal on ground that additional relief should have been claimed and court-fee paid thereon — No claim for consequential relief could be read in claim for declaration.)

12. Court-fee on costs. — (1) Ordinarily, court-fees are not payable upon costs entered in the decree against which an appeal is presented. AIR 1927 Sind 251 (252) = 23 Sind LR 277 (DB).

(2) Where apart from and independently of any other relief which appellant seeks in appeal from a decree he seeks distinct relief on ground that costs of parties have not been properly assessed or apportioned court-fee will have to be paid on such costs. AIR 1940 Oudh 182 (183) = 15. Luck 392 (DB) ** 1901 All WN 21 (21) (DB) ** AIR 1934 Lah 739 (739) ** AIR 1918 Pat 210 (211) = 3 Pat L Jour 443 ** 1957-1 Andh WR 257 (258).

SECTION 7, Para. (i) — SYNOPSIS

1. Suit for money.
2. Suit for arrears of maintenance.
3. Suit for damages.
4. Court-fee in suit for mesne profits.
5. Suit for rent.
6. Suit on instalment-bond.
7. Claim for compensation for improvements in suit for ejectment.
8. Suit for movable property or its value.
9. "Amount claimed."
10. Court-fee on future interest.
11. Court-fee on written statement pleading set-off.
12. Court-fee on appeal — General.
13. Appeal from instalment decree.
14. Applicability to suit for sale on mortgage.
15. Court-fees in suits on mortgages — Illustrative cases.

Section 7, Para. (i) — Synopsis (contd.)

16. Court-fee on appeal from decree in mortgage suit.

17. Court-fee on appeal from personal decree in mortgage suit.

18. Court-fee on appeal from personal decree in a suit on pledge.

1. Suit for money.— (1) A suit for an ascertained sum of cesses is within this paragraph. AIR 1930 Pat 605 (606).

(2) Suit by agent against principal for specified amount of money is governed by this paragraph. (36-43) Tax Dec (Nag) 103 (105).

(3) A suit to surcharge and falsify accounts already furnished and to recover specific sums is governed by Section 7 (i) of the Court-fees Act. AIR 1946 Mad 136 (137).

(4) Suit for enhancement of rent — Paragraph not applicable. AIR 1934 Cal 674 (675) = 61 Cal 513.

(5) Suit for declaration that plaintiff is liable to pay achupalisha at a rate lower than that claimed by the defendant — Paragraph does not apply. AIR 1924 Mad 621 (621) (DB).

(6) Memorandum of appeal by landlord from decree in a suit by tenant for commutation of grain rent into money rent, on the ground that the rate fixed by the lower Court is too low is not governed by this paragraph. AIR 1924 Mad 623 (623, 624) (DB).

(7) Suit to obtain a declaration that plaintiff is the sole and exclusive owner of Government Promissory Notes which are not mature for payment — Paragraph does not apply. AIR 1940 Lah 26 (26) (DB).

(8) Suit for possession of land with damages and mesne profits — Claim for possession falls under para. (v) while claims for damages and mesne profits fall under this paragraph — Different reliefs should be valued according to mode indicated in respective paragraphs applicable to them. (1877) 1 All 552 (554) (FB).

(9) A suit for declaration that the defendant State is liable to pay the amount of pension and for a mandatory injunction calling upon the defendant to pay the amount to him is governed by Section 7 (ii) and not by Section 7 (i) or Section 7 (iv) (c). It is not a suit for money. AIR 1959 Bom 436 (437) = 60 Bom LR 1377.

2. Suit for arrears of maintenance.—

(1) This paragraph refers only to claims for arrears of maintenance and does not apply to a claim for the establishment of the plaintiff's right to maintenance hereafter. Paragraph (ii) refers to such suits and not to suits for arrears of maintenance. AIR 1925 Nag 435 (436) ** AIR 1927 Oudh 623

(624) ** AIR 1961 Punj 11 (12) = 62 Pun LR 701.

(2) Claim for arrears of maintenance founded on allegation of a contractual as well as legal right — Paragraph applies. See AIR 1927 Oudh 623 (624).

(3) Plaintiff claimed that she had a charge on certain properties for Rs. 3,500 which she had to spend for her maintenance — Held that claim was really one for arrears of maintenance. AIR 1934 Lah 150 (1) (150) (DB).

3. Suit for damages.— (1) Suit for damages for breach of contract — Plaintiff alleging that he had sustained damages to the extent of Rs. 3,600 but deducting Rs. 2,000 which he owed to defendant for goods purchased actually claiming only Rs. 1,600 — Court-fee need be paid only on Rs. 1,600. AIR 1919 Lah 363 (364) = 1919 Pun Re No. 61 (DB).

(2) Where the plaintiff company claimed Rs. 6,023-1-9 which was made up of Rs. 30,000 which they claimed as damages minus the amount which was due from them on the cash credit account it was held that the Court-fee was payable on Rs. 6,023-1-9. AIR 1956 Punj 214 (214) = ILR (1955) Punj 49 (DB).

(3) Suit for damages — Plaintiff can enter in his plaint an approximate estimate of damages and offer to pay additional Court-fee in case a larger amount is found to be due before decree is passed — Section 11 will not apply to the case and consequently plaintiff cannot be allowed to pay Court-fee after decree is passed and before execution. (1907) 17 Mad L Jour 625 (626) (DB) ** AIR 1957 Mad 297 (298).

(4) Suit for redemption of kanom and for damages — Plaintiff is entitled to pay Court-fee in respect of damages after amount recoverable as damages is ascertained and set-off against the sum payable by plaintiff as compensation for improvements made by kanomdar and after it is decided what amount, if any, is due to plaintiff as damages after such set-off is made under Sec. 6 (2) of Malabar Compensation for Tenants Improvements Act (1 of 1900). AIR 1926 Mad 764 (765). (AIR 1926 Mad 542, Reversed on review.)

(5) Suit for possession of land and damages — Relief as to possession should be valued under paragraph (v) of this section and relief as to damages should be valued under this paragraph. (1877) 1 All 552 (554) (FB).

(6) No Court-fee need be paid on damages pendente lite. AIR 1935 Pat 160 (163) = 14 Pat 414 (DB) ** AIR 1964 Madh Pra 259 (260, 261) = 1964 MPLJ 758. (Suit against trustees and legal representatives of a deceased trustee for damage to trust property and rent)

Section 7, Para (i) — Note 3 (contd.)
tion of accounts — Damages claimed and balance after accounts valued by plaintiffs themselves — No allegation of dishonesty and malversation — **Held**, the plaintiff must pay ad valorem Court-fees.)

4. Court-fee in suit for mesne profits.— (1) Claim for mesne profits is one for damages or compensation. AIR 1937 Mad 46 (48) = ILR (1937) Mad 284 (DB) ** AIR 1917 Pat 79 (80) = 3 Pat L Jour 67 (DB).

[See also AIR 1926 Pat 218 (222) = 5 Pat 361 (FB) ** AIR 1941 Cal 1 (12) (DB) ** AIR 1955 Ajmer 51 (Pr. 3). (Suit for partition — Appeal — Point that since plaintiff had been in occupation of part of property during period prior to partition he should have been made accountable for mesne profits — No Court-fee paid on such claim either in lower Court or in appeal — Point cannot be allowed to be raised.)]

(2) The paragraph applies only to mesne profits up to institution of suit and not to mesne profits in regard to subsequent period. (1891) 15 Bom 416 (418) (DB) ** AIR 1937 Mad 46 (48) = ILR (1937) Mad 284 (DB) ** AIR 1935 Pat 160 (163) = 14 Pat 414 (DB) ** AIR 1926 Pat 218 (225, 229) = 5 Pat 361 (FB) ** AIR 1953 Pat 289 (Pr. 2) ** (1966) 70 Cal WN 55.

(3) Plaintiff must plead his cause of action, specifically claim a decree for past mesne profits, value the claim approximately and pay court-fees thereon. AIR 1967 SC 155 (157) = (1966) Supp SCR 128.

(4) Mesne profits up to institution of suit — Amount of court-fees payable on plaint will depend on the amount at which plaintiff estimates his claim for mesne profits in the plaint. AIR 1931 All 538 (539) (DB) ** AIR 1941 Cal 1 (12) (DB) ** AIR 1926 Pat 218 (222) = 5 Pat 361 (FB).

(5) Suit for recovery of mesne profits after taking accounts filed in Court having pecuniary jurisdiction up to Rs. 10,000 — Suit valued at Rs. 6,000 — Plaint subsequently amended so as to raise claim up to Rs. 14,400 — **Held** suit came under Section 7 (i) and not under Section 7 (iv) (f). AIR 1963 Madh Pra 194 = 1963 MPLJ 87 (DB).

(6) Decree in plaintiff's favour for a larger sum than claimed — Under first part of Section 11 he will have to pay additional court-fee on extra amount decreed before he can execute decree — Court passing preliminary decree and leaving exact amount of mesne profits to be determined subsequently — Plaintiff need not pay any additional court-fee until exact amount due to him is ascertained and final decree is passed for amount in excess of that

claimed. AIR 1935 All 206 (206, 207) (DB).

[See however AIR 1931 All 538 (539) (DB).]

(7) Suit for mesne profits dismissed — Plaintiff appealing — He must pay court-fee on appeal according to amount at which he estimates his claim. AIR 1917 Pat 79 (79) = 3 Pat LJ 67 (DB).

[See AIR 1931 All 538 (539) (DB).]

(8) No court-fee is payable on memorandum of appeal or cross-objection in regard to future mesne profits, filed by plaintiff whose claim has been dismissed by lower Court. AIR 1937 Mad 46 (49) = ILR (1937) Mad 284 (DB).

[See however AIR 1933 Pat 234 (235) = 12 Pat 694.]

[But see AIR 1948 Pat 103 (104) = 26 Pat 119.]

(9) The plaintiff claimed in the plaint future mesne profits from date of suit. That claim was disallowed by the lower appellate Court, and therefore, the claim in the memorandum of second appeal was for mesne profits from date of suit to the date of the institution of the second appeal and future mesne profits after the institution of the second appeal. It was held that on the memorandum of the second appeal 'ad valorem' fee had to be levied according to Sch. I of the Court-fees Act on the additional amount, claimed by the plaintiff as mesne profits from the date of suit to the date of the institution of the second appeal. For the mesne profits after the date of the institution of the second appeal no Court-fee need be paid. AIR 1955 Trav-Co 167 (Pr. 6).

(10) Preliminary decree for mesne profits passed against defendant — Defendant appealing — He must pay ad valorem Court-fee on amount claimed in plaint. (1909) 1 Ind Cas 670 (673) (DB) (Cal) ** (1893) 16 Mad 310 (311) (DB) ** AIR 1933 Pat 81 (83) = 12 Pat 188 ** AIR 1919 Pat 471 (472).

[See however AIR 1930 Mad 597 (599) = 53 Mad 540 (DB) ** AIR 1957 Him Pra 16 (19). (Suit for mesne profits — Preliminary decree followed by final decree — Appeals from preliminary as well as final decrees — Full Court-fee paid on appeal from final decree — No Court-fee need be paid on appeal from preliminary decree.)]

(11) Final decree for mesne profits passed after preliminary decree for the same — Defendant appealing against final decree — He must pay ad valorem Court-fee on amount in dispute under Article 1, Schedule 1. AIR 1923 Mad 19 (19) = 43 Mad 280 (DB) ** AIR 1933 Pat 81 (83, 84) = 12 Pat 188 ** AIR 1933 Pat 234 (235) = 12 Pat 694.

Section 7, Para. (i) — Note 4 (contd.)

[See also AIR 1958 Mad 414 (415). (Any observation in a judgment of the High Court, that the mesne profits should be determined in execution, cannot enable the party filing the appeal against the quantum of the mesne profits, so determined in execution, to escape by paying a Court-fee of one rupee where a Court-fee of a larger amount is required as ad valorem Court-fee on the disputed amount.) ** AIR 1957 Him Pra 16 (19). (Suit for mesne profits—Preliminary decree followed by final decree — Appeals from preliminary decree as well as final decree — Full Court-fee paid on appeal from final decree — No Court-fee need to be paid on appeal from preliminary decree.)]

(12) In a suit for mesne profits whether past or future, if the mesne profits are ascertained and decreed, the party preferring an appeal should pay Court-fee on the amount or value of the subject-matter in the appeal. AIR 1957 Andh Pra 6 (10) = ILR (1956) Andh 610 (DB).

(13) Decree passed against a number of defendants jointly — Some of them alone appealing — They must pay Court-fee on whole amount and not only on a portion of it which may be proportionate to area of land in their occupation. AIR 1933 Pat 81 (83, 84) = 12 Pat 188.

(14) Plaintiff appealing against order dismissing his application for ascertainment of mesne profits awarded by preliminary decree must pay ad valorem Court-fee on amount claimed by him. AIR 1931 All 538 (539) (DB) ** AIR 1918 Pat 623 (624) = 3 Pat L Jour 101 (DB).

[But see AIR 1939 Mad 667 (669).]

(15) Where a plaintiff wants to appeal against a final decree fixing the amount of mesne profits, and seeks for an enhancement of the amount awarded, he must pay ad valorem Court-fees on the extra amount claimed by him, whether the decree appealed from relates to mesne profits before suit or to subsequent mesne profits. AIR 1932 Pat 228 (230, 231) = 11 Pat 532 (DB) ** AIR 1933 Pat 234 (235) = 12 Pat 694 ** AIR 1954 Pat 447 (Pr. 6) (DB).

5. Suit for rent.— (1) This paragraph expressly includes a suit for sums payable periodically. Suit for arrears of rent will fall within this paragraph — Court-fee would be payable according to amount of arrears claimed. (1912) 6 Sind LR 114 (115) (DB).

(2) Suit for arrears of rent including also prayer for injunction restraining certain defendants from disputing plaintiff's title — Relief of injunctions should be valued under para. (iv) of the

section. (1912) 6 Sind LR 114 (115) (DB).

(3) Suit for rent — Possession not claimed — Mere fact that court will have to decide question of title will not alter character of suit for purposes of Court-fees — Fees paid according to amount of rent claimed will be enough. 1893 Bom PJ 458 (DB).

(4) Suit for possession and rent — Future rent also claimed from date of suit to date of delivery of possession — Neither para. (i) nor para. (ii) of this section would apply to claim of future rent. (1880) 2 All 682 (683) (FB). (Per Spankie J.)

6. Suit on instalment-bond.— (1) Suit on instalment-bond — Court-fee is payable only on amount of instalment which has fallen in arrear and is being sued for — Court-fee need not be paid on whole amount of bond. (1965) 4 Suth WR (SCC) 12 (13) (DB).

7. Claim for compensation for improvements in suit for ejectment.— (1) Suit for ejectment of tenant — Tenant claimed a certain amount as compensation for improvements — On claim being disallowed and decree for ejectment being passed against him without giving him any compensation he filed appeal from decree repeating his claim for compensation — **Held** that in Madras Presidency such claims were not separately valued for purposes of Court-fee and that valuation of appeal as simply one against decree for possession was sufficient. (1900) 23 Mad 84 (85) (DB).

8. Suit for movable property or its value. — (1) Suit for recovery of certain movable properties or certain sum of money as compensation for their value comes under this paragraph — All items of the property claimed on basis of same cause of action — Court-fee paid on their aggregate value is sufficient. (1881) 3 All 131 (133, 134) (DB).

9. "Amount claimed".— (1) The Court-fee under this paragraph is to be computed according to the amount claimed in the suit. This refers to the amount actually claimed in the plaint. AIR 1925 Rang 65 (66) = 2 Rang 462 ** AIR 1956 Punj 214 (214) = ILR (1955) Punj 49. (AIR 1919 Lah 363 (2) = 1919 Pun Re (Civ) No. 61, Rel. on.) ** AIR 1919 Lah 363 (364) = 1919 Pun Re No. 61 (DB).

10. Court-fee on future interest.— (1) Interest for period after institution of suit cannot be said to form any part of plaintiff's claim. No Court-fee is chargeable on future interest, either at time of instituting suit or before execution of decree. (1905) 27 All 559 (561) (DB) ** (1906) 33 Cal 1232 (1235) (DB) ** (1875) 12 Bom HCR 227 (228) ** (1893)

Section 7, Para (i) — Note 1 (contd.)

17 Bom 41 (42) (DB) ** (1900) 10 Mad L Jour 144 (145) (DB) ** AIR 1937 Nag 6 (8) ** AIR 1929 Nag 1 (12) = 24 Nag LR 197 (DB) ** AIR 1934 Pat 571 (573) = 14 Pat 4 (SB). (AIR 1922 Pat 387 = 1 Pat 19 (DB), **Overruled.**)

(2) Plaintiff appealing from dismissal of his suit is not liable to pay Court-fee on interest subsequent to institution of suit. (1900) 10 Mad L Jour 144 (145) (DB) ** AIR 1947 Lah 40 (42) = ILR (1946) Lah 805 (FB) ** AIR 1953 Kutch 46 (Pr. 4). (Where the question of future interest is decided in appeal, it becomes a subject-matter in dispute and interest pendente lite is ascertainable.) ** ILR (1954) 4 Raj 1019 (1030) ** AIR 1927 Pat 230 (230) (DB) ** (1893) 17 Bom 41 (42) (DB).

[See also AIR 1934 Lah 32 (33) (DB).]

[But see AIR 1954 Trav-Co 178 (Pr. 4) = ILR (1953) Trav-Co 1170 (FB). (Interest for period between institution of suit and decree — Court-fee has to be paid — Court-fee is not to be paid on interest subsequent to date of decree appealed against.) ** AIR 1937 Nag 6 (8) ** AIR 1919 Oudh 305 (305) = 22 Oudh Cas 1 ** AIR 1933 Lah 941 (943).]

(3) Decree awarding future interest — Defendant appealing against such decree is bound to pay Court-fee on such interest calculated up to date of filing appeal — Appellant will not be liable for such Court-fee if there is no ground of appeal challenging order as to future interest. AIR 1939 Pat 83 (85) = 17 Pat 687 (DB) ** AIR 1936 Oudh 151 (151) = 11 Luck 396 (DB) ** AIR 1937 Oudh 3 (3) = 12 Luck 466 (DB) ** AIR 1934 All 805 (807) = 57 All 71 (DB) ** ILR (1954) 4 Raj 1019 (1030).

[See also AIR 1953 Kutch 46 (Pr. 3). (On the trial Court exercising discretion one way or other, its grant, or refusal of future interest becomes a subject-matter in dispute in appeal and the memorandum of appeal directed against its grant or refusal as the case may be must bear Court-fee either under Article, Schedule 1, or under Article 17, Schedule II.)]

(4) Where the decree awarded interest at the rate of Rs. 8 per cent. per annum from the date of the suit till the date of realisation and the plaintiff filed cross-objection in an appeal by the defendant claiming interest at the rate of Rs. 12 per cent. per annum from the date of the decree of the trial Court to the date of the realisation it was held that the claim of interest by the plaintiff in his cross-objection was capable of determination and he should pay *ad valorem* Court-fee on the

amount claimed. Madh BLJ 1954 HCR 1699 (1701).

(5) Suit for money — Decree in plaintiff's favour making decretal amount payable by certain instalments — If default was made in paying any instalment, interest at a certain rate was to be recoverable by decree-holder on balance of amount — Plaintiff appealed, praying that he must be allowed future interest on decretal amount till payment of each instalment, irrespective of default being made by judgment-debtor or not — Plaintiff was allowed to pay fixed Court-fee of Rs. 10 under Article 17 of second schedule on ground of subject-matter not being capable of valuation in money. AIR 1937 Nag 95 (96).

11. Court-fee on written statement pleading set-off.— (1) Written statement pleading a set-off or counter-claim — Court-fee will be payable under Article 1, Schedule 1 according to amount claimed to be set-off and not according to difference between such amount and amount claimed by plaintiff in plaint. AIR 1938 All 522 (523) ** AIR 1958 All 574 (575) * (1889) 13 Bom 672 (673) (DB) ** (1892) 15 Mad 29 (34) (DB) ** (1912) 15 Ind Cas 528 (528) (Oudh) ** AIR 1925 Rang 65 (67) = 2 Rang 462 ** AIR 1923 All 118 (119) = 45 All 218 (DB).

(2) No Court-fee is payable on a written statement which does not plead a set-off or counter-claim but merely pleads that there has been adjustment of accounts between parties before suit and that consequently only a fraction of sum claimed in plaint is due to plaintiff. AIR 1937 Lah 62 (62) ** AIR 1966 All 619 = 1965 All LJ 901. (Plea of adjustment in written statement — Adjustment satisfying liability in part or whole — Plea does not amount to set off — No Court-fee payable.)

(3) Where a suit and a cross-suit have both been filed and proper Court-fees have been paid by plaintiffs in both the suits, and the written statement in the former is practically worded in the same manner as the plaint in the latter, the Court in the former suit cannot treat the written statement as claiming a set-off and demand *ad valorem* Court-fee from the defendant. AIR 1956 Punj 214 (215) = ILR (1955) Punj 49 (DB).

12. Court-fee on appeal — General.

(1) Plaintiff sued for recovery of Rs. 1,000 from defendant and on his suit being dismissed, appeals from decree but reduces his claim in appeal to Rs. 750 — He will have to pay Court-fees under this paragraph only on Rs. 750 — Plaintiff sued for Rs. 6000 but only gets a decree for Rs. 4000 and

Section 7, Para (i) — Note 12 (contd.)

he appeals from decree, claiming whole amount — He must pay Court-fee on Rs. 2000. AIR 1914 Lah 390 (390) = 1915 Pun Re No. 12 (DB).

[See also AIR 1940 Bom 369 (372) = ILR (1941) Bom 71 (DB).]

[But see (1936-1943) Tax Dec (Nag) 103 (106).]

(2) Plaintiff claiming a fixed sum and obtaining decree — Defendant appealing and asking for accounts to be taken must pay ad valorem Court-fee on valuation of suit as fixed in plaint. AIR 1935 Bom 69 (70) (DB).

(3) If the dispute in appeal does not relate to a claim for money this paragraph will not apply to the appeal. AIR 1922 Mad 211 (214) = 45 Mad 246.

(4) Plaintiff claiming a decree for money against a number of defendants — Suit decreed only against one or some of them alone — Plaintiff appealing praying for a decree against remaining defendants also — His appeal will come under this paragraph. AIR 1923 Lah 135 (136) (DB) ** AIR 1922 Bom 172 (173) = 46 Bom 840 (DB) ** (1898) 12 CPLR 43 (44, 45).

(5) In the trial Court plaintiff seeking a decree for a certain sum of money against defendant 1 personally and against assets of a deceased person in the hands of defendants 2 to 5 who are his legal representatives — Suit decreed against first defendant but dismissed as against other defendants — Plaintiff appealing from latter part of decree will have to pay ad valorem fee either on value of assets in the hands of defendants 2 to 5 or on amount claimed by plaintiff appellant whichever is less. AIR 1932 All 406 (407) = 54 All 608.

(6) Suit for recovery of money — Defendant repudiating claim and setting up counter-claim — Suit decreed and counter-claim dismissed — Defendant appellant should pay Court fees on both claims. AIR 1964 All 345 = 1963 All LJ 680 (DB).

(7) Costs are not part of the dispute and their allowance or disallowance is within the discretion of the Court. Court-fee is, therefore, not payable in respect of costs entered in the decree from which the appeal is filed. The prayer in appeal that costs be allowed to the appellant is merely incidental. 1961 Jab LJ 1502.

(8) Suit for accounts — Defendant appealing against final decree should pay Court-fee on amount of decree passed against him. AIR 1970 All 197 (198) (FB).

13. Appeal from instalment decree.—

(1) Plaintiff appealing against instalment decree and praying for a decree for a lump sum — He is liable to ad

valorem Court-fee on the difference between decretal amount taken as a whole and present value of instalments — In such a case, this paragraph does not apply. AIR 1936 Pesh 232 (232) (DB) ** AIR 1955 Pepsu 122 (Pr 4) (DB) ** AIR 1914 Lah 390 (391) = 1915 Pun Re No. 12 (DB) ** (1892) 19 Cal 272 (274) (DB).

(2) Instalment decree — Defendant required to give security for due payment of instalments — Defendant only appealing against imposition of condition as to security — Subject-matter of appeal is not capable of valuation — Defendant need pay only fixed fee of Rs. 10 under Article 17 (vi) of second schedule. (1884) 14 CPLR 172 (173).

14. Applicability to suit for sale on mortgage. — (1) A "suit for money" includes a suit for sale in enforcement of a mortgage — Amount of court-fee payable thereon is according to the amount claimed by the plaintiff and not the principal money secured by the mortgage as under para (ix). AIR 1931 Cal 159 (159) = 58 Cal 829 (DB) ** AIR 1931 Mad 710 (711) ** (1894) 18 Bom 696 (698) ** AIR 1938 Mad 30 (31) ** AIR 1942 Mad 205 (207) = ILR (1942) Mad 438 (DB).

(2) The paragraph also applies to cases in which no personal decree or decree against the other properties of the defendant is sought in the plaint in suit for sale on mortgage. (1905) 7 Bom LR 194 (195) (DB).

(3) Where a plaintiff in a suit on a mortgage seeks for a decree for sale of the mortgaged property and also for a money decree, the former relief falls under para. (iv) (c) of this section and the latter relief under this paragraph. 1876 Oudh SC No. 34.

(4) The same principle applies to a suit for sale in enforcement of a charge on immovable property as a suit on a mortgage. AIR 1942 Mad 205 (207) = ILR (1942) Mad 438 (DB).

15. Court-fees in suits on mortgages — Illustrative cases.—

(1) Mortgagee suing on a puisne mortgage and praying that sale under such mortgage should be subject to prior mortgage. It is enough if he pays ad valorem Court-fee according to amount claimed by him in respect of puisne mortgage. In regard to prior mortgage it is enough if he pays fixed Court-fee of Rs. 10 under Article 17, Clause (iii) of the second schedule. AIR 1935 All 100 (101, 102) = 57 All 602 (DB).

(2) A sub-mortgagee suing for sale of properties mortgaged to his mortgagor, i.e., the main mortgagee under this paragraph, must pay Court-fee on the amount of the main mortgage and not on that of the sub-mortgage. AIR 1938 Mad 30 (31).

Section 7, Para. (i) — Note 15 (contd.)

(3) One co-mortgagee suing for his share of the mortgage-money making other co-mortgagees defendants to the suit must pay Court-fee on the whole amount due on the mortgage. AIR 1937 Mad 922 (925) (DB) ** AIR 1942 Mad 205 (208) = ILR (1942) Mad 438 (DB). (AIR 1930 Mad 985, Dissented from.)

(4) Plaintiff sued for sale on his mortgage. The plaintiff did not ask for any relief in respect of two prior mortgages on the property. The plaintiff is only bound to pay Court-fee on the amount of his mortgage. He is not liable to pay Court-fee in addition under para. (ix) on the footing of his suit being one for redemption of the prior mortgages. (1903) 30 All 103 (105) (DB).

(5) Suit on mortgage — Prayer for sale of mortgaged property free from claims of other alienees — Plaintiff not party to document of alienation — Relief of cancellation held unnecessary — No additional Court-fee payable under Section 7 (iv-A) (Madras). AIR 1946 Mad 181 (183, 184).

16. Court-fee on appeal from decree in mortgage suit.— (1) Decree in favour of plaintiff in suit for sale on mortgage — Defendant appealing from such decree — Court-fee will be payable under this paragraph according to amount of the decree. AIR 1927 Sind 251 (251, 252) = 23 Sind LR 277 (DB).

[See AIR 1914 All 520 (520, 521) = 36 All 40 (FB).]

(2) Decree granting interest on mortgage-money from date of institution of suit to date of decree — Defendant appealing from whole decree — He will have to pay Court-fee on whole amount of decree although plaintiff, in trial Court, would have had to pay Court-fee only according to amount due at date of institution of suit. (1913) 35 All 94 (98) (DB) ** AIR 1927 Sind 251 (252) = 23 Sind LR 277 (DB) ** AIR 1947 All 295 (296).

(3) Plaintiff's suit dismissed — Appeal from decree — Court-fee would be payable according to amount claimed in appeal. See AIR 1915 Nag 48 (49) = 11 Nag LR 83 (DB).

[But see AIR 1947 Lah 40 (42) = ILR (1946) Lah 805 (FB).]

(4) Decree passed against defendant in suit for sale on mortgage — Defendant in appeal questioning not amount for which decree has been passed but only contending that certain items of properties against which decree has been passed or certain shares in such properties are not liable for mortgage-debt — Ad valorem Court-fee is payable according to value of property in respect of which exemption is sought or amount of the decree whichever is

less. AIR 1920 Pat 642 (643) ** 1882 All WN 37 (38) (DB) ** (1910) 37 Cal 914 (917) (DB) ** AIR 1926 Lah 408 (408) = 7 Lah 215 (DB) ** (1887) 10 Mad 187 (188, 189) (DB) ** AIR 1931 Mad 710 (712) ** AIR 1918 Oudh 348 (348) ** AIR 1916 Lah 151 (151) = 1916 Pun Re No. 11 (DB) ** AIR 1928 Nag 316 (318) = 24 Nag LR 142.

(5) Trial Court decreeing amount claimed by plaintiff in suit for sale on mortgage but holding that certain of the properties sought to be proceeded against are not liable for mortgage-debt — Plaintiff appealing from latter portion of decree — Ad valorem fee is payable according to value of the property or amount of decree whichever is less. AIR 1921 Oudh 237 (237) = 24 Oudh Cas 295 ** (1911) 33 All 20 (24) ** (1907) 30 Mad 96 (98) (FB) ** (1890) 13 Mad 508 (509, 510) (DB) ** AIR 1914 Oudh 396 (397) = 17 Oudh Cas 90.

(6) Appeal from final decree in mortgage suit — Ad valorem Court-fee is payable on such appeal according to value of subject-matter in dispute. AIR 1928 Nag 146 (147) ** AIR 1947 Pat 113 (113, 114) = 25 Pat 305 ** AIR 1915 Oudh 121 (121) = 18 Oudh Cas 114 (DB) ** (1913) 35 All 476 (478) (FB) ** AIR 1919 Pat 425 (425) ** AIR 1927 Pat 46 (47) = 5 Pat 721 ** AIR 1928 Rang 194 (195) = 6 Rang 285 (DB).

(7) On appeal from order rejecting an application for final decree ad valorem Court-fee is payable. Such an appeal is not one from an order for purposes of Court-fees. AIR 1920 All 145 (147) (DB) ** (1908) 12 Cal WN 1028 (1029) (DB).

[See also AIR 1931 All 538 (539) (DB).]

(8) Appeal preferred against preliminary decree — Before its disposal appeal also preferred against final decree — In computing court-fees on appeal from final decree amount paid as Court-fee on appeal from preliminary decree must be deducted—Combined appeal filed against both preliminary and final decrees—Court-fee on appeal from preliminary decree must be deducted in computing court-fee on appeal from final decree. AIR 1917 All 158 (159) = 39 All 452 ** AIR 1956 Hyd 161 (162) = ILR (1956) Hyd 45 (DB) ** AIR 1929 Cal 815 (817) = 57 Cal 463 ** AIR 1932 Mad 453 (455) = 55 Mad 664 (DB) ** AIR 1925 Oudh 39 (42) (DB) ** AIR 1924 Pat 694 (694) = 3 Pat 815 (DB) ** AIR 1933 Pat 81 (83, 84) = 12 Pat 198.

[See AIR 1937 Mad 569 (571) = ILR (1937) Mad 936.]

[But see AIR 1953 Mad 415 (Prs. 3, 5) = ILR 1953 Mad 826.]

(9) Before appeal from final decree is filed, appeal against preliminary decree disposed of and dismissed — Court-fee paid on appeal from prelimi-

for maintenance and annuities;

- (ii) in suits for maintenance and annuities or other sums payable periodically—according to the value of the subject-matter of the suit, and such value shall be deemed to be ten times the amount claimed to be payable for one year:

STATE AMENDMENTS

Delhi:

Same as in Punjab—See S.R.O. 422, Gaz. of Ind., 1950, Pt. II, S. 3, p. 458.

Section 7, Para. (i) — Note 16 (contd.)

nary decree cannot be deducted from Court-fee payable on appeal from final decree. AIR 1932 Mad 453 (455) = 55 Mad 664 (DB) ** AIR 1952 Hyd 21 (Pr. 1) = ILR (1951) Hyd 541 (DB) ** AIR 1951 Him Pra 52 (Pr. 6) ** (1924) 79 Ind Cas 906 (906) (Pat).

[But see AIR 1924 Pat 694 (694) = 3 Pat 815 (DB).]

(10) Suit on a mortgage — Person impleaded as subsequent mortgagee appealing from decree claiming priority over plaintiff's mortgage — Court-fee payable on memorandum of appeal is ad valorem on value of subject-matter in dispute. AIR 1932 All 221 (222) = 43 All 341.

(11) Suit for sale of mortgaged property — Puisse mortgagee and mortgagor impleaded — Mortgagor denied puisne mortgage but Court found it to be subsisting and ordered that the balance after paying off plaintiff's mortgage should be paid to puisne mortgagee to the extent of amount due on his mortgage — Appeal by mortgagor challenging this portion of the decree — Court-fee payable on appeal is ad valorem on amount due on mortgage. AIR 1933 Lah 954 (955) (DB).

(12) Suit on mortgage by co-mortgagee — Widow of other co-mortgagee made party — Widow claimed a declaration that mortgagees were not members of a joint Hindu family and that she was entitled to half the money — Court granting the declaration passed a decree in favour of both — Appeal by plaintiff — Held that ad valorem Court-fee on subject-matter in dispute was payable. AIR 1943 Oudh 361 (365).

(13) Suit on a mortgage — Court passed a decree overruling defendant's contention that plaintiff was not entitled to get a decree without rendering accounts — Defendant appealed claiming the same relief and putting his own valuation on appeal — Held that appeal must be valued at amount of the decree and Court-fee on that amount must be paid. AIR 1935 Bom 69 (70) (DB).

17. Court-fee on appeal from personal decree in mortgage suit.— (1) A personal decree against mortgagor under Order 34, Rule 6 of the Civil Procedure

Code is a decree and hence, on an appeal from such decree, ad valorem Court-fee is payable according to the amount of the decree. AIR 1924 All 292 (293) (DB) ** AIR 1957 Raj 165 (166) = ILR (1956) 6 Raj 413 (DB) ** AIR 1916 All 357 (358) ** (1913) 19 Ind Cas 971 (973) (DB) (Cal) ** (1935) 62 Cal 568 (571) ** AIR 1915 Oudh 122 (123) = 18 Oudh Cas 121.

18. Court-fee on appeal from personal decree in a suit on pledge.— (1) The plaintiff filed a suit for recovery of Rs. 6709 advanced on pledge of articles — The amount was decreed and was to be recovered by sale of articles but no personal decree was passed — Appeal by plaintiff against the decree was valued at Rs. 2250 and a personal decree was granted. Defendant filed second appeal and he paid Rs. 10 under Schedule 2, Article 17 (vi) on ground that subject-matter of appeal was incapable of valuation — It was held that the value of the second appeal would be approximate amount which might remain unrealised after sale of articles — Unless defendant could show that articles were likely to fetch higher value, value placed by plaintiff should be considered proper in second appeal and defendant would be liable to pay ad valorem Court-fee thereon. 1955 Raj LW 35 (35).

SECTION 7, PARA (ii) — SYNOPSIS

1. Nature of suits to which paragraph applies.
2. "Maintenance."
3. "Annuity."
4. "Other sums payable periodical-ly."
5. Applicability — Illustrative cases.
6. Suit for reduction of maintenance.
7. Suit for enhancement of maintenance.
8. Claim for future rent in suit for possession.
9. Mode of valuation under this paragraph.
10. U. P. Amendment.

1. Nature of suits to which paragraph applies.— (1) A claim for arrears of maintenance or other sums periodical-ly payable comes under paragraph (i) and not under this paragraph. AIR

Orissa:

In Section 7(ii) after the words "shall be deemed to be", the words "in suits for maintenance five times and in other suits" were inserted—Orissa Act 5 of 1939 (31-10-1939.)

Punjab, Haryana and Chandigarh:

In Section 7 of the Act, the existing clause (ii) shall be numbered as sub-clause (a) thereof and after the clause so numbered, add the following:—

"(b) In suits for reduction or enhancement of maintenance and annuities or other sums payable periodically according to the value of the subject-matter of the suit and such value shall be deemed to be ten times the amount sought to be reduced or enhanced for one year."—E. P. Act 26 of 1949, Section 3 (1-4-1950); Act 31 of 1966, S. 88 (1-11-1966).

Uttar Pradesh:

For sub-section (ii) of Section 7, the following was substituted:—

"(ii) (a) In suits for maintenance and annuities or other sums payable periodically—according to the value of the subject-matter of the suit and such value shall be deemed to be ten times the amount claimed to be payable for one year:

Provided that in suits for personal maintenance by females and minors such value shall be deemed to be the amount claimed to be payable for one year.

(b) in suits for reduction or enhancement of maintenance and annuities or other sums payable periodically—according to the value of the subject-matter of the suit and such value shall be deemed to be ten times the amount sought to be reduced or enhanced for one year."—U. P. Act 19 of 1938 (9-1-1939).

Section 7, Para. (ii) — Note 1 (contd.)

1927 Oudh 623 (624) ** AIR 1953 All 442 (Pr. 4).

(2) Paragraph does not apply to a suit for a bare declaration of the plaintiff's right to receive a periodical payment. AIR 1925 Bom 282 (282) (DB) ** AIR 1953 All 442 (Pr. 4). (Such a suit will come under Article 17 (iii) of Schedule II.)

(3) In the following cases it was held that a suit for declaration that the plaintiff is entitled to receive a certain sum periodically from the defendant is a suit within this paragraph. AIR 1920 All 40 (40) = 42 All 353 (DB) ** AIR 1934 Lah 150 (150) (DB) ** AIR 1934 Pat 240 (242) = 13 Pat 290 (DB).

(4) When a person sues for maintenance at a particular rate, whether or not she has been refused maintenance by the Magistrate under Section 488, Criminal P. C., she is clearly making a money claim whose value can be assessed under this section. AIR 1953 Vindh Pra 28 (Pr. 6) = 1953 Cri L Jour 1214.

(5) When a Magistrate having ordered maintenance, the husband or father comes to the Civil Court, he does not exactly ask for the cancellation of a specific monetary liability. What he can urge is that there are circumstances which entitle him to a declaration that the person concerned is not his wife or child or that the right to maintenance has been lost by her or his own conduct. In such a case it is a suit for declaration about status or a disqualification. Such suit is

not to be taxed ad valorem, but under Schedule 2, Article 17, Clause (3) of the Act, and the appropriate local amendment, if any, to that article. AIR 1953 Vindh Pra 28 (Pr. 6) = 1953 Cri L Jour 1214.

2. "Maintenance."—(1) Maintenance ordinarily imports a conception of amounts payable for life to a person by virtue of his standing in a particular relationship with somebody else and though the obligation to make the payment may often be defined in a contract, the original relationship which gives rise to the obligation is not necessarily contractual. AIR 1934 Cal 674 (675) = 61 Cal 513.

3. "Annuity."—(1) Annuity is an yearly payment of a certain sum of money granted to another in fee for life or years charging the person only. AIR 1934 Cal 674 (675) = 61 Cal 513.

4. "Other sums payable periodically."—(1) Expression "other sums payable periodically" must be held to refer to claims which are of the same nature as a claim for maintenance or an annuity. AIR 1934 Cal 674 (675) = 61 Cal 513 ** AIR 1919 Pat 541 (542) = 4 Pat LJ 561 ** AIR 1927 Pat 123 (125) = 6 Pat 17.

(2) A suit for assessment of rent or enhancement of rent does not come under this paragraph. AIR 1934 Cal 674 (675) = 61 Cal 513 ** AIR 1919 Pat 541 (542) = 4 Pat LJ 561 ** AIR 1927 Pat 123 (124, 125) = 6 Pat 17.

[But see AIR 1932 Cal 674 (677, 678) = 59 Cal 997 (DB) ** AIR 1936 Cal 804 (807) = ILR (1937) 1 Cal 103 (DB).]

Section 7 (ii) — Note 4 (contd.)

(3) A claim that plaintiff and her descendants are entitled to receive generation after generation, a certain sum every month from defendants and their successors is a claim coming within this paragraph. AIR 1920 All 40 (40) = 42 All 353 (DB).

(4) Claim that plaintiff is entitled to receive every year certain articles of value from defendant — This paragraph does not apply. (1885) 8 Mad 384 (388) (DB).

5. Applicability — Illustrative cases.

— (1) A wakf-deed purported to create wakf and appointed A as mutwalli. The deed provided for annual payment of Rs. 50 to B. Descendants of settlor sued A and B praying for removal of mutawalli, A, for appointment of new Mutawalli and for benefits conferred on them under wakf-deed under which, on disagreement between parties, income was to be divided and enjoyed in proportions set out. Plaintiffs claimed to be entitled to annual receipts capable of valuation at least on an average basis. **Held**, that case came within this paragraph and that plaintiffs should pay court-fee on ten times annual value of receipts to which they claimed to be entitled. AIR 1942 Sind 160 (161) = ILR (1942) Kar 424 (DB).

(2) In previous suit a decree was passed declaring that A was entitled to a charge on B's property in respect of a right of maintenance for Rs. 200 per annum — B suing to set aside decree. — This paragraph does not apply. AIR 1936 Oudh 317 (319) (DB).

(3) Suit praying that defendant should be required to furnish security for due payment of Rs. 27-8-0 per mensem to plaintiff or should be directed to invest Rs. 8,250 which will yield annually Rs. 330 as interest thereon to be paid to plaintiff — Under this paragraph court-fee is to be computed according to ten times the amount claimed for each year. 1886 All WN 228 (228).

(4) A sued B and C for declaration of his title to certain property and for an injunction restraining C from paying and B from receiving an allowance of Rs. 2,400 a year out of the income of the property in dispute — **Held**, that this paragraph did not apply. (1893) 17 Bom 56 (59) (DB).

(5) Suit for declaration that plaintiffs are entitled to certain properties subject to certain trusts created by the will of last owner in favour of some temples and provision for maintenance of his son, is not governed by this paragraph. (1893) 3 Mad L Jour 242 (244) (DB).

(6) Suit for declaration that defendant is liable to pay pension to plaintiff and for mandatory injunction — Sec-

tion 7 (ii) and not Section 7 (iv) (c) applies. AIR 1959 Bom 436 (437) = 60 Bom LR 1377.

(7) Suit for wrongful termination of service — Relief for future emoluments during pendency of suit — Not covered by Section 3 (2) Travancore-Cochin Court-fees Act (2 of 1125) — No Court-fee payable. 1961 Ker LJ 1086.

(8) Suit for arrears — Right to maintenance not previously established — Section 7(ii) applies. AIR 1961 Punj 11 (12) = 62 Pun LR 701.

6. Suit for reduction of maintenance.

— (1) Maintenance awarded by a decree — Judgment-debtor sued to have rate of maintenance reduced on ground of change in circumstances — Suit does not come under this paragraph. AIR 1945 Nag 264 (266) = ILR (1945) Nag 661 (DB) ** (1936-1943) Tax Dec (Nag) 29 (30) ** AIR 1935 Mad 655 (655) = 59 Mad 159 ** 24 Bom 386 (390) (DB) ** ('53) 6 Sau LR 529 (531, 532) ** AIR 1953 Vindh Pra 28 (Pr. 6) = 1953 Cri L Jour 1214.

(2) Claim for enhancement of maintenance awarded by decree would come under this paragraph and court-fee would be payable on ten times the amount of enhancement claimed for each year. ('36-43) Tax Dec (Nag) 76 (77, 78) ** AIR 1953 Vindh Pra 28 (Pr. 6) = 1953 Cri L Jour 1214.

7. Suit for enhancement of maintenance. — (1) A suit for enhancement in the rate of maintenance falls within the scope of Section 7 (ii) and not under Art. 17-B of Sch. II (Mad). Ad valorem court-fee on the annual increase of maintenance is therefore proper. AIR 1953 Mad 605 (Pr. 3).

8. Claim for future rent in suit for possession. — (1) A claim for future rent from date of suit to delivery of possession in suit for possession held would come under this paragraph. (1880) 2 All 682 (685, 686) (FB). (Per Stuart C. J., Spankie, J., Dissenting.)

9. Mode of valuation under this paragraph. — (1) The paragraph provides that value of subject-matter of the suit is to be regarded as being ten times the amount claimed as payable for one year. See (1968) 5 Bom HCR (AC) 55 (56, 57) (DB).

(2) Claim for arrears of the amount as well as for a decree for payment of future instalments made in the same suit. Former claim must be charged with the court-fee under para (i) and latter claim must be charged, under this paragraph according to ten times the amount for each year. 1886 All WN 228 (228) ** AIR 1936 Mad 388 (393, 394, 397) (DB).

(3) Maintenance decree — Suit to set aside — To be valued on basis of

for other movable property having a market value;

(iii) In suits for movable property other than money, where the subject-matter has a market-value—according to such value at the date of presenting the plaint;

(iv) In suits—

for movable property of no market-value;

(a) for movable property where the subject-matter has no market-value, as, for instance, in the case of documents relating to title,

Section 7 (ii) — Note 9 (contd.)

amount payable for one year. AIR 1959 Mad 432 (433) = (1968) 2 Mad LJ 159.

10. U. P. Amendment. — (1) Irrespective of the person who files the appeal or cross objection, the valuation of an appeal or a cross objection if it is against a decree passed in a suit for personal maintenance by females and minors is to be made at the amount claimed to be payable for one year by such females or minors. Thus the person filing the appeal or the cross objection in such a case can get advantage of the proviso to Section 7 (ii) (a). AIR 1957 All 541 (543) = ILR (1957) 1 All 558 (FB). (AIR 1952 All 605 and AIR 1952 All 175, **Overruled**; AIR 1950 All 55. **Approved** — Per Full Bench, Shrivastava J., contra.)

(2) Where the husband files an appeal claiming reduction of maintenance against the decree obtained by the wife the court-fee payable on the memorandum of appeal also is to be computed in the manner laid down in the proviso to Section 7 (ii) (a) and not under Section 7 (ii) (b). AIR 1957 All 541 (542, 543) = ILR (1957) 1 All 558 (FB). (AIR 1952 All 175, **Overruled**.)

(3) Both in the main clause of and in the proviso to Section 7 (ii) (U. P.) the words used are "the amount claimed to be payable for one year". The 'claim' referred to is the claim of the plaintiff. The fact that the Court decrees the claim at a lesser rate is immaterial at least for purposes of valuation of the cross objection or the appeal. Thus, for the determination of the question of payment of court-fee in the appeal or for the purpose of cross objection, it is the value of the amount actually claimed by the plaintiff in the suit that is to be taken into consideration and not the lesser amount decreed by the trial Court. AIR 1957 All 541 (542) = ILR (1957) 1 All 558 (FB).

(4) In a suit for personal maintenance by a female, the proviso to Section 7 (ii) (a) (U. P.) does not mention the year which is to be taken into account in determining the amount payable for that year. In the absence of any such specification in the section the proper interpretation would be to hold the 'one year' referred to as the year in which the suit is brought. AIR 1950 All 56 (Pr. 7).

Section 7, Para (iii) — Note 1

(1) Movable property in plaintiff's possession attached — He sued for removal of attachment — His suit does not fail under this paragraph. (1880) 2 All 63 (65, 66) (DB).

(2) A hut would be immovable property according to definition in Section 3 (25) General Clauses Act and therefore would not be movable property. See (1872) 8 Beng LR 508 (519) (FB).

(3) Standing crops would be immovable property and not movable property. (1895) 22 Cal 877 (887, 888) (DB).

(4) "Market-value" has been defined as meaning what the property would fetch in the market under the state of things existing at the time. AIR 1924 Mad 19 (21) = 46 Mad 782 (FB).

[See also ILR (1953) 3 Raj 1009 (1011). (Under the law, the court-fees are to be paid according to the value of the goods claimed on the date of the suit.)]

(5) Suit to have deed of disclaimer executed and registered — Subject-matter is not house to which it relates and has no monetary value — Section 7 (iii) does not apply. AIR 1952 Hyd 1 (Pr. 7) = ILR (1952) Hyd 160 (DB).

(6) A State lottery ticket which has drawn a prize is movable property with a market value of the same amount as the prize it has drawn and is within the purview of Section 7 (iii). 1949 Bur LR (HC) 358 (373, 378) (FB).

(7) Share scrips in hands of third party who is in wrongful possession of the same — Suit for recovery of would be governed by Section 7 (iv) (a) and not by Section 7 (iii). AIR 1965 Punj 314. = ILR (1965) 1 Punj 39.

Section 7, Para (iv), Clause (a) — Note 1

(1) 'Documents relating to title' will include not only documents of title to immovable property like deeds of sale or mortgage of immovable property, but also such documents as promissory-notes, bonds, Government securities, etc. Hence, a suit to recover possession of such documents will come under this clause and not under para (ii). 1894 Bom PJ 145 (DB) ** AIR 1934 Mad 730 (730) = 58 Mad 228.

(2) A suit merely for possession of documents of title is not a suit for the recovery of the property to which the

Section 7 (iv) (a) — Note 1 (contd.)
document relates. AIR 1949 Pat 520 (Pr. 3) = 28 Pat 313 (DB).

[See (1879) 4 Cal 322 (326) (DB).]

(3) Plaintiff in a suit for possession of document need not be stamped as plaintiff in a suit for possession of property to which the document relates. AIR 1934 Mad 730 (730) = 58 Mad 228.

[See also AIR 1952 Hyd 1 (Pr. 7) = ILR (1952) Hyd 160 (DB). (Suit to have deed of disclaimer executed and registered — Subject-matter is not house to which the deed relates — Court-fee not to be paid on value of the house — Suit held governed by Sch. II, Art. 17 (vi).]

[But see 1871 Pun Re No. 10, p. 15 (17) (DB).]

(4) A suit for return of a mortgage-bond with endorsement of full satisfaction is really a suit for redemption and is not covered by this clause. Such a suit will come under para (ix). (1936) 63 Cal 657 (660).

(5) A suit for cancellation and delivery of a document will not come under this clause. (1904) 27 Mad 480 (481) (DB).

(6) Mortgagee sued mortgagor for return of mortgage-deed on ground that mortgagor had not paid mortgage-money. **Held**, that real point in issue was not about return of mortgage-deed but whether mortgage-money had been paid and that this clause did not apply. 1875 Pun Re No. 39, p. 117 (117) (DB).

(7) A sued B and other trustees, to set aside a deed of trust and to recover the trust money which was in the form of Government promissory notes. **Held**, that Court-fee must be paid according to amount of the Government promissory note. (1884) 10 Cal 380 (382).

(8) Relief coming under this clause combined with one not coming under it. Two reliefs must be valued separately under respective provisions that would apply to them for purposes of court-fees. 1894 Bom PJ 145 (DB).

(9) Shares are not same thing as share scrips — Share scrips are of no value in hands of third party who is in wrongful possession of the same and have no market value — Suit for recovery of such share scrips would be governed by Section 7 (iv) (a) and not by Section 7 (iii). AIR 1965 Punj 314 (315) = ILR (1965) 1 Punj 39.

U. P. Amendment

(10) State seeking to collect cess or tax under certain Acts — Plaintiff alleging the Acts as void filing suit to restrain the State — Court-fees are payable under Cl. (iv-B) (b) and not under Cl. (iv) (a) or Cl. (iv-A). AIR 1968 SC 102 = (1967) 3 SCR 920.

(11) Plaintiff seeking for declaration that order of his dismissal should be held null and void and he should be

declared entitled to salary which he would have otherwise received — **Held**, second declaration could not amount to consequential relief. ILR (1965) 1 All 575.

(12) Suit for declaration and consequential relief — Appeal — Court-fees — Ad valorem fees payable only if value of relief could be ascertained — Otherwise court-fee is payable under Art. 17 (7) of Sch. II to the Act. AIR 1968 All 94 (95).

(13) Suit for declaration and injunction — **Held**, on facts (1) that the relief of injunction was incidental to the main relief of declaration and therefore Court-fee was payable under Section 7 (iv) (a) (U. P. Amendment).

(2) that the case did not fall within the proviso to Section 7 (iv) (a) (U. P.) since the relief of injunction, indirectly affected immovable property. AIR 1961 All 483 (484, 485).

(14) Suit for declaration and injunction — Injunction not dependent on declaration — Section 7 (iv-B) (b) and not Section 7 (iv) (a) held applied. AIR 1963 All 86 (87, 88, 89) = 1961 All LJ 763 (DB).

(15) Suits by some Parsis for injunction restraining defendants who were also Parsis from interfering with rights of plaintiffs and of other Parsis of the city to enter fire temple and perform religious rites, etc. — Relief for declaration held not necessary — Court-fee payable was under Section 7 (iv-B) (b) and not under Section 7 (iv) (a). AIR 1963 All 89 (90). (AIR 1955 All 177 and AIR 1963 All 86, **Rel. on.**)

(16) Suit by landlord for declaration that allotment order of Rent Control Authority was void and for injunction to restrain allottee from occupying accommodation — Suit falls under Section 7 (iv) (a). AIR 1965 All 496 (497, 498) = 1964 All LJ 1061.

(17) Cancellation of instrument or adjudication as to its validity — Plaintiff suing for partition of joint family property — Defendant setting up a will in defence — Plaintiff alleging that the will was forged and in the alternative invalid — **Held**, it was not a suit for a declaration of the invalidity of the will and the plaintiff was not liable to pay additional court-fee under Section 7 (iv) (a). AIR 1967 All 153 = 1966 All LJ 570.

(18) Suit for possession involving cancellation of deeds of wakf and gift — Court-fees payable separately for relief of possession under Section 7 (iv) and for cancellation under Section 7 (iv-A) (1) — Section 17 (2) does not apply. ILR (1961) 1 All 17.

to enforce a right to share in joint family property;

(b) to enforce the right to share in any property on the ground that it is joint family property,

SECTION 7, PARA (iv), CLAUSE (b) — SYNOPSIS

1. U. P. Amendment.
2. M. P. Amendment.
3. Bombay Amendment.
4. Suit for share of profits of impartible property.
5. Suit for partition by person in joint possession.
6. Suit by excluded coparcener for joint possession.
7. Suit for partition by excluded coparcener.
8. Suit for declaration of title.
9. Suit by purchaser from co-owner.
10. "Joint family property."
11. Appeal in partition suit — Court-fee.
12. Liability of defendant to pay court-fee in partition suit.
13. Amendment of plaint in partition suit — Court-fee.
14. Suit for re-opening of partition.
15. Other reliefs in suit for partition — Court-fee.

1. U. P. Amendment. — (1) Suit instituted before the amending Act — Plaintiff sought an amendment of plaint claiming an additional share — **Held**, that so far as claim for an additional share was concerned, it was governed by the amending Act which had come into force then and ad valorem fee in respect of such share must be paid. AIR 1942 All 222 (223) = ILR (1942) All 376 (DB).

(2) Section worded generally — No reference is made to right or interest claimed by plaintiff — It refers to a suit for accounts -- Court cannot add words to restrict its scope — Suit for accounts instituted by person not claiming personal interest would be governed by Section 7 (iv) (b) and not by Sch. II, Art. 17 (vi). AIR 1966 All 189 (190) = 1965 All LJ 890.

(3) Section 2 of Court-fees Act as inserted by the U. P. Court-fees (Amendment) Act defines suit as including an appeal. The section therefore is also applicable to an appeal in partition suit and the court-fee payable is on the value of appellant's share which is in dispute in the appeal. AIR 1943 All 281 (282) = ILR (1943) All 507 ** AIR 1945 Oudh 207 (208) (DB) ** AIR 1954 All 313 (Pr. 4) (DB).

(4) Section 14 of Religious Endowments Act 1863 does not cover case of general prayer for accounts — Court-fee, held, was payable under Section 7 (iv)

(b) on suit for accounts. AIR 1966 All 189 (190) = 1965 All LJ 890.

(5) No dispute about a share in a partition suit — Only question is whether one particular property should be allotted to one party or the other — Art. 17 (vi) of Schedule II applies. AIR 1943 All 281 (282) = ILR (1943) All 507.

(6) Words "his claim to be a co-owner on such date is denied" should be interpreted to mean both when it is denied in its entirety or even when only the extent of the share claimed is in dispute. AIR 1944 All 199 (200) = ILR (1944) All 478.

(7) The word 'approximate' in Section 7 (iv) (b), Proviso means very near, closely resembling or fairly correct. AIR 1964 All 430 (430, 431) = 1963 All LJ 628 (DB).

(8) In a suit for accounts where the plaintiff asserts that a particular sum of money is due to him from the defendants on account of the business of partnership, it would be correct to say that it is the approximate sum due to the plaintiff within the meaning of second proviso to clause (b) of Section 7 (iv) as amended in U. P. and the plaintiff cannot be heard to say that the amount due to him cannot be ascertained without proper accounting. AIR 1964 All 430 (431) = 1963 All LJ 628 (DB).

(9) Suit for accounts — Defendant appealing against final decree should pay Court-fee on amount of decree passed against him. AIR 1970 All 197 (198) (FB).

2. M. P. Amendment. — (1) The effect of the amendment brought about by Act (IX of 1953) is to wholly abolish the application of Art. 17 to partition suits — For the purposes of sub-clause (a) of Clause (vi-a) the question whether the plaintiff who sues for partition is in possession or not also becomes irrelevant. In every suit for partition, whether the plaintiff is in or out of possession, the minimum that he must always be called upon to pay is court-fee on one-half of the value of his share in the property — Sub-clause (b) of clause (vi-a) refers to two conditions which if fulfilled the full ad valorem court-fee is payable — So far as the requirement of Section 7 (vi-a) (b) is concerned the burden is on the defendants to allege and prove ouster before the date of suit. AIR 1956 Nag 175 (Prs. 11, 12, 15).

3. Bombay Amendment (Before Bombay Act 36 of 1959). — (1) It has been held that by Section 6, Bombay Act XII of 1954 (whereby a new sub-clause, namely sub-clause (vi-a) is added to Section 7, Court-fees Act), the legislature has made it more difficult for the

Section 7 (iv) (b) — Note 3 (contd.)

party aggrieved by the decision of the lower Court in a partition suit to appeal to the High Court and therefore, the amendment is not retrospective; and the Court-fee prescribed thereby cannot apply to the appeal preferred by such aggrieved party. AIR 1955 Bom 287 (Prs. 5, 6) = ILR (1955) Bom 530.

4. Suit for share of profits of impartible property. — (1) Suit to enforce right to share in the profits of an impartible property on the ground that it is joint family property falls within this clause. ('36-43) Tax Dec (Nag) 61 (63).

5. Suit for partition by person in joint possession. — (1) This clause does not apply to a suit for partition by a co-owner not excluded from enjoyment of common property. Such a suit comes under Clause (vi) of Art. 17 of Sch. II. AIR 1943 Pat 433 (438) (DB) ** AIR 1947 Bom 259 (261, 263) (FB). (Overruling 18 Bom 209; 33 Bom 658 and 1892 Bom PJ 13.) ** AIR 1941 Lah 152 (156) = ILR (1941) Lah 308 (FB) ** AIR 1940 Mad 113 (117) = ILR (1940) Mad 259 (FB). (8 Ind Cas 512 (Mad), Overruled.) ** AIR 1934 Lah 563 (573) = 15 Lah 531 (FB) ** 1949 Trav-Co LR 225 (228) (FB) ** AIR 1955 Andhra 200 (Pr 3) ** AIR 1955 Mys 140 (Pr. 3) = ILR (1955) Mys 431 ** 1953-1 Mad L Jour 461 (461) ** AIR 1953 Mad 846 (Pr. 6) ** AIR 1953 Mys 108 (Pr. 1) = ILR (1953) Mys 325 (DB) ** AIR 1953 Cal 36 (Pr. 4) = ILR (1954) 1 Cal 400 (DB) ** AIR 1952 Kutch 36 (Pr. 5) ** AIR 1952 Punj 280 (Pr. 5) ** AIR 1950 Nag 81 (Prs. 11, 12) = ILR (1950) Nag 778 ** Madh BLJ 1955 HCR 56 (57) ** AIR 1953 Madh B 151 (Pr. 5) = ILR (1952) Madh B 345 (DB) ** AIR 1950 Bom 4 (Pr. 2) (DB) ** AIR 1949 Nag 305 (308) = ILR (1949) Nag 35 (DB) ** AIR 1949 Nag 97 (101) = ILR (1948) Nag 117 ** 1 Sau LR 82 (83) ** AIR 1945 Sind 128 (130) = ILR (1945) Kar 84 ** AIR 1945 Sind 11 (20) = ILR (1944) Kar 325 ** AIR 1942 Pat 60 (61) = 20 Pat 780 (DB) ** AIR 1930 All 443 (443, 444) = 52 All 756 ** AIR 1942 Cal 180 (200) (DB) ** AIR 1924 Nag 86 (86, 87) = 20 Nag LR 43 ** AIR 1927 Nag 248 (249) = 23 Nag LR 73 ** AIR 1940 Oudh 47 (50) = 15 Luck 76 (DB) ** AIR 1938 Rang 76 (78, 80) = 1937 Rang LR 447 (DB) ** AIR 1942 Mad 103 (1) (103) ** 163 Ind Cas 821 (821) (DB) (Nag) ** AIR 1935 All 292 (293) = 57 All 787 (DB) ** AIR 1966 Goa 1 (FB). (Plaintiff alleging that he was in joint possession of the properties in suit). ** AIR 1968 Manipur 52 ** AIR 1966 Him Pra 4. (Plaintiff in actual and constructive possession of property.) ** AIR 1961 Ker 142 (145, 146) = 1960 Ker LT 1297 ** ILR (1959) Ker 315.

[But see (1953) 6 Sau LR 170 (171). (A suit for partition of joint family

property, when plaintiff is in joint possession is governed by Sec. 7 (iv) (b).) ** (1898) 22 Bom 315 (316) (DB) ** AIR 1941 Rang 297 (298) = 1941 Rang LR 249 (DB) ** AIR 1929 Rang 211 (212) = 7 Rang 164.]

(2) It has been held that the effect of the insolvency is not to put an end to the joint possession of the coparceners where a suit for partition is brought by sons of the insolvents for their shares in the joint family properties the court-fee payable is not as in a suit for ejectment under Section 7 (v) but under Art. 17-B of Sch. II, (Mad). 1953-1 Mad L Jour 461 (461).

(3) Mysore High Court has held that a suit for partition of his share in joint family properties by a minor plaintiff on the allegation that he had become a member of the joint family by his adoption 2 or 3 months prior to the suit and that he was in constructive possession of the suit properties is chargeable with a fixed court-fee of Rs. 100 under Sch. II, Art. 11-B, Mysore Court-fees Act, and not with ad valorem court-fees on the value of his share. AIR 1955 Mys 143 (Pr. 3) = ILR (1955) Mys 436.

(4) The following case has held that even where the plaintiff in a suit for partition is in joint possession, he must pay ad valorem court-fee on the value of the share claimed by him. (1923) 73 Ind Cas 788 (790) (Pesh).

(5) The question whether a suit is one by a person in joint possession for partition or by an excluded coparcener depends on the allegations in the plaint and not on the defence or the evidence in the case. AIR 1937 Pat 514 (515) = 16 Pat 491 ** AIR 1955 Mys 140 (Pr. 3) = ILR (1955) Mys 431 ** AIR 1953 Mys 108 (Pr. 4) = ILR (1953) Mys 325 (DB) ** AIR 1950 Cal 397 (Pr. 2) (DB) ** AIR 1932 Cal 353 (355) (DB) ** AIR 1915 Oudh 208 (208) (DB) ** AIR 1930 All 443 (443, 444) = 52 All 756 ** AIR 1935 Cal 273 (275) (DB) ** AIR 1934 Lah 563 (573) = 15 Lah 531 (FB) ** AIR 1937 Mad 606 (607) ** AIR 1924 Nag 105 (105, 106) ** AIR 1940 Oudh 47 (50) = 15 Luck 76 (DB) ** AIR 1927 Pat 145 (164) = 6 Pat 506 (DB) ** AIR 1938 Rang 76 (78, 80) = 1937 Rang LR 447 (DB) ** AIR 1938 Sind 189 (190) = 32 Sind LR 124 (DB) ** AIR 1941 Sind 154 (156) = ILR (1941) Kar 102 (DB).

[See AIR 1927 Nag 248 (249) = 23 Nag LR 73.]

(6) Suit for partition by a member of a joint family — Nature of suit is not altered for purposes of court-fee merely because the defendant denies that property is joint family property. AIR 1932 Cal 227 (229) = 59 Cal 315 ** 1958-1 Mad L Jour 199 (200) ** AIR

Section 7 (iv) (b) — Note 5 (contd.)

1950 Bom 4 (Pr. 2) (DB) ** AIR 1927 Cal 411 (412) = 54 Cal 524 (DB).

[But see AIR 1924 Nag 86 (87) = 20 Nag LR 43 ** AIR 1927 Nag 248 (249) = 23 Nag LR 73.]

(7) Suit for partition by a member of a joint family — Nature of suit is not altered for purposes of Court-fee merely because the defendant denies that plaintiff was in joint possession of the suit properties. AIR 1955 Mys 140 (Pr. 3) = ILR (1955) Mys 431.

(8) Facts proved showing that plaintiff is not in joint possession — Suit not liable to be thrown out on ground of insufficient court-fee but may be dismissed on ground that plaintiff being out of possession is not entitled to sue for partition without suing for possession of the property, unless the Court deems it fit to allow an amendment of plaint. AIR 1915 Cal 357 (361) (DB). (Plaintiff may be allowed to amend his plaint where it is found he is not in joint possession.) ** AIR 1934 Lah 563 (573) = 15 Lah 531 (FB) ** AIR 1921 Oudh 174 (175) (DB) ** AIR 1938 Sind 189 (190) = 32 Sind LR 124 (DB).

[See AIR 1925 Pat 47 (47) = 3 Pat 654 (DB).]

(9) So long as there is no ouster, every member of the joint family will be deemed to be constructively in possession of the family properties and a suit for partition by a member in such circumstances must be deemed to be one by a member in joint possession and not as one by a person who is out of possession. AIR 1927 Cal 411 (412) = 54 Cal 524 (DB) ** AIR 1952 Kutch 36 (Pr. 5) ** AIR 1950 Nag 81 (Prs. 11, 12) = ILR (1950) Nag 778 ** AIR 1942 Cal 180 (200) (DB) ** AIR 1926 Mad 122 (123) ** AIR 1937 Mad 606 (607) ** AIR 1924 Pat 640 (640) (DB).

(10) Unless there are express allegations that she has been kept out of possession or is out of possession in some other way, a Hindu widow's suit for partition under Hindu Women's Right to Property Act is a suit for partition by a coparcener in joint possession and as such is governed by Sch. II, Art. 17 (vi). AIR 1943 Mad 654 (654) ** AIR 1952 Punj 280 (Pr. 5).

(11) Hindu widow as co-owner suing for partition, on allegation of division in status and claim under will of her husband — Court-fee payable would be only under Art. 17-B of Sch. 2. AIR 1960 Andh Pra 313 (315) = 1960 Andh LT 180.

6. Suit by excluded coparcener for joint possession. — (1) Suit by an excluded coparcener for joint possession — Court-fee is to be computed under this clause on the basis of the amount at which plaintiff values his relief in the

plaint. (1907) 6 Cal L Jour 651 (655) (DB) ** AIR 1934 Lah 563 (573) = 15 Lah 531 (FB) ** 1949 Jaipur LR 237 (DB).

[See also AIR 1942 Cal 180 (200) (DB).]

(2) A distinction should be made between a suit filed by coparceners against an alienee for partition and possession of their shares, and suits, filed by coparceners, not asking for partition, not asking for their specific share in the property, but merely asking for joint possession with the alienee. In the first case, it is clearly a suit for possession. The second case falls under Section 7 (iv) (b), and not under Section 7 (v). AIR 1953 Bom 308 (Pr. 9) = ILR (1953) Bom 321.

7. Suit for partition by excluded coparcener. — (1) Suit for partition by an excluded coparcener comes under this clause and court-fee is to be computed on basis of amount at which plaintiff values relief in his plaint. AIR 1940 Oudh 47 (51) = 15 Luck 76 (DB) ** AIR 1955 Mad 682 (Prs. 5, 6) = ILR (1956) Mad 341 (DB) ** AIR 1924 Nag 86 (87) = 20 Nag LR 43 ** AIR 1941 Rang 297 (298) = 1941 Rang LR 249 (DB).

(2) Suit for partition by an excluded coparcener — Court-fee payable is ad valorem according to the value of the share claimed by the plaintiff. AIR 1943 Mad 655 (655) ** AIR 1954 Mad 1126 (Pr. 10) = ILR (1955) Mad 810 ** AIR 1952 Trav-Co 509 (Pr. 11) = ILR (1952) Trav-Co 407 (FB) ** AIR 1955 Andhra 200 (Pr. 3) ** 1949 Trav-Co LR 225 (229) (FB) ** AIR 1947 Nag 243 (245) = ILR (1947) Nag 220 ** AIR 1945 Sind 128 (131) = ILR (1945) Kar 84 ** AIR 1942 Pat 60 (62) = 20 Pat 780 (DB) ** AIR 1939 Pat 274 (275) = 18 Pat 267 (DB) ** AIR 1938 Mad 474 (475) ** ('36-43) Tax Dec (Nag) 73 (75) (DB) ** (1912) 34 All 184 (185) (DB) ** AIR 1930 All 443 (443, 444) = 52 All 756 ** AIR 1942 Cal 180 (200) (DB) ** AIR 1934 Lah 563 (573) = 15 Lah 531 (FB) ** AIR 1927 Nag 248 (249) = 23 Nag LR 73.

(3) If the extent of property is definitely stated in plaint, plaintiff is bound to value his suit according to share claimed by him and pay court-fees on value of such share. (1902) 15 CPLR 120 (122).

(4) Where the plaintiff's exclusion has been only in regard to a portion of joint family property he will have to pay ad valorem court-fee only on the value of his share in the particular portion from which he has been excluded. AIR 1949 Nag 305 (309) = ILR (1949) Nag 35 (DB) ** AIR 1959 Madh Pra 181 (182) = 1958 MPLJ 704.

(5) Suit for declaration, injunction, and partition as regards immovable joint family property — Original prayer as exclusive owner and for possession drop-

Section 7 (iv) (b) — Note 7 (contd.)

ped—Suit would fall under S. 7(iv)(b) and (c) and not under Section 7 (v) and the plaintiff would have a right to value relief sought at his own valuation. AIR 1963 Guj 291 (294) = (1963) 4 Guj LR 1022.

(6) Plaintiff's claim for partition and accounts, the family being joint at the time of suit and the plaintiff having been ousted from possession — Omission to value the relief for partition for purposes of court-fee though valuation for purposes of jurisdiction was given — Plaintiff paying fixed court-fee under Art. 17 (vi) of Second Schedule of the Act — **Held**, the plaintiff was bound to pay ad valorem court-fee under Section 7 (iv) (b) on the valuation given for purposes of jurisdiction which in view of Section 8 of Suits Valuation Act is the same for court-fees also. AIR 1967 Punj 389 (390) = 68 Pun LR 54 (FB).

(7) Suit for separate possession of share in joint property as contradistinguished from joint family property — Plaintiff neither in actual nor constructive possession — Section 7 (iv) (b) and Art. 17 (vi) do not apply — Court-fee payable is ad valorem under Section 7 (v). 1962 Raj LW 357 = ILR (1962) 12 Raj 766.

8. Suit for declaration of title. — (1) A suit for a mere declaration of the plaintiff's title will not come under this clause. 1895 Pun Re No. 104, p. 490 (492) (DB).

(2) This clause does not apply to a suit for partition by a Hindu coparcener. Wording of the clause seems to contemplate a suit for enforcement of an abstract claim of right. (1909) 33 Bom 658 (663) (DB).

(3) This clause appears to be designed to cover merely the rare, but quite possible, cases where the plaintiff's status as a coparcener is in dispute and is sought to be enforced. (1910) 8 Ind Cas 512 (516, 517) (FB) (Mad). (Per Ayling J.)

(4) Plaintiff who is in joint possession and sues for partition need not pay ad valorem court-fee on value of share claimed by him but need only pay a fixed court-fee of Rs. 10 under Sch. II, Art. 17, Cl. (vi). If plaintiff is out of possession and is suing for recovery of possession of or the establishment of title to the property, he would have to pay ad valorem court-fee. (1882) 8 Cal 757 (758) ** AIR 1962 Assam 137 (139, 140) = ILR (1962) 14 Assam 453 (DB). (Suit for declaration of title to property by person in constructive possession — Partition of property claimed — Proper Court-fee payable is according to Sch. II, Art. 17 (vi)).

(5) Even if a plaintiff merely sues to establish his title to the share he claims

he would still have to pay an ad valorem court-fee on value of that share. (1894) 18 Bom 209 (211) (DB).

(6) Suit by member of joint Hindu family for declaration that he was entitled to a share in plaint items unaffected by alienations made by his father and for partition and possession — Alienees in possession impleaded — Suit was one for declaration — When the plaintiff challenged the alienations the allegation amounted to saying that the alienees were unauthorised persons and therefore court-fee had to be paid on the basis that the plaintiff was seeking recovery of possession of his share of the alienated property. AIR 1960 Mys 104 (105) = 37 Mys LJ 773 (DB).

(7) Suit for joint title and possession — Relief of confirmation of possession claimed — Ad valorem fee paid — If necessary Court-fee is paid, relief for recovery of possession can be granted even though prayer is for confirmation of possession. AIR 1967 Orissa 81 (82) = ILR (1966) Cut 913.

9. Suit by purchaser from co-owner. —

(1) Purchaser of share of one of the co-owners suing for possession — Court-fee paid with reference to value of share claimed by him is enough — He need not pay any separate court-fee for determination of extent of his vendor's share. 1881 All WN 161 (161) (DB) ** AIR 1952 Nag 202 (Pr. 30) = ILR (1949) Nag 526 (DB).

(2) Purchaser of a part of a coparcener's interest in joint family property sued for partition — Court-fee is payable on value of property he has purchased and not on value of the coparcener's whole interest in family property, though prayer in the suit is for ascertaining share of the coparcener from whom he has purchased. 1882 Bom PJ 148.

(3) Person purchasing share of coparcener in certain land suing for possession of such share — Person asking for declaration of entire share of his vendor and then for recovery of possession of what he had purchased out of that share — Separate court-fee is necessary for two reliefs — Claim for partition falls under Sch. II, Art. 17 (vi) — Additional fee for recovery of possession of vendor's possession must also be paid. AIR 1945 Bom 336 (337) = ILR (1945) Bom 729 (DB).

[See also AIR 1949 Mad 208 (209, 210).]

(4) Where the alienee from a Hindu coparcener is in actual possession of the property and sues for partition, he is not bound to pay court-fee under Section 7 (v). Payment of court-fee under Sch. II, Art. 17-B (Mad) is sufficient. AIR 1951 Mad 656 (1) (Pr. 4) ** AIR 1957 Andh Pra 724 (724).

(5) Pending suit for partition by member of a joint family, he transferred

Section 7 (iv) (b) — Note 9 (contd.)

his interest in suit properties partially to another person — Such person made a party to suit — Court deciding that court-fee of Rs. 10 under Sch. II, Art. 17 (vi) is sufficient — Order cannot be changed merely because subsequently plaintiff has transferred a portion of his interest. AIR 1925 Pat 47 (48) = 3 Pat 654 (DB) ** AIR 1947 Mad 285 (286) = ILR (1947) Mad 763.

(6) Where original plaintiff subsequently gets himself transferred as defendant leaving alienee of his entire interest as sole plaintiff suit becomes one by a person claiming to be an alienee from a coparcener for partition against other members. Court-fee must be paid under Section 7 (v) ad valorem on the value of share claimed. AIR 1947 Mad 285 (286) = ILR (1947) Mad 763.

(7) Where an alienee from a coparcener brings a suit for a general partition against the alienor and other members of joint Hindu family, with a prayer that the properties be divided in such a way as to allot the properties alienated wholly to the share of his alienor, he has to value the relief under Section 7 (v). The suit is not governed by Sch. II, Art. 17-B (Mad). (1955) 68 Mad LW 554 (555). (The plaintiff must pay court-fees under Section 7 (v) only in regard to the share which is in excess of the property in the possession of the plaintiff).

10. "Joint family property." — (1) The clause does not apply to a suit relating to property owned by the members of a Mahomedan family. AIR 1934 Lah 563 (573) = 15 Lah 531 (FB). (Held AIR 1932 Lah 421, taking the view that it applies to Mahomedans is to that extent erroneous.) ** ('36-43) Tax Dec (Nag) 33 (34) ** AIR 1924 Mad 207 (208).

[See also AIR 1929 Rang 211 (212) = 7 Rang 164.]

(2) Where property is owned as tenants-in-common by members of a Mahomedan or some other family and there is no ouster one of them can, relying on the principle of constructive possession, sue for partition by paying only a fixed court-fee of Rs. 10 under Sch. II, Art. 17, Cl. (vi). AIR 1941 Lah 152 (156) = ILR (1941) Lah 308 (FB). (**Overruling** AIR 1939 Lah 568.) ** AIR 1952 Mad 539 (Pr. 1a) ** ('36-43) Tax Dec (Nag) 33 (34) ** AIR 1924 Mad 207 (208) ** AIR 1935 Pesh 30 (33) (DB) ** AIR 1920 Mad 585 (585) = 43 Mad 396 (DB).

[But see (1894) 4 Mad L Jour 110 (111) (DB).]

(3) If plaintiff is out of possession and sues for partition he will have to pay ad valorem fee on his plaint according to the value of the share claimed by him. AIR 1939 Mad 506 (507) (DB) ** AIR 1947 Nag 243 (245) = ILR (1947)

Nag 220 ** AIR 1938 Lah 275 (277) = ILR (1938) Lah 240 (DB) ** AIR 1938 Mad 278 (279) = ILR (1938) Mad 309 (DB) ** AIR 1935 Pesh 30 (33) (DB) ** (1909) 3 Ind Cas 304 (305) (DB) (Cal) ** AIR 1916 Low Bur 72 (73) (DB).

(4) Where there has been a division in status, the property which belonged to the joint family will cease to be joint family property. A suit for partition by metes and bounds in such cases will not come under this clause. In such a case where the plaintiff is in joint possession, the court-fee on the suit for partition will have to be the fixed court-fee of Rs. 10 under Sch. II, Art. 17, Cl. (vi). ('36-43) Tax Dec (Nag) 33 (34) ** AIR 1949 Nag 305 (308) = ILR (1949) Nag 35 (DB) ** AIR 1931 Mad 49 (49) ** AIR 1933 Mad 430 (431) (DB).

(5) Plaintiffs alleged that they were in joint possession of emoluments of an office and asked Court to frame a scheme whereby plaintiffs and defendants might enjoy the emoluments separately — Held that suit was of a nature similar to a suit for partition and was governed by Sch. II, Art. 17 (vi). AIR 1935 All 292 (293) = 57 All 787 (DB).

(6) Where a person sues for partition and separate possession of a share in the property of deceased, of which he was never in possession, the suit is essentially one of title and the plaintiff is liable to pay ad valorem court-fees on the market value of the interest claimed by him at the time of the institution of his suit. AIR 1950 Kutch 60 (Pr. 2).

(7) Among joint families, properties are sometimes purchased in the names of the female members of the family. So that fact will not make the properties any the less joint family properties and if a member of the family sues for partition on the basis that the family is in possession of the properties the plaintiff's suit will be governed by Art. 17 (vi) of Sch. II, (Art. 17-B, Sch. II (Mad).) AIR 1955 Andhra 200 (Pr. 6).

(8) Where the benamidar is in actual possession and is claiming adversely to the family the plaintiff will be liable to pay court-fee under Section 7 (v) in respect of his relief for possession of these properties. AIR 1955 Andhra 200 (Pr. 6).

11. Appeal in partition suit — Court-fee. — (1) Plaintiff who is not in joint possession suing for partition and separate possession of his share and on his suit being dismissed, appealing from decree — He must pay ad valorem court-fee on appeal according to value of share claimed by him. (1909) 3 Ind Cas 304 (305) (DB) (Cal) ** AIR 1930 All 443 (443, 444) = 52 All 756 ** 1892 Bom PJ 13.

Section 7, Para. (iv), Clause (b) — Note 11 (contd.)

(2) It has been held that in a suit that has to be valued for purposes of court-fee under Section 7 (iv) (b), the plaintiff may value the relief at his own figure and the valuation of the relief falling under Section 7 (iv) (b) for purposes of appeal is the same as the valuation in the plaint. AIR 1955 Mad 682 (Prs. 5, 6) = ILR (1956) Mad 341.

(3) Where plaintiff is in joint possession, actually or constructively, and sues for partition and on his suit being dismissed, appeals from such decree, he is liable to pay only a fixed fee of Rs. 10 on his appeal under Sch. II, Art. 17, Clause (vi). (1936) 163 Ind Cas 821 (821) (Nag) (DB) ** AIR 1953 Mys 108 (Pr. 4) = ILR 1953 Mys 325 (DB) ** AIR 1930 All 443 (443, 444) = 52 All 756 ** AIR 1932 Cal 227 (229) = 59 Cal 315 ** AIR 1939 Oudh 90 (91) = 14 Luck 346 (DB).

(4) The fact that the lower Court has found that the plaintiff is not in joint possession, or that he is not entitled to any interest in the property, is immaterial for the purpose of calculating the court-fee on the memorandum of appeal. AIR 1930 All 443 (443, 444) = 52 All 756.

[But see AIR 1937 Pat 514 (515) = 16 Pat 491 ** AIR 1939 Oudh 90 (90, 91) = 14 Luck 346 (DB).]

(5) Plaintiff alleging himself to be in joint possession suing for various reliefs, such as partition, declaration, injunction, etc. — Suit dismissed. In appeal plaintiff confining himself to relief as to partition — It is enough if he pays fixed court-fee of Rs. 10 under Sch. II, Art. 17, Cl. (vi) on such appeal. AIR 1932 Cal 353 (355) (DB) ** AIR 1932 Cal 227 (229) = 59 Cal 315.

[See also AIR 1950 Pat 317 (Prs. 3, 4) = 29 Pat 331 (DB).]

(6) Plaintiff suing for partition on allegation of his being in joint possession with defendant — Suit decreed — Defendant appealing — He need pay only fixed court-fee of Rs. 10 on his memo of appeal. AIR 1930 Rang 164 (165) (DB) ** AIR 1952 Orissa 113 (Pr. 3) = ILR (1951) Cut 11 ** AIR 1950 Bom 4 (Pr. 3).

[See also AIR 1919 Pat 403 (404).]

(7) Only question raised by defendant in appeal from a decree for partition in a suit by a minor being that partition not being for benefit of the minor should not be decreed — Subject-matter in appeal is only a change in mode of enjoyment — Court-fee payable is under Sch. II, Art. 17 (vi). ('36-43) Tax Dec (Nag) 94 (94).

(8) Plaintiff alleging dispossession from joint property and suing for partition — Suit decreed — Defendant appealing from decree must pay ad valorem court-fee on amount at which suit

was valued in plaint. ('36-43) Tax Dec (Nag) 73 (74) ** 1908 Pun Re No. 150, p. 681 (683).

(9) Suit for partition and separate possession in which plaintiff's right to share is in dispute decreed — Defendant appealing from decree raising same plea — Court-fee payable on appeal is ad valorem on value of plaintiff's share. ('36-43) Tax Dec (Nag) 87 (88) ** (1936-1943) Tax Dec (Nag) 73 (74, 75).

(10) In a partition suit, trial Court holding that certain property which is alleged to be wakf property and as such impartible, is liable to partition and including it in preliminary decree for partition — Decision amounts to declaration that property is partible — Court-fee on memorandum of appeal with reference to that property need not be ad valorem. AIR 1931 Lah 170 (175) (DB).

(11) Appeal against final decree for partition — No dispute as to the extent of share to which each party is entitled — Appeal only seeking to impeach mode of partition — Under Sch. II, Art. 17, Cl. (vi) fixed court-fee of Rs. 10 on memorandum of appeal is sufficient. AIR 1943 All 281 (282) = ILR (1943) All 507 ** (1921) 62 Ind Cas 979 (980) (Lah) (DB).

(12) Suit for partition by vendee of a share of one of heirs of deceased Mahomedan — Preliminary decree directed plaintiff to pay a proportionate share of mortgage-money due on a mortgage executed before sale in favour of plaintiff — Plaintiff appealed seeking to delete the direction — Held, that subject-matter of appeal related to the mode of enjoyment — Court-fee payable was under Sch. II, Art. 17 (vi). ('36-43) Tax Dec (Nag) 79 (80).

(13) An appeal against an order under Section 4, Partition Act (1893) is governed by Cl. (v-a) of Art. 17, Sch. II (Bengal) and under this Article a fixed court-fee of Rs. 15/- is payable on the memorandum of appeal. AIR 1957 Cal 65 (66) (DB).

(14) Appeal from final decree passed in suit for partition — It is necessary to pay ad valorem court-fee on amount alleged to have been wrongly allowed to other party. AIR 1924 Lah 325 (326) (DB).

(15) Where appellant claims more amount than what has been awarded to him or disputes amount awarded to other party he must pay ad valorem court-fee on amount in dispute. AIR 1935 Lah 14 (15) (DB) ** (1933) 142 Ind Cas 329 (1) (829) (Lah) (DB) ** AIR 1932 Lah 127 (127) (DB).

(16) Parties to partition suit being in possession of different items of properties — Appeal against decree for partition—Appellant questioning decree only so far as property in his possession is concerned — It is sufficient if he pays

Section 7, Para. (iv), Clause (b) --**Note 11 (contd.)**

court-fee on value of property in his possession. (1873) 10 Bom HCR 444 (445) (DB).

12. Liability of defendant to pay court-fee in partition suit. — (1) There is no provision in the Act which makes the defendant in a suit for partition liable for court-fee in respect of the separation of his share in the property. AIR 1944 Bom 58 (58) ** AIR 1954 Trav-Co 315 (Pr. 3) = ILR (1954) Trav-Co 146 (FB). (34 Cochin LR 221, **Rel. on.**) ** AIR 1949 Mad 471 (Pr. 5) (DB) ** (1905) 29 Bom 79 (81) (DB) ** AIR 1936 Lah 1 (3, 4) = 16 Lah 901 (DB) ** AIR 1932 Mad 722 (723) = 55 Mad 975 (DB) ** AIR 1926 Pat 154 (156) (DB) ** AIR 1941 Sind 50 (67) = ILR (1940) Kar 534. ** 1961 Jab LJ 326 = 1961 MPLJ 1202. (Suit for partition — Defendant not liable to pay Court-fees for separating his share.)

[But see (1899) 23 Bom 184 (186) (DB) ** (1900) 24 Bom 128 (131) (DB) ** (1913) 20 Ind Cas 177 (178) (Lah) (DB) ** AIR 1918 Mad 443 (444) (DB) ** AIR 1939 Mad 576 (577) = ILR (1939) Mad 913 (DB) ** AIR 1942 Mad 364 (365).]

(2) Even the claim of the defendants to the partition of certain properties which are not included in the plaint, by itself cannot cast a burden on the defendants to pay court-fee on the value of such property. AIR 1954 Trav-Co 315 (Pr. 4) = ILR (1954) Trav-Co 146 (FB).

(3) Suit for partition — Stranger in possession of some of joint family property also made party — Defendant claiming that their share be separated and put in their possession — No court-fee payable. AIR 1945 Nag 273 (275) = ILR (1945) Nag 856.

13. Amendment of plaint in partition suit — Court-fee. — (1) Ad valorem fee payable on a partition suit — Fresh items of property added after institution of suit on objection taken by defendant that suit must include all joint properties—Plaintiff is bound to pay extra court-fee in respect of added items. (1887) 14 Cal 835 (838).

(2) Plaintiff in a suit for partition allowed to amend his plaint by including some fresh items of property — Valuing additional items for purposes of court-fee on market-value of property at date of amendment and not at date of original institution of suit was held proper. (1873) 10 Bom HCR 444 (447) (DB).

(3) A plaintiff cannot be compelled to amend his plaint by inclusion of certain property and to pay court-fee thereon. AIR 1943 Bom 441 (442) = ILR (1945) Bom 6.

(4) In a partition suit after preliminary decree, a new born person added as a plaintiff and given a share — De-

fendant's appeal is against modification of the decree — Court-fee payable on memo of appeal is ad valorem on value of such share. ('36-43) Tax Dec (Nag) 25 (26).

(5) After a preliminary decree in a suit for partition the plaintiff applied to the Court that by reason of his father's death his share was increased from 1/8th to 1/7th. It was held that the plaintiff would not be required to pay upon the footing of his augmented share. It was only when a decree was passed in his favour increasing his share from 1/8th to 1/7th that the plaintiff would be called upon to pay the amount of stamp duty upon the difference between his increased share which was 1/7th and the 1/8th share which was awarded to him by the preliminary decree. AIR 1957 Bom 59 (61) = ILR (1957) Bom 175 (DB).

14. Suit for re-opening of partition. —

(1) Partition already taking place — Plaintiff filing suit alleging that partition deed is not binding on him as it was executed under coercion and praying for a fresh partition being made — Suit is in substance a suit for a declaration and further relief—Clause (c) of this paragraph will apply. AIR 1931 Mad 94 (96).

(2) Plaintiff sued only for partition alleging that an alleged deed of partition taken by defendant was executed by plaintiff when he was a minor and that deed was a colourable transaction and was never acted upon, and that parties continued to be joint in spite of the deed — **Held**, that relief of declaration either with or without consequential relief cannot be imported into plaint and court-fee payable was fixed fee under Sch. II, Art. 17 (vi). AIR 1942 Pat 60 (62) = 20 Pat 780 (DB).

(3) Where the plaintiffs bring a suit for partition of joint family property on the allegation that a previous partition deed between the parties which was subsequently affirmed by a compromise decree was illusory, fraudulent, inequitable and void and specifically prays for declaration to that effect, the relief of possession by partition must be held to be consequential to the relief of declaration and the suit would be governed by Section 7 (iv) (c) for purposes of Court-fees and ad valorem court-fees would be payable. AIR 1954 Pat 406 (Pr. 6) (DB).

(4) If the plaintiffs put their case in the alternative and therein they assume an initial partition but want it to be ignored or set aside and fresh partition to be made, it cannot be taken to be a case involving mere change in the mode of enjoyment of property jointly belonging to different persons. To such

Section 7, Para. (iv), Clause (b) — Note 14 (contd.)

a case Section 7 (iv) will apply. Madh BLJ 1955 HCR 56 (57).

(5) In a partition suit plaintiff alleging that previous partition effected between parties was unfair and that he is entitled to more property than what was allotted to his share — Value of suit for purposes of court-fee is difference between value of property in his possession and value of property claimed by him as falling to his share. AIR 1939 Pat 274 (276) = 18 Pat 267 (DB).

(6) It has been held that where in a partition suit the plaintiff alleges that the previous partition effected between the parties was brought about by fraud and that he was entitled to more property than what was allotted to his share, in such a case the plaintiff cannot say that he need only pay court-fee on the valuation representing the difference between the value of the property in his possession and the additional property that might be allotted to him on the re-partition that might be effected, should he succeed in the suit. AIR 1955 Andhra 200 (Prs. 11, 12).

(7) In a suit to set aside a partition deed so far as plaintiffs are concerned, court-fee to be paid is on value of the plaintiffs' share and not on value of whole property. AIR 1932 Mad 491 (493).

(8) Plaintiff abandoning his claim to portion of property allotted to him at a prior partition and seeking a re-partition of entire estate, throwing into hotch-pot that portion of it which has been in his exclusive possession — He cannot be given credit for any part of court-fee payable on ground that he is in possession of a portion of estate of which he seeks partition. AIR 1941 Sind 154 (158) = ILR (1941) Kar 102 (DB).

15. Other reliefs in suit for partition — Court-fee. — (1) Suit for partition and accounts — Court-fees must be paid both in respect of prayer for partition and in regard to claim for accounts. AIR 1936 Mad 562 (563) ** AIR 1952 Trav-Co 509 (Pr 19) = ILR (1952) Trav-Co 408 (FB) ** AIR 1953 Mad 846 (Pr. 6) ** AIR 1933 Mad 431 (432) ** AIR 1927 Pat 413 (413).

[But see AIR 1930 Pat 1 (5, 6) = 8 Pat 818 (DB).]

(2) Where the relief of accounting or any other relief is an inherent part of the main relief of partition and implied therein the court-fee paid on the relief for partition would cover the other relief also. AIR 1953 Mad 846 (Pr. 6).

(3) Where partition cannot be granted without granting some other relief the plaintiff must pay court-fee in respect of such relief also though he may not have expressly asked for such relief. AIR 1951 Cal 410 (Pr. 1) (DB).

(4) Immovable property belonging to the family alienated by manager of the family and in possession of alienee — Plaintiff challenging alienation — Plaintiff must pay court-fee in respect of such property under para (v) of this section. AIR 1936 Mad 411 (412) ** AIR 1936 Mad 562 (563) ** AIR 1940 Mad 113 (118) = ILR (1940) Mad 259 (FB).

(5) It has been held that even where the alienating coparcener continued to be in possession in the absence of any particulars as to alienations given by the plaintiff such possession must be taken to be on behalf of the alienee and court-fee is payable under Section 7 (v). AIR 1947 Mad 16 (17).

[But see AIR 1951 Mad 732 (Pr. 4). (AIR 1947 Mad 16, Diss; AIR 1940 Mad 113 = ILR (1940) Mad 259 (FB), Foll.)]

(6) Decree obtained against the family — Decree to be set aside before partition can be effected as claimed by plaintiff — Court-fee must be paid in regard to setting aside of such decree — Plaintiff must pay court-fees in respect of whole amount for which decree may have been passed. AIR 1944 Mad 19 (19) = ILR (1944) Mad 430 ** AIR 1947 Mad 16 (17) ** AIR 1940 Mad 113 (118) = ILR (1940) Mad 259 (FB) ** AIR 1927 Nag 239 (240).

(7) In a partition suit plaintiff impleading certain creditors and claiming a declaration that debts alleged to be due to them were not binding on his share, plaintiff not being a party to the transaction — Separate court-fee in respect of each debt must be paid. AIR 1937 Mad 876 (878) ** AIR 1935 Mad 419 (420) = 58 Mad 821.

(8) Under an alienation of family property by father, alienee not given possession — Plaintiff in suit for partition is not bound to pay court-fee for avoiding alienation. AIR 1940 Mad 113 (118) = ILR (1940) Mad 259 (FB).

(9) Alienee given possession — Plaintiff seeking to recover possession treating alienation as not binding on him — He is not bound to ask for cancellation of the deed and pay court-fee therefor. AIR 1949 Mad 105 (106) ** AIR 1947 Nag 243 (246) = ILR (1947) Nag 220. (In such cases even if plaint contains prayer for declaration or cancellation it is to be considered as one for incidental but unnecessary relief.)

(10) Suit for partition — Plaintiff challenging various transactions relating to joint family property entered into by manager and asking for appointment of a receiver to manage properties and to collect the rents and profits — He need not pay a separate court-fee in respect of prayer for appointment of a receiver. AIR 1940 Mad 113 (119) = ILR (1940) Mad 259 (FB).

for declaratory decree and consequential relief;

(c) to obtain a declaratory decree or order, where consequential relief is prayed,

Section 7, Para. (iv), Clause (b) — Note 15 (contd.)

(11) A suit for partition of the joint Hindu family property, so far as the properties sought to be partitioned stand in the name of strangers to the co-parcenary, must be regarded as a suit for declaration of title and consequential relief and consequential ad valorem court-fees are payable. AIR 1951 Pat 633 (Pr. 3) = 29 Pat 219 (DB).

(12) It has been held that a suit which involved a declaration of title of a stranger to the joint family is also to be treated as a suit for partition and is governed by Sch. II, Art. 17 (V-A) (Bengal). AIR 1957 Cal 651 (653) (DB). (AIR 1951 Cal 410, Not foll; AIR 1951 Pat 633 = 29 Pat 219, Dist.) ** AIR 1958 Cal 537 (538, 539) (DB). (AIR 1957 Cal 651, Foll.)

(13) In a suit for partition pure and simple where there is no dispute regarding the title or the share of the plaintiffs, the valuation for the purpose of jurisdiction should be the valuation of the entire properties. But where there is a dispute with regard to the title or share of the plaintiffs which require determination by the Court, the valuation for the purpose of jurisdiction should be the valuation of the interest claimed by the plaintiffs. 1968 PLJR 400.

**SECTION 7, PARA (IV), CLAUSE (C)
— SYNOPSIS**

1. Scope and applicability.
2. Suit for declaration of title and possession.
3. Suit for declaration and injunction.
4. Suit to set aside decrees and instruments — General.
5. Suit for setting aside decree and execution sale.
6. Suit for setting aside decree and for refund of money realized under it.
7. Suit for setting aside decree and for injunction against execution.
8. Suit for avoiding deed of transfer or decree — Plaintiff not entitled to sue for possession — Effect on court-fee.
9. Suit to set aside decree for partition and for fresh partition.
10. Minor.
11. Hindu joint family.
12. Suit by Hindu reversioners.
13. Malabar tarwad.
14. Deed of adoption.
15. Suit under Section 53, Transfer of Property Act.
16. Other illustrative cases.

17. Mode of valuation under para (iv) (General).

18. Court-fee and jurisdiction.

19. Valuation of suits coming under Clause (c).

20. Suit to set aside deed or decree — Mode of valuation.

21. Court-fee on appeal — Applicability of the provisions of Section 7 and Sch. II, Article 17.

22. State Amendments.

1. Scope and applicability. — (1) Suits for bare declarations are provided for by Section 42 of the Specific Relief Act. Under that section the declaration sought for must relate to the title to any legal character or to any right as to any property and the plaintiff must be unable to seek further relief than a mere declaration of title. AIR 1921 PC 50 (51) = 47 Ind App 255 = 48 Cal 110 ** (1899) 22 Mad 270 (282) = 26 Ind App 16 (PC).

[See however AIR 1950 Assam 214 (Prs. 6, 7) = ILR (1950) 2 Assam 140 (DB). (Specific Relief Act does not apply to Khasi and Jaintia Hills and a suit for a mere declaration of title without the consequential relief of possession and without payment of ad valorem court-fee is maintainable.)]

(2) The following cases hold that the section is not exhaustive on the subject of declaratory decrees and Courts in India have power to pass merely declaratory decrees in cases not falling within the section. AIR 1933 All 488 (490) = 55 All 791 (FB) ** AIR 1930 Cal 787 (793) = 58 Cal 474 (DB) ** AIR 1920 Mad 665 (665) = 43 Mad 410 (DB) ** AIR 1928 Rang 143 (144) = 6 Rang 188 (DB). [But see (1912) 39 Cal 704 (708) (DB).]

(3) In the following cases it has been held that unless the declaration sought for is of the character contemplated by Section 42 of the Specific Relief Act, the suit will not come under Sch. II, Article 17 (iii). AIR 1938 Oudh 201 (203) = 14 Luck 176 (FB) ** AIR 1938 Oudh 1 (7) = 13 Luck 628 (FB) ** AIR 1934 Cal 674 (675, 676) = 61 Cal 513.

(4) The question whether Section 7 (iv) (c) or Article 17 of Sch. II of the Court-Fees Act applies to a particular case must be determined according to the relief actually claimed in the plaint in a particular case and not on what relief the plaintiff should ask for in order to succeed. It is not open to Court to import into the plaint or to read into it any relief which has not been asked for by the plaintiff only in order to levy higher Court-fees. AIR 1967 Punj 263 = 69 Pun LR (D) 52 (FB).

(5) The question whether a suit comes within the terms of Section 42 of the

Section 7, Para (iv), Clause (c) — Note 1 (contd.)

Specific Relief Act, or not will not affect the question of court-fees which must be determined on the basis of what the plaintiff actually sues for and not on the basis of what he is entitled, under the law, to sue for. AIR 1944 Pat 17 (20) = 22 Pat 783 (FB) ** AIR 1953 SC 28 (Pr 8) = 1953 SCR 197 ** AIR 1941 Lah 97 (104) = ILR (1941) Lah 451 (FB) ** AIR 1957 Pat 711 (711) (DB) ** AIR 1922 Pat 392 (392, 393) = 1 Pat 1 (DB) ** AIR 1967 Madh Pra 221 = 1967 MPLJ 242.

(6) Where in a suit the plaintiff merely seeks a declaration, the Court has to consider whether a consequential relief is implicit in the declaration. If that is so, the provision applicable must necessarily be Section 7 (iv) (c). If the necessary effect of a declaration granted in accordance with the prayer made in a suit is to grant a consequential relief also, for instance, the setting aside of a previous decree, *ad valorem* Court-fee is realisable under Section 7 (iv) (c). AIR 1961 Pat 470 (472) = ILR 39 Pat 571.

(7) If, on the whole, and in substance, a suit appears to ask for some relief other than or in addition to a mere declaration the suit must be held not to be one for a bare declaration although the prayers in the plaint may have been cast in a declaratory form. AIR 1944 Pat 17 (21, 23) = 22 Pat 783 (FB) ** AIR 1941 Lah 97 (104) = ILR (1941) Lah 451 (FB) ** AIR 1938 Oudh 1 (6, 7) = 13 Luck 628 (FB). (AIR 1936 Oudh 317 (DB), **Overruled.**) ** AIR 1957 Pat 711 (711) (DB) ** AIR 1949 Nag 211 (Pr 6) = ILR (1949) Nag 66 ** AIR 1944 All 271 (271, 272) = ILR (1944) All 336 ** AIR 1946 Nag 30 (35) = ILR (1945) Nag 975 (DB) ** AIR 1943 Oudh 361 (364, 365) ** AIR 1942 Lah 209 (209, 210) (DB) ** AIR 1942 Pesh 62 (63) (DB) ** AIR 1927 Cal 775 (775) (DB) ** 1886 All WN 54 (55) (FB).

(8) The maintainability or otherwise of a suit for a bare declaration may be taken into consideration in determining what is the substance of the plaint. AIR 1941 Lah 97 (104) = ILR (1941) Lah 451 (FB) ** AIR 1922 Pat 404 (405) = 1 Pat 197 (DB).

[See (1912) 39 Cal 704 (709) (DB).]

(9) Plaint only asking for a bare declaration will be governed for purposes of court-fee by Sch. II, Article 17 (iii) — It is not permissible to hold that suit is of some other character merely because in the circumstances disclosed in plaint Court considers that suit for a bare declaration is not maintainable under law. AIR 1941 Lah 97 (105) = ILR (1941) Lah 451 (FB) ** AIR 1955 Him Pra 61 (Pr 5) ** (1951) 88 Cal L Jour 133 (136). (AIR 1945 Cal 354 = ILR (1945) 2 Cal 509, **Dissented.**) ** AIR 1937 Sind 248 (250) ** (1876) 1 Bom 538 (542) (DB) ** AIR

1943 Lah 39 (41) (DB) ** AIR 1937 All 411 (412) = ILR (1937) All 259 (DB) ** AIR 1933 All 350 (351) = 55 All 274 (DB) ** AIR 1922 Pat 392 (392, 393) = 1 Pat 1 (DB) ** AIR 1967 Madh Pra 221 = 1967 MPLJ 242.

(10) In body of plaint, plaintiff specifically challenging order of dismissal — In relief clause plaintiff claiming decree for arrears of salary and any other relief — Court-fees paid on consequential relief without paying any court-fees on declaration — Court can grant a decree for arrears of salary — Relief of declaration could be implicit in residuary item on prayer clause under the description "any other relief". AIR 1959 Madh Pra 46 (48) = 1958 MPLJ 681.

(11) Suit by stranger styled as one for cancellation of sale-deed — Relief claimed to the effect that sale deed was void and inoperative against plaintiff — Suit must be treated, for Court-fee, as for simple declaration under Sch. II, Article 17 (III). AIR 1965 J and K 33 (34, 35) = 1964 Kash LJ 397.

(12) Plaintiff omitting to ask for further relief to which he is entitled — Suit liable to be dismissed under proviso to Section 42 of Specific Relief Act — Court cannot treat plaint as including prayer for such relief and to hold that suit comes under Section 7 (iv) (c). AIR 1944 Pat 17 (20) = 22 Pat 783 (FB) ** AIR 1953 SC 28 (Pr 8) = 1953 SCR 197 ** Madh BLJ 1955 HCR 497 (498, 499) ** AIR 1952 Madh B 147 (Pr 70) ** AIR 1949 Nag 211 (Pr 12) = ILR (1949) Nag 66 ** AIR 1942 Pat 60 (62) = 20 Pat 780 (DB) ** AIR 1936 Oudh 317 (319) (DB) ** AIR 1935 All 667 (668) = 57 All 943 (DB) ** AIR 1933 All 488 (489) = 55 All 791 (FB) ** AIR 1924 Cal 183 (184) ** (1936-1943) Tax Dec (Nag) 51 (52).

[See AIR 1919 Lah 63 (64, 65) (DB).]

(13) Number of separate declarations asked for in a suit — Separate court-fee of Rs. 10 will have to be paid in respect of each declaration. AIR 1933 All 350 (351) = 55 All 274 (DB) ** (1895) 18 Mad 459 (460) (DB) ** (1891) 13 All 389 (390, 391) (DB).

(14) Suit cast in a declaratory form but held not to come within Sch. II, Article 17 (iii) — Suit will not necessarily come under this clause. See AIR 1938 Oudh 1 (7) = 13 Luck 628 (FB) ** AIR 1938 Oudh 201 (203) = 14 Luck 176 (FB).

(15) Declaration for which plaint asks in fact amounting only to a finding as basis for decree for some substantial relief — Suit will not come under this clause. AIR 1938 Pat 22 (26) = 16 Pat 766 (FB) ** AIR 1945 Pat 81 (83, 85) = 23 Pat 749 ** AIR 1942 Pat 60 (63) = 20 Pat 780 (DB).

(16) Suit ostensibly professed to be one for declaration and further relief — **Held**, suit was really one for substantial relief alone as declaration was unneces-

Section 7, Para (iv), Clause (c) — Note 1 (contd.)

sary. AIR 1941 Mad 91 (93) = ILR (1941) Mad 157 ** AIR 1922 Pat 615 (616, 617) = 2 Pat 125 (SB) ** AIR 1920 All 158 (159) ** 1956 BLJR 265 (269) ** AIR 1953 Cal 42 (Pr 10) = ILR (1954) 2 Cal 176 (DB).

[See also AIR 1950 Mad 643 (Pr 3).]

(17) Suit professing to be one for declaration and further relief — Court holding that plaintiff wants a declaratory decree to be passed in his favour — Suit must be held to include a prayer for a declaratory decree for purposes of court-fee though declaration is unnecessary for granting of the relief. 1938 Nag L Jour 130 (132) ** AIR 1931 Rang 319 (320) = 9 Rang 401 (DB) ** AIR 1928 All 248 (250) = 50 All 610 ** AIR 1924 All 612 (612) = 47 All 78.

[See also AIR 1943 Sind 56 (58) = ILR (1942) Kar 358 (DB).]

(18) Suit including relief for declaratory decree and also for some substantial relief — Two reliefs independent of each other — This clause will not apply — Declaratory relief will come under Sch. II, Article 17 (iii) and other relief will come under other appropriate provision. AIR 1937 All 148 (158) = ILR (1937) All 443 (DB) ** AIR 1955 All 177 (Prs 8, 9) (DB) ** AIR 1953 Sau 180 (Pr 19) (DB).

(19) "Further relief" in Section 42, Specific Relief Act refers to some relief to which plaintiff will be necessarily entitled on basis of the title declared. AIR 1919 Mad 233 (234, 235) (DB) ** 1913 Pun LR No. 211, p. 713 (715) = 1913 Pun Re No. 18 (DB) ** (1882) 5 All 55 (57) (DB) ** AIR 1961 Pat 425 (431) = 1961 (2) Cri LJ 662.

(20) "Consequential relief" in this clause must be such that it will constitute further relief within Section 42, Specific Relief Act. 1935 All L Jour 1319 (1320) (DB) ** AIR 1945 All 290 (290) = ILR (1945) All 516 (DB) ** AIR 1915 Mad 444 (445) ** AIR 1937 Sind 248 (249) ** AIR 1961 Pat 425 (431) = 1961 (2) Cri LJ 662.

(21) A relief to which plaintiff would not be entitled unless a certain title were established will not be a further relief based on such title unless plaintiff would necessarily be entitled to such relief if title was established. See AIR 1935 Mad 203 (206) = 58 Mad 448.

[See however AIR 1932 All 114 (115) = 54 All 232.]

(22) When a plaintiff files a suit against the State Government challenging the right of the State Government to recover the specified amount from him as a surety for the performance of a contract the claim in suit is governed by Section 7 (iv) (c), and an ad valorem Court-fee on the specified sum is liable to be paid. AIR 1962 Madh Pra 367 (367, 368) = 1962 MPLJ 128.

(23) Declaration and the further relief must be asked for as one joint and indivisible relief so that if the Court refuses to pass a declaratory decree the claim for further relief will also fall with it. AIR 1951 Simla (Punj) 238 (Pr 9) = ILR (1951) Punj 155 ** AIR 1961 Pat 425 (431) = 1961 (2) Cri LJ 622.

[See also AIR 1949 Nag 347 (Pr 8) = ILR (1949) Nag 195.]

(24) Though consequential relief will be further relief, further relief will not necessarily be consequential relief. AIR 1952 Pepsu 168 (Pr 4) = ILR (1952) Patiala 319 ** AIR 1961 Pat 425 (431) = 1961 (2) Cri LJ 662.

(25) Further relief must be asked for as incident to the declaratory decree. AIR 1952 Pepsu 168 (Pr 4) = ILR (1952) Patiala 319 ** AIR 1961 Pat 425 (431) = 1961 (2) Cri LJ 662.

(26) A relief is consequential if it follows something on which it depends. What ensues or follows must have a necessary connection with the cause. 'Cause' and 'consequence' are co-relative terms, one implying the other. What the Courts have to see under Section 7 (iv) (c) is whether the relief of possession where a declaratory decree is prayed for follows as a natural sequence from the declaration. AIR 1961 Punj 426 (429) = 1961 Cur LJ (Part G) 16.

(27) Mere fact that a certain relief flows from the right declared will not ipso facto make it consequential relief within the meaning of this clause. It will be a consequential relief only if it is asked for as incidental to the declaratory decree. AIR 1932 All 485 (487) = 54 All 812 (FB) ** AIR 1961 Pat 425 (431) = 1961 (2) Cri LJ 662.

(28) In the following cases it has been held that a relief which flows from the right declared will necessarily be a consequential relief within this clause. AIR 1937 Nag 14 (15) ** 1935 All L Jour 1319 (1320) (DB) ** AIR 1926 Mad 678 (679) ** (1949) ILR (1949) 2 Cal 363 (365) ** AIR 1966 Madh Pra 169 (171) = 1964 MPLJ 553 (DB) ** AIR 1961 All 555 (556).

(29) In the following cases consequential relief has been defined as some relief which follows directly from the declaration given, the valuation of which is not capable of being definitely ascertained and which is not specifically provided for anywhere in the Act and cannot be claimed independently of the declaration as a substantive relief. AIR 1955 All 177 (Prs 4, 6) (DB) ** AIR 1950 Cal 85 (Pr 9) = ILR (1950) 2 Cal 530 ** AIR 1932 All 485 (487) = 54 All 812 (FB) ** AIR 1949 All 207 (208) = ILR (1949) All 410 (DB) ** ILR (1962) 1 Cal 75 (DB).

(30) Kaul C. J. — Even though the object of the plaintiff is to escape the

Section 7, Para (iv), Clause (c) — Note 1 (contd.)

payment of higher court-fees there is nothing in the law which would debar her from doing so. AIR 1952 Madh B 147 (Pr 7a).

(31) In the following cases the suit was held to be one for a bare declaration coming under Sch. II, Article 17 (iii). AIR 1943 Lah 39 (41) (DB) ** AIR 1957 Madh Pra 173 (174) (DB) ** 1954 Mad WN 908 (911, 912) ** AIR 1942 Cal 539 (542) = ILR (1942) 2 Cal 253 ** AIR 1942 Pesh 62 (63) (DB) ** 1939 Oudh WN 152 (153, 154) (DB) ** AIR 1935 All 100 (101) = 57 All 602 (DB) ** AIR 1933 Pat 224 (232) = 12 Pat 261 (DB) ** AIR 1929 Mad 572 (573) ** AIR 1926 Rang 184 (186) (FB) ** AIR 1924 Mad 621 (621) (DB) ** AIR 1918 Lah 246 (246) = 1918 Pun Re No. 81 (DB) ** ILR (1965) 1 All 575 ** ILR (1962) 1 Cal 75 (DB) ** AIR 1961 Pat 470 (472) = ILR 39 Pat 571.

(32) In the following case the suit was held to come under this clause though it was ostensibly cast in the form of a pure declaratory suit. 1886 All WN 54 (55) (FB).

(33) Suit for rectification of instrument under Section 31, Specific Relief Act — Suit held to be for declaration and consequential relief within this clause. AIR 1922 Nag 264 (265).

(34) For other instances of suits for declaration with consequential relief see the following cases. AIR 1939 Pat 219 (220) (DB) ** AIR 1957 Raj 277 (277) = ILR (1957) 7 Raj 563 ** AIR 1956 Mad 7 (Pr 4) = ILR (1956) Mad 1378 ** AIR 1938 Cal 865 (865) = ILR (1938) 2 Cal 64 (DB) ** AIR 1927 Pat 123 (125) = 6 Pat 17.

(35) In the following cases, even a mere declaration has been held to be capable of being a consequential relief within the meaning of this clause. AIR 1939 Oudh 125 (126) = 14 Luck 536 (DB) ** AIR 1939 Pat 219 (220) (DB) ** AIR 1946 Bom 167 (167, 168) = ILR (1945) Bom 1080 ** AIR 1926 Pat 453 (455) = 5 Pat 496 (DB).

(36) Plaintiff suing for declaration that a decree is null and void and is not executable against him — **Held**, latter part of the declaration may be regarded as a consequential relief. AIR 1941 Lah 97 (105) = ILR (1941) Lah 451 (FB).

(37) A suit by a person for a declaration that the property sold at an auction sale was his property and that it could not be sold in execution of a decree in a suit in which he was not either actually or constructively represented comes under Sch. II, Article 17 (iii) and not Section 7 (iv) (c). In such a case the plaintiff is not required to pay for the cancellation of the sale, because such relief does not follow from the declaration asked for and must therefore be

regarded as a surplusage. 1965 Cur LJ 466 (Punj). (AIR 1936 Lah 703, **Held**, not approved by AIR 1941 Lah 97 (FB).)

(38) Where the plaintiff alleges that the partition deed between him, the father and the step-mother was merely a sham and in fact there was no partition which affected his status as a member of the joint Hindu family, a suit for pure declaration is competent and the prayer for the cancellation of the document being purely a surplusage can be ignored for purposes of Court-fee and Suits Valuation Act, and no ad valorem Court-fee under Section 7 (iv) (c) is payable. ILR (1965) 1 Punj 265 = (1964) 66 Pun LR 916.

(39) Prayer for consequential relief pure surplusage — Suit will be only a declaratory suit pure and simple. AIR 1929 Mad 396 (398) (DB) ** 1911 Pun LR No. 47, p. 215 (217) = 1911 Pun Re No. 1 (DB) ** (1910) 12 Cal L Jour 638 (641) (DB) ** 1881 All WN 13 (13) (DB).

[See also AIR 1926 Pat 453 (456) = 5 Pat 496 (DB).]

(40) Prayer that in addition to reliefs claimed any other relief which the Court may find the plaintiff entitled to may be granted to him, added in plaint. Coupled with relief of declaration, it cannot change nature of suit and make it one for a declaratory decree or order where consequential relief is prayed. AIR 1940 Pat 158 (158) = 18 Pat 756 (DB) ** AIR 1933 All 488 (491) = 55 All 791 (FB) ** AIR 1926 Pat 453 (455) = 5 Pat 496 (DB) ** AIR 1919 Lah 63 (64) (DB).

[But see (1912) 39 Cal 704 (710) (DB) ** AIR 1946 Nag 251 (251, 252, 253) = ILR (1946) Nag 578.]

(41) At date of institution of suit plaintiff not entitled to possession of suit property — Plaintiff suing for mere declaration — Pending suit he becoming entitled to sue for possession — This will not affect maintainability of suit as one for bare declaration. (1904) 26 All 215 (216) (DB) ** (1888) 12 Mad 136 (138) (DB).

[See AIR 1939 Pat 219 (220) (DB).]

(42) Suit for declaration of title and other consequential reliefs — Suit must be governed by Section 7 (iv) (c) and not by Section 7 (xi) (cc). AIR 1965 Pat 260 (260).

(43) Suit for declaration and injunction, but in substance one for specific performance — Suit, held, could not be treated as merely under Section 7 (iv) (c). AIR 1960 Assam 65 (66, 67) = ILR (1957) 9 Assam 376 (DB).

(44) Suit for specific performance of contract of sale of land — Incidental prayer for declaration about invalidity of subsequent sale — Suit would be governed by Section 7 (x) and not by Section 7 (iv) (c). AIR 1960 Orissa 129 (130) = ILR (1960) Cut 184.

(45) Suit for declaration under O. 21, Rule 63, Civil Procedure Code filed even before claim petition under Order 21, Rule 58 filed — Article 17 of Sch. II not

Section 7, Para (iv), Clause (c) — Note 1 (contd.)

applicable to such a case but Sec. 7 (iv) (c) is applicable. AIR 1968 Manipur 1.

(46) Plaintiff claiming owner's interest and not tenant's interest — Issue involving question of title between two rival bidders for land — This aspect by itself is decisive on question whether suit is in substance one for declaration of title with consequential relief of possession — Hence Section 7 (iv) (c) and not Section 7 (xi) (d) or (e) will apply. AIR 1962 Orissa 123 (123, 124, 125). (AIR 1954 Nag 124 and AIR 1925 Sind 275, Dissented from.)

(47) Municipality rescinding a lease and recovering possession of demised property on ground of the transaction being in breach of Section 103 of Bengal Municipal Act — Lessee moving the criminal Court and obtaining an order under Section 144, Criminal P. C. — Suit by Municipality before a Munsif's Court for declaration, confirmation of possession and permanent injunction — Suit held to fall within the purview of Section 7 (iv) (c). AIR 1967 Cal 423.

(48) Contract partly performed — Suit for specific performance of remaining part of the contract — Ad valorem Court-fee on the full consideration of the contract need not be paid. AIR 1967 Pat 281 (282) = 1966 BLJR 544.

2. Suit for declaration of title and possession. — (1) In the following cases where plaintiff sued for declaration of title to immovable property and recovery of possession it was held that the suit comes under para (v). AIR 1940 Mad 273 (279) (DB) ** AIR 1957 J and K 21 (22) ** AIR 1954 Cal 101 (Prs 2, 3) (DB) ** AIR 1954 Madh B 17 (Pr 6) = ILR (1954) Madh B 107 ** AIR 1950 East Punj 360 (Pr 8) ** AIR 1952 Trav-Co 509 (Prs 6, 8) = ILR (1952) Trav-Co 407 ** AIR 1949 Mad 719 (Pr 3) ** AIR 1946 Bom 363 (365) (DB) ** AIR 1937 Mad 529 (529) = ILR (1937) Mad 672 (DB) ** AIR 1935 Mad 346 (347) ** AIR 1915 Mad 948 (950) = 38 Mad 922 (FB) ** AIR 1942 Lah 209 (210, 211) (DB) ** 1942 Nag L Jour 372 (372, 373) ** AIR 1941 Pat 167 (169) (DB) ** AIR 1938 Pat 22 (26, 27) = 16 Pat 766 (FB) ** AIR 1937 All 148 (158) = ILR (1937) All 443 (DB) ** AIR 1936 Cal 264 (264) ** AIR 1931 Rang 319 (320) = 9 Rang 401 (DB) ** AIR 1930 Oudh 368 (369) = 6 Luck 64 (DB) ** AIR 1930 Oudh 104 (104, 105) = 5 Luck 474 (DB) ** AIR 1922 Pat 615 (617, 618) = 2 Pat 125 (SB) ** AIR 1920 All 158 (159) ** (1905) 29 Bom 96 (98) (DB) ** AIR 1963 Orissa 71 = 28 Cut LT 563 ** AIR 1962 Assam 127 (127, 129) = ILR (1962) 14 Assam 436.

(2) In the following cases the suit was held to come under this clause and not para (v). AIR 1933 Mad 42 (43) = 56 Mad 314 (DB) ** 1957-2 Andh WR 203

(204) ** AIR 1956 Assam 121 (121) (DB) ** AIR 1956 Tripura 31 (32) ** AIR 1956 Vindh Pra 16 (17) ** AIR 1955 Pat 469 (Pr 3) (DB) ** AIR 1952 Pat 430 (Pr 3) (DB) ** AIR 1951 Orissa 10 (Pr 3) = ILR (1950) Cut 410 ** AIR 1949 Pat 291 (Pr 9) ** (1949) 53 Cal WN 340 (342) ** AIR 1929 Mad 529 (535, 539) (DB) ** AIR 1942 Lah 209 (211) (DB) ** 1938 Nag L Jour 130 (132) ** AIR 1934 Pat 641 (642) = 14 Pat 220 (DB) ** AIR 1927 Pat 123 (125) = 6 Pat 17 ** AIR 1924 All 612 (612) = 47 All 78 ** AIR 1922 Pat 615 (616, 617) = 2 Pat 125 (SB) ** AIR 1922 All 358 (360) = 44 All 629 ** (1913) 40 Cal 615 (618) (DB).

[See also AIR 1943 Sind 56 (58) = ILR (1942) Kar 358 (DB) ** AIR 1955 Assam 126 (Pr 7) (DB).]

(3) Declaration and possession asked for as two separate reliefs — Declaratory part will come under Sch. II, Article 17 (iii) and relief as to possession will come under para (v). AIR 1937 All 148 (158) = ILR (1937) All 443 (DB) ** AIR 1958 Bom 307 (309) = ILR (1958) Bom 198.

[See also AIR 1936 Mad 344 (345).]

(4) Suit for declaration and possession of land allotted in partition and for declaration of right of pre-emption — Court-fee payable on market value. AIR 1969 Mys 255 = 1968 Mys LJ 273.

(5) Plaintiff's title to possession depending on his getting a decree setting aside a deed of transfer or decree — Plaintiff suing for possession — His suit will necessarily imply a prayer for cancellation of the deed or decree. AIR 1930 Oudh 104 (104, 105) = 5 Luck 474 (DB) ** AIR 1952 Punj 335 (Pr 6) = ILR (1952) Punj 373 = ILR (1953) Punj 683 (FB) ** AIR 1951 Pat 329 (Pr 2) (DB) ** AIR 1949 Pat 363 (Pr 2) ** AIR 1917 Pat 108 (108) = 3 Pat L Jour 92 (DB).

[See also AIR 1937 Pat 141 (142) (DB) ** ILR (1937) 2 Cal 501 (504, 505) (DB).]

[But see AIR 1929 Oudh 419 (420) = 5 Luck 98 (DB) ** AIR 1926 Oudh 380 (380) ** AIR 1933 Mad 93 (93, 94).]

(6) Under proviso to Section 42 of the Specific Relief Act, a suit for mere declaration of title will not be maintainable where plaintiff is able to ask for a decree for possession also but abstains from doing so. AIR 1939 Pat 219 (220, 221) (DB) ** AIR 1916 Low Bur 68 (69) (DB) ** (1895) 18 Mad 405 (407) (DB) ** (1892) 15 Mad 255 (257) (DB) ** AIR 1961 Pat 425 = 1961 (2) Cri LJ 662.

(7) Plaintiff not able to sue for possession — He will be entitled to sue for a mere declaration and his suit will come under Sch. II, Article 17 (iii). AIR 1943 Oudh 462 (462) (DB) ** AIR 1924 Pat 385 (386) (DB) ** AIR 1917 Cal 559 (559) (DB) ** (1913) 36 Mad 62 (63) (DB) ** (1904) 27 Mad 591 (593, 594) (DB) ** AIR 1942 Oudh 58 (60) = 17 Luck 145 (DB) ** AIR 1932 Lah 97 (98) (DB) ** AIR 1922 Cal 419 (420) = 49 Cal 544

Section 7, Para (iv), Clause (c) — Note 2 (contd.)

(DB) ** 1891 Bom PJ 38 (DB) ** 1884 All WN 11 (12) (DB).

[See also AIR 1927 Nag 316 (317).]

(8) Plaintiff suing for possession simpliciter — Court cannot demand court-fee under this clause on ground that suit as framed will not be maintainable under law, unless he obtains declaration of title. AIR 1929 Nag 276 (276).

(9) One of three plaintiffs dying pending suit for declaration of title and recovery of possession — His heirs substituted — Plaint amended — Two plaintiffs permitted to sue in forma pauperis — Third plaintiff must pay full amount of Court-fee on value of entire suit property — Plaint in spite of substitution and amendment, is one document — on principle a deviation allowing the third plaintiff to pay Court-fee on his one-third share of property is not permissible. AIR 1967 Pat 310 (311).

3. Suit for declaration and injunction.

— (1) Suit for declaration and injunction will come under this clause where injunction is asked for as a consequential relief based on declaratory decree. AIR 1937 Nag 14 (15) ** AIR 1958 All 41 (41) (DB) ** AIR 1955 Cal 341 (Pr 3) ** AIR 1953 Cal 34 (Pr 4) (DB) ** AIR 1950 Cal 85 (Pr 10) = ILR (1950) 2 Cal 530 ** AIR 1953 Bom 382 (Prs 3, 4) = ILR (1953) Bom 980 (DB) ** AIR 1949 Mad 778 (Prs 3, 4, 5) = ILR (1950) Mad 34 ** 1949 Jaipur LR 133 (135, 136) (DB).

(2) A suit for declaration is not one under this clause merely because an ad interim injunction is asked for. AIR 1940 Pat 158 (159) = 18 Pat 756 (DB) ** (1950) 3 Sau LR 137 (138) (DB).

[See AIR 1922 Sind 20 (21) = 16 Sind LR 109.]

[See also AIR 1953 Cal 583 (Pr 5).]

[But see AIR 1926 Pat 249 (251) = 5 Pat 211 ** AIR 1924 Pat 582 (585) = 3 Pat 640 ** (1912) 39 Cal 704 (710) (DB).]

(3) Plaintiff suing for declaration and injunction as independent reliefs — Sch. II, Article 17 (iii) will apply to former relief and Section 7 (iv) (d) will apply to latter relief. AIR 1926 All 423 (423) = 48 All 412 (DB) ** 1904 Pun LR No. 118 p. 419 (422) (DB) ** AIR 1954 Mad 188 (Pr 2) ** AIR 1951 Mad 604 (Pr 3) = ILR (1950) Mad 242 (DB).

(4) Suit for mere injunction without declaration — Section 7 (iv) (d) applies. AIR 1955 Mys 65 (Prs 2, 3) = ILR (1955) Mys 43 (FB). (AIR 1952 Mys 80 = ILR (1952) Mys 344, Overruled.) ** AIR 1952 Mad 41 (Pr 4) ** AIR 1950 Mad 273 (Pr 5) = 51 Cri LJ 704 ** 1950 Ker LT 117 (119, 121) (DB) ** AIR 1965 Punj 468 (469) = 1965 Cur LJ 195.

(5) Prayer for injunction superfluous — Suit held to be one for pure declaration. (1940) 42 Pun LR 364 (365) ** AIR 1935 Mad 318 (318) ** AIR 1918 PC 188

(191) = 43 Bom 507 = 46 Ind App 24 ** AIR 1955 Mys 118 (Pr 2) = ILR (1955) Mys 387.

(6) Suit for declaration that defendant is liable to pay pension to plaintiff and for mandatory injunction — Section 7 (ii) and not Section 7 (iv) (c) applies. AIR 1959 Bom 436 = 60 Bom LR 1377.

(7) In the following case suit was held to be really for possession though ostensibly it professed to be one for declaration and injunction. AIR 1930 Cal 41 (42) (DB).

(8) In the following cases suit was mentioned as falling under clauses (c) and (d) of this paragraph. AIR 1939 Cal 743 (744) = ILR (1939) 2 Cal 20 ** AIR 1938 Cal 302 (303) ** AIR 1924 Nag 316 (318) (DB) ** 1913 Pun LR No. 232 p. 775 (778) = 1913 Pun Re No. 93 (DB) ** (1892) 17 Bom 56 (60, 61) (DB).

(9) Where a suit seeks for declaration of ownership of certain property and a consequential injunction restraining the defendant from alienating the particular property and also seeks a declaration and possession in respect of certain other property, with direction to the defendant to remove certain constructions made thereon, the plaintiff has to value his relief under Section 7 (iv) (c) in respect of the relief for declaration and consequential relief of injunction. AIR 1968 J and K 110 = 1968 Kash LJ 121.

(10) Suit based on lease deed — Plaintiff stating that he is not liable to pay enhanced royalty demanded by defendant and praying for a 'perpetual injunction restraining him from claiming the demand as it is illegal, and/or from recovering any sum which is not legally payable by plaintiff — Suit is not for a mere declaration but with consequential relief of perpetual injunction and is governed by Section 7 (iv) (c). AIR 1964 Madh Pra 9 (10) = 1963 MPLJ 717 (DB).

(11) Suit for injunction — Held, on facts (1) that the suit fell under Article 17 (vi) of Schedule II read with S. 7 (iv) (d) of the Court-fees Act, (2) that the plaintiff was not liable to pay ad valorem Court-fee under Section 7 (iv) (c) as the subject-matter of the property involved, or subject-matter of the interest in respect of which an injunction is claimed does not determine the valuation for the purpose of an injunction. AIR 1959 Madh Pra 253 (255) = 1959 MPLJ 388.

4. Suit to set aside decrees and instruments — General. — (1) A suit for a mere declaration that an instrument or decree is void against plaintiff comes under Sch. II, Article 17 (iii). AIR 1933 All 488 (490) = 55 All 791 (FB) ** AIR 1949 Nag 37 (38, 39) = ILR (1948) Nag 210 ** (1950) 3 Sau LR 137 (138) ** AIR 1931 All 369 (372) = 53 All 552 (DB) ** AIR 1917 Cal 668 (669) (DB) ** (1903)

Section 7, Para (iv), Clause (c) — Note 4 (contd.)

30 Cal 788 (790) (DB) ** (1896) 20 Bom 736 (742) (DB) ** (1884) 7 Mad 134 (136) ** AIR 1967 Madh Pra 221 = 1967 MPLJ 242 ** AIR 1962 Madh Pra 279 (280) = 1961 MPLJ 1443. (Mortgage decree against father — Suit by sons for declaration that mortgage is not binding on them — Court-fee need be paid only under Article 17 (iii). 1956 Madh BLR (Civil) 532, held not good law.)

[See also AIR 1942 Pat 309 (309).]

(2) Suit to declare decree void — Sch. II, Article 17 (v) (Bom) applies. AIR 1945 Bom 474 (475) = ILR (1945) Bom 1033 (DB).

(3) Suit for cancellation of instrument or decree falls under Section 7 (iv) (c). AIR 1943 Pat 102 (107) = 21 Pat 720 ** AIR 1938 Oudh 1 (7) = 13 Luck 628 (FB) ** AIR 1952 Vindh Pra 69 (Pr 9) ** AIR 1951 Ajmer 102 (Pr 3) ** AIR 1948 Nag 219 (222) = ILR (1947) Nag 902 ** (1935) 62 Cal 479 (482) ** AIR 1934 Oudh 505 (506) (DB) ** AIR 1933 Nag 214 (215) ** AIR 1921 Pat 78 (80) = 5 Pat LJ 540 (DB) ** AIR 1920 Nag 243 (243) = 16 Nag LR 84 (DB) ** AIR 1919 Mad 223 (224) (DB) ** AIR 1916 Upp Bur 4 (5) = 2 Up Bur Rul 102 ** (1901) 28 Cal 334 (338) (DB) ** (1904) 27 Mad 480 (481) (DB).

[See AIR 1941 Lah 265 (267) (DB).]

(4) The following cases hold that a suit for cancellation of instrument or decree will come under Sch. I, Article 1. AIR 1936 All 710 (712) (DB) ** AIR 1933 All 488 (489, 490) = 55 All 791 (FB) ** AIR 1941 Lah 97 (104, 105, 106, 108) = ILR (1941) Lah 451 (FB) ** AIR 1932 All 485 (487) = 54 All 812 (FB) ** (1941) 16 Luck 526 (527) (DB) ** AIR 1954 Raj 170 (Prs 7, 11) = ILR (1953) 3 Raj 782 (DB).

(5) If on 'true construction of plaint suit appears to be one for cancellation, it must be held to be such a suit although prayer portion of plaint may be cast in a declaratory form. AIR 1944 Pat 17 (20, 21, 24) = 22 Pat 783 (FB) ** AIR 1958 Pat 560 (561) ** AIR 1958 Pat 108 (110) ** AIR 1957 Madh Pra 134 (135) ** AIR 1947 Sind 84 (91) = ILR (1946) Kar 218 (DB) ** AIR 1943 Nag 70 (71) = ILR (1943) Nag 440 ** AIR 1943 Pat 102 (107) = 21 Pat 720 ** AIR 1941 Lah 97 (99) = ILR (1941) Lah 451 (FB) ** AIR 1938 All 481 (482) = ILR (1938) All 470 (DB) ** AIR 1938 Nag 183 (185) = ILR (1939) Nag 373 (DB) ** AIR 1938 Oudh 1 (6, 7) = 13 Luck 628 (FB) ** AIR 1937 All 411 (412, 414) = ILR (1937) All 259 (DB) ** AIR 1936 Pesh 180 (181) ** AIR 1934 Lah 235 (236, 237) (DB) ** AIR 1962 Pat 211 (212, 213) = 1961 BLJR 830. (1958 BLJR 190, Dissented from.)

[See also AIR 1951 Mad 661 (Pr 5).]

(6) Suit for declaration that money decree passed against applicant was

illegal and void — Real claim not only for declaration that money decree was void but for its cancellation also — Not a mere declaratory suit — Section 7 (iv) (c) applied. 1965 BLJR 185.

(7) Suit merely for a declaration — Courts are not entitled to treat it as being one for cancellation merely because plaintiff's proper remedy is to ask for cancellation and a suit for a bare declaration is not maintainable under the circumstances of the case. ('36-43) Tax Dec (Nag) 51 (52) ** AIR 1933 All 488 (490) = 55 All 791 (FB) ** AIR 1925 Mad 713 (714) ** AIR 1938 Mad 645 (646) ** AIR 1935 All 817 (829) = 58 All 146 (FB) ** AIR 1957 Madh Pra 173 (174) (DB).

(8) Plaintiff being a party to instrument or decree sought to be avoided — Decree or instrument not absolutely void — He must sue for cancellation — Mere suit for declaration that it is not binding on plaintiff will not be competent. AIR 1943 Mad 106 (107) ** AIR 1956 Mad 670 (677) = ILR (1956) Mad 1300 (FB) ** AIR 1957 Nag 53 (55) = ILR (1956) Nag 486 (DB) ** 1956 Andhra WR 182 (183) ** AIR 1954 Raj 170 (Pr 6) = ILR (1953) 3 Raj 782 (DB) ** AIR 1952 Mad 799 (Pr 1) ** AIR 1951 Mad 678 (Pr 1) (DB) ** 1958 BLJR 190 (190) ** AIR 1944 Mad 478 (478, 479) (DB). (Suit for declaration that compromise decree is not binding on plaintiff — If cancellation is necessarily implied, suit comes under Section 7 (iv) (a) (Mad) ** AIR 1946 Nag 30 (31) = ILR (1945) Nag 975 (DB). (Agreement under Debt Conciliation Act — Suit by representatives of debtor to have decree declared unenforceable — Ad valorem court-fee is required.) ** AIR 1942 Pat 60 (62) = 20 Pat 780 (DB) ** AIR 1940 Mad 113 (118, 123) = ILR (1940) Mad 259 (FB) ** ('36-43) Tax Dec (Nag) 36 (38) ** AIR 1915 Mad 948 (950) = 38 Mad 922 (FB) ** AIR 1933 Pesh 13 (14) (DB) ** AIR 1942 Pat 309 (309) ** AIR 1941 Lah 284 (285) = ILR (1942) Lah 379 (DB) ** (1941) 16 Luck 526 (527) (DB) ** AIR 1938 Nag 183 (184) = ILR (1939) Nag 373 (DB) ** AIR 1938 Oudh 1 (7) = 13 Luck 628 (FB) ** AIR 1937 All 411 (412, 414) = ILR (1937) All 259 (DB) ** AIR 1934 Pesh 109 (110) ** AIR 1929 Lah 463 (464) (DB) ** AIR 1927 Lah 499 (500) = 8 Lah 531 (DB).

[But see AIR 1928 Mad 416 (419) = 51 Mad 664 (DB).]

(9) Plaintiff being third party to document or decree — He may avoid it by merely suing for a declaratory decree to the effect that deed or decree is not binding on him. AIR 1944 Mad 19 (19) = ILR (1944) Mad 430 ** (1954) 7 Sau LR 56 (57) ** AIR 1954 Raj 170 (Pr 6) = ILR (1953) 3 Raj 782 (DB) ** AIR 1952 Mad 552 (Pr 2) ** ILR (1950) All 81 (84) ** AIR 1946 Mad 181 (183, 184). (Suit on mortgage — Prayer for sale if

Section 7, Para (iv), Cl. (c) — Note 4 (contd.)

mortgaged property free from claims of other alienees — Plaintiff not party to document of alienation — Relief of cancellation not necessary.) ** AIR 1947 Mad 130 (130) ** AIR 1943 Lah 348 (349) = ILR (1943) Lah 565 (DB) ** AIR 1943 Mad 490 (491) ** AIR 1942 Pat 60 (62, 63) = 20 Pat 780 (DB) ** AIR 1941 Lah 159 (160) (DB) ** (1936-1943) Tax Dec (Nag) 36 (38).

[See also AIR 1957 Andh Pra 955 (956) ** AIR 1954 Mad 1126 (Pr 10) = ILR (1955) Mad 810 (DB).]

(10) Alienation by a Hindu widow is not void but only voidable by reversioner — He can sue alienee for possession — Mere declaration would be enough, though it would not be necessary for purpose of decreeing possession in favour of reversioner. (1907) 34 Cal 329 (333) = 34 Ind App 87 (PC) ** AIR 1949 Mad 105 (Pr 5).

(11) Where the plaintiff brought a suit for declaration of his title to certain lands and for possession and mesne profits on the allegation that a sale-deed executed by defendant 2 his son, in favour of defendant 1, was fictitious transaction it was held that the plaintiff could ignore the document and ask for the appropriate relief for possession and pay the proper court-fee thereon without asking for cancellation. AIR 1956 Mad 179 (Prs 8, 9).

(12) Instrument or decree absolutely void — Mere suit for declaration would be enough to enable plaintiff to avoid it and get relief inconsistent with it although he may have been party to document or decree. ('36-43) Tax Dec (Nag) 36 (37, 38) ** 1958 BLJR 190 (190) ** AIR 1956 Pat 203 (Prs 1, 2, 4) ** AIR 1953 Madh B 81 (Pr 4) = ILR (1953) Madh B 39 ** 1955-1 Mad LJ 310 (312) ** 1951 Ker LT 758 (763) ** AIR 1949 Mad 746 (Pr 2) ** AIR 1950 Mad 190 (Pr 2) ** AIR 1948 Mad 451 (452) = ILR (1948) Mad 883 (DB) ** AIR 1946 Mad 342 (343, 344). (Allegation that material page of document fraudulently abstracted by defendant — Sch. II, Article 17-A (Mad) applies.) ** AIR 1944 Mad 408 (408) (DB) ** (1908) 30 All 375 (377) (DB) ** AIR 1933 Rang 109 (110) = 11 Rang 66.

[See however AIR 1951 Mad 522 (Pr 2).]

(13) Suit for declaration that registered gift deed is inoperative — Court-fee to be paid under Section 7 (iv) (c). AIR 1968 Manipur 52.

(14) Document attacked as being sham transaction — Plaintiff being party to the deed — Held that relief prayed for should be cancellation and not mere declaration. AIR 1947 Mad 57 (57, 58).

(15) Test adopted by Madras High Court to determine if suit attacking

instrument is one for bare declaration or for its cancellation, is to see if instrument is one which cannot be avoided by plaintiff except by suit for setting it aside. AIR 1929 Mad 396 (398) (DB) ** (1900) 23 Mad 490 (491, 492) (DB) ** AIR 1936 Mad 266 (266).

(16) According to following cases test as to whether a suit attacking an instrument is for declaration or cancellation is to see whether suit falls under Section 39 or Section 42 of the Specific Relief Act. AIR 1935 All 817 (822) = 58 All 146 (FB) ** AIR 1936 Lah 703 (703) (DB) ** AIR 1934 Oudh 505 (506) (DB) ** AIR 1931 Pat 78 (79) = 10 Pat 432 (DB) ** AIR 1929 Nag 71 (72) = 25 Nag LR 52 ** AIR 1941 Rang 269 (270) = 1941 Rang LR 387 ** AIR 1933 Oudh 116 (117) = 8 Luck 674 (DB).

(17) Express prayer for cancellation of instrument — Suit will be held to be one under Section 39, Specific Relief Act and as such for cancellation for purposes of court-fees. AIR 1941 Lah 265 (267) (DB) ** (1935) 62 Cal 479 (481) ** AIR 1933 Rang 410 (410) (DB) ** AIR 1933 Rang 40 (40) ** AIR 1929 Oudh 491 (493) = 5 Luck 235 (DB) ** AIR 1918 Pat 482 (483) = 3 Pat LJ 194 ** AIR 1916 Lah 21 (21) = 1916 Pun Re No. 87 (DB) ** (1905) 29 Bom 207 (210) (DB) ** (1901) 28 Cal 334 (338) (DB).

[But see AIR 1933 Oudh 116 (117) = 8 Luck 674 (DB).]

(18) No express prayer for cancellation — Court must consider if primary object of plaintiff is to attack instrument and have it adjudged void or voidable or whether object is only to obtain declaration of plaintiff's rights in property and instrument is merely referred to incidentally. AIR 1935 All 817 (822) = 58 All 146 (FB).

(19) Instrument being one which cannot be avoided by plaintiff otherwise than by bringing a suit for setting it aside — Primary object of plaintiff is to attack instrument and get it vacated by Court. AIR 1944 Pat 17 (24) = 22 Pat 783 (FB) ** AIR 1941 Lah 97 (99, 106) = ILR (1941) Lah 451 (FB). (Overruling AIR 1923 Lah 373 (DB) and AIR 1935 Lah 611 (DB)) ** AIR 1935 All 207 (208, 210) = 57 All 638 (DB).

(20) If a document is void and is declared to be void its actual cancellation cannot by itself be a very valuable remedy. AIR 1941 Lah 265 (267) (DB).

(21) Section 39, Specific Relief Act does not apply to decrees. AIR 1931 All 369 (370) = 53 All 552 (DB).

[But see 1940 Nag LJ 96 (97).]

(22) In the following case a third party's suit to avoid a decree was held to be one for cancellation. (1934) 152 Ind Cas 847 (1) (847) (DB) (Lah) ** AIR 1933 Nag 214 (215).

(23) Suit impeaching instrument by person having present interest in pro-

Section 7, Para (iv), Cl. (c) — Note 4 (contd.)

perty sought to be affected by instrument — Suit held to be under Section 39, Specific Relief Act and one for cancellation of instrument for purpose of court-fees. AIR 1935 All 817 (833) = 58 All 146 (FB).

(24) Suit seeking to avoid decree — **Held** suit can never be mere suit for declaration coming under Sch. II, Article 17 (iii). AIR 1938 Oudh 201 (203, 204) = 14 Luck 176 (FB) ** AIR 1938 Oudh 1 (7) = 13 Luck 628 (FB).

[See (1912) 39 Cal 704 (709, 710) (DB).]

(25) Deed of transfer not requiring setting aside by Court — Plaintiff entitled to get back possession from defendant — He will have to claim possession in his suit — Such suit comes under this clause. AIR 1942 Lah 209 (210, 211) (DB) ** AIR 1924 All 612 (612) = 47 All 78 ** AIR 1922 All 358 (360) = 44 All 629.

[See also AIR 1943 Pat 102 (107) = 21 Pat 720.]

[See however AIR 1957 J and K 21 (22).]

(26) Where plaintiff is in a position to ask for some relief besides a mere declaration that a certain document which is void against him, does not affect his rights, his suit will come under this clause. AIR 1943 Mad 490 (491) ** AIR 1938 Mad 474 (475) ** (1882) 4 All 320 (328) (FB).

(27) Plaintiff suing for declaration that certain deed to which he was not party is illegal and not binding on him and for possession — Prayer for declaration surplusage — Suit comes under Section 7 (v). AIR 1952 Mad 548 (Prs 5, 6) ** AIR 1951 Trav-Co 142 (Pr 10) = 1950 Trav-Co LR 581 ** AIR 1947 Mad 237 (237, 238) = ILR (1947) Mad 628.

(28) Court cannot treat a suit not including a prayer for further relief as if it does so and demand court-fee under Section 7 (iv) (c). AIR 1952 Madh B 147 (Pr 7a).

(29) Possession delivered to transferee under voidable deed requiring suit to set it aside — Suit brought for setting aside deed and for recovery of possession — Suit for purposes of court-fee, is only one for cancellation of deed — Prayer for possession is only ancillary. AIR 1939 Mad 462 (463) = ILR (1939) Mad 764 ** AIR 1957 Nag 53 (55) = ILR (1956) Nag 486 (DB) ** AIR 1952 Punj 335 (Pr 6) = ILR (1952) Punj 373 = ILR (1953) Punj 683 (FB) ** AIR 1938 Mad 921 (922).

[See AIR 1933 Sind 53 (55).]

[See also (1949) 2 Sau LR 221 (223).]

(30) Suit for declaration that sale deed in question was void on grounds that requisite consent of collector under Bihar Tenancy was not obtained and that it was also vitiated by fraud mis-

representation and collusion — Ad valorem fee under Section 7 (iv) (c) alone is payable. AIR 1968 Pat 187 (187).

(31) Suit to declare sale deed invalid and for possession — Cause of action for suit under Section 39, Specific Relief Act and suit for declaration and possession under Section 42, Specific Relief Act would be different — Section 17 (1) would apply. AIR 1945 All 290 (290) = ILR (1945) All 516 (DB).

(32) Suit by vendee under sale deed for refund of consideration on ground that he has been induced by fraud to purchase property is really one for setting aside deed — Relief as to refund is only ancillary. AIR 1926 Mad 96 (99).

(33) Suit to have rate of maintenance fixed by decree altered owing to change in circumstances is not one to set aside decree for purposes of court-fees. AIR 1935 Mad 655 (655) = 59 Mad 159 ** AIR 1945 Nag 264 (266) = ILR (1945) Nag 661 (DB).

(34) Suit for declaration that decree is fraudulent, collusive, etc., and that family property of plaintiff is not liable to be taken in execution of decree comes under this clause. (1913) 40 Cal 615 (617, 618) (DB).

(35) Suit for declaration that alleged receipt was forgery — Additional prayer for finding of absence of consideration if receipt was found genuine — **Held**, latter was prayer for additional relief and ad valorem court-fee on amount involved under receipt was payable in addition to fixed fee paid on first relief. AIR 1953 Madh B 81 (Pr 4) = ILR (1953) Madh B 39.

5. Suit for setting aside decree and execution sale. — (1) Decree executed and property sold in execution — Suit brought thereafter for impeaching decree — If decree is void against plaintiff suit would be for declaration that decree is void — No suit for cancelling sale necessary. AIR 1943 Lah 348 (349) = ILR (1943) Lah 565 (DB) ** AIR 1950 Cal 30 (Prs 5, 8, 9, 11, 12) (DB).

(2) Possession delivered to auction-purchaser — It is open to plaintiff to sue for declaration that decree and sale are void and as a consequential relief, for possession of property sold — Suit will come under this clause. AIR 1931 Mad 375 (376) ** AIR 1928 All 248 (250) = 50 All 610.

(3) Decree requiring setting aside before it can be avoided — Suit will be for setting aside decree though sale has taken place in execution of decree and sale is also attacked — No separate court-fee will be necessary for setting aside sale. AIR 1944 Oudh 118 (119) = 19 Luck 54 (DB).

(4) Decree requiring setting aside before it can be avoided — Sale in execution — Possession delivered to auction-

Section 7, Para (iv). Cl. (c) — Note 5 (contd.)

purchaser — Plaintiff suing to recover possession also — Held setting aside of decree is substantive relief and recovery of possession is only ancillary relief. AIR 1920 Pat 656 (658, 659) = 4 Pat LJ 703 (DB) ** AIR 1920 Pat 290 (290) = 5 Pat LJ 394 (DB) ** AIR 1915 Mad 550 (551) = 38 Mad 1184 (DB).

[See also AIR 1952 Punj 335 (Pr 7) = 54 Pun LR 331 (FB). (AIR 1944 Oudh 118 = 19 Luck 57, Diss.) ** AIR 1949 Pat 363 (Pr 2).]

[But see AIR 1944 Oudh 118 (119) = 19 Luck 54 (DB) ** AIR 1922 Cal 242 (243) (DB).]

(5) Validity of decree not questioned but sale in execution of decree attacked as a nullity — Suit for recovery of property is one for possession falling under Section 7, para. (v). AIR 1922 Cal 506 (507) = 49 Cal 880 (DB).

6. Suit for setting aside decree and for refund of money realised under it. —

(1) Suit by A for declaring that decree obtained by B against C is null and void and for refund of amount realised by B under his decree by way of rateable distribution comes under this clause. AIR 1937 Nag 316 (317) = ILR (1938) Nag 302.

7. Suit for setting aside decree and for injunction against execution. — (1) Suit for declaring decree to be void and for injunction restraining its execution will come under this clause. AIR 1940 Cal 482 (484) = ILR (1940) 1 Cal 409 ** AIR 1954 Sau 91 (Pr 5) ** (1957) 61 Cal WN 518 (521) (DB) ** AIR 1949 Mad 746 (Pr 2) ** AIR 1934 Rang 152 (152, 153) (DB) ** AIR 1933 Nag 214 (215) ** AIR 1915 Mad 948 (950) = 38 Mad 922 (FB) ** 1886 All WN 54 (55) (FB).

(2) Suit for declaring decree to be fraudulent and for injunction will come under this clause. AIR 1933 Lah 246 (246, 247) = 13 Lah 788 ** AIR 1924 Cal 969 (970) (DB) ** AIR 1922 Cal 242 (243) (DB).

(3) Schedule II, Article 17 (v), (Bombay) and (Sind), will not apply to suit to set aside decree and for injunction restraining its execution — Separate court-fee must be paid in respect of injunction. AIR 1937 Sind 241 (242) = 31 Sind LR 442 (FB).

(4) Decree void against plaintiff — It is not necessary for him, when suing for a declaration that decree is not capable of being executed against him, to ask for injunction against execution. AIR 1929 Lah 446 (447) ** (1913) 17 Cal LJ 30 (33) (DB).

[But see AIR 1919 Lah 63 (64) (DB).]

(5) Suit for declaration that decree to which plaintiffs were not parties was not binding — Injunction restraining one of defendants from executing decree —

Injunction held was as consequential relief — Plaintiffs could make their own valuation. AIR 1963 Madh Pra 206 (207, 208) = 1963 Jab LJ 150.

8. Suit for avoiding deed of transfer or decree — Plaintiff not entitled to sue for possession — Effect on court-fee. —

(1) Suit to set aside sale-deed — Plaintiff in possession of property affected — Value of relief for purposes of Court-fees would be consideration for which sale-deed was executed and not market value of property. AIR 1940 Oudh 248 (249) = 15 Luck 531.

(2) Plaintiff in possession — Document sought to be avoided absolutely void — Suit will come under Sch. II, Article 17 (iii). AIR 1923 Cal 362 (363) (DB).

[See also AIR 1957 Manipur 25 (32).]

(3) In the following cases deed in question was not absolutely void and plaintiff was a party to deed. It was held that suit was one for a bare declaration and not for cancellation because plaintiff was in possession. AIR 1933 Oudh 127 (127) (DB) ** (1932) 138 Ind Cas 147 (148) (Oudh).

[But see AIR 1921 Oudh 217 (219) = 24 Oudh Cas 361 (DB).]

(4) Suit for declaration that registered gift deed is inoperative — Plaintiff in joint possession — Court-fee to be paid under Section 7 (iv) (c). AIR 1968 Manipur 52 (54).

9. Suit to set aside decree for partition and for fresh partition. — (1) Suit to set aside prior decree for partition with prayer for fresh partition — Held, suit is for declaratory decree where consequential relief is prayed. AIR 1941 Sind 154 (157) = ILR (1941) Kar 102 (DB) ** AIR 1939 Cal 627 (627) (DB) ** AIR 1938 Sind 189 (190) = 32 Sind LR 124 (DB). ** AIR 1965 Punj 1 (5, 6, 10, 13) = 67 Punj LR 339.

[See also AIR 1954 Pat 406 (Pr 6) (DB).]

[See however AIR 1953 Cal 42 = ILR (1954) 2 Cal 176 (DB).]

[But see AIR 1952 Trav-Co 509 (Prs 15, 16) = ILR (1952) Trav-Co 407 (FB).]

(2) Partition suit — Plaintiff's incidental claim for declaration that previous compromise decree for partition was not binding — Previous decree void and not voidable — Mere finding that decree was void sufficient — Ad valorem duty not necessary. AIR 1965 Pat 486 (488, 489) = 1965 BLJR 538.

10. Minor. — (1) Decree passed against minor represented by duly qualified guardian impeaching by means of suit decree on ground of fraud, collusion or gross negligence of guardian — Suit would be one for setting aside or cancellation of decree and not mere declaratory suit for purposes of court-fees. AIR 1942 Pat 309 (309) ** AIR 1951 Mad 278 (Pr 1) ** AIR 1940 Mad 113 (118) =

Section 7, Para (iv), Cl. (c) — Note 10 (contd.)

ILR (1940) Mad 259 (FB) ** AIR 1936 Pesh 180 (181) ** AIR 1932 All 485 (487) = 54 All 812 (FB) ** AIR 1932 Lah 132 (133) = 13 Lah 391 (DB) ** AIR 1921 Oudh 217 (219) = 24 Oudh Cas 361.

(2) Minor not represented by guardian in former suit — Decree would be absolutely void against him — He can simply sue for declaration that decree is void against him. (36-43) Tax Dec (Nag) 36 (38) ** AIR 1936 Mad 470 (470).

[See also AIR 1950 Mad 190 (Pr 2).]

(3) Contract or transfer of property made by minor — Suit by minor to avoid such a transaction would only be a suit for mere declaration under Sch. II, Article 17 (iii). AIR 1933 Rang 109 (110) = 11 Rang 66 ** AIR 1950 Mad 832 (Prs 1, 7). (AIR 1929 Mad 668; AIR 1938 Mad 921 and AIR 1947 Mad 130, Not foll.)

(4) Guardian transferring minor's property in circumstances in which such a transfer is not justified — Minor is not bound to sue to set aside transfer — Minor's suit for declaring invalidity of transfer would be only for mere declaration coming under Sch. II, Article 17 (iii). AIR 1943 Mad 427 (428) ** AIR 1928 Mad 816 (816) (DB).

[But see AIR 1938 Mad 921 (922) ** ILR (1937) 2 Cal 501 (504) (DB) ** AIR 1937 Pat 141 (142) (DB) ** AIR 1929 Mad 668 (669) ** AIR 1947 Mad 130 (131) ** (1911) 7 Nag LR 190 (191).]

(5) Suit by minor for declaration of alienation by father as sham — No prayer for setting aside transaction need be made. AIR 1962 Mad 396 = 1962 Mad WN 293.

11. Hindu joint family. — (1) In the following cases suit for avoiding a decree passed against manager of a joint Hindu family was treated as one for cancellation of decree. AIR 1944 Mad 19 (19) = ILR (1944) Mad 430 ** AIR 1944 All 208 (209) = ILR (1944) All 388 ** AIR 1947 Mad 16 (17) ** AIR 1943 Nag 70 (73, 74, 76) = ILR (1943) Nag 440 ** AIR 1941 Lah 97 (105) = ILR (1941) Lah 451 (FB) ** AIR 1936 Lah 166 (166) (DB) ** AIR 1934 Oudh 212 (212) = 8 Luck 668 ** AIR 1930 Oudh 104 (104, 105) = 5 Luck 474 (DB) ** AIR 1920 Pat 290 (290) = 5 Pat LJ 394 (DB) ** AIR 1918 Pat 131 (131, 132) = 4 Pat LJ 191 (DB).

(2) In the following cases suit for avoiding decree passed against manager of joint family was treated as suit for mere declaration. (1935) 16 Lah 752 (755) (DB) ** AIR 1935 All 667 (669) = 57 All 943 (DB) ** AIR 1934 Oudh 212 (213) (DB).

(3) Mortgage decree against Hindu father — Suit by son for declaration that decree was not binding on him on ground of want of necessity and also immorality and illegality of debt — Suit is one for

declaration with injunction as a consequential relief as decree for declaration pure and simple cannot stop execution of decree. AIR 1945 Lah 13 (14) (DB).

(4) Suit by junior member of Hindu joint family seeking to avoid alienation of joint family property by manager — Suit is mere suit for declaration. AIR 1935 All 817 (824, 829) = 58 All 146 (FB) ** AIR 1935 Mad 66 (67) = 58 Mad 385 ** AIR 1925 Mad 713 (713, 714). ** AIR 1967 Madh Pra 221 = 1967 MPLJ 242 ** (1967) 69 Punj LR 445 (DB). (Court-fee to be paid under Article 17 (iii) of Sch. II and not under Section 7 (iv) (c)).

[But see AIR 1942 Lah 209 (210, 211) (DB) ** AIR 1941 Lah 97 (105) = ILR (1941) Lah 451 (FB) ** 1885 All WN 48 (49) ** AIR 1925 Mad 1248 (1249) (DB) ** AIR 1952 Mad 810 (Prs 1, 3).]

(5) Suit by son for possession of family property sold in execution of mortgage decree against father on basis of mortgage by father — Son bound by sale unless he proves illegality or immorality of debt — Suit comes under S. 7 (iv) (c). AIR 1952 Punj 335 (Pr 6) = ILR (1952) Punj 372 = ILR (1953) Punj 683 (FB).

[See also AIR 1949 Pat 363 (Pr 2).]

(6) Suit for possession of some properties sold by private sale and some in execution of mortgage decree — With regard to properties sold in execution of mortgage decree plaintiff must state amount at which relief sought is valued — With regard to other properties value shall be computed at twenty times the revenue payable for them. AIR 1945 Pat 421 (424) = 24 Pat 334 (DB).

(7) Suit for partition by junior member — Such member attacking alienation by manager as not binding on him — Alienee in possession — Plaintiff has to pay court-fee under Section 7 (v). AIR 1949 Mad 105 (106).

(8) Suit for partition of joint family property — Allegation of certain alienations being fraudulent — Deeds of alienations not acted upon — Proper Court-fee is that for a pure suit for partition — Section 7 (iv) (c) does not apply. AIR 1962 Orissa 47 (48, 49) = ILR (1960) Cut 704.

[See also AIR 1963 Orissa 120 (120, 121) = (1963) 5 Orissa JD 45. (Partition suit — Alienations made by defendant set out as cause of action — Prima facie suit as framed appeared to be substantially for partition. Section 7 (iv) does not apply — Fixed court-fee under Article 17-A payable.)]

[See however AIR 1962 Orissa 102 (103) = 27 Cut LT 242. (Suit framed as partition suit but essentially a suit to set aside alienations by defendant and for possession of plaintiff's share — Suit falls under Section 7 (iv) (c) and is not one for partition. AIR 1962 Orissa 47;

Section 7, Para (iv), Cl. (c) — Note 11 (contd.)

AIR 1960 Orissa 153 and AIR 1940 Mad 113 (FB), **Dissented from.**]

(9) Gift deed by a member of joint family — Suit by a widow on death of her husband, for partition of her one-fourth share in properties without any prayer for cancellation of gift deed or for declaring it to be void — No ad valorem Court-fee is payable because even if the deed of gift is genuine and is not cancelled or declared void it will not affect the plaintiff's case. ILR (1968) 47 Pat 509 (DB).

12. Suit by Hindu reversioners. —

(1) Alienation by Hindu — Suit by reversioners for declaration that alienation will not be binding on them will come under Sch. II, Article 17 (iii). AIR 1933 Mad 108 (109) ** 1893 Pun Re No. 109, p. 430 (433) ** 1877 Pun Re No. 70 p. 181 (182) (DB).

[See however AIR 1957 Madh Pra 134 (135).]

(2) Suit for declaration by reversioners impeaching several alienations — He has to pay separate court-fee in respect of each alienation. AIR 1951 Pat 526 (Pr 7) (DB).

(3) A reversioner can sue for injunction or for appointment of Receiver for estate during life-time of the widow if he can make out that she has been wasting or mismanaging the estate — Injunction or appointment of Receiver asked for along with declaration.

(a) Where declaration and injunction or appointment of Receiver are sought as joint relief, suit will come under this clause. AIR 1932 All 114 (115, 116) = 54 All 232 ** AIR 1946 All 392 (393) = ILR (1946) All 455 (DB) ** AIR 1924 Nag 316 (317, 318) (DB) ** AIR 1917 Mad 134 (134).

(b) Injunction or appointment of receiver asked for as sole relief — Injunction will come under Section 7 (iv) (d) and appointment of receiver will come under Sch. II, Article 17 (vi). AIR 1949 Pat 346 (Pr 1) = 27 Pat 11 (DB). (AIR 1922 Pat 61, **Overruled.**)

(4) Plaintiff sued for declaration that certain alienation would be void beyond widow's life-time and for appointment of Receiver to the estate — **Held**, that latter relief was not consequential relief within the meaning of this clause. AIR 1926 Mad 678 (678, 679).

(5) A suit in which merely ad interim injunction is prayed for or in which a Receiver is sought to be appointed during pendency of the suit is not one for an injunction or appointment of Receiver. AIR 1940 Pat 158 (158, 159) = 18 Pat 756 (DB).

[See AIR 1938 Mad 118 (119) = ILR (1938) Mad 326 (DB).]

(6) Where a widow dies having alienated her husband's property and the alienee is in possession, the reversioner is entitled to sue alienee straightway for possession. He is not bound to sue for setting aside alienation. (1907) 34 Cal 329 (333, 334) = 34 Ind App 87 (PC).

(7) Reversioner after widow's death sued praying that it may be held that an alienation by widow is not binding on him and that possession may be decreed in his favour — Suit will be one simply for possession — Prayer for declaration — Court can ignore the prayer and treat suit as simple suit for possession. AIR 1922 Pat 615 (616, 617) = 2 Pat 125 (SB) ** AIR 1920 All 158 (159).

(8) Suit for possession of property alienated by Hindu widow with declaration that plaintiff was owner of property and that sale deed in respect thereof was illegal — **Held**, relief of possession being principal relief and not consequential relief suit was governed by Section 7 (v) — Market value at date of suit held should be considered. AIR 1946 Bom 363 (365) (DB).

(9) If plaintiff clearly wants as declaratory decree to be passed in addition to decree for possession, Court will not be entitled to ignore the prayer for declaration. AIR 1935 Mad 346 (347).

(10) In the following cases relief as to possession was treated as consequential relief. AIR 1943 Sind 56 (58) = ILR (1943) Kar 358 (DB) ** AIR 1921 Pat 57 (59) = 6 Pat L Jour 101 (DB).

(11) A suit for partition of the joint Hindu family property, so far as the properties sought to be partitioned stand in the name of strangers to the coparcenary, must be regarded as a suit for declaration of title and consequential relief and consequently ad valorem court-fees are payable. AIR 1951 Pat 633 (Pr 3) = 29 Pat 219 (DB).

13. Malabar tarwad.— (1) Suit by member of Malabar tarwad for declaration that instrument executed by other members including karnavan is not binding on him — Suit is for mere declaration. (1907) 30 Mad 18 (20, 21) (DB) ** (1891) 14 Mad 26 (28) (DB).

(2) Some of the members of Malabar tarwad, being dissatisfied with a partition arrangement entered into during their minority, sued to have partition deed set aside. **Held**, that suit was for cancellation of partition deed and was governed by Section 7 (IV-A) of Madras Amendment. AIR 1932 Mad 491 (492, 493).

(3) Suit by junior member of tarwad seeking to avoid decree passed against karnavan in his representative capacity as karnavan will be one for cancellation of decree but if allegation of plaintiff is that person against whom decree had been obtained was not karnavan he can sue for mere declaration. AIR 1944 Mad

Section 7, Para. (iv), Cl. (c) — Note 13 (contd.)

19 (19) = ILR (1944) Mad 430 ** AIR 1945 Mad 430 (431) = ILR (1945) Mad 886.

[But see AIR 1931 Mad 375 (376).]

14. Deed of adoption. — (1) Mere suit for declaration is enough for the purpose of avoiding a deed of adoption. AIR 1938 Mad 824 (826).

[See also AIR 1937 Rang 400 (400) ** AIR 1931 Rang 319 (320) = 9 Rang 401 (DB).]

15. Suit under Section 53, Transfer of Property Act. — (1) Creditor's suit under Section 53, Transfer of Property Act is a purely declaratory suit for purposes of court-fee. AIR 1939 Mad 894 (895) = ILR (1940) Mad 73.

16. Other illustrative cases. — (1) Suits for damages — Plaintiff seeking account of his father's estate from defendant, as executor appointed under his father's will and in default of obtaining such accounts claiming damages to the extent of a definite sum — He is liable to pay ad valorem court-fee on such amount. (1871) 16 Suth WR 156 (157) (DB).

(2) Suit for assessment of rent and for recovery of a specific sum of money as damages for use and occupation of land is to obtain a declaratory decree of order where consequential relief is prayed. AIR 1919 Pat 541 (542) = 4 Pat L Jour 561.

(3) Suits to set aside revenue sales — A suit to have a revenue sale set aside must be stamped as one for recovery of property. (1882) 9 Cal L Rep 231 (232) (DB).

(4) Suit to set aside revenue sale and for confirmation or restoration of possession of property is a suit to obtain a declaratory order where consequential relief is prayed. AIR 1935 Pat 459 (459, 460) (DB) ** AIR 1918 Pat 487 (487) = 3 Pat L Jour 448 (DB).

(5) Even if interest of plaintiff extends only to a portion of property sold, relief asked being that whole sale should be set aside, court-fee must be paid on value of entire property and not on value of plaintiff's share. AIR 1918 Pat 487 (487) = 3 Pat L Jour 448 (DB) ** AIR 1924 Cal 239 (239) = 50 Cal 892 (DB) ** (1874) 12 Beng LR 370 (372) (FB).

[But see AIR 1935 Pat 459 (459, 460) (DB).]

(6) Suits to set aside patni sales. — A suit under Section 14 of the Bengal Patni Taluks Regulation (VIII of 1819) against the zamindar for reversal of the patni sale is not a suit for a mere declaratory decree within the meaning of Sch. II, Article 17 (iii). AIR 1924 Cal 731 (732) = 51 Cal 216 (DB).

(7) Suits under the Madras Estates Land Act. — Suit by a person, unsuccessful in getting himself registered as a landholder by the Collector under Sec-

tion 3 (5) of the Madras Estates Land Act (1 of 1908), with prayer that order of Collector be set aside and plaintiff be recognised as landholder, is essentially a suit for a declaratory decree falling under Sch. II, Article 17-A (i) as amended by Madras Act V of 1922. AIR 1936 Mad 383 (384) = 59 Mad 882.

(8) Suits under the Bengal Tenancy Act — Suit by person under Section 104-H of the Bengal Tenancy Act, 1885, for declaration that his status is that of an occupancy ryot and not of tenure-holder as recorded in Settlement Revenue Roll and for settlement of fair and equitable rent on that basis in respect of the holding is one under Section 7 (iv) (c). (1912) 16 Cal L Jour 383 (384, 385) (DB) ** (1913) 17 Cal L Jour 426 (427) (DB).

[See AIR 1941 Pat 463 (465) (DB).]

(9) Application under Section 105 — Several parties joined — Stamp of 12 annas is to be put for each tenancy — If issue is raised by applicant under Section 105-A, then in addition to above stamp, a stamp of the amount of ad valorem fee chargeable under Sch. I, Article 1 must be put subject to a maximum of twenty rupees in respect of each tenancy. AIR 1932 Cal 674 (676) = 59 Cal 997 (DB) ** AIR 1924 Cal 345 (345) = 50 Cal 903.

(10) Suit under Section 106 of the Act — Court-fee on such application is to be calculated under Sch. I, Article 1 — Where amount of such ad valorem fee is less than twenty rupees application is to be stamped according to valuation put on relief sought subject to maximum of 20 rupees in respect of each tenancy. AIR 1932 Cal 674 (676) = 59 Cal 997 (DB).

(11) Application under Section 105-A or Section 106 seeking for alteration of rent as recorded in Record of Rights — Plaintiff should value his relief against each tenancy at ten times the difference between rent claimed and rent recorded. AIR 1932 Cal 674 (676) = 59 Cal 997 (DB).

(12) Suit under proviso to Section 111A — Plaintiff claiming that he is in possession of occupancy right — He is entitled to ask for declaration of his occupancy right — In addition to such declaration, plaintiff also asking for declaration that entry in the records as to his status as tenure-holder is a nullity — Case is one in which plaintiff asks for a declaratory decree with consequential relief. AIR 1917 Cal 77 (77) = 44 Cal 352 (DB).

[But see AIR 1919 Pat 13 (13) = 4 Pat L Jour 302.]

(13) The property under the usufructuary mortgage had been sold in execution of a decree for rent which under the terms of mortgage was to be paid by the mortgagees. On the sale of the property it had been got back by

Section 7, Para. (iv), Cl. (c) — Note 17 (contd.)

settlement by the mortgagees again. In suit for redemption the mortgagor alleged that the sale had been brought about as a result of fraud on the part of the mortgagees and also as a result of non-payment of rent by them. It was held that the suit as framed was one purely for redemption and the Court-fee paid on that footing on the bond amount was sufficient. No court-fee was required under Section 7 (iv) (c). AIR 1953 Pat 306 (Pr 11).

17. Mode of valuation under para. (iv) (General).— (1) Different views are held as regards the question whether plaintiff is entitled to value his suit arbitrarily and in any manner he chooses or whether the Court is entitled to revise his valuation and require him to correct it.

(a) According to the following decisions the Court has no power under Order 7, Rule 11 (b) to interfere with plaintiff's valuation under this paragraph. AIR 1925 Bom 282 (282) (DB) ** AIR 1955 Hyd 23 (Pr 6) = ILR (1954) Hyd 844 (FB) ** AIR 1958 Bom 310 (311) = ILR (1958) Bom 1052 ** AIR 1954 Raj 170 (Pr 9) = ILR (1953) 3 Raj 782 (DB) ** AIR 1953 Bom 382 (Pr 14) = ILR (1953) Bom 980 (DB) ** AIR 1952 Punj 200 (Pr 4) = ILR (1952) Punj 176 (DB) ** AIR 1949 East Punj 372 (Prs 3 to 5) ** AIR 1952 Mad 41 (Pr 4) ** AIR 1951 Orissa 150 (Pr 8) = ILR (1950) Cut 497 ** AIR 1950 Mad 643 (Pr 3) ** AIR 1951 Ajmer 102 (Pr 3) ** 1951 Ker LT 758 (763) ** (1878) 2 Bom 219 (226, 227) (DB) ** AIR 1946 Lah 94 (96) (FB) ** AIR 1914 Lah 214 (219) = 1913 Pun Re No. 111 (FB) ** AIR 1941 Mad 91 (94) = ILR (1941) Mad 157 ** AIR 1942 Pesh 4 (5) (DB) ** AIR 1937 Nag 14 (15, 16) ** AIR 1927 Nag 375 (376) ** AIR 1915 Mad 948 (950) = 38 Mad 922 (FB). (24 Mad L Jour 233 (FB). Followed.) ** AIR 1938 Sind 189 (190) = 32 Sind LR 124 ** AIR 1924 Sind 105 (110) = 17 Sind LR 15 ** AIR 1930 Cal 686 (688) = 58 Cal 281 ** AIR 1930 Cal 473 (474) (DB).

(b) The following cases hold that Court has power even in cases coming under this paragraph to consider if plaintiff has undervalued relief and to require him to correct the valuation if Court considers that the valuation is too low. AIR 1939 Nag 50 (56) = ILR (1938) Nag 558 (FB) ** AIR 1958 Pat 201 (202) ** AIR 1957 Pat 560 (561) ** AIR 1957 Nag 53 (55) =

ILR (1956) Nag 486 (DB) ** AIR 1956 Nag 195 (199) = ILR (1956) Nag 514 (DB). (AIR 1949 Nag 4 = ILR (1948) Nag 999, Overruled.) ** AIR 1956 Nag 175 (Pr 16) ** AIR 1954 Nag 48 (Pr 5) = ILR (1954) Nag 82 ** AIR 1956 Ajmer 34 (Prs 3, 6) ** AIR 1952 Ajmer 53 (1) (Pr 2) ** AIR 1955 Pat 469 (Pr 3) (DB) ** 1954 BLJR 360 (362) ** AIR 1954 Pat 406 (Pr 6) (DB) ** 1953 BLJR 100 (102) ** AIR 1951 Orissa 10 (Pr 2) = ILR (1950) Cut 410. (Practice of Patna High Court followed.) ** 1949 Bur LR (HC) 358 (373, 378) (FB). (AIR 1933 Rang 40, Approved. AIR 1934 Rang 268 = 12 Rang 335, Distinguished.) ** AIR 1948 Nag 223 (224) = ILR (1947) Nag 933 ** 1903 Pun Re No. 28, p. 88 (90) ** AIR 1933 Rang 40 (40) ** AIR 1924 All 652 (656) = 46 All 553 (DB) ** AIR 1944 Pat 17 (24) = 22 Pat 783 (FB) ** AIR 1945 Pat 421 (425) = 24 Pat 334 (DB) ** AIR 1943 Pat 218 (227) = 22 Pat 114 (DB) ** AIR 1935 Lah 689 (689) ** AIR 1941 Sind 154 (157) = ILR (1941) Kar 102 (DB) ** AIR 1937 Sind 241 (241, 242) = 31 Sind LR 442 (FB) ** AIR 1938 Cal 302 (304) ** AIR 1934 Cal 448 (451) = 61 Cal 796 (FB) ** AIR 1964 Madh Pra 9 (11) = 1963 MPLJ 717 (DB).

(c) The following case has held that where plaintiff makes an absurd and outrageous valuation in order to have his suit tried in a particular Court, Court can interfere with plaintiff's valuation under S. 151 of the Civil Procedure Code. AIR 1928 Oudh 260 (261).

(d) The following cases hold that whatever may be the case in regard to other kinds of suits coming under this paragraph Court is bound to accept plaintiff's valuation, however arbitrary it may be, in suits for accounts. AIR 1944 All 84 (87) = ILR (1944) All 133 (DB) ** AIR 1953 Sau 65 (Pr 2) ** AIR 1949 East Punj 372 (Pr 4) ** AIR 1949 Nag 4 (5) = ILR (1948) Nag 999 ** 1942 Nag L Jour 197 (199) ** AIR 1941 Rang 322 (324) = 1941 Rang LR 512 (FB) ** AIR 1936 Bom 166 (166, 167) ** AIR 1936 Mad 562 (563) ** AIR 1935 Bom 212 (212, 213) (DB) ** AIR 1935 Rang 13 (14) = 12 Rang 512 (DB) ** AIR 1932 Mad 656 (657) ** AIR 1926 Lah 242 (242).

(2) In respect of suits falling under Clause (iv), liberty has been given to the plaintiff to value his claim for the purposes of court-fees, the theoretical basis of this provision being that in cases

Section 7, Para. (iv), Cl. (c) — Note 17 (contd.)

in which the plaintiff is given the option to value his claim it is really difficult to value the claim with any precision or definiteness. AIR 1958 SC 245 (251) = 1958 SCR 1021 ** 1967 Raj LW 401 = ILR (1966) 16 Raj 1019 (DB).

(3) In suits covered by Section 7 (iv) in which a plaintiff has the option to value the relief sought the value of the relief is normally the value of the subject-matter of the suit. AIR 1963 Him Pra 9 (12).

(4) It is not open to a plaintiff to substitute an arbitrary valuation by another arbitrary valuation simply with a view to be able to prefer a second appeal. AIR 1963 Him Pra 9 (12).

(5) In Bengal now the Court is expressly given power to revise and determine the correct valuation if in its opinion the subject-matter of the suit has been wrongly valued. AIR 1940 Cal 482 (484) = ILR (1940) 1 Cal 409 ** AIR 1940 Cal 451 (452) = ILR (1940) 2 Cal 166 ** AIR 1954 Cal 26 (Pr 6) (DB) ** AIR 1953 Cal 755 (Pr 5) = ILR (1954) 1 Cal 296 (DB) ** AIR 1953 Cal 34 (Pr 4) (DB) ** AIR 1950 Cal 85 (Pr 11) = ILR (1950) 2 Cal 530.

(6) Subject-matter of suit consisting of Government Securities of definite value — Plaintiff's valuation, though erroneous, accepted on ground of want of proper standard of valuation — High Court can revise decision. AIR 1963 Guj 207 = (1963) 4 Guj LR 836.

(7) Where a suit was filed against 61 sets of tenants in respect of 61 items of lands in their possession for the appointment of a receiver in respect of the crops on those lands on the allegation that the tenants had entered into a conspiracy to defeat the plaintiffs of their share of the produce on the lands and had resolved to carry them away without giving the waram due to them. Held, that even if there were 61 sets of defendants only one suit would lie and the correct way of valuing the suit would be to calculate the court-fee by applying Section 7 (iv) (c) on the value of the warams claimed by the plaintiffs. AIR 1958 Mad 413 (414).

18. Court-fee and jurisdiction. — (1) The proper construction of Section 8, Suits Valuation Act is that suit must first be valued for purposes of court-fees and then the valuation should be adopted for purpose of jurisdiction also. AIR 1939 Cal 155 (156) = ILR (1938) 2 Cal 411 (DB) ** AIR 1918 PC 135 (136) = 43 Bom 376 = 46 Ind App 15 ** AIR 1949 Lah 116 (120) = Pak LR (1949) Lah 123 (FB) ** (1954) 7 Sau LR 56 (58) ** AIR 1950 Pat 316 (Pr 2) = 29 Pat 226 (DB) ** AIR 1948 Bom 8 (11, 12) (DB) ** AIR 1937 Bom 167 (169) =

ILR (1937) Bom 623 ** AIR 1934 Rang 268 (269) = 12 Rang 335 ** AIR 1925 All 602 (604) = 47 All 501 ** AIR 1924 Nag 316 (318) (DB).

(2) It is only the valuation given by the plaintiff that has to be considered for purpose of deciding the question of valuation of the suit for purposes of Court-fees and jurisdiction. AIR 1965 Punj 468 (469) = 1965 Cur LJ 195.

(3) It is the option of the plaintiff to value his claim and it is the amount at which he has valued the relief sought for court-fees that determines the value for jurisdiction of the suit and not vice versa. AIR 1968 J & K 110 = 1968 Kash LJ 121. (AIR 1958 SC 245, Rel. on.) ** AIR 1964 Punj 381 (382) = ILR (1964) 1 Punj 403 ** 1962 Ker LJ 1270 ** AIR 1959 Bom 517 (518, 519) = 60 Bom LR 587 (DB).

(4) Rules made under Section 9, Suits Valuation Act for purposes of jurisdiction — Plaintiff is not bound to adopt the same valuation for purposes of court-fee. AIR 1946 Lah 94 (96) (FB).

(5) Valuation for purposes of jurisdiction — Substance of plaint has to be seen. AIR 1965 J and K 82 (82, 83) = 1964 Kash LJ 349.

(6) Plaintiff, on the view that this paragraph does not apply valuing suit for purposes of jurisdiction — Court cannot on coming to the conclusion that the suit comes under this paragraph, require him to pay court-fee on value given for purposes of jurisdiction. AIR 1934 Rang 268 (269) = 12 Rang 335 ** (1954) 7 Sau LR 56 (58) ** AIR 1927 Lah 890 (891) = 9 Lah 366 (DB).

(7) In the following cases valuation given by plaintiff for purposes of jurisdiction was adopted for purposes of court-fees also. ('36-43) Tax Dec (Nag) 31 (33) (DB) ** AIR 1958 Bom 307 (309) = ILR (1958) Bom 198 ** AIR 1936 Lah 990 (990) (DB) ** (1936) 38 Pun LR 688 (689) (DB) ** AIR 1934 Rang 152 (153) (DB) ** AIR 1926 All 423 (423) = 48 All 412 (DB) ** AIR 1922 All 358 (360) = 44 All 629 ** AIR 1921 Oudh 217 (218) = 24 Oudh Cas 361 ** AIR 1916 Cal 649 (649) (DB) ** (1913) 40 Cal 245 (249) (DB).

(8) Value given for purposes of jurisdiction may often furnish a criterion for seeing proper value for court-fees. AIR 1914 All 72 (72) = 36 All 500 (DB).

[See AIR 1938 Lah 647 (649) = ILR (1939) Lah 172.]

(9) Plaintiff may be precluded, on principles of estoppel, from contending that different valuation should be applied for purposes of court-fee from what he has given as value for purposes of jurisdiction. AIR 1941 Lah 97 (108, 109) = ILR (1941) Lah 451 (FB) ** AIR 1951 Mad 646 (Prs 2, 4) ** AIR 1930 Cal 686 (687) = 58 Cal 281 ** AIR 1925 All 602 (604) = 47 All 501.

Section 7, Para. (iv), Cl. (c) — Note 18 (contd.)

[See AIR 1932 All 114 (116) = 54 All 232.]

(10) Plaintiff not giving any value for court-fee but only for jurisdiction — Latter may be taken as value for court-fee also. AIR 1926 Mad 591 (592).

(11) Suit for accounts under Clause (f) — Value of subject-matter of original suit is value given in plaint, unless it is enhanced by adjudication that a higher sum is due in which case it is this latter sum on which court-fee is computed. AIR 1934 Lah 488 (491, 492) = 15 Lah 151 (FB).

[See also AIR 1944 Nag 7 (10) = ILR (1944) Nag 63 (DB).]

(12) Suit for declaration, injunction, partition and also for possession as regards immovable joint family property — Later prayer dropped — Suit falls under Section 7 (iv) (b) and (c) — Hence value for jurisdictional purposes is same as for court-fees. AIR 1963 Guj 291 (293-295) = (1963) 4 Guj LR 1022.

(13) Suit for declaration of title and possession of plaintiff's share in joint family property — Court-fee paid under Section 7 (iv) (c) valuing suit at Rs. 2000 for purpose of jurisdiction — Plaintiffs cannot, for purpose of appeal to High Court add a sum of Rs. 8100 as value of entire property in respect of which partition is sought. AIR 1961 Pat 307 (308) = 1961 BLJR 434.

19. Valuation of suits coming under clause (c).— (1) Relief under this clause is to be valued as a single and conjoint relief. It is not proper to split up relief into a declaration and a consequential relief and value each of them separately, add up the values and regard the aggregate as the value of the relief. AIR 1944 All 113 (114) = ILR (1944) All 214 ** AIR 1953 Cal 755 (Pr 6) = ILR (1954) 1 Cal 296 (DB) ** AIR 1953 Cal 583 (Pr 4) ** AIR 1950 Cal 85 (Pr 10) = ILR (1950) 2 Cal 530 ** AIR 1941 Cal 509 (512) (DB) ** 1935 All LJ 1319 (1320) (DB) ** AIR 1930 Cal 686 (687) = 58 Cal 281 ** AIR 1915 Mad 386 (387) (DB). [But see AIR 1925 All 602 (604) = 47 All 501 ** AIR 1922 Lah 236 (237) ** AIR 1914 All 72 (73) = 36 All 500 (DB).]

(2) In the following cases the consequential relief alone was valued and value of consequential relief was taken as the value of the whole relief. AIR 1940 Cal 560 (561) = ILR (1940) 2 Cal 33 ** AIR 1928 Cal 55 (56) (DB) ** AIR 1924 Pat 582 (585) = 3 Pat 640 ** AIR 1915 Mad 386 (387) (DB).

(3) In the following cases it was held that the declaration should be charged with a court-fee of Rs. 10 under Sch. II, Article 17 (iii) and the consequential relief should be valued separately and charged with an ad valorem fee. AIR 1934 Rang 268 (270) = 12 Rang 335.

(4) Plaintiff is at liberty to give his valuation and the valuation to be accepted for purposes of Court-fee. AIR 1964 Manipur 9 (11, 12). (AIR 1958 SC 245, Foll.) ** AIR 1968 Tripura 11.

(5) Suit for declaration with consequential relief — Court-fee payable is on value of amount at which relief sought is valued in plaint and not value of subject-matter. (1966) 70 Cal WN 1157.

(6) The plaintiff has an unfettered option to value his suit under Section 7 (iv) (c) for purpose of Court-fees and it is not open to Courts to disturb such valuation except in cases where the same may be found to be contrary to the rules made by the High Court under S. 9 of the Suits Valuation Act. 1967 Raj LW 401 = ILR (1966) 16 Raj 1019 (DB).

(7) Though in a suit falling under clause (iv) (c) Court-fee has to be paid on the amount at which the relief sought is valued in the plaint, the plaintiff's valuation must not be arbitrary or capricious. The plaintiff must endeavour to fix a fair value, bearing a relation to the right litigated and if the plaintiff's valuation is arbitrary and unreasonable and the disparity is so great as to show that the plaintiff had not endeavoured to fix a fair value at all, the Court can correct the valuation. AIR 1965 Madh Pra 4 (5) = 1964 MPLJ 362.

(8) Ad valorem value as mentioned in Section 7 (iv) (c) does not mean market value, but only a reasonable value to be put by the plaintiff for one thing where there is a reasonable criterion for the Court to follow in understanding the valuation put by the plaintiff who is privileged to put his own valuation, that reasonable criterion should be adopted as the standard for determining whether the plaintiff's valuation should be accepted or it should not be accepted or modified. 1968 Pat LJR 578 = ILR 47 Pat 664.

20. Suit to set aside deed or decree — Mode of valuation. — (1) Suit for setting aside decree — Amount of decree would be value of the relief if court-fee is to be computed according to value of the relief. AIR 1922 Sind 20 (21) = 16 Sind LR 109 ** (1908) 8 Cal LJ 485 (488) (DB).

[See 1940 Nag LJ 96 (97).]

(2) If decree sought to be avoided is mortgage-decree, amount of decree or value of plaintiff's interest in the property, whichever is less would be value of the relief. AIR 1929 Pat 615 (617) (DB) ** AIR 1915 Cal 705 (706) = 42 Cal 370 (DB) ** (1908) 35 Cal 202 (207) = 35 Ind App 22 (PC). (31 Cal 511. **Overruled** — Suit under Order 21, R. 63, Civil P. C.).

(3) Suit for setting aside decree brought after some property has been sold in execution of decree— **Held**, value of property will determine value of relief

Section 7, Para. (iv), Clause (c) — Note 21 (contd.)

for purposes of court-fee. AIR 1941 Pat 532 (535) (DB) ** AIR 1939 Pat 254 (254).

[But see AIR 1922 Cal 242 (243) (DB).]

(4) Suit to declare void and cancel instrument of relinquishment of management of Gurdwara brought by a third person — The value of the property of the Gurdwara does not determine the court-fee or jurisdiction. AIR 1941 Lah 265 (267) (DB).

(5) Suit to set aside pronote — **Held**, no objective valuation is possible. AIR 1937 Cal 748 (749) = ILR (1938) 1 Cal 196.

(6) Suit for cancellation of mortgage decree — Cancellation of the decree leaving defendant with the right and opportunity to obtain another similar decree on same mortgage in another properly framed suit — **Held**, valuation of claim is value of decree minus value of chance of defendant obtaining another decree — Latter being incapable of valuation value of claim was not capable of ascertainment. AIR 1925 Nag 66 (66).

(7) Suit brought by members of Malabar tarwad to set aside an instrument affecting the whole of the tarwad property — The plaint cannot be valued according to the value of whole of the tarwad property but must be valued only according to value of plaintiff's share. (1891) 14 Mad 169 (169, 170) (DB).

(8) Where the value of the property in respect of which the plaintiff wants to get rid of the decretal liability is less than the latter, payment of court-fee on market value of such property cannot be considered improper. AIR 1957 Nag 53 (56) = ILR (1956) Nag 486 (DB).

(9) Suit to set aside decree and for injunction against execution — Value of property covered by decree cannot necessarily be the value of the suit — Proper amount of court-fee should be the amount payable on valuation of the relief sought by the plaintiff. (1957) 61 Cal WN 518 (521) (DB).

(10) Suit for adjudging a partition deed null and void and for its cancellation — Suit falls within Section 7 (iv) (c) — Value of property covered by partition deed need not be considered — Plaintiff can value his suit arbitrarily. AIR 1951 Ajmer 100 (Pr 4).

21. Court-fee on appeal — Applicability of the provisions of Sections 7 and Schedule II, Article 17. — (1) Section 7 (iv) (c) has been applied to appeal arising from mortgage suit. AIR 1931 All 251 (252) ** AIR 1928 Nag 316 (318, 319) = 24 Nag LR 142 ** AIR 1921 Oudh 237 (237) = 24 Oudh Cas 295 ** AIR 1918 All 79 (81) ** AIR 1918 Oudh 348 (348)

** 1894 Bom PJ 153 (154) ** (1887) 10 Mad 187 (188) (DB).

(2) In some cases, the plaint may fall under one para of Section 7 and the appeal may fall under a different para of the same section. In others, the plaint may fall under some para of Section 7 and the appeal may not fall under S. 7 at all. AIR 1922 All 358 (360) = 44 All 629 ** AIR 1924 Pat 582 (585) = 3 Pat 640.

(3) If the suit comes within Section 7 (iv), then the appeal will necessarily be governed by that provision. ILR 44 Pat 1009.

(4) Suit for declaration and appointment of receiver — Second relief abandoned in appeal — Subject-matter in appeal being purely declaratory, appeal is governed by Article 17 of Sch. II. AIR 1953 SC 28 (Pr 7) = 1953 SCR 197.

(5) Subject-matter in dispute in appeal not different from subject-matter in dispute in suit — Appeal will be governed by same provision as the suit. AIR 1955 Punj 223 (Prs 10, 12, 13) = ILR (1955) Punj 896 (DB).

(6) Plaintiff's suit dismissed in its entirety — Appeal from decree — Appeal will be governed by same provisions as suit for purposes of court-fees. AIR 1932 All 114 (117) = 54 All 232 ** AIR 1926 Pat 249 (251) = 5 Pat 211 ** AIR 1921 Sind 149 (150, 151) = 16 Sind LR 273 (DB) ** AIR 1918 Cal 193 (194) (DB) ** (1886) 10 Bom 60 (61).

(7) Suit entirely decreed — Defendant's appeal — Appeal will be subject to same provisions as to court-fees as the suit. (1941) 16 Luck 526 (527) (DB) ** AIR 1933 Rang 410 (410) (DB) ** AIR 1929 Sind 161 (161) (DB) ** (1900) 23 Mad 490 (491, 492) (DB) ** (1884) 10 Cal 380 (382).

(8) Different views are held as regards the question whether the applicability of clauses of Sch. II, Article 17 to appeals is to be determined with reference to the subject-matter in dispute in the appeal or in the original suit.

(a) According to the following decisions the criterion is the subject-matter of the suit in the trial Court. AIR 1941 Lah 123 (127) = ILR (1941) Lah 234 (FB) ** AIR 1952 Nag 350 (Pr 14) = ILR (1952) Nag 457 (FB) ** AIR 1950 Mad 353 (Pr 6) = ILR (1950) Mad 852 ** AIR 1957 Andh Pra 766 (769, 770) ** AIR 1928 Cal 878 (879) = 56 Cal 188 ** (1936-1943) Tax Dec (Nag) 47 (48) ** AIR 1933 All 45 (46) = 54 All 553 ** AIR 1932 All 221 (222) = 54 All 347 ** AIR 1922 Cal 203 (205) (DB).

(b) It has been held in the following decisions that the criterion for applying the provisions of this article to an appeal is only the nature

Section 7, Para. (iv). Clause (c) — Note 21 (contd.)

of the subject-matter of the appeal. AIR 1938 Nag 409 (411) = ILR (1938) Nag 423 (FB) ** AIR 1953 SC 28 (Pr 7) = 1953 SCR 197 ** AIR 1951 Orissa 150 (Pr 9) = ILR (1950) Cut 497 ** AIR 1937 Nag 95 (96) ** AIR 1937 Pesh 89 (89, 90) (DB) ** AIR 1937 Pesh 31 (32) (DB) ** AIR 1936 Lah 668 (668) ** AIR 1934 Pat 473 (473) ** AIR 1924 Pat 582 (585) = 3 Pat 640 ** AIR 1937 Mad 840 (842) = ILR (1938) Mad 253 ** AIR 1941 Oudh 622 (623) = 17 Luck 246 ** AIR 1945 Oudh 30 (31) = 20 Luck 101 (DB) ** AIR 1936 All 221 (221) (DB) ** AIR 1935 Lah 14 (15) (DB).

(9) Suit under any of the clauses of Article 17 — Subject-matter of appeal arising from it being the same as that in the suit — Same clause will apply to the appeal also. AIR 1939 Oudh 90 (91) = 14 Luck 346 (DB) ** AIR 1939 Oudh 64 (64) (DB) ** AIR 1937 Mad 786 (787) = ILR (1937) Mad 980 (DB) ** AIR 1933 Mad 108 (109, 110) ** AIR 1933 Pat 224 (232) = 12 Pat 264 (DB) ** AIR 1932 Cal 47 (47, 48, 49) = 58 Cal 710 ** AIR 1930 Lah 839 (840) (DB) ** AIR 1930 Rang 164 (166) (DB) ** AIR 1924 Cal 183 (184) ** AIR 1921 Pat 305 (306).

(10) If a suit does not fall under any clause of this Article and there is no difference in subject-matter of the appeal which arises from the suit, appeal also will not come under this article. AIR 1938 All 97 (98) = ILR (1938) All 230 (FB) ** AIR 1936 Oudh 151 (151) = 11 Luck 396 (DB) ** AIR 1922 Bom 172 (173) = 46 Bom 840 (DB) ** AIR 1914 Lah 507 (507) = 1915 Pun Re 7 (DB) ** (1909) 1 Ind Cas 670 (673) (DB) (Cal).

(11) Where the subject-matter of appeal is such that there is no specific provision applicable to it, if the subject-matter is capable of valuation, Sch. 1, Article 1 will apply to the appeal. AIR 1937 Oudh 501 (502) (DB) ** AIR 1950 Kutch 12 (Pr 7) ** AIR 1936 All 216 (217) ** AIR 1936 Pesh 232 (232) (DB) ** AIR 1934 Lah 958 (959) = 15 Lah 893 (DB) ** AIR 1934 Mad 230 (231) = 57 Mad 632 (DB) ** AIR 1931 Mad 710 (711) ** AIR 1930 Lah 825 (826, 827) ** AIR 1919 Pat 425 (425) ** (1910) 37 Cal 914 (917) (DB).

[See also AIR 1935 Nag 83 (86, 88) (FB) ** AIR 1936 All 221 (221) (DB).]

(12) If the subject-matter in appeal is not capable of valuation the appeal will come under Schedule II, Article 17 (vi). AIR 1940 Oudh 183 (184) = 15 Luck 321 (DB) ** AIR 1935 Bom 111 (112) = 59 Bom 439 ** AIR 1934 Cal 377 (379) = 61 Cal 320 ** AIR 1933 Lah 678 (680)

(DB) ** AIR 1928 Nag 333 (334, 335) = 25 Nag LR 175 ** AIR 1927 Lah 189 (189) ** AIR 1927 Nag 100 (101, 102) ** (1885) 8 Mad 22 (24) (DB) ** AIR 1924 Cal 600 (605) (DB).

(13) It is always open to the appellant in an appeal to give up a portion of his claim and to restrict it. It is further open to him unless the relief is of such a nature that it cannot be split up, to relinquish a part of the claim and to bring it within the amount of court-fee already paid. AIR 1953 SC 28 (Pr 8) = 1953 SCR 197.

(14) Appeal to High Court against award given under Land Acquisition Act by Additional District Judge who accepted as correct the amount awarded by Collector and rejected the claim of the claimant — Held that Schedule 2 Article 17 (iii) or (iv) did not apply as the proceeding in which the award was obtained could not be described as a suit. AIR 1951 Pat 608 (Pr 3).

(15) Preliminary decree for redemption — Mortgage debt deposited in court beyond time — Final decree for foreclosure — Appeal against — Amount of debt not in dispute but only a subsidiary matter — No ad valorem court-fee payable — Fixed court-fee is sufficient. AIR 1962 Madh Pra 237 (238, 239) = 1961 Jab LJ 1267.

22. State Amendments

(A) Section 7 (iv) (a) (U. P.)

(1) Suit to obtain declaratory decree — Consequential relief sought in respect of immovable property — Relief incapable of valuation in money — Ad valorem court-fee is payable as if relief was one for possession of immovable property. AIR 1940 Oudh 249 (250) = 15 Luck 415 (DB) ** AIR 1948 Oudh 297 (298) = 23 Luck 189.

(2) Suit for declaration of right with permanent injunction — Section 7 (iv) (a) (U. P.) applies. AIR 1958 All 41 (41) (DB) ** AIR 1961 All 483.

(3) The words "relief sought" in para (iv) of the amendment mean the whole relief which is prayed for in the suit. AIR 1944 All 113 (114) = ILR (1944) All 214.

(4) A suit with a prayer (i) that an order of the T. R. O. requiring the plaintiff tenant to vacate the premises be declared ultra vires, null and void and (ii) that the defendant landlord be restrained by perpetual injunction interfering with the possession of the plaintiff so long as the tenancy is not legally determined, falls under Section 7 (iv) (a). The consequential relief of injunction cannot be valued according to Section 7 (iv-B) as that clause applies to suits for injunctions only. It has to be valued in the manner provided by Section 7 (iv) (a). Applying the principle of Section 7 (v-B) (U. P.) the court-fee in such a suit for

for an injunction;

(d) to obtain an injunction,

Section 7, Para. (iv), Clause (c) — Note 22 (contd.)

a consequential relief of injunction should be on one year's rent. AIR 1949 All 560 (Pr 4) = ILR (1949) All 882 (DB).

(5) The proviso to Section 7 (iv) (a) will apply only where the relief affects immovable property directly. AIR 1949 All 207 (208) = ILR (1949) All 410 (DB).

(6) Where the plaintiff asks for cancellation of a compromise and consequential relief of possession and recovery of money the reliefs must be separately valued according to the provisions applicable to them. AIR 1949 All 170 (171) = ILR (1949) All 852 (DB).

Section 7 (iv) (b) (U. P.)

(7) There is nothing in law to prevent the plaintiff from valuing a relief for accounting at any figure chosen by him but he cannot get a decree for any amount in excess of that amount until he pays the proper court-fee. AIR 1944 All 84 (87) = ILR (1944) All 133 (DB).

[See also AIR 1949 All 161 (162) = ILR (1949) All 434 (DB).]

(8) In an appeal against a decree in suit for accounts falling under S. 7 (iv) (b) the appellant's valuation of the relief cannot be interfered with unless there is material on the record on which the Court can arrive at a different valuation. 1950 All LJ 285 (286).

(9) Suit for dissolution of partnership and accounts — Liabilities alleged to exceed assets — Relief can be valued only at discretion of plaintiff. AIR 1949 All 359 (360) = ILR (1948) All 25.

(10) 'Suit' in second proviso does not include appeal. AIR 1949 All 382 (384, 388) = ILR (1949) All 929 (FB).

(B) Punjab Amendment.

(11) The word property in the proviso added by the Punjab Court-fees Amendment Act 31 of 1953 to Section 7 (iv) (c) is used in the sense of a right in the property involved in the case. AIR 1956 Punj 251 (251, 252).

(12) For applying the proviso it has first to be decided whether a suit falls under sub-clause (c) of Section 7 (iv). If it falls under sub-clause (d) of S. 7 (iv) then the question of applying the proviso cannot possibly arise. AIR 1965 Punj 468 (469) = 1965 Cur LJ 195.

(13) The proviso to Section 7 (iv) (c) applies only to suits relating to property of which method of calculation of value is given in clause (v) and not to other suits. AIR 1964 Punj 381 (382) = ILR (1964) 1 Punj 403.

(14) Suit for declaration that certain mortgage on agricultural land is without consideration — Value for purpose of Court-fee is thirty times the land revenue — Order demanding fee on value of

mortgage money is illegal. ILR (1967) 1 Punj 512 = 68 Punj LR 689.

(15) Suit for declaration that previous partition decree was void with consequential relief for setting it aside and for fresh partition — Second proviso applies to such a case as right, title and interest of various co-owners in property in dispute would be affected if consequential relief is granted — Ad valorem Court-fee payable on market value of plaintiff's share. AIR 1965 Punj 1 (6, 7, 11, 12) = 67 Pun LR 339 (FB). (R. S. A. No. 56 of 1955 dated 24th March 1960 (Punj), Overruled.)

Section 7, Para (iv), Clause (d) — Note 1

(1) The kind of suit contemplated by this clause is that in which a perpetual injunction is claimed. Suit will not come under this clause merely because an application is made therein under O. 39 of the Civil Procedure Code for the grant of a temporary injunction. But where the suit itself is for an injunction this clause will apply whether the injunction sought is preventive or mandatory. (1882) 4 All 320 (329, 330) (FB) ** AIR 1940 Cal 552 (553) (DB).

(2) Relief of injunction asked as substantive relief in addition to relief of declaration. (1897) 19 All 60 (63) (DB).

(3) Suit on behalf of certain idols for declaration that defendant had no power to manage property of the minors and for perpetual injunction restraining defendant from interfering with management of the properties—**Held**, that suit was one for declaratory decree with prayer for consequential relief. AIR 1925 All 602 (604) = 47 All 501.

[See also (1896) 10 Bom 60 (61).]

(4) Suit framed as one for injunction restraining defendant from interfering with plaintiff's possession as sale-deed executed by plaintiff in favour of defendant was void — **Held**, that object of suit was avoidance of sale-deed and that suit should be valued as one for declaration and not as one in which there was only prayer for injunction. AIR 1939 Mad 435 (435).

(5) Plaintiff prayed for permanent injunction restraining certain persons from quarrying and removing stones without paying necessary fees to plaintiff — **Held**, suit came under this clause. AIR 1936 Mad 200 (201).

(6) Plaintiff claimed that he was entitled to customary supply of water to his irrigation tank from overflow of water from defendant's tanks and sued for an injunction restraining defendant from carrying out certain projected works which would endanger customary flow of water to plaintiff's tank — **Held**,

Section 7, Para. (iv), Clause (d) — Note 1 (contd.)

suit was only for injunction coming under this clause and not one for declaratory decree with consequential relief. AIR 1941 Mad 91 (93, 94) = ILR (1941) Mad 157.

(7) Suit for permanent injunction restraining defendant from erecting permanent structures on suit land and for mandatory injunction for removal of construction already made alleging that defendant's interest in land was not sufficient to entitle him to erect such structures comes under this clause. (1882) 4 All 320 (329, 330) (FB) ** AIR 1940 Cal 552 (553) (DB).

(8) Suit for possession of money bonds and for an injunction restraining defendants from drawing money from the bank — Prayer for recovery of bonds will fall under clause (a) and prayer for injunction will fall under this clause. 1894 Bom PJ 145 (DB).

(9) Plaintiff sued for declaration that he was the sole shebait, that a certain consent decree was not operative and that defendants who were constituted joint shebait were not validly appointed and for an injunction restraining defendants from interfering with management of the endowed property. **Held**, that as plaintiff alleged himself to be already in possession, relief of injunction was to be valued for purposes of court-fee under this clause at the amount mentioned by plaintiff and value of the endowed property was not material for this purpose. AIR 1914 Cal 879 (880, 881) (DB).

(10) Suit for permanent injunction restraining defendant from cutting timber and undergrowth from a jungle belonging to plaintiff falls under this clause. AIR 1919 Cal 975 (975) (DB).

(11) Suit for injunction restraining Municipality from demolishing a thera alleged to be not constructed in accordance with Municipal sanction falls under this clause. AIR 1929 Lah 566 (568) (DB).

(12) Suit to restrain defendant from opening certain windows in his wall and from preventing or obstructing plaintiff from building a second storey to his own house falls under this clause. (1901) 24 Mad 34 (36) (DB).

(13) Suit for injunction restraining defendants from felling certain trees and shrubs in certain lands — Trees are immovable property within Section 3 (14), Madras General Clauses Act, and hence according to High Court notification in R. O. C. No. 911/40-B. 1, D/- 7-8-1943 plaintiff must pay court-fee on the plaint and on the memorandum of appeal on half the market value of trees calculated in manner provided in Section 7(v). AIR 1948 Mad 44 (44).

(14) Suit for injunction to remove obstruction to plaintiff's window from which he derived light and air — Suit valued as one for declaration — **Held**, claim should be valued by ascertaining the difference between the value of the room before the window was blocked up and the value after it was blocked up — Value of the property to be removed need not be considered. 1887 Pun Re No. 52, page 109 (109) (DB).

(15) Suit for declaration that the defendant who was constructing a house next to that of the plaintiff was bound to construct it in accordance with the conditions laid down by the Municipality when it formed the sites and for an injunction restraining the defendant from constructing the house contrary to these conditions and for the removal of such portion of the building as had been built contrary to the conditions — **Held**, that the main relief sought was injunction and the suit must be regarded as governed by this clause. AIR 1955 Mys 65 (Prs. 2, 3) = ILR (1955) Mys 43 (FB). (Per Medappa C. J. and Mallappa J.; Vasudevamurthy J., Contra. AIR 1952 Mys 80 = ILR (1952) Mys 344, **Overruled**.)

(16) Suit filed for declaration that the plaintiff was entitled to certain properties and for possession, with also a prayer that the defendant should be directed to remove the structures on a vacant site — **Held**, that the prayer for injunction was only an ancillary one. Hence for purposes of court-fee the relief of declaration and possession was to be valued under Section 7 (iv) (c) and not under S. 7 (iv) (d). 1957-2 Andh WR 203 (204).

(17) Suit for permanent injunction restraining defendant from interfering with plaintiff's enjoyment of suit land by grazing his cattle thereon — Only dispute is whether the plaintiff or the defendant is entitled to right of grazing — Neither Section 7 (iv) (c) nor Madras proviso to Section 7 (iv) (c) applies. AIR 1958 Andh Pra 106 (107).

(18) Notification of 1-11-1943 under the Suits Valuation Act — Applicability — Conditions for, stated. Where in a suit for injunction relating to immovable property the only allegation is that the defendant is threatening the plaintiff's possession, the notification will not be attracted and the plaintiff can value the suit under Section 7 (iv) (d). AIR 1956 Mad 52 (Pr. 6) = ILR (1956) Mad 1266.

(19) Suit for declaration that award of Deputy Registrar Co-operative Societies is not valid and for injunction — Injunction not consequential on declaration — Section 7 (iv) (d) applies — Plaintiff can put his own valuation. AIR 1954 Mad 188 (Pr. 2).

(20) Suit by Taluqdar of an estate for declaration that the suit lands were his

for easements;

(e) for a right to some benefit (not herein otherwise provided for) to arise out of land, and

for accounts;

(f) for accounts—

according to the amount at which the relief sought is valued in the plaint or memorandum of appeal;

In all such suits the plaintiff shall state the amount at which he values the relief sought *[* * *].

[*] The words “and the provisions of the Code of Civil Procedure, section thirty-one, shall apply as if, for the word ‘claim’, the words ‘relief sought’, were substituted” were omitted by the Amending Act, 1891 (12 of 1891).

Section 7, Para. (iv), Clause (d) — Note 1 (contd.)

absolute property and not taluqdari lands under Section 5 (1) of the Bombay Taluqdari Tenure Abolition Act, 1949 — Relief of injunction restraining State Government from applying Section 5(1) of the Act and from levying assessment thereon asked for — Relief of injunction was consequential to the declaration sought, in that the Government had threatened the plaintiff with recovery of full assessment as an occupant of the suit lands — Suit is covered by Section 7 (iv) (d) of the Court-Fees Act and not by Art. 17, Cl. (iii) of Sch. II of that Act — Plaintiff entitled to put his own valuation for purposes of Court-fees and jurisdiction and was not bound to value the lands at market value. (1965) 6 Guj LR 655 = ILR (1965) Guj 597.

(21) Suit for injunction directing licensee, whose licence has been terminated to vacate — Section 7 (iv) (d) and not Section 7 (v) applies. AIR 1964 J & K 99 (103, 104) = 1964 Kash LJ 141 (DB).

(22) Suit for injunction — Suit held fell under Art. 17 (vi) of Sch. II read with Section 7 (iv) (d) — Plaintiff held not liable to pay ad valorem court-fee under Section 7 (iv) (c). AIR 1959 Madh Pra 253 = 1959 MPLJ 388.

(23) Suit essentially for injunction in regard to truck — Plaintiff also claiming that he had share in truck — Suit held would fall under Section 7 (iv) (d) and not under Section 7 (iv) (c). AIR 1965 Punj 468 = 1965 Cur LJ 195.

(24) Under Section 8 of the Suits Valuation Act whatever value is fixed for court-fee must necessarily become the value for the purpose of jurisdiction. Even in a suit for injunction the plaintiff has to pay court-fee on the ad valorem basis. But he has the discretion to fix the value for purpose of paying court-fee. Once he fixes the amount for the purpose of paying the court-fee, that becomes the valuation for jurisdiction also under Section 8 of the Suits Valuation Act. It is not right to say that the valuation fixed for jurisdiction becomes the valuation for purpose of court-fee. AIR 1968 Orissa 181 = 34 Cut LT 1195 (DB).

Section 7, Para (iv), Clause (e) — Note 1

(1) Suit to establish an easement comes under this clause. (1882) 4 All 320 (329) (FB) ** AIR 1929 Bom 341 (342, 343) = 53 Bom 552 (DB) ** (1912) 16 Ind Cas 963 (965) (Cal) (DB).

(2) Plaintiff sued for declaration that he was liable to pay certain kind of royalty and not at higher rate claimed by defendant. It was held that the suit did not come under this clause as, if there was a benefit, it was a benefit to the defendant and the plaintiff aimed at reducing such benefit. AIR 1924 Mad 621 (622) (DB).

(3) Suit to recover possession of a mine — Suit is governed by Section 7 (v) and not by this clause. (1912) 16 Ind Cas 963 (965) (Cal) (DB).

(4) Suit for declaration that the defendant, who was constructing a house next to that of the plaintiff was bound to construct it in accordance with the conditions laid down by the Municipality when it formed the sites and for an injunction restraining the defendant from constructing the house contrary to these conditions and for the removal of such portion of the building as had been built contrary to these conditions — The main relief claimed by the plaintiff was injunction and not easement or any other right to some benefit to arise out of land — The suit could not be said to be one under this clause but fell under Cl. (d) of Section 7. AIR 1955 Mys 65 (Prs. 2, 3) = ILR (1955) Mys 43 (FB). (Per Medappa C. J. and Mallappa J., Vasudevamurthy J., Contra. AIR 1952 Mys 80 = ILR (1952) Mys 344, Overruled.)

SECTION 7, Para (iv), Clause (f) — SYNOPSIS

1. Suit for accounts.
2. Suit for dissolution of partnership and for accounts.
3. Suit for administration.
4. Suit for partition.
5. Suit under Section 92, Civil Procedure Code.
- 5A. Valuation for purposes of Court-fees and jurisdiction.
6. Appeal in suit for account.

STATE AMENDMENTS

Andaman and Nicobar:

In paragraph (iv) of Section 7, after the word 'appeal', insert the words, figures and letter "subject to the provisions of Section 8-C".—Reg. II of 1957, S. 7(1) (1-8-1957).

Delhi:

Same as in Punjab—See S.R.O. 422 and G.S.R. 842, Gaz. of Ind., 1950, Pt. II, S. 3, p. 458 and Gaz. of Ind., 1950, Pt. II, S. 3 (i), p. 1039.

Madhya Pradesh:

In paragraph (iv) of Section 7—

(a) clause (b) shall be omitted;

(b) after the word 'appeal', insert the words "with a minimum fee of twenty rupees".—C. P. Act 16 of 1935 and M. P. Act 9 of 1953, S. 3 (15-4-1953).

Orissa

Clause (b) of Section 7 (iv) was omitted — Orissa Act 5 of 1939 (31-10-1939).

Pondicherry:

Same as that of Andaman and Nicobar—See Act 26 of 1968, Sec. 3 and Schedule, Pt. II (18-12-1968).

Punjab, Haryana, Chandigarh:

In clause (iv) of Section 7, after the word 'sought' at the end of the clause, add the following, namely:—

"(a) Provided that the minimum court-fee in each case shall be thirteen rupees;

(b) Provided further that in suits coming under sub-clause (c), in cases where the relief sought is with reference to any property such valuation shall not be

Section 7, Para. (iv), Clause (f) — Synopsis (contd.)

7. Appeal against final decree in suit for accounts — Court-fee.

8. Appeal from preliminary decree.

9. Appeal from dismissal of suit for accounts.

10. Appeal in mortgage suit.

11. Appeal in suit for money due on accounts.

12. Appeal from preliminary decree in suit for money.

13. Decree in favour of defendant — Court-fees.

14. Suits under Section 33, U. P. Agriculturists' Relief Act.

15. Suits under Section 15D, Dekkhan Agriculturists' Relief Act.

1. Suit for accounts.— (1) A suit for accounts connotes that the defendant is liable in law to render accounts to the plaintiff. AIR 1944 Oudh 101 (102) ** AIR 1918 Cal 1037 (1039) (DB) ** AIR 1916 Mad 990 (990) ** (1897) 20 Mad 418 (420) (DB).

(2) There must be something more, for a suit to be a suit for accounts, than a mere relationship of debtor and creditor between the parties. The defendant must stand in some other relation to the plaintiff such as that of agent or bailee or receiver or trustee or partner or mortgagee. AIR 1947 Bom 255 (258) = ILR (1947) Bom 162 (DB).

(3) The general rule may be taken to be that the agent will not be entitled to an account against his principal. But this rule is subject to exceptions in cases in which the relation between the

agent and the principal is of a fiduciary character or the transactions between the parties are so involved and complicated that the right of accounting will alone serve to administer complete justice and where the accounting sought is ancillary to the main purpose of the action. AIR 1957 Trav-Co 264 (265).

(4) Suit for money will not be one for accounts merely because Court will have to look into accounts before passing a decree. (36-43) Tax Dec (Nag) 103 (105) ** AIR 1957 Mad 297 (298) ** AIR 1932 Mad 565 (565, 566) ** AIR 1928 Bom 476 (477, 483) = 52 Bom 904 (DB) ** AIR 1918 Cal 1037 (1039) (DB) ** AIR 1914 All 108 (108) (DB) ** (1905) 28 Mad 394 (395, 396) (DB) ** AIR 1941 Oudh 622 (623) = 17 Luck 246.

(5) A suit for accounts is a special form of suit. It does not embrace every case in which accounts have to be looked into to ascertain the amount due by one party to the other. 1958 Andh LT 747. (ILR 28 Mad 394, Rel. on.)

(6) The case must be one in which owing to the nature of the relationship between the parties, the plaintiff is not in a position to state definitely whether anything, and if so, how much is due to him from the defendant. AIR 1928 Bom 476 (479, 483) = 52 Bom 904 ** AIR 1956 J & K 35 (36) (DB) ** AIR 1915 Cal 365 (366) (DB) ** (1912) 8 Nag LR 36 (38).

(7) A merely incidental or ancillary relief as to taking accounts will not make a suit one for accounts. (1899) 21 All 200 (203) (DB). (Suit under Sec. 92, Civil P. C., containing an incidental prayer for accounts.)

less than the value of the property calculated in the manner provided for by clause (v) of this section.”—E. P. Act 26 of 1949, S. 3 (1-4-1950) and Punj. Acts 31 of 1953, Section 2 (13-5-1953) and 19 of 1957, Section 3 (13-7-1957); Act 31 of 1966, Section 88 (1-11-1966).

Uttar Pradesh:

For sub-section (iv) of Section 7, the following sub-section was substituted, namely:—

“(iv) In suits—

(a) to obtain a declaratory decree or order, where consequential relief other than relief specified in sub-section (iv-A) is prayed; and

(b) for accounts;

according to the amount at which the relief sought is valued in the plaint or memorandum of appeal:

Provided that in suits falling under clause (a), where the relief sought is with reference to any immovable property, such amount shall be the value of the consequential relief and if such relief is incapable of valuation, then the value of the immovable property computed in accordance with sub-sections (v), (v-A) or (v-B) of this section as the case may be:

Provided further, that in all suits falling under clause (a), such amount shall in no case be less than Rs. 300:

Provided also, that in suits falling under clause (b), such amount shall be the approximate sum due to the plaintiff and the said sum shall form the basis for calculating (or determining) the valuation of an appeal from a preliminary decree passed in the suit.”—U. P. Acts 19 of 1938 (9-1-1939), 9 of 1941 (19-6-1941) and 44 of 1958, S. 2(1).

Section 7, Para. (iv), Clause (f) — Note 1 (contd.)

(8) A suit for money due on a mortgage does not become a suit for accounts merely because it involves taking of accounts or because defendant claims that accounts should be taken according to a certain method. AIR 1922 Pat 59 (60) (DB) ** AIR 1935 Bom 69 (70) (DB).

(9) Plaint specially mentioning specific amount misappropriated by defendant — Claim in respect of such amount not independent of claim for accounts — This clause applies. AIR 1937 Mad 235 (236, 237).

(10) Plaintiff in a suit for accounts referring in plaint to account sent by defendant wherein it was stated that a specific amount was remaining in the hands of defendant — Suit does not become a simple suit for money. AIR 1936 Mad 525 (525, 526).

(11) Where the plaint asks for decree directing the defendant to render accounts and for appointment of a commissioner to examine the accounts and vouchers already handed over to the plaintiff, and allegations of mismanagement and extravagance are made, but no specific sums are claimed, the suit is one for accounts within the meaning of Clause (f) of Section 7 (iv) and the allegation in the plaint that the plaintiff had got the accounts examined carefully through audit reports does not alter the nature of the suit. AIR 1947 Mad 360 (2) (361).

(12) Prior to suit for accounts plaintiff had sent notice to defendant claiming a definite sum of money — This

does not make it a simple suit for money. AIR 1936 Bom 166 (166, 167).

(13) Defendant accounting to party — Plaintiff suing him for definite sum of money — Suit will not be one for accounts. AIR 1914 Mad 100 (1) (100) ** AIR 1952 Kutch 36 (Pr. 8). (When a definite amount is claimed there is no question of taking accounts — Ad valorem Court-fee on the amount is to be paid.)

(14) Suit to surcharge and falsify accounts already furnished and to recover specific sums — Suit is not for accounts — Plaintiff must value and pay ad valorem Court-fee on basis of specific sums. AIR 1946 Mad 136 (137).

2. Suit for dissolution of partnership and for accounts.— (1) Suit for accounts of a dissolved partnership — Suit is one for accounts. (1895) 22 Cal 692 (708) (DB) ** AIR 1957 Mad 667 (667, 688).

(2) Suit for dissolution of partnership and for accounts is a suit for accounts. (1914) 22 Ind Cas 71 (72) (DB) (Bom) ** (1910) 32 All 517 (521).

[See AIR 1937 Lah 694 (696) = ILR (1937) Lah 196 (DB).]

(3) Partnership at will — Institution of suit itself dissolves partnership — Suit may be treated for purposes of Court-fee as merely a suit for accounts. AIR 1943 Mad 639 (640, 641) = ILR (1944) Mad 271 (DB).

(4) Suit purely for dissolution of partnership — No money-decree asked for against defendant on the basis that he is an accounting party — Suit is not

West Bengal:

(1) Clause (b) of paragraph (iv) was omitted.

(2) In paragraph (iv), after the words "memorandum of appeal", the words, figure and letter "subject to the provisions of S. 8-C" were inserted.—Bengal Act 7 of 1935, (2-5-1935).

**Section 7, Para. (iv), Clause (f) —
Note 2 (contd.)**

one for accounts. AIR 1944 Oudh 101 (102).

(5) Where the suit in substance is one for dissolution of partnership and accounts the mere fact that certain declarations are asked for besides the prayer for dissolution of partnership and for distribution of profits and assets of the partnership would not attract the provisions of Section 7 (iv) (c), Court-fees Act. (1955) 59 Cal WN 726 (728).

(6) In a suit for dissolution of partnership and for accounts under Section 7 (iv) (b) (U. P.) the plaintiff is required to state the approximate amount due to him. It will not do for him to merely value his suit for purpose of payment of Court-fee at a certain figure. AIR 1957 All 754 (755).

3. Suit for administration.— (1) Suit for administration is a suit for accounts for purposes of this clause. AIR 1941 Rang 322 (323) = 1941 Rang LR 512 (FB) ** AIR 1955 Sau 55 (Pr. 4) ** AIR 1952 Sau 30 (Prs. 2, 3) ** AIR 1945 Sind 11 (20) = ILR (1944) Kar 325 ** AIR 1946 Bom 356 (359) = ILR (1946) Bom 245 ** 42 Pun LR 101 (102) ** AIR 1936 Bom 353 (356) (DB) ** AIR 1936 Lah 879 (881) (DB) ** AIR 1935 Rang 13 (14) = 12 Rang 512 ** AIR 1918 Cal 895 (895) = 45 Cal 634 (DB) ** AIR 1914 Oudh 1 (18) (DB) ** AIR 1918 Cal 883 (886) = 44 Cal 890 (DB) ** AIR 1914 Lah 490 (491) = 1914 Pun Re No. 100 (DB).

[But see AIR 1942 Mad 247 (248, 249) = ILR (1942) Mad 455.]

(2) Different views are held as to the liability of creditors other than the plaintiff, to pay Court-fees in respect of claims which they put forward under a preliminary decree for administration.

(a) In the following case it was held that such a creditor may be required to pay ad valorem Court-fees on his claim. AIR 1918 Cal 883 (886) = 44 Cal 890 (DB).

(b) In the following decision it was held that such a creditor was liable to pay Court-fee not on the amount claimed by him but on the actual dividend that was payable to him. AIR 1938 Cal 785 (787, 788) = ILR (1939) 1 Cal 152 (DB).

(c) The following case holds that a creditor coming in with a claim after a preliminary decree for administration was liable to pay Court-fee on his claim. AIR 1939

Rang 115 (117) = 1939 Rang LR 134 (DB).

(d) The following case has held that such a creditor is not liable to pay any Court-fee and that a creditor suing for administration does not do so on behalf of all creditors so as to treat them all as plaintiffs in a suit for accounts governed by Section 11 of this Act and liable to pay Court-fees on the amount decreed to them AIR 1931 Mad 683 (683, 684, 687) = 55 Mad 26 (DB).

(e) The following Sind case holds that such a creditor comes under explanation to Section 11 (Sind) and is liable to pay Court-fee in respect of his claim. AIR 1946 Sind 72 (73) = ILR (1946) Kar 104.

(3) Person suing for recovery of estate of a deceased person as his heir — Suit cannot be treated as suit for administration merely because plaint is headed as such a suit — Court-fee is payable according to value of the estate. AIR 1937 Rang 455 (456) = 1937 Rang LR 426 (DB).

(4) A suit to ascertain the estate to which the plaintiffs may be ultimately found entitled, is a suit essentially for administration of the estate and for accounts. It may be that on the winding up of the estate, there may be very little or nothing left for the plaintiffs who may not be able to value their claim at any definite figure. AIR 1953 Nag 276 (Prs. 16, 17) = ILR (1953) Nag 565. (The mere fact that the plaintiffs relied upon the will to claim their share did not make any difference in the nature or the frame of the suit. Nor did the defence alter its nature.)

4. Suit for partition.— (1) Separate Court-fee is payable in respect of relief of taking accounts in a suit for partition — Such relief is assessable to Court-fee under this clause. AIR 1936 Mad 562 (563) ** AIR 1956 Nag 175 (Pr. 17) ** AIR 1952 Kutch 36 (Pr. 8) ** AIR 1933 Mad 431 (432) ** AIR 1918 Cal 159 (159) (DB).

[But see AIR 1930 Pat 1 (6, 7) = 8 Pat 818 (DB) ** AIR 1919 Pat 403 (404).]

(2) Suit for partition of some property held by plaintiff and defendant as tenants-in-common — Defendant alleged in written statement that plaintiff was managing the property and receiving rents and that he should render accounts — Held that defendant must

Section 7, Para. (iv), Clause (f) — Note 4 (contd.)

value relief and pay necessary Court-fee. AIR 1933 Sind 304 (304).

(3) Suit for dissolution of partnership and accounts, and declaration that certain transactions were not binding on plaintiff's share and for partition and possession of his share — Suit for purposes of Court-fee comes properly under Section 17 and not under Section 7 (iv) (c) and (f). AIR 1958 Bom 307 (309) = ILR (1958) Bom 193.

5. Suit under Section 92, Civil Procedure Code.— (1) Suit under Sec. 92, Civil Procedure Code, for removal of trustees and for appointment of new trustees is not one for accounts merely because plaint contains a prayer for accounts. Such a suit falls under Schedule II, Article 17 (vi). (1910) 7 Ind Cas 92 (94) (DB) (Cal) ** (1899) 21 All 200 (202, 203) (DB).

[But see (1885) 9 Bom 22 (24) (DB).]

(2) Suit under Section 92, Civil P. C. — Some reliefs outside scope of Sec. 92 — Court-fees chargeable on these reliefs have to be paid — Suit against trustees and legal representatives of a deceased trustee for damages to trust property and rendition of accounts — Damage claimed and balance after accounts valued by plaintiffs themselves — No allegation of dishonesty and malversation — **Held**, the plaintiff must pay ad valorem Court-fees. AIR 1964 Madh Pra 259 = 1964 MPLJ 758.

5-A. Valuation for purposes of Court-fees and jurisdiction.— (1) The plaintiff is authorised under the law to give his own valuation for the purpose of Court-fees in a suit for account and in such a case, the valuation for the purpose of Court-fee and jurisdiction is the same. ILR (1968) Cuttack 326 ** ILR (1967) 46 Pat 127 = 1967 BLJR 679 (DB) ** AIR 1961 Him Pra 22 (24) ** AIR 1960 J & K 89 (89, 90, 91) (DB) ** ILR (1960) 10 Raj 262 (DB).

(2) Section 7 (iv) (f) permits the plaintiff or the appellant to put his own valuation. But, the plaintiff or appellant cannot place any arbitrary valuation on the plaint or the memorandum of appeal. The valuation must be a reasonable one, and when a question is raised as to the true valuation, it is open to the Court to determine whether the valuation put by the plaintiff or the appellant is a reasonable one. AIR 1966 Madh Pra 247 (248) = 1966 MPLJ 136.

6. Appeal in suit for account.— (1) Section 7 (iv) (f) will apply to appeals in suits for account, provided that the nature of the subject-matter in dispute in appeal falls within its scope. Where the dispute in appeal relates to a right to accounts and to a decree for the money found due or taking such ac-

counts, this clause will apply but not where the appeal does not relate to such dispute. The clause will not apply to appeals where a decree for a definite amount is prayed for or is challenged. AIR 1956 J & K 35 (36) (DB).

(2) The forum of appeal in a suit for accounts would depend on the value of the relief as set out in the plaint and not on the amount for which the decree may have been passed. AIR 1961 Him Pra 22 (24) ** ILR 46 Pat 127 = 1967 BLJR 679 (DB) ** AIR 1960 J & K 89 (89 to 91) (DB).

7. Appeal against final decree in suit for accounts — Court-fee.— (1) This clause is applicable to appeals from final decree as well as to appeals from preliminary decrees in suits for accounts, whether such an appeal is by plaintiff or defendant—Hence, an ad valorem Court-fee is payable in such cases and not a fixed Court-fee under Art. 17 of Schedule II. (1937) 31 Sind LR 37 (43) (DB) ** AIR 1933 Lah 633 (634) = 14 Lah 738 ** AIR 1929 PC 147 (148) = 56 Ind App 232 = 10 Lah 737 ** AIR 1922 All 228 (230) = 44 All 542 ** AIR 1929 Cal 815 (816) = 57 Cal 463.

(2) Where a defendant in a suit for accounts appeals against a final decree for a definite sum against him, he must pay Court-fee on such sum. AIR 1938 Mad 435 (438) = ILR (1938) Mad 598 (FB). (AIR 1933 Mad 330 = 56 Mad 705 (DB), **Overruled**.) ** AIR 1956 J & K 35 (36) (DB) ** AIR 1950 Mad 26 (Pr. 3). (Suit for partition and account — AIR 1938 Mad 435 = ILR (1938) Mad 598 (FB), **Applied**.) ** AIR 1938 Nag 527 (527, 528) = ILR (1941) Nag 344 ** AIR 1938 Rang 23 (24, 25) = 1937 Rang LR 309 ** ('36-43) Tax Dec (Nag) 72 (72) (DB) ** AIR 1934 All 807 (810) ** AIR 1934 Cal 786 (787) (DB) ** AIR 1929 Cal 815 (817) = 57 Cal 463.

[See also AIR 1937 All 465 (466).]

(3) Decree in suit for accounts for a definite sum of money — Defendant appealing against decree must pay ad valorem Court-fee on decretal amount — Case is governed by Schedule I, Article 1 and not by Section 7 (iv) (f) as the dispute in appeal would no longer be for taking accounts but would relate to the definite sum of money decreed against the defendant. AIR 1963 J & K 9 = 1962 Kash LJ 1.

(4) A plaintiff would be free to value his appeal at a lower figure than the amount of the decree against him. AIR 1943 Mad 685 (686).

[See however AIR 1954 Mys 62 (Prs. 2, 8) = ILR (1954) Mys 299 (DB). (AIR 1941 Bom 242. Rel. on. AIR 1943 Mad 685, Not Foll; AIR 1929 PC 147, **Expl.**) ** AIR 1941 Bom 242 (242) = ILR (1941) Bom 477 (DB) ** AIR 1933 Sind 322 (323) = 27 Sind LR 335 (DB).]

Section 7, Para. (iv), Clause (f) — Note 7 (contd.)

(5) Suit for accounts — Appeal against final decree — Appellant dissatisfied with decree passed in his favour seeking fresh accounting in appeal — Entitled to put his own valuation on relief. AIR 1962 Mys 212 (215) = 40 Mys LJ 187 (DB).

(6) Decree for certain amount passed in favour of plaintiffs in suit for accounts — Appeal against decree claiming higher amount — He must pay Court-fee on excess amount claimed by him. AIR 1938 Lah 633 (634) = 14 Lah 738 ** AIR 1959 Punj 466 (467) = 61 Pun LR 350 (DB).

[But see AIR 1952 Trav-Co 43 (Pr 4) = ILR (1951) Trav-Co 374 (DB). (Final decree in suit for accounts — Appeal by plaintiff — Appellant seeking to make defendant liable for more amounts than found by lower Court — It is open to the plaintiff to have the whole case opened in appeal on court-fee paid on a notional valuation.)]

(7) Suit for dissolution of partnership and rendition of accounts — Final decree passed — Appeal from — Cross objection preferred in appeal — Court-fee on, is to be paid ad valorem under Schedule I, Article 1 — Section 7 (iv) (f) and Schedule II, Article 17 do not apply. AIR 1962 Punj 110 (115, 116, 117) = ILR (1961) 1 Punj 728 (DB). (AIR 1930 Lah 579, Dissented from.)

8. Appeal from preliminary decree.—

(1) Appeal from preliminary decree in a suit for accounts — Appeal is liable to an ad valorem Court-fee under this clause and not to a fixed Court-fee under Schedule II, Article 17, Clause (iii) or (vi). AIR 1922 All 228 (229) = 44 All 542 ** AIR 1914 Lah 507 (507) = 1915 Pun Re. No. 7 (DB) ** (1910) 32 All 517 (522).

(2) Different views are held as regards the question whether defendant appealing from a preliminary decree in suit for accounts is bound by plaintiff's valuation of the suit in trial Court and to adopt such valuation for purposes of the appeal.

(a) The following cases held that the defendant is bound to accept the plaintiff's valuation of the suit for the purpose of the appeal. AIR 1938 Mad 435 (438) = ILR (1938) Mad 598 (FB) ** AIR 1952 Bhopal 57 (Prs. 4, 8). (Suit for partnership accounts — Proper Court-fee on memo of appeal preferred from preliminary decree by defendants is that paid on plaint.) (AIR 1917 Mad 668 = 39 Mad 725 (FB), Foll.) ** AIR 1917 Mad 368 (369) = 39 Mad 725 (FB) ** AIR 1927 Sind 100 (102) = 21 Sind LR 377 (DB) ** (1924) 79 Ind Cas 923 (924) (DB) (Sind) ** AIR 1937 Lah 694

(696) = ILR (1937) Lah 196 (DB) ** AIR 1946 Lah 280 (290) = ILR (1947) Lah 47 (FB). (Overruling AIR 1926 Lah 189) ** AIR 1943 Nag 13 (16) = ILR (1943) Nag 17 (DB) ** AIR 1959 Bom 495 (496, 497) = 61 Bom LR 599 (DB). (AIR 1925 All 787 and AIR 1931 Rang 146 (FB) and view of Sen J. in AIR 1935 Bom 212, Diss. from.)

(b) The following cases have held that the defendant is entitled to put his own valuation on the appeal for purposes of Court-fee in such cases. AIR 1937 All 465 (466) ** AIR 1958 Raj 144 (145) = ILR (1957) 7 Raj 918. (23 Mad 490 and AIR 1917 Mad 668 (FB) and AIR 1933 Mad 435 (FB) and AIR 1914 Lah 507 and AIR 1946 Lah 230 (FB) and AIR 1943 Nag 13 and 1 Ind Cas 670 (Cal), Dissent. from.) ** AIR 1925 All 787 (790, 793) = 47 All 756 (DB) ** AIR 1935 Bom 212 (213) (DB) ** AIR 1935 Pat 396 (399, 400) = 14 Pat 658 (SB) ** AIR 1924 Pat 161 (162) = 3 Pat 146 ** AIR 1938 Rang 23 (24) = 1937 Rang LR 369 ** AIR 1931 Rang 146 (146) = 9 Rang 165 (FB) ** ('36-43) Tax Dec (Nag) 24 (25) ** AIR 1933 Nag 127 (128, 129) = 29 Nag LR 34.

[See however AIR 1956 Madh B 132 (Pr. 26) (DB). (Shinde C. J. and Dixit J., Chaturvedi J., contra) (Although the defendant is free to put his own valuation on the appeal he cannot do so arbitrarily. He should be allowed to value the memorandum of appeal at an amount less than the valuation of the plaint only when he can demonstrate that there is valid ground for holding that the plaint is deliberately overvalued.)]

(3) Appeal by plaintiff against part of preliminary decree to which he took exception — Held, a Court-fee of Rs. 10 which plaintiff appellant had paid was sufficient as regards question of interest and other questions of debit and credit were merely incidental. AIR 1920 Lah 136 (139) = 1 Lah 6 (DB).

9. Appeal from dismissal of suit for accounts.— (1) Plaintiff's suit for accounts dismissed — Appeal against dismissal — He is not entitled to change valuation of his claim for purposes of Court-fee in appeal. AIR 1940 Mad 878 (879) ** AIR 1938 Mad 887 (889) = ILR (1938) Mad 1031 (FB) ** AIR 1934 Lah 488 (491, 492) = 15 Lah 151 (FB).

10. Appeal in mortgage suit.— (1) Suit for sale in enforcement of a mortgage — Defendant claiming that accounts must be taken under Dekkhan Agriculturists' Relief Act — Decree — Appeal by defendant against decree for

Section 7, Sub-sections (iv-A), (iv-B), (iv-C).

Orissa:

After paragraph (iv) the following paragraph was inserted, viz.:—

“(iv-A) In a suit for cancellation of a decree for money or other property having a money value, or other document securing money or other property having

Section 7, Para. (iv), Clause (f) — Note 10 (contd.)

certain amount in mortgage suit — **Held** that appellant must pay court-fee computed according to full amount of decree appealed from inasmuch as appeal seeks setting aside of whole decree and remanding of case for taking accounts under Dekkhan Agriculturists' Relief Act. AIR 1935 Bom 69 (70) (DB) ** AIR 1945 Bom 504 (510, 511) = ILR (1945) Bom 629 (DB)

11. Appeal in suit for money due on accounts.— (1) Plaintiff sued for a certain sum of money as being due as cesses — Defendant denied his liability to pay any cesses — Court found that plaintiff was entitled to recover cesses but left it to the Commissioner to determine amount due — Defendant appealed — **Held** that appellant was bound to pay Court-fee according to the amount claimed by plaintiff in his plaint. AIR 1930 Pat 605 (607).

(2) A sued B and C on bahi accounts for Rs. 6,000 — Court dismissed suit against B and as against C decreed suit only to the extent of Rs. 4,000 — A appealed and paid Court-fee only on Rs. 2,000 — **Held** that A would not be entitled to a decree for more than Rs. 2,000 against B. AIR 1926 Lah 558 (559) (DB).

12. Appeal from preliminary decree in suit for money.— (1) Suit for money coming under Section 7 (i) — Court holding that defendant is liable to plaintiff but exact amount due left to be determined by Commissioner — Defendant appealing from such decree — This clause will not apply to such an appeal — Court-fee on such appeal will be payable under Schedule 1, Article 1. AIR 1931 Pat 335 (336) = 10 Pat 458 ** AIR 1930 Pat 605 (607) ** AIR 1921 Sind 100 (100, 101) = 15 Sind LR 82 (DB).

13. Decree in favour of defendant — Court-fees.— (1) Suit for accounts — Balance found in favour of defendant — Court can pass decree in his favour although he has not pleaded counter claim or set-off by his written statement — It is sufficient if he pays Court-fee on amount which is actually found due and for which decree is passed in his favour. AIR 1933 Sind 247 (249) (DB) ** AIR 1955 Nag 109 (Pr. 7) = ILR (1955) Nag 261 (DB). (If balance is found ultimately in favour of the defendant then a decree may be passed in his favour conditional on his paying Court-fee on the amount found due.) ** AIR 1924 All 854 (854) = 46 All 858 (DB)

** (1910) 32 All 525 (527) (DB) ** (1897) 20 Mad 418 (420) (DB) ** (1887) 14 Cal 147 (153) = 13 Ind App 123 (PC) ** AIR 1914 Sind 137 (137) = 8 Sind LR 122. [But see (1911) 10 Ind Cas 250 (253) (DB) (Lah).]

14. Suit under Section 33, U. P. Agriculturists' Relief Act.— (1) A suit for accounting under Sections 7 and 9, U. P. Debt Redemption Act, on the basis of a mortgage, cannot be stamped with Rs. 13, Court-fee under S. 33 (3), U. P. Agriculturists' Relief Act, but under Section 7 (iv) (b), Court-fees Act. AIR 1944 Oudh 59 (60).

(2) Suit under Section 33, U. P. Agriculturists' Relief Act, falls under Sec. 7 (iv) (f) and ad valorem Court-fee under Article 1 of Schedule I, Court-fees Act, is payable on appeal arising out of such suit even when the defendant has not obtained a decree under Section 33 (2) of that Act — Amending Act IX of 1937 has not effected any change. AIR 1942 Oudh 209 (209, 210) = 17 Luck 502 (DB).

(3) Suit under Section 33, U. P. Agriculturists' Relief Act, is a suit for accounts and falls under Section 7 (iv) (f). AIR 1940 All 189 (190) = ILR (1940) All 93 (DB) ** AIR 1940 All 504 (506) = ILR (1940) All 762 (FB).

(4) Appeal by plaintiff for reduction of amount adjudicated by Court in suit under Section 33 — Ad valorem Court-fee under Schedule 1, Article 1, Court-fees Act, should be charged on amount by which reduction is sought even when defendant has not obtained a decree under Section 33 (2) of that Act. AIR 1938 All 467 (468, 469) = ILR (1938) All 686 (DB).

15. Suit under Section 15-D, Dekkhan Agriculturists' Relief Act.— (1) A suit for declaration that the deed in suit is really a mortgage and not a sale and for taking accounts of that mortgage under Section 15-D of the Dekkhan Agriculturists' Relief Act, 1879, is a suit for accounts within the meaning of this paragraph. The existence of the prayer for declaration does not prevent the suit from being one for accounts or the fact that on application of the parties under Section 15-D (3) of that Act the suit might be converted into a suit for redemption or foreclosure will not change its nature till that contingency arises. AIR 1946 Bom 319 (321) = ILR (1946) Bom 726 (FB).

Section 7 (iv-A) (Orissa) — Note 1

(1) Suit by X on behalf of X and Y, a minor for partition decreed — Subse-

such value, according to the value of the subject-matter of the suit and such value shall be deemed to be—

if the whole decree or other document is sought to be cancelled, the amount or the value of the property for which the decree was passed or the other document executed;

if a part of the decree or other document is sought to be cancelled such part of the amount or value of the property.

Explanation.—In any case where a suit for the cancellation of a whole decree for money or other property having a money value, or other document securing money or other property having such value has to be instituted, but the substantial relief claimed is only in respect of a part of the amount or the value of the property for which the decree was passed or the other document was executed, the value of the subject-matter of the suit shall be deemed to be such part of the amount or value of the property in respect of which the relief is sought.”—Orissa Act 5 of 1939 (31-10-1939).

Uttar Pradesh:

“(iv-A) In suits for or involving cancellation of or adjudging void or voidable a decree for money or other property having a market-value, or an instrument securing money or other property having such value.

(1) where the plaintiff or his predecessor-in-title was a party to the decree or the instrument, according to the value of the subject-matter, and

(2) where he or his predecessor-in-title was not a party to the decree or instrument according to one-fifth of the value of the subject-matter, and such value shall be deemed to be—

if the whole decree or instrument is involved in the suit, the amount for which or value of the property in respect of which the decree was passed or the instrument executed, and if only a part of the decree or instrument is involved in the suit, the amount or value of the property to which such part relates.

Explanation.—“The value of the property” for the purposes of this sub-section shall be the market-value, which in the case of immovable property shall be deemed to be value as computed in accordance with sub-sections (v), (v-A) or (v-B), as the case may be.”—U. P. Act 19 of 1938 (9-1-1939).

Section 7 (iv-A) (Orissa) — Note 1 (contd.)

quent suit by Y on attaining majority for partition and for declaration that decree in previous suit was not binding on him as it was obtained fraudulently — Court-fee as prescribed in Section 7 (iv-A) is payable. 31 Cut LT 1123 = ILR (1965) Cut 602.

(2) Suit for specific performance of contract of sale of land — Incidental prayer for declaration about invalidity of subsequent sale — Section 7 (x) and not Section 7 (iv) (c) or Section 7 (iv-A) (Orissa) applies — Valuation for suit would be amount of consideration of the suit contract of sale and not that for subsequent sale. AIR 1960 Orissa 129 (130) = ILR (1960) Cut 184.

(3) Suit to set aside compromise decree, having money value and for partition of properties claiming certain share — Court-fee shall be computed on the basis of market value of share claimed and not on that of entire properties — This value shall also determine jurisdiction. 32 Cut LT 434 = ILR (1965) Cut 946.

Section 7 (iv-A) (U. P.) — Note 1

(1) The paragraph is not retrospective in operation. 1941 Oudh WN 471 (472).

(2) This paragraph applies to appeal but will not apply to an appeal by an unsuccessful defendant in a suit although it involves the cancellation of a decree passed by the Court of first instance. AIR 1944 Oudh 29 (30).

(3) The words “a decree for money” include decree in a mortgage suit where the amount of the decree in such a suit is immediately apparent. AIR 1944 Oudh 118 (119) = 19 Luck 54 (DB) ** AIR 1948 Oudh 86 (87) = 22 Luck 481 (DB).

(4) The test to determine whether a suit does or does not involve cancellation of an instrument is to see whether the granting of the relief sought by plaintiff necessarily requires cancellation of the deed. AIR 1949 All 535 (Pr. 2) = ILR (1949) All 498 (DB) ** AIR 1950 All 410 (Pr. 5) = ILR (1951) 2 All 555 (DB) ** AIR 1950 All 231 (Pr. 3).

(5) Where the effect of a declaration in favour of the plaintiff would be that the decree being a charge against the

Section 7 (iv-A) (U. P.) — Note 1 (contd.)

property which is the subject-matter of the suit would no longer be a good decree and would be void so far as that property was concerned, the suit clearly involves adjudging void or voidable the decree. AIR 1955 All 667 (Prs. 3, 4, 6) (DB).

(6) The plaint read as a whole should involve cancellation of, or adjudging void or voidable, a document. It is not necessary that there should be an express mention of or specific claim about cancellation of a document. ILR (1950) All 81 (84) (DB).

(7) Where, though the relief as claimed in the plaint was for a declaration as to the plaintiff's right in certain property, yet when the plaint was read as a whole it could not be denied that what the plaintiff really wanted was that a certain will as put forward by the defendant might be declared ineffective or void for the reason mentioned in the plaint and unless the will put forward by the defendant was considered and a declaration as to its validity or its invalidity given, the relief claimed by the plaintiff could not be awarded to him, it was held that this was a case in which the relief claimed by the plaintiff involved the cancellation or adjudging void or voidable an instrument. AIR 1956 All 71 (Pr. 9).

(8) A suit for declaration that the sale deed is unauthorised, void, illegal and ineffective as against plaintiff is for adjudging the sale deed void or voidable and hence falls squarely within the four corners of Section 7 (iv-A) and Art. 17 (iii) of Sch. 2 which applies only to suits not otherwise provided for does not come into play. AIR 1968 All 216 (219) = 1967 All LJ 612 (FB). (AIR 1956 All 168, **Overruled.**)

(9) State seeking to collect cess or tax under certain Acts — Plaintiffs alleging the Acts as void filing suit to restrain the State — Court-fees are payable under Clause (iv-B) (b) and not under Clause (iv) (a) or Clause (iv-A) of Section 7 — Prayer for injunction cannot be treated as one for a declaratory decree of which the consequential relief is injunction. AIR 1968 SC 102 (105) = (1967) 3 SCR 920. (AIR 1967 All 242, **Reversed.**)

(10) Suit for declaration setting aside partition decree — Plaintiff has to pay ad valorem fees on the value of his share in the property comprised in the decree. AIR 1966 All 542 (543) = 1966 All LJ 633 (DB).

(11) Court-fee payable depends on allegations in plaint and reliefs claimed and not on allegations in written statement — Hindu widow inheriting property under will of husband — Aliena-

tions by her — Suit by reversioner for declaration that alienations were not binding upon him after death — Court-fee paid on 1/5th of the aggregate amounts of sale deed and wakf deed under Section 7 (iv-A) (2), held, was sufficient. AIR 1963 All 330 (335) = 1963 All LJ 353 (DB).

(12) A suit for injunction and possession over bhumidari land in which the plaintiffs also challenged certain sale deeds to which they were parties, held, attracted Court-fee under Section 7 (iv-A) read with Section 7 (v) (1) (b) of the Court Fees Act and payable at 10 times the revenue payable for the land. Sale consideration should not be taken into account in finding the valuation for purposes of Court-fees. 1968 All WR (HC) 501.

(13) Suit for possession of property by plaintiffs as stridhan heirs — Validity of will leaving property to defendants challenged — Court-fees paid on valuation of property in accordance with Section 7 (v) (U. P.) — Proper Court-fees required to be paid in accordance with Section 7 (iv-A) also. AIR 1962 All 268 (270, 271) = 1961 All LJ 884 (DB). (**Overruled** on another point in AIR 1968 All 216).

(14) Suit to declare rights of plaintiff to certain properties — Plaintiff also seeking declaration that a decree passed in a prior suit declaring defendant as owner is invalid and ineffective — Suit is maintainable on declaratory court-fee — Court-fee on valuation of property cannot be required. AIR 1965 All 10 (12, 13) = 1964 All LJ 498 (DB).

(15) Plaintiff is not required to pay separate Court-fee for cancellation of sale held in execution of decree sought to be cancelled. AIR 1944 Oudh 118 (119) = 19 Luck 54 (DB).

(16) Plaintiff praying that he may be given possession of the property after cancellation of decree and sale — Separate court-fee is payable on claim for possession. AIR 1944 Oudh 118 (119) = 19 Luck 54 (DB).

(17) A will cannot be described as an "instrument securing any property" within the meaning of this paragraph. AIR 1944 All 84 (87) = ILR (1944) All 133 (DB). (It is no more than the declaration of an intention) ** AIR 1953 All 550 (Pr. 7).

(18) The expression "securing" in Section 7 (iv-A) connotes making safe or certain. AIR 1968 All 216 (219) = 1967 All LJ 612 (FB) ** AIR 1956 All 492 (493) = 1956 All LJ 394 (DB). ("Secure" means to make secure or certain or to make safe.)

(19) A deed of transfer can properly be called 'an instrument securing money or property having such value.' AIR 1947 Oudh 149 (150) = 22 Luck 203

“(iv-B) In suits—

- (a) for a right to some benefit (not herein otherwise provided for) to arise out of land;
 - (b) to obtain an injunction;
 - (c) to establish an adoption or to obtain a declaration that an alleged adoption is valid;
 - (d) to set aside an adoption or to obtain a declaration that an alleged adoption is invalid, or never, in fact, took place;
 - (e) to set aside an award not being an award mentioned in Section 8;
- according to the amount at which the relief sought is valued in the plaint:

Provided that such amount shall not be less than one-fifth of the market-value of the property involved in or affected by the relief sought or Rs. 200, whichever is greater:

Provided further, that in the case of suits falling under clauses (a) and (b), the amount of court-fee leviable shall in no case exceed Rs. 500.

Explanation 1.—When the relief sought is with reference to any immovable property, the market-value of such property shall be deemed to be the value computed in accordance with sub-sections (v), (v-A) or (v-B) of this section, as the case may be.

Explanation 2.—In the case of suits—

- (i) falling under clauses (a) and (b), the property which is affected by the relief sought, and where properties of both the plaintiff and the defendant are affected, the property of the plaintiff so affected,

Section 7, Para. (iv-A) (U. P.) — Note 1 (contd.)

(20) A sale deed is ‘an instrument securing property’ within the meaning of S. 7 (iv-A) (U. P.). AIR 1968 All 216 (219) = 1967 All LJ 612. (AIR 1956 All 168, **Overruled.**)

(21) An instrument generally speaking means a writing usually importing a document of formal legal kind but it does not include the Acts of legislature unless there is a statutory definition to that effect in any Act. AIR 1968 SC 102 (104) = (1967) 3 SCR 920. (AIR 1967 All 242, **Reversed.**)

(22) A document securing a person merely the right of mutawalliship is not a document securing money or property. ILR (1950) All 81 (84) (DB).

(23) A will after the death of the testator becomes an instrument securing money or property within the meaning of Section 7 (iv-A) (U. P.) of the Court-fees Act. AIR 1956 All 71 (Pr. 8) ** AIR 1956 All 492 (494) (DB). (AIR 1953 All 550, **Overruled**; AIR 1944 All 84; AIR 1929 Mad 396 and AIR 1948 Mad 501, **Dissent. from.**) ** AIR 1966 All 563 (565) = 1966 All LJ 489 (FB). (AIR 1944 All 84, **Overruled**; AIR 1948 Mad 501, **Dissented.**)

(24) The expression ‘market value’ in Section 7 (iv-A) means the value which the property would fetch in open market regardless of any consideration such as litigation relating to it. AIR 1949 All 63 (65, 68) = ILR (1949) All 3 (DB).

(25) The expression “market value” in Section 7 (iv-A) does not mean the value of the property as mentioned in

the deed sought to be cancelled. AIR 1949 All 535 (Pr. 5) = ILR (1949) All 498 (DB).

(26) It has been held that the words “predecessor in title” in Section 7 (iv-A) Clause (1) mean a person from or through whom the plaintiff derives his title, and where the rights of two persons are derived from the same source but the rights of each are independent and not interdependent one cannot be considered the predecessor-in-title of another. AIR 1957 All 90 (91) (DB).

(27) Where a Hindu father executes an instrument of sale of the joint family property on behalf of himself and for his minor son as his guardian, the son cannot be said to be a party to the sale-deed within Section 7 (iv-A) (1). AIR 1950 All 460 (Pr. 9).

(28) Minor plaintiff on whose behalf the next friend files a partition suit is a “party to the suit” for the purpose of Section 7 (iv-A) (1). AIR 1966 All 542 (542) = 1966 All LJ 633 (DB).

(29) Article 17 of Sch. II would not, in its application to U. P. override the provisions of Section 7 (iv-A), (U. P.) Court-fees Act. AIR 1955 All 667 (Pr. 3) (DB).

Section 7 (iv-B) (U. P.) — Note 1

(1) Clause (b) of the paragraph applies to a suit in which the only relief claimed is one to obtain an injunction. AIR 1940 Oudh 249 (250) = 15 Luck 415 (DB) ** AIR 1949 All 560 (Pr. 4) = ILR (1949) All 882 (DB).

(2) The “market-value” referred to in the first proviso of the paragraph means

(ii) falling under clauses (c) and (d), the property to which title by succession or otherwise may be diverted or affected by the alleged adoption, and

(iii) falling under clause (e), the property which forms the subject-matter of the award, shall be deemed to be the property involved in or affected by the relief sought within the meaning of the proviso to this sub-section."—U. P. Acts 19 of 1938 (9-1-1939) and 44 of 1958, S. 2 (2) (1-4-1959).

"(iv-C) In suits—

(a) for the restitution of conjugal rights;

(b) for establishing or annulling or dissolving a marriage;

(c) for establishing a right to the custody or guardianship of any person such as a minor including guardianship for the purpose of marriage;

according to the amount at which the relief sought is valued in the plaint, but in no case shall such amount be less than Rs. 200" — U. P. Acts 19 of 1938 and 44 of 1958, S. 2 (3).

°[° ° °]

[°] Explanation deleted by Act 44 of 1958, S. 2 (3) (1-4-1959).

for possession of land, houses and gardens;

(v) In suits for the possession of land, houses and gardens—according to the value of the subject-matter; and such value shall be deemed to be—where the subject-matter is land, and—

(a) where the land forms an entire estate, or a definite share of an estate, paying annual revenue to Government,

Section 7, Para. (iv-B) (U. P.) — Note 1 (contd.)

the market value of the property on the date of presenting the plaint. AIR 1941 All 134 (135) = ILR (1940) All 793.

(3) Suit by Zamindar for injunction restraining defendant from interfering with plaintiff's right to realize tahbazan dues from shopkeepers of bazar — Relief to be valued not less than one-tenth of market-value of land — Market-value to be computed according to sub-section (v). AIR 1946 Oudh 61 (62) = 21 Luck 245 (DB).

(4) Suit for injunction restraining transfer of certain postal certificates — Ad valorem court-fee is to be paid on one-tenth of value of certificates. AIR 1946 All 392 (392) = ILR (1946) All 455 (DB).

(5) In a suit for injunction restraining the defendants from interfering with the plaintiff's user of the land in dispute, the value to be calculated for purposes of court-fee under Section 7 (iv-B) (b) (U. P.) is the market value not of the user of the plaintiff but of the land over which the user is claimed and with reference to which the injunction is sought, computed in accordance with Section 7 (v). AIR 1951 All 570 (Prs. 6, 8).

(6) Suit by some Parsis for injunction restraining defendants who were also Parsis from interfering with rights of plaintiffs and of other Parsis of the city to enter fire temple and perform religious rites, etc. — Relief for declaration held not necessary — Court-fee payable was under Section 7 (iv-B) (b)

and not under Section 7 (iv) (a). AIR 1963 All 89 (90).

(7) State seeking to collect cess or tax under certain Acts — Plaintiff alleging the Acts as void filing suit to restrain the State — Court-fees are payable under Clause (iv-B) (b) of Section 7 and not under Cl. (iv) (a) or Clause (iv-A) of Section 7 — Prayer for injunction cannot be treated as one for a declaratory decree of which the consequential relief is injunction. AIR 1968 SC 102 (105) = (1967) 3 SCR 920. (AIR 1967 All 242 Reversed.)

SECTION 7, Para (v) — SYNOPSIS

1. Scope.

2. Suit for possession by a mortgagee.

3. Suit for possession by tenant.

4. Suit for possession of mine.

5. Claim for possession in alternative — Court-fees.

6. Suit for possession — Illustrative cases.

7. Mode of valuation — General.

7A. Valuation for purposes of court-fees and jurisdiction.

8. "Where the subject-matter is land."

9. "Land," meaning of.

10. "Land paying revenue to Government" — Meaning.

11. Lease-hold, whether land within the meaning of Paragraph — See Notes 1, 3, 8 and 10.

12. Mode of valuation of land — Cls. (a) to (d).

13. "Estate", meaning of.

or forms part of such an estate and is recorded in the Collector's register as separately assessed with such revenue, and such revenue is permanently settled—

ten times the revenue so payable;

- (b) where the land forms an entire estate, or a definite share of an estate, paying annual revenue to Government, or forms part of such estate and is recorded as aforesaid;
and such revenue is settled, but not permanently—
five times the revenue so payable;

- (c) where the land pays no such revenue, or has been partially exempted from such payment, or is charged with any fixed payment in lieu of such revenue,
and nett profits have arisen from the land during the year next before the date of presenting the plaint—
fifteen times such nett profits :

but where no such nett profits have arisen therefrom—the amount at which the Court shall estimate the land with reference to the value of similar land in the neighbourhood;

- (d) where the land forms part of an estate paying revenue to Government, but is not a definite share of such estate and is not separately assessed as abovementioned—the market-value of the land :

Section 7, Para. (v) — Synopsis (contd.)

14. "Definite share."

15. "Collector's register."

16. "Separately assessed."

17. "Revenue so payable."

18. Clause (c).

19. Clause (d).

20. Market-value.

21. Clause (e).

22. Proviso.

23. "House," meaning of.

24. "Garden".

25. Suit for religious property.

26. Court-fee on appeals.

27. Court-fee on cross-objections

28. Bengal Amendment.

28A. Orissa Amendment.

29. U. P. Amendment.

30. Reductions and remissions.

1. Scope. — (1) This paragraph is a general provision for court-fees in respect of suits for possession of land, houses and gardens and where there is a specific provision applicable to a case, the latter will apply on the principle of *generalia specialibus non-derogant*. AIR 1937 Mad 831 (833). (Suit for specific performance of contract of sale and possession — Section 7 (x) applies and not Section 7 (v).) ** AIR 1945 Bom 81 (81) = ILR (1945) Bom 32 (DB). (Do.)

(2) Suit for Specific performance of contract of lease — Relief of possession only incidental to it — Court-fee, held, was payable under Section 7 (x) (c) and not under Section 7 (v). AIR 1959 Madh Pra 430 (431, 432) = 1959 MPLJ 649.

(3) Under this paragraph, the suit need not be for proprietary possession. AIR 1931 Oudh 366 (367, 368) = 6 Luck 684 (DB). (Suit by usufructuary mortgagee against prior mortgagees.) ** 1896 Pun Re No. 1, p. 1 (2) (FB). (Suit by mortgagee against third person.) ** 1897 Pun Re No. 56, p. 205 (206) (FB). (Suit for possession by *likha mukhi* mortgagee.)

[But see AIR 1929 Oudh 321 (321) = 5 Luck 101 (DB). (Suit by mortgagee to recover possession is not governed by Section 7 (v) but by Section 7 (ix) — that section covers suits for proprietary possession.)]

(4) The paragraph applies to suits for exclusive possession as well as to suits for joint possession. 1892 Pun Re No. 56, p. 205 (206) (FB).

(5) Where the essential relief in the suit is for recovery of possession, Section 7 (v) (c) would apply irrespective of the fact whether the plaintiff asked for declaration of title or not. AIR 1963 Orissa 71 (73) = 28 Cut LT 563.

(6) A suit for possession will come under this paragraph though the suit is for possession on payment of a certain sum to the defendant. AIR 1928 Lah 852 (853).

(7) A suit for confirmation of possession simply means that if the plaintiff is found not to be in possession he must be given a decree for possession and as such comes within this paragraph. AIR 1935 Pat 191 (191). (AIR 1923 Pat 137 = 2 Pat 198, Rel. on.) ** AIR 1923 Pat 137 (138) = 2 Pat 198 (DB) ** (1911) 11 Ind Cas 882 (884) (Cal). (Suit for declara-

Proviso as to Bombay Presidency:

Provided that, in the *territories subject to the Governor of Bombay in Council, the value of the land shall be deemed to be—

- (1) where the land is held on settlement for a period not exceeding thirty years and pays the full assessment to Government—a sum equal to five times the survey-assessment;
- (2) where the land is held on a permanent settlement, or on a settlement for any period exceeding thirty years, and pays the full assessment to Government—a sum equal to ten times the survey-assessment; and
- (3) where the whole or any part of the annual survey-assessment is remitted—a sum computed under paragraph (1) or paragraph (2) of this proviso, as the case may be, in addition to ten times the assessment, or the portion of assessment, so remitted.

Explanation.—The word “estate,” as used in this paragraph, means any land subject to the payment of revenue, for which the proprietor or a farmer or raiyat shall have executed a separate engagement to Government, or which, in the absence of such engagement, shall have been separately assessed with revenue:

[°] See para. 8 of A. O., 1937. In view of this provision the expression “Governor of Bombay in Council” has been left unmodified. Since Court-fees Act has been repealed by Bom. Act 36 of 1959, this has an academic interest only.

STATE AMENDMENT**Manipur and Tripura**

Omit proviso to clause (d) of para. (v) — See G. S. R.s. 1139, 1140, Gaz. of Ind., 1-7-63, Pt. II, S. (i), Ext., pp. 501 and 531.

Section 7, Para. (v) — Note 1 (contd.)
tion and confirmation of possession held for recovery of possession.)

(8) Prayer for confirmation of possession a mere surplusage—Court-fee under this section is not payable. AIR 1967 Cal 423.

(9) Reversionary suit — It is essentially one for possession — Only Section 7 (v) (c) is applicable. AIR 1969 Orissa 257 = ILR (1968) Cut 270.

(10) A suit for possession of a tank-bed or of a temple is not capable of valuation and comes under Sch. II, Art. 17 and not under this paragraph. AIR 1934 Mad 714 (715) = 58 Mad 471. (Suit for possession of tank-bed.) ** AIR 1924 Mad 19 (22) = 46 Mad 782 (FB). (Suit for possession of temple.)

(11) This paragraph will apply whether or not the plaintiff claims any beneficial interest in the property sued for. AIR 1925 Mad 804 (805). (Properties claimed as trustees.)

[See also 1912 Pun LR No. 216 p. 685 (687) (DB). (Suit for removal of defendant from management of dharma-shala held to be one for possession.)]

(12) The technical rules for valuation contained in this paragraph apply only to suits for possession. It cannot be held that they are applicable whenever land has to be valued for purposes of court-fees though the claim in question may not be for possession. AIR 1931 Mad 710 (711).

(13) A suit by a landlord for ejectment of certain fixed rate tenants comes under this paragraph, but in such a case

the land itself would not be the subject-matter of the suit for the purpose of clauses (a) to (d) of the paragraph. The relief must be valued under the general words in the first clause of the paragraph and not according to the subsequent clauses. (1893) 15 All 63 (64) (DB).

(14) A suit for eviction of the licensee who continues to live in the licensed premises in spite of termination of his license, and for possession has to be valued under Section 7 (v) (e).

If a licensee continues to be in possession of certain premises after expiry of a reasonable time from the date his license is revoked, he does so only as a trespasser. If, therefore, a suit is instituted for his eviction it is clearly a suit for recovery of possession from a trespasser. The entire value of the property in question must be held to be the value of the subject-matter of the suit. AIR 1963 Pat 308 (308, 309, 311) = 1963 BLJR 704 (FB). (AIR 1927 Pat 140, **Overruled**; AIR 1961 Cal 229 (SB), **Rel. on.**) ** AIR 1961 Cal 229 (240) = 65 Cal WN 1 (SB). (AIR 1959 Cal 537, **Overruled.**)

(15) A suit by a tenant to recover possession of leased land from the landlord and third persons, comes under this paragraph but the subject-matter of the suit will not be the land itself but the lease-hold interest and the court-fee on the suit should be paid according to the value of the lease-hold interest and not according to the scale mentioned in clauses (a) to (d). AIR 1914 Cal 791 (791) (DB).

for houses and gardens;

(e) where the subject-matter is a house or garden—according to the market-value of the house or garden :

STATE AMENDMENTS

Andaman and Nicobar

Same as that of West Bengal. — Reg. II of 1957, S. 7 (2) (1-8-1957).

Assam and Nagaland

In clause (a) of para. (V) for the word “ten” the word “twenty” was substituted. — Assam Act 3 of 1932: Act 27 of 1962, S. 26 (w. e. f. 1-12-1963).

Bihar

In clause (a) of S. 7 (v) for the word “ten” the word “twenty” was substituted and in clause (b) of S. 7 (v), for the word “five” the word “ten” was substituted. — Bihar and Orissa Act 2 of 1922 (21-8-1922).

Madhya Pradesh

In paragraph (v) of Section 7—

(1) in clause (a), between the words ‘or’ and “forms part” insert the words “where the land”;

(2) in clause (b)—

(i) between the words ‘or’ and “forms part” insert the words “where the land”;

(ii) for the word ‘five’ substitute the words “twenty”;

Section 7, Para. (v) — Note 1 (contd.)

(16) In a suit for possession by a usufructuary mortgagee the value of the mortgagee interest will be the value of the suit. AIR 1924 Oudh 163 (163, 164).

(17) Suit by tenant to recover possession from trespasser — Section 7 (v) (d) applies. AIR 1938 Oudh 139 (139).

(18) Suit for possession of share in under-proprietary tenure — Ss. 7 (v) (a) applies. AIR 1921 Oudh 110 (111) = 24 Oudh Cas 29.

(19) Section 7 (v) (a) applies to a suit by subordinate tenure-holder. (1882) 8 Cal 192 (194, 195) (DB).

(20) In a suit for ejectment the value of the suit is the value of the rights which on his plaint plaintiff seeks to recover. (1920) 24 Cal WN 167n (168n).

(21) Section 7 (v) shows in clear terms that the subject-matter of a suit for the possession of a house or property is the house or property itself and not something else. AIR 1956 Madh B 47 (Pr. 3) = ILR (1956) Madh B 77.

(22) The particular clause that is to be applied to the case which involves a claim for possession of immovable property against a licensee is Section 7 (v). The subject-matter of the suit is the property itself and nothing else. AIR 1955 Mys 98 (Pr. 6) = ILR (1955) Mys 261 ** AIR 1954 Mad 200 (Pr. 6) ** ILR (1954) Madh-B 137 (139) ** AIR 1952 Madh-B 123 (Pr. 3) ** AIR 1949 Cal 621 (Pr. 2) = ILR (1950) 1 Cal 371 ** AIR 1949 Mad 719 (Pr. 3).

(23) A suit for ejectment of a licensee falls under Section 7 (v), Section 7, Cls. (xi) (cc) governs suits between landlord and tenant only and it is not possi-

ble to treat a licensee as a tenant because the position and rights of the two are quite different. AIR 1960 Tripura 7 (7, 8).

(24) The object of a suit under Section 7 (v) is “the possession of land, houses or gardens” while the subject of the suit is “land, houses or gardens,” clearly the subject of the suit is not the same thing as the object of the suit. AIR 1951 Simla (Punj) 238 (Pr. 10) = ILR (1951) Punj 155.

(25) The valuation of a suit for possession of a shop in a market building by the permanent lessee thereof depends on the market value of the lease-hold rights in it. AIR 1950 Nag 237 (Pr. 4) = ILR (1950) Nag 432.

(26) Suit for injunction directing licensee, whose licence has been terminated to vacate — Section 7 (iv) (d) and not Section 7 (v) applies. AIR 1964 J & K 99 (103, 104) = 1964 Kash LJ 141 (DB).

(27) Suit for possession by partition — Plaintiff alleging that he was in joint possession of properties in suit — Suit held, was governed by Sch. 2, Art. 17 (vi) and not by Section 7 (iv) (b) nor by Section 7 (v). AIR 1966 Goa 1 (FB).

(28) Partition suit — Plaintiff in actual and constructive possession of property — Art. 17 (vi) applies and not Section 7 (iv) or (v). AIR 1966 Him Pra 4.

(29) Suit for partition of watan property on allegation that plaintiff has been validly adopted into plaintiff family — Plaintiff not in actual possession of suit properties — Relief comes within scope of Art. 17 (ii). AIR 1962 Mys 53

(3) for the Explanation under clause (d), substitute the following Explanation, namely,—

“Explanation.—The word ‘estate’ as used in this paragraph means—

- (i) any land subject to the payment of revenue, for which the proprietor or farmer or raiyat shali have executed a separate engagement to Government, or which, in the absence of such engagement, shall have been separately assessed with revenue;
- (ii) any land held by a person deemed to be a tenant of State under Ss. 45 and 59 of the Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1950 (I of 1951), or a person deemed to be a lessee from the State under sub-section (2) of S. 68 of the Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1950 (I of 1951) and any reference to revenue in this paragraph shall, in such cases, be deemed to be a reference to the rent or lease money payable to the State Government in respect of such land.” — C. P. Act 16 of 1935 (21-5-1935), and M. P. Act 9 of 1953, S. 3 (15-4-1953).

Manipur and Tripura

Same as in Assam — See G. S. Rs. 1119, 1120, G. I., 1-7-1963, Pt. II, S. 3 (i), Ext., pp. 501 and 531 (w. e. f. 15-7-63).

Orissa

In paragraph V—

- (1) in clause (a) for the word “ten” the word “twenty” was substituted,
- (2) in clause (b) for the word “five” the word “ten” was substituted,
- (3) the following proviso was inserted after the existing proviso—

Section 7, Para. (v) — Note 1 (contd.)
(55, 56) = 1962 (1) Cri LJ 441 = 39 Mys LJ 830 (DB).

(30) Suit for cancellation of deed of exchange and for recovery of property — S. 7 (iv-A) and not (v) applies. AIR 1959 Andh Pra 495.

2. Suit for possession by a mortgagee.

— (1) A suit for possession by a usufructuary mortgagee comes within this paragraph. AIR 1931 Oudh 366 (367, 368) = 6 Luck 684 (DB). (Suit against prior mortgagees.) ** 1896 Pun Re No. 1 p. 1 (2) (FB). (Suit against tenants in possession.) ** 1892 Pun Re No. 56, p. 205 (206) (FB). (Suit for joint possession as likha mukhi mortgagee of certain shares in wells and land is suit for possession of land.)

[See also AIR 1924 Oudh 163 (163, 164). (Suit for possession by usufructuary mortgagee — Value of mortgagee, interest, i. e., amount of mortgage, is market value of land for purpose of suit.)]

[But see AIR 1929 Oudh 321 (321) = 5 Luck 101 (DB). (Suit for possession by usufructuary mortgagee to whom mortgagor has failed to deliver possession does not come under this para.)]

(2) This paragraph will apply to a suit by the mortgagee for possession on the ground that the mortgage has been foreclosed already. Para (ix) will not apply to such suit. 1893 Pun Re No. 20, p. 104 (105, 106) (DB). (Foreclosure under Regulation XVII of 1806.) ** (1878) 1 Cal

LR 473 (474) (DB). (Suit for possession brought after decree for foreclosure is obtained.)

(3) A suit for enforcement of a mortgage by a decree for sale is clearly not a suit for possession of the mortgaged property. AIR 1931 Cal 159 (159) = 58 Cal 829 (DB).

(4) Transfer of Property Act (1882), Section 91 (a) — Subsequent mortgagee seeking possession of mortgaged property by discharging mortgage debt — Suit is in substance one to redeem prior mortgage — Court-fee is payable under Section 7 (ix) and not under Section 7 (v). 1965 Cur LJ 833 (Punj) = ILR (1966) 1 Punj 793.

3. Suit for possession by tenant. —

(1) A suit for possession by a tenant will come under this paragraph if it does not fall under any other more specific provision. AIR 1938 Oudh 139 (139). (Suit for possession by tenant against trespasser — Section 7 (v) (d) applies.) ** AIR 1918 Pat 460 (461). (Suit for possession of immovable property based on a mokarrari lease.) ** AIR 1951 Hyd 53 (Pr. 2) = ILR (1951) Hyd 830.

(2) Suit for possession of a house by tenant against his landlord and a third person who is also in occupation of the house under an agreement of partnership with the landlord — Real possession in such a case is that of the landlord and not of third party — Suit is governed by Section 7 (ix) (e) and

"Provided further that in suits for possession of land, if rules are framed under S. 3 of the Suits Valuation Act, 1887, for determining the value for the purposes of jurisdiction, the value so determined shall be deemed to be the value of the land for the purposes of this paragraph."

(4) The original Explanation was renumbered as Explanation I and after the Explanation so renumbered the following Explanation was added, viz.:

"Explanation II.—In this paragraph 'building' includes a house, out-house, stable, privy, urinal shade, hut, wall and any other such structure whether of masonry, bricks, wood, mud, metal or any other material whatsoever." — Orissa Act 5 of 1939 (31-10-1939).

Pondicherry

Same as in Andaman and Nicobar — See Act 26 of 1968, S. 3 and Sch., Pt. II (18-12-1968).

Punjab, Haryana and Chandigarh

In Para. V, clause (b) for the word "five" the word "ten" was substituted. — Punjab Act 6 of 1918 (12-6-1918); Act 31 of 1966, S. 88 (1-11-1966).

Uttar Pradesh

For para. (v) of Section 7 the following was substituted, namely:—

"(v) In suits for the possession of land, buildings or gardens — according to the value of the subject-matter; and such value shall be deemed to be—

(I) Where the subject-matter is land, and

(a) Where the land forms an entire estate or a definite share of an estate paying annual revenue to Government, or forms part of such an estate, and is re-

Section 7, Para. (v) — Note 3 (contd.)
not by Section 7 (v). AIR 1954 Nag 124 (Pr. 8) = ILR (1954) Nag 67.

(3) A suit by a plaintiff claiming occupancy rights in lands with whose possession he has parted legally and peacefully, and under orders of Court in judicial proceedings, for possession and declaration of the title of the kudiwaram impleading strangers to the suit is governed by Section 7 (v) (e) and not Section 7 (xi) (e). AIR 1954 Mad 168 (Pr. 3).

(4) A suit for possession by a subsequent lessee against a prior lessee who is holding over after the expiry of his term is governed not by Section 7 (xi) (cc) but by this paragraph. AIR 1951 Bom 352 (Pr. 5) = ILR (1951) Bom 385 ** AIR 1955 Andhra 140 (Pr. 7) ** AIR 1958 Andh Pra 711 (713) = ILR (1958) Andh Pra 416 (DB).

[But see AIR 1948 Mad 409 (411).]

(5) A suit for possession by a tenant of a shop from which he has been dispossessed by the defendant, a third party, is governed by Cl. (e) of this paragraph. AIR 1951 Simla (Punj) 238 (Prs. 9, 10) = ILR (1951) Punj 155.

(6) Suit for possession of house property by alleged statutory tenant from his alleged landlords and from some other persons — Plaint alleging that forcible possession was taken by landlords in plaintiff's absence and given to other persons — Suit held fell under Section 7 (v) and not under Section 7 (xi)

(e). AIR 1963 Guj 45 (47, 48) = (1963) 4 Guj LR 274.

(7) Suit by lessee for declaration of his title under lease and for possession of land — Transfer pendente lite of a portion by lessor alleged — No relief to avoid transfer claimed — Court-fee is payable according to Section 7 (v) (d). AIR 1962 Assam 127 = ILR (1962) 14 Assam 436.

4. Suit for possession of mine. — (1) A suit by the lessee of a mine against the lessor and subsequent transferees for possession of the mine is a suit for possession coming under this paragraph and not a suit for a right to some benefit to arise out of land. (1912) 16 Ind Cas 963 (965) (Cal) (DB).

5. Claim for possession in alternative — Court-fees. — (1) Where the relief of possession is claimed as an alternative to a certain other relief but the court-fee payable in respect of the relief of possession is less than that on the other relief then court-fee should be paid on the latter relief. AIR 1925 Pat 193 (194) (DB). (Suit for possession of land with alternative prayer for declaration that defendant was tenant in respect of the land — Prayer for partition also made as alternative to above reliefs — Held, that fixed fee of Rs. 15 was payable on prayer for declaration or partition as court-fee in respect of possession was only Rs. 3, As. 12.) ** (1891) 15 Bom 82 (84) (DB). (Suit for possession of land — Claim in alternative for award of certain sum per annum in lieu

corded in the Collector's register as separately assessed with such revenue and such revenue is permanently settled—thirty times the revenue so payable;

(b) Where the land forms an entire estate or a definite share of an estate paying annual revenue to Government, or forms part of such estate and is recorded as aforesaid and such revenue is settled but not permanently—ten times the revenue so payable;

(c) Where the land pays no such revenue or has been partially exempted from such payment, or is charged with any fixed payment in lieu of such revenue, and nett profits have arisen from the land during the three years immediately preceding the date of presenting the plaint—twenty times the annual average of such nett profits;

but when no such nett profits have arisen therefrom, the market value, which shall be determined by multiplying by twenty the annual average nett profits of similar land for the three years immediately preceding the date of presenting the plaint;

(d) Where the land forms part of an estate paying revenue to Government, but is not a definite share of such estate and does not come under clauses (a), (b) or (c) above—

the market value of the land, which shall be determined by multiplying by fifteen the rental value of the land including assumed rent on proprietary cultivation, if any.

(II) Where the subject-matter is a building or garden—according to the market value of the building or garden as the case may be.

Explanation.—The word "estate" as used in this sub-section, means any land subject to the payment of revenue for which the proprietor or farmer or raiyat shall have executed a separate engagement to Government or which, in the absence of such engagement shall have been separately assessed with revenue." — U. P. Act 19 of 1938 (9-1-1939).

Section 7, Para. (v) — Note 5 (contd.)
of profits of land — Court-fee is payable on latter relief which was higher.)

(2) Where in a suit for accounts, the plaint contained a claim for a specific amount misappropriated by the defendant with an alternative prayer for possession and mesne profits of the property purchased by him with that amount, it was held that court-fee was payable under this paragraph in respect of relief for possession and mesne profits. AIR 1937 Mad 235 (237).

6. Suit for possession — Illustrative cases. — (1) Where a person is out of possession of property to which he considers himself to be entitled and seeks to obtain possession thereof from the person who is keeping it back from him, there being no jointness of possession or title between the two, his suit is one for possession bare and simple under this clause. AIR 1938 Lah 275 (277) = ILR (1938) Lah 240 (DB). (Suit for partition by legatee from Hindu who had already separated in status from defendant, his brother.)

(2) A obtaining possession of certain fields in execution of his mortgage decree, B, lessee of mortgagor, preventing A from taking crops standing on fields — Proceedings under Section 145, Cri-

minal P. C., started and Magistrate attaching crops, selling them and ordering sale proceeds to be made over to B, treating B as being in possession of crops — Suit by A claiming the sale proceeds was held to be one for possession and not for mere declaration. AIR 1927 Nag 316 (317).

(3) Where the suit is in fact to recover an estate the mere assertion that it is a suit for administration will not make it one for administration and the suit must be valued at the value of the estate. AIR 1937 Rang 455 (456) = 1937 Rang LR 426 (DB).

(4) A suit brought by certain members of a caste for the administration of property of the caste in which all the members of the caste are interested, after ejectment of persons who are in exclusive possession of it and who refuse to have it administered for the common benefit, is in substance a suit for recovery of possession. AIR 1937 Mad 591 (593).

(5) A suit by the purchaser from a mortgagee having the right to sell the mortgaged property without the intervention of the Court for ejectment of the mortgagor is one for possession liable to stamp duty under Section 7 (v). (1909) 1 Upp Bur Rul (Mort.) p. 5.

WEST BENGAL

For paragraph V the following paragraph was substituted, viz.,

"V. In suits for the possession of land, buildings or gardens, not being suits referred to in clause V-A—

- (a) according to the value of the subject-matter, and such value shall be deemed to be fifteen times the nett profits which have arisen from the land, building or garden during the year next before the date of presenting the plaint, or if the Court sees reason to think that such profits have been wrongly estimated, fifteen times such amount as the Court may assess as such profits or according to the market value of the land, building, or garden, whichever is lower;
- (b) if, in the opinion of the Court, such profits are not readily ascertainable or assessable, or where there are no such profits, according to the market value of the land, building or garden.

Explanation.—In this paragraph "building" includes a house, out-house, stable, privy, urinal, shed, hut, wall and any other such structure whether of masonry, bricks, wood, mud, metal or any other material whatsoever." — Bengal Act 7 of 1935 (2-5-1935) and 18 of 1963, S. 3 (2) (3-5-1963).

Section 7, Para. (v) — Note 6 (contd.)

(6) Where a manager of a Malabar tarwad in a suit against a member claims property as having passed to the tarwad by inheritance and alleges that the defendant's possession is adverse to the tarwad and not permissive, the suit falls under Section 7 (v) and not under Section 7 (iv) (b) or Sch. II, Art. 17 (vi). AIR 1930 Mad 597 (599) = 53 Mad 540 (DB).

(7) P, a subsequent mortgagee, of portion of house obtaining mortgage decree, purchasing portion in execution thereof and obtaining symbolical possession — D, a prior mortgagee, who had obtained mortgage decree in respect of whole house purchasing whole house at sale in execution of his decree subject to P's right — D in physical possession of house and refusing to allow P to enter into physical possession of his portion — Suit by P for partition of house and possession of his portion held was in truth and in fact a suit for possession against person in wrongful possession and was governed by Section 7 (v) and not by Sch. II, Art. 17B as amended in Madras. AIR 1939 Mad 506 (507) (DB).

(8) A suit was brought for the removal of the defendant from the shebaitship of a private debutter and for the appointment of any competent person as shebait. There was a further prayer for an injunction against the defendant that he may not waste or possess the debutter properties. It was held that the object of the suit was to exclude the defendant from the management of the debutter properties and not to recover possession and therefore court-fee paid on the valuation of the shebait right and on the value of the relief of injunction was sufficient. AIR 1934 Cal 250 (250, 251) (DB).

(9) Plaintiff claiming to have been appointed member and manager of

school committee in place of defendant bringing suit praying, inter alia, that if need be he be put in possession of office of managership — Suit in respect of prayer for possession of office of managership held fell under Schedule II, Art. 17B as amended in Madras and not under Section 7 (v). AIR 1939 Mad 776 (777, 778).

(10) A suit under Section 25A, Sonthal Paraganas Settlement Regulation (III of 1872), for declaration that entries in Record of Rights were incorrect as plaintiff's share was not recorded in it held suit as framed was governed by Sch. II, Art. 17 (i) and (iii) and could not be treated as suit for possession on ground that question of possession was likely to arise in it. AIR 1936 Pat 171 (172) = 15 Pat 386 (DB). (For purposes of court-fee, Court must look to the plaint only.)

(11) Suit for declaration that plaintiff properties are ancestral undivided properties, that sale deed dealing with them is not binding on plaintiffs and for separate possession — Plaintiffs not even in constructive possession — Defendant claiming adversely on basis of sale deed — Suit held one for possession under Section 7 (v) and not under Section 7 (iv) (b) or Section 7 (iv) (c) — Prayer for declaration does not make any difference. Section 7 (iv-A) (Madras) has also no application. AIR 1936 Mad 411 (412).

(12) Suit between rival managers for right to manage property of deity — Deity admitted to be owner of property — Suit is not for possession of land, buildings and garden within Section 7 (v) — Sch. II, Art. 17 applies. AIR 1944 All 279 (281) = ILR (1944) All 564 (DB).

(13) Suit by Hindu sons for partition and possession of their shares in properties transferred by their father — Sons electing to treat transfer as nullity

Section 7, Para. (v) — Note 6 (contd.)

— Possession with transferee — Suit is one for possession under Section 7 (v) and not one for cancellation falling under Section 7 (iv-A) (Madras). AIR 1949 Mad 105 (106).

(14) Plaintiffs' suit for declaration that certain alienations created by their father not binding upon them and for delivery of possession — Suit is one for possession — Valuation of subject-matter will be governed by provisions of Section 7 (v) — Even if none of the sub-clauses of Section 7 (v) is attracted in view of the changed situation on account of Bihar Land Reforms Act, still value of subject-matter has to be determined in a suit for possession of land for the purpose of determining the amount of court-fee payable on it. (1965) ILR 44 Pat 1009.

(15) Plaintiff brought a suit for declaration of his right to pala of worship and for an injunction restraining the defendants from interfering with the plaintiff's exercise of the right. There was no allegation in the plaint that the plaintiff had been dispossessed of the debutter properties nor was there any prayer for possession of the same. The deity's title was not in controversy on the allegation made in the plaint. It was held that the suit came within the purview of Section 7 (iv) (c) and not under S. 7 (v) (a). AIR 1953 Cal 34 (Pr. 4).

(16) Properties purchased in name of female member of Hindu joint family — Member of family suing for partition — Benamidar in actual possession and claiming adversely to family — Plaintiff is liable to pay court-fee under Section 7 (v) in respect of his relief for possession of those properties. AIR 1955 Andhra 200 (Prs. 6, 7).

(17) Effect of insolvency is not to put an end to joint possession of coparceners — Suit for partition by sons of insolvent — Court-fee payable is not as in suit for ejectment under Section 7 (v) but under Art. 17B of Sch. II (Mad). 1953-1 Mad L Jour 461 (461).

(18) In a suit brought by a Mutwalli to recover possession of wakf property alienated by a former Mutwalli, if there is no prayer for any declaration and the only prayer is for recovery of possession, the case does not come under Section 7 (iv) (c) but falls under Section 7 (v). AIR 1954 Cal 101 (Prs. 2, 3) (DB).

(19) Suit for possession of property sold by guardian on ground that it was not binding on plaintiff — Prayer for cancellation is not necessary — Section 7 (iv-A) (Mad) does not apply — Court-fee paid under Section 7 (v) is sufficient. AIR 1950 Mad 832 (Prs. 1, 7).

(20) Suit for possession — Plaint stating that compromise under which defen-

dant had taken possession was not binding on plaintiff — No relief as to cancellation of compromise asked — Suit involves such relief and court-fee is payable also under Section 7 (iv-A) (U. P.) — Section 17 does not apply — Plaintiff asked to pay court-fee on aggregate amount of two reliefs. AIR 1949 All 641 (Prs. 3, 4, 5) = ILR (1949) All 896 (DB).

(21) Party having order in his favour for delivery of possession on condition of certain payment but failing to fulfil condition — Private purchaser from such party seeking to obtain possession but obstructed by persons not parties to suit — Petition under O. 21, R. 97, Civil P. C. by purchaser dismissed summarily without investigation — Suit by him for possession — Ad valorem court-fees to be paid on value of property — Schedule II, Art. 17 (1) not applicable. AIR 1949 Mad 545 (Prs. 1, 5).

(22) Suit for separate possession of share in joint property as contra distinguished from joint family property — Plaintiff neither in actual nor constructive possession — Section 7 (iv) (b) and Art. 17 (vi) do not apply — Court-fee payable is ad valorem under Section 7 (v). 1962 Raj LW 357 = ILR (1962) 12 Raj 766.

(23) Suit for declaration that the proceedings under Tripura Public Demands Recovery Act are not valid and for recovery of possession of property sold thereunder — Payment of fixed court-fee cannot be justified on the ground that the relief prayed for in the suit could be had by a petition filed under O. 21, R. 90, Civil P. C. since under Section 7 of the above Tripura Act, the amount covered by the certificate ought to have been recovered as per the provisions of the Civil P. C. — Suit in the Civil Court is governed by the Indian Court-fees Act and Indian Suits Valuation Act — Court-fee held payable under Section 7 (v) of Court-fees Act. AIR 1967 Tripura 19 (24).

(24) Suit by trustees for recovery of possession of dharmashala — Defendants alleged to have obtained possession wrongfully — Property under seal of Court in pending proceedings under Section 145, Criminal P. C. — Still suit is governed by Section 7 (v) (e) and not by Art. 17 (vi). AIR 1962 Punj 479 (480).

7. Mode of valuation — General. —

(1) The Legislature has made a distinction for purposes of valuation under this paragraph between land on the one hand, and houses and gardens on the other. AIR 1936 Cal 264 (264).

(2) Where a plaintiff claims, in the suit for possession of land, demolition of buildings erected on it, the value of the buildings need not be taken into

Section 7, Para. (v) — Note 7 (contd.)

account in valuing the suit for purposes of the court-fees. (1897) 7 Mad L Jour 49 (50) (DB) ** (1882) 4 All 320 (330) (FB) ** AIR 1957 All 337 (338) = ILR (1956) 2 All 765 (DB) ** AIR 1954 All 188 (189) ** AIR 1968 MP 74 = 1966 MPLJ 329 (DB). (C. R. No. 399 of 63 D/- 19-12-1963 (MP), **Overruled.** Taxing Decisions of Nag HC 49 and AIR 1950 Nag 237, **Not foll.**)

(3) Suit for possession of land — Demolition of buildings erected on land also claimed — Plaintiff has to pay separate Court-fee on relief of demolition. AIR 1954 All 188 (Pr. 6) ** AIR 1968 Madh Pra 74 = 1966 MPLJ 329 (DB). (C. R. No. 399 of 1963, dated 19-12-1963 (M. P.) **Overruled.**)

(4) Where the object of the plaintiff is to use the land of which possession is sought, for grazing purposes, court-fee on the value of the well and the buildings standing on the land need not be paid. 1903 Pun Re No. 78, p. 207 (208, 209).

(5) Trees growing on the land need not be valued separately in the suit for possession of the land on which they stand as they are included in the valuation of the land itself. AIR 1927 Mad 1002 (1004) (DB) ** AIR 1918 Mad 805 (807) = 40 Mad 824 (DB).

(6) Mesne profits, unless past mesne profits are claimed at a certain rate, need not be valued separately. AIR 1918 Mad 805 (807) = 40 Mad 824 (DB).

[See AIR 1930 Mad 833 (834) = 54 Mad 1 (FB).]

(7) Under Madras Estates Land Act, raiyati land held on patta in an estate cannot be used for building purposes without the consent of the landlord. It would, therefore, be wrong to value such land on the value of the land as a building site on the hypothetical assumption that the landlord would be willing to allow it to be used as a building site for some bazaar. AIR 1933 Mad 367 (367).

(8) A suit for possession of a part of a house will be chargeable with a proportionate part of the court-fee that will be leviable in respect of a suit for the whole house. (1902) 1 Low Bur Rul 303 (306) (FB).

[See also AIR 1949 Bom 254 (Pr. 5). (Suit for possession of a part of a house also falls under Section 7 (v) — Point conceded.)]

(9) Charts issued by the District Judge setting out minimum values of lands in different parts of the district should not be regarded as though they were in themselves evidence of the value of the land, and a judicial officer acting in judicial matters upon such charts would be acting without evidence. AIR 1930 Cal 65 (69) = 57 Cal 587 (DB).

(10) Where the plaintiff seeks recovery of possession of immovable properties and the interest of the contesting defendants in those properties is limited, one ad valorem Court-fee will have to be paid on the market-value of that limited interest. AIR 1951 Trav-Co 212 (Pr. 3).

(11) In a suit for possession of a village share and sir fields if the claim for possession of sir fields is merely ancillary to the claim for possession of the village share no separate Court-fee need be paid. Similarly, if the substance of the claim is not houses or gardens Clause (e) of Section 7 (v) would not apply but Clauses (a) to (d) if the land is assessed to land revenue and satisfies the conditions in those clauses. Where the substance of the claim is possession of sir fields in addition to the village share they have to be separately valued under Clause (d). Where the substance of the claim involves a garden or house the valuation is under Clause (e) on the market-value of the house or garden and it does not matter if the land on which they are situate is or is not assessed to land revenue. AIR 1950 Nag 249 (Prs. 21, 42) = ILR (1950) Nag 748.

(12) Suit was in effect a suit for possession of immovable property falling under Section 7 (v) — It may also be regarded as a suit for specific performance of an award falling under Sec. 7 (x) (d) of the Court-fees Act. In either case the suit had to be valued in accordance with the market-value of the property in suit. 1961 Raj LW 237.

(13) Suit for possession of land — Alienees erecting buildings on part of land — Plaintiff, however not claiming possession of any building — **Held**, Court fee payable in such a suit could not be dependent upon defence which might be taken — Defendant could not compel the plaintiff to pay Court-fee on cost of building erected by them. AIR 1959 Punj 181 (182) = 61 Punj LR 268 (DB).

(14) Where the plaintiff asks for possession of seri land and it is found that the land in respect of which the suit is brought is registered in the accounts as seri land, that a separate demarcation number is given to it and that the Government collects the revenue in respect thereof as per assessment made, the land forming the subject-matter of the suit satisfies the requirements of Sec. 7 (v) (b) and the Court-fee need be paid accordingly.

He need not pay an additional court-fee on the relief of demolition of superstructure raised thereon by the defendant, as such a relief is ancillary to the relief of possession of land sought for by the plaintiff. AIR 1962 Andh Pra 408

Section 7, Para. (v) — Note 7 (contd.)
(409, 410) = (1962) 1 Andh LT 290.
(AIR 1954 All 188, Dissented from.)

7-A. Valuation for purposes of court-fees and jurisdiction.— (1) In a case falling under paragraph (v) of Section 7 the valuation for Court-fee may be different from the valuation for jurisdiction. In all the cases falling under Clauses (a), (b) and (c) of para. (v) the valuation for the purpose of jurisdiction will be the market value of the property in suit. Therefore, the valuation for Court-fee will be different from the valuation for jurisdiction. When, however, the valuation for Court-fee is the market value of the property in question as in a case falling under Para. (v) (e) the valuation for Court-fee must be the same as the valuation for jurisdiction and that valuation would be the market value of that portion of the house, the possession of which the plaintiff seeks to recover from the defendants. AIR 1963 Pat 308 (308, 309, 311) = 1963 BLJR 704 (FB).

(2) Suit for recovery of possession and mesne profits in respect of raiyatwari plots in ex-Madras territories transferred to Orissa — Court holding that Court-fee is payable under Sec. 7 (v) (b) of Court-fees Act — Valuation for purpose of Court-fee would be deemed to be valuation for purpose of jurisdiction. AIR 1964 Orissa 27 (28) = 29 Cut LT 268 (DB).

(3) Suit governed by Section 7 (v) (c) — Subject-matter of suit, land — No rules under Section 3 of Suits Valuation Act framed — Lower Court not calculating market value as prescribed under Section 7 (v) (c) — On evidence produced, comparison of land discussed in evidence and suit land not possible — Evidence not helpful in deciding jurisdictional value — Lower Court taking market value of such land in 1937, year of sale of that land, as jurisdictional value — In taking such jurisdictional value, lower Court commits serious illegality — Lower Court has to decide market value of land on date of suit on evidence on record — If suit is within its pecuniary jurisdiction, suit must be tried without calling for further Court-fees. AIR 1969 Orissa 257 = ILR (1968) Cut 270.

(4) Suit for declaration, injunction, partition and also for possession as regards immovable joint family property — Latter prayer dropped — Value of suit for purposes of jurisdiction of appellate Court — Section 8, Suits Valuation Act, applicable as suit falls under S. 7 (iv) (b) and (c) and not under S. 7 (v) or Item 17 (vii) of Schedule 2 — Hence, value for jurisdictional purposes is same as for Court-fees. AIR 1963 Guj 291 = (1963) 4 Guj LR 1022.

8. "Where the subject-matter is land."— (1) A mokatari lease of a definite share in a revenue-paying estate is land within the meaning of clause (a) of this paragraph. AIR 1918 Pat 460 (461).

9. "Land", meaning of.— (1) The word "land" is used in a restricted sense, i.e., as distinguished from houses or gardens. (1902) 24 All 218 (225) (DB).

[See also AIR 1953 Hyd 28 (Pr. 4) = ILR (1952) Hyd 550.]

(2) Where the land has a house or a garden on it, the subject-matter is no longer the land alone, but the land with its accretions and has to be valued as such for the purpose of Court-fees even though it is a revenue-paying land. ('36-43) Tax Dec (Nag) 49 (50).

(3) The term "land" is not necessarily restricted to agricultural land but covers all kinds of land, regardless of the use to which it is put or may be likely to be put. AIR 1948 East Punj 9 (10) ** AIR 1960 J & K 110 (112). (Land capable of being used as building site also included.)

10. "Land paying revenue to Government" — Meaning.— (1) A suit for possession of a definite share in an under-proprietary tenure which forms part of an estate assessed to the payment of annual revenue falls under clause (a) though the revenue in such a case may be paid by the superior proprietor and not the under-proprietor. AIR 1921 Oudh 110 (111) = 24 Oudh Cas 29 ** (1882) 8 Cal 192 (194, 195) (DB).

[See also AIR 1931 Oudh 366 (367, 368) = 6 Luck 684 (DB). (Paragraph (v) applies to all suits for possession, proprietary, under-proprietary possession as tenant, etc.)]

[But see AIR 1929 Oudh 321 (321) = 5 Luck 101 (DB). (Suit for possession by mortgagee — Paragraph (v) does not apply as he does not claim proprietary possession.) ** AIR 1914 Cal 791 (791) (DB). (Clauses (a) to (d) of this paragraph do not apply to a suit for possession by a lessee as the leasehold land cannot be said to be liable to payment of revenue the obligation to pay revenue being on proprietor.)]

11. Lease-hold, whether land within the meaning of paragraph.— See Notes 1, 3, 8 and 10.

12. Mode of valuation of land — Clauses (a) to (d).— (1) The scheme of the paragraph seems to be to value land with reference to the revenue payable in respect of it wherever such valuation is possible. AIR 1937 All 206 (206) = ILR (1937) All 128 (DB).

(2) Suit for possession of paddy lands — Section 7 (v) (b) applies. AIR 1934 Rang 313 (316) (DB).

Section 7, Para. (v) — Note 12 (contd.)

(2-A) Suit for possession over bhumi-dari Lands — Sale deeds also challenged — Valuation for Court-fee purposes is governed by Section 7 (v) (i) (b) of Court-fees Act (1870). 1968 All WR (HC) 501 (502).

(3) Entire holding separately assessed — Section 7 (v) (b) applies. AIR 1924 Rang 102 (104) = 1 Rang 651 (DB).

(4) Suit for possession of land separately assessed to revenue — No separate engagement with Government — Section 7 (v) (b) applies. AIR 1948 East Punj 9 (10).

(5) Where the land is not subject to the payment of fixed annual revenue or though forming part of a revenue-paying estate, does not form a definite share of such estate and is not separately assessed, other modes of valuation are given, viz., according to the net profits from the land or the market-value of the land (Clauses (c) and (d)). In such cases the idea presumably is that valuation according to the revenue is not possible. AIR 1937 All 206 (206) = ILR (1937) All 128 (DB).

(6) In suits with respect to the lands in what was once a permanently settled estate village but is now a ryotwari village, if the lands are separately assessed, Clauses (a), (c) and (d) of Section 7 (v) will not apply and Cl. (b) will apply if the separate assessments are recorded in any of the registers now maintained in the village, and if those registers are maintained under the authority of the Government or of the Collector. 1955-1 Mad L Jour 83 (83).

[See also AIR 1957 Andh Pra 607 (608). (The proper course is to ascertain whether a ryotwari patta has been issued or whether a register is maintained showing the separate assessment levied on this land. If so, the Court-fee will have to be levied under Section 7, clause (v) (b). If the terms of Sec. 7 (v) (b) do not apply then the Court-fees under Section 7, Clause (v) (d) will have to be paid.)]

(7) A suit for possession of a specific plot of land not separately assessed to revenue but forming a fractional share or a portion of a separately assessed part of an estate comes within Cl. (b) of Section 7 (v) and the value, therefore for purposes of Court-fees and jurisdiction shall be determined in terms of land revenue rateably payable thereon and not in terms of its market-value. AIR 1960 J & K 23 (25) (DB).

(8) Where the lands are held for agricultural purposes and are private lands, the rent payable to the land-holder, in respect of fasli year in which the estate (in which the lands are situated) is notified is the land revenue. Therefore in a suit for recovery of such pro-

perty the Court-fee is to be assessed on the basis of 10 times of that. 1958 Andh LT 774.

13. "Estate" meaning of.— (1) A khewat khata in the United Provinces is only a separately assessed part of an estate and not in itself an estate. AIR 1933 All 414 (415) = 55 All 531.

[But see AIR 1937 All 206 (207) = ILR (1937) All 128 (DB). (The decision overlooks the definition of "Estate" in this paragraph.)]

(2) Even when a single field is assessed to revenue it can be regarded as estate within the meaning of the explanation and there being no other field comprised in the estate it would constitute an entire estate. AIR 1948 East Punj 9 (10).

14. "Definite share."— (1) The mode of valuation under this paragraph according to the annual revenue is applicable not only when the land in suit forms an entire estate but also when it forms a definite share of an estate. In such cases, the value of the suit is to be calculated according to the proportionate part of the revenue which corresponds to the fraction which the land in suit constitutes out of the whole estate. AIR 1937 Nag 100 (100) = ILR (1937) Nag 309 ** (1908) 12 Cal WN 990 (992) (DB) ** (1906) 3 All L Jour 511 (512) ** 1881 All WN 5 (5) (DB).

(2) When the land is part of an estate but separately assessed to revenue, the mode of valuation according to the revenue is applicable though the land is not a "Definite share" of an estate. 1878 Pun Re No. 67, p. 226 (227) (DB).

(3) When the land is part of revenue-paying estate but is neither a definite share of it nor separately assessed to revenue, it is to be valued according to its market-value under clause (d) and not according to the Government revenue. AIR 1941 Sind 154 (158) = ILR (1941) Kar 102 (DB) ** AIR 1951 J & K 18 (Pr. 4) = 10 J and K LR 88 (DB). (Suit for possession or pre-emption of a fractional share of khewat paying revenue.) ** AIR 1933 All 414 (415) = 55 All 531. (Suit for possession of fractional share of khewat khata.) ** AIR 1932 Pat 319 (321). (Suit for possession of kunjora ghatwali tenure.) ** AIR 1931 Cal 417 (419) = 58 Cal 66 (DB) ** AIR 1923 Rang 246 (246) ** AIR 1918 Mad 25 (26) (DB) ** AIR 1914 Cal 442 (444) = 41 Cal 812 (DB) ** (1911) 33 All 630 (634) ** 1883 Pun Re No. 6, p. 13 (15, 16) (DB). (Suit for pre-emption.) ** 1880 Pun Re No. 102, p. 248 (249) (DB).

(4) It has been held that when ryoti land is situated in an estate which had been taken over by the Government under Madras Act 26 of 1948 and if a

Section 7, Para. (v) — Note 14 (contd.) ryotwari patta has been issued to the person concerned under Section 11 of that Act then Court-fee will have to be paid under Clause (b). Even if no patta has been issued there might still be a register maintained under the authority of the Government relating to the assessment of revenue payable under Section 23 (a) (ii) of Madras Act 26 of 1948 to attract the definition of estate. If the terms of Clause (b) do not apply Court-fee will have to be paid under Clause (d). AIR 1957 Andh Pra 607 (608).

(5) The words "definite share" in this paragraph mean an undivided land undemarcated fraction of an estate as distinct from a defined, demarcated plot, which has been taken out of an estate. AIR 1918 Mad 25 (26) (DB) ** AIR 1924 Mad 646 (647) ** (1906) 3 All L Jour 511 (512, 513).

[See also AIR 1921 Oudh 110 (111) = 24 Oudh Cas 29. (Revenue paid by superior proprietor — Still land is revenue-paying land.)]

(6) Where this section speaks of a "Definite share" in an estate as opposed to a "part" of the estate, it draws a distinction between abstract rights in an estate and the concrete or physical portion of it. The former deals with abstractions, a claim to possession of a definite share, in inchoate rights, however expressed, while the latter deals with a claim to possession of physical and defined parts of the whole estate whether actually demarcated or not. ('36-43) Tax Dec (Nag) 39 (41).

(7) In the case of a specified plot of land which is part of a revenue-paying estate, unless the land is separately assessed to revenue, Court-fee will have to be paid under Clause (d) according to the market value of the land, and Clauses (a) and (b) of this paragraph will not apply. AIR 1933 Oudh 533 (534). (Suit for pre-emption.) ** AIR 1956 Tripura 25 (26) ** AIR 1952 Mad 88 (Pr. 1). (Suit for possession of specific portion of undivided land, viz., the 'northern half' — Clause (d) and not Clause (b) applies.) ** AIR 1951 Mad 698 (Pr. 15) = ILR (1951) Mad 867 (DB). (Suit for recovery of specific plot with boundaries.) ** AIR 1930 Lah 182 (183). (Suit for possession of a share in a specific plot of land not separately assessed.) ** AIR 1924 Mad 646 (647) ** AIR 1914 Cal 442 (443, 444) = 41 Cal 812 (DB) ** (1911) 33 All 630 (634) ** (1936-1943) Tax Dec (Nag) 39 (41).

[See also AIR 1956 Tripura 31 (32).]

(8) Where the suit land is a fractional share or a part of an "estate" which is separately assessed to revenue, the Court-fee will have to be paid under Clause (d) according to the market-

value and not according to the revenue. AIR 1927 Mad 1002 (1005, 1006) (DB) ** 1880 Pun Re No. 102, p. 248 (249) (DB).

(9) A suit for a fractional share of khewat in the United Provinces must be assessed with Court-fee under Cl. (d), such khewat being only a separately assessed part of an "estate". AIR 1933 All 414 (416) = 55 All 531.

[But see AIR 1937 All 206 (207) = ILR (1937) All 128 (DB). (The khewat in question was held to be a separate estate.)]

(10) The words "definite share" do not mean a definite share separately assessed with revenue in the Collector's register. (1908) 12 Cal WN 990 (992) (DB).

(11) Government of India Notification of 1921 bearing on Clause (b) of this paragraph issued under Section 35 of this Act, in substitution of original Notification No. 4650 dated 10-9-1889, runs as follows:— "When a part of an estate paying annual revenue to the Government under a settlement which is not permanent is recorded in the Collector's register as separately assessed with such revenue, the value of the subject-matter of a suit for the possession of . . . a fractional share of that part shall, for the purposes of the computation of the amount of the fee chargeable in the suit, be deemed not to exceed five times such portion of the revenue." A suit for a specific plot of land comprised in a separately assessed part of an estate does not come within the above Notification, so as to be governed by Clause (b) as the expression "fractional share" therein can only refer to an undefined share and not to a definitely located area. ('94) 16 All 493 (496). (Suit for pre-emption of specific plots — Court-fees is payable under Clause (d).) * AIR 1947 Mad 297 (298) = ILR (1947) Mad 643 (FB). (AIR 1927 Mad 1002 (DB), **Overruled.**) ** AIR 1951 Mad 698 (Pr. 15) = ILR (1951) Mad 867 (DB). (A plot of land with definite boundaries can never be a fractional share within the meaning of the notification by the Madras Government issued in 1921.) ** AIR 1952 Mad 88 (Pr. 1) ** AIR 1943 Pesh 96 (98) (DB) ** AIR 1924 Mad 646 (647) ** AIR 1918 Mad 25 (27) (DB).

[But see AIR 1945 Lah 15 (16) (DB). (Suit for possession of plot — Plot capable of being arithmetically worked out as fraction of property that has been assessed to land-revenue — Section 7 (v) (b) applies and not Section 7 (v) (d).)]

(12) In the United Provinces, the Government of India Notification of 1921 issued under Section 35 of this Act is not now in force. See AIR 1933 All 414 (416) = 55 All 531.

15. "Collector's register."— (1) The expression "Collector's register" used in

Section 7, Para. (v) — Note 15 (contd.) clauses (a) and (b) is intended to refer to the register in which the land-revenue is recorded for fiscal purposes and is maintained by the Collector. AIR 1935 Lah 331 (332).

(2) In the Punjab the Jamabandi has been treated as the Collector's register. AIR 1935 Lah 331 (332).

(3) In Madras the Paimash register was held not to be the Collector's register. AIR 1924 Mad 646 (647).

16. "Separately assessed."— (1) "Separately assessed" means assessed separately and not as part of a whole. Hence, the mere fact that by a mathematical calculation it can be stated what the revenue is on a particular plot which forms part of a unit which is assessed to revenue, it cannot be said that the plot is separately assessed to revenue. AIR 1917 Mad 323 (323) (DB). (Confirmed on appeal in AIR 1918 Mad 25 (DB).)

(2) Plots forming a separate khata in themselves, though under-proprietary, must be taken to be separately assessed with Government Revenue for purposes of the Court-fees Act when they are so assessed with the rent which the khata as a whole is liable to pay to the superior proprietor. AIR 1930 Oudh 520 (520) (DB). (AIR 1921 Oudh 110 = 24 Oudh Cas 29, Followed.)

17. "Revenue so payable."— (1) Remissions of revenue granted in any particular year cannot be taken into account in calculating the value of land for purposes of Court-fees under this paragraph. The calculation should be based on the revenue fixed at the settlement. AIR 1937 All 657 (658).

18. Clause (c).— (1) This clause applies to cases in which the land is exempted wholly or partially from the payment of revenue or is charged with any fixed payment in lieu of such revenue. AIR 1943 Nag 315 (316) = ILR (1943) Nag 802 ** AIR 1914 Cal 442 (443, 444) = 41 Cal 812 (DB).

(2) An izara village or alienated village is assessed under Sections 96 and 97 of the Berar Land Revenue Code, 1928 to land revenue and is not exempt from payment of revenue. Hence, a suit for partition and separate possession of a share in such a village will fall under Clause (b) and not under Clause (c) of this paragraph. AIR 1943 Nag 315 (316) = ILR (1943) Nag 802.

(3) A suit for possession of inam lands which have been wrongly classed by Government as ryotwari land and in respect of which pattas have been issued may be valued by the plaintiff as ryotwari land held on patta at five times the revenue payable under Clause (b). AIR 1918 Mad 590 (591, 592) (DB). (Fact

that after institution of suit, the lands are classed as inam, will not affect the question.)

(4) "Such revenue" in this clause means an annual revenue payable to the Government whether fixed permanently or not. Land subject to a fluctuating assessment based on the harvest cannot be considered as paying an annual revenue to the Government, and must, therefore, be valued under this clause. AIR 1919 Lah 106 (107) = 1919 Pun Re No. 100 (DB).

(5) The "year next before the date of presenting the plaint" means the revenue year and not the calendar year. AIR 1935 All 642 (642).

[But see (1906) 28 All 411 (413). (The expression denotes a period of 365 days reckoning backwards from the date of presentation of the plaint.)]

(6) In construing the words "net profits" regard must be had to the subject-matter of the suit. When subject-matter of suit is kudivaram right the value of that right can only be arrived at after deducting rent payable to landholder and expenses incurred in cultivation. AIR 1946 Mad 322 (324) = ILR (1946) Mad 821 (DB). (AIR 1942 Mad 585, Overruled.) ** AIR 1954 Mad 168 (Pr. 3). (AIR 1946 Mad 322 = ILR (1946) Mad 821, Foll.)

(7) The expression "net profits" in relation to an estate means the difference between the gross collection and the expenses incurred for collection, management and preservation of the estate including expenses incurred for payment of statutory public charges, for example, revenue, cesses, taxes, local rates and the like. AIR 1953 Cal 710 (Pr. 7) (DB).

(8) In order to entitle the plaintiff to deduct any amount from the gross collection it must be shown that the amount spent had some connection with the collection of rent or management and preservation of the estate. AIR 1953 Cal 710 (Pr. 7) (DB). (Case under Sec. 7 (v) (a) (Bengal).)

(9) Maintenance and education allowances paid to junior members of the family and widows and grants to medical and educational institutions cannot be deducted for arriving at net profits of the estate. AIR 1953 Cal 710 (Pr. 7) (DB).

(10) The net profits for the year preceding the presentation of the plaint cannot be excluded from consideration for purposes of Court-fees on the ground that they partake of the nature of a windfall. AIR 1940 Mad 821 (821).

(11) Where no nett profits have arisen from the land during the year next before the suit, the clause requires the Court to estimate the land with refer-

Section 7, Para. (v) — Note 18 (contd.)

ence to the value of similar land in the neighbourhood. The mere fact that the land is "religious" does not render it incapable of valuation with reference to the value of the similar land in the neighbourhood. AIR 1920 Upp Bur 7 (8) = 3 Upp Bur Rul 236.

19. Clause (d).— (1) This clause applies where the land in suit forms part of revenue-paying estate but does not constitute a definite share of it and is not separately assessed to revenue. If the land is a definite share of a revenue-paying estate, this clause will not apply. AIR 1937 Nag 100 (100) = ILR (1937) Nag 309 ** AIR 1919 Lah 106 (107) = 1919 Pun Re No. 100 (DB) ** (1908) 12 Cal WN 990 (992) (DB).

(2) To a suit for land which is subject to a fluctuating assessment of revenue based on the harvest, clause (c) and not this clause, will apply. AIR 1919 Lah 106 (107) = 1919 Pun Re No. 100 (DB).

(3) A suit for a specific plot of land forming part of an estate but not separately assessed will come under this clause and not Clause (a) or Clause (b). The valuation under this clause is to be according to the market-value of the land. AIR 1938 Oudh 139 (139) ** AIR 1956 Tripura 25 (26) ** AIR 1952 Mad 88 (Pr. 1) ** AIR 1951 Mad 698 (Pr. 15) = ILR (1951) Mad 867 (DB) ** AIR 1938 Oudh 40 (41) (DB) ** AIR 1931 Cal 417 (419) = 58 Cal 66 (DB) ** AIR 1921 Pat 466 (466) (DB). (Claim for possession of milkiat share and for direct possession of khudkasht lands — Real dispute about claim to possession of khudkhasht. Court-fee payable under Cl. (d) of para. (v).) ** AIR 1918 Mad 25 (26) (DB). (Suit for possession of plot forming part of survey number but not separately assessed — Court-fee is payable under Clause (d).) ** (1914) 25 Ind Cas 24 (24) (DB) (Lah) ** (1911) 33 All 630 (634). (Suit by reversioner to recover specific plots of land — Court-fee payable on market-value.) ** (1894) 16 All 493 (496). (Suit for pre-emption.) ** 1883 Pun Re No. 6, p. 13 (15, 16) (DB). (Do.)

(4) In a suit for possession, the market-value of the land at the date of the suit is to be taken as the basis of valuation. AIR 1928 Lah 852 (853).

(5) In a suit for pre-emption, the market-value at the date of the sale will be the basis of valuation. AIR 1924 Lah 380 (381) ** AIR 1945 Oudh 135 (138).

(6) In a suit for possession of a plot of land and for injunction for removal of buildings erected thereon, the valuation must be according to the market-value of the land and the cost of the buildings need not be taken into account.

(1882) 4 All 323 (329, 330) (FB) ** AIR 1954 All 188 (Pr. 6).

(7) Where the suit is for possession of land as well as buildings and groves standing thereon the land must be valued under this clause and the buildings and groves under Clause (e). AIR 1938 Oudh 40 (42) (DB).

[See AIR 1928 Lah 852 (853). (Suit for possession of land and not of buildings on land — Market-value of land, irrespective of buildings, determines jurisdiction of Court and amount of Court-fee.)]

(8) In a suit for possession as usufructuary mortgagee, the Court-fee payable is on the market-value of the mortgagee interest in the property, i.e., the mortgage-money, on payment of which the property can at any time be redeemed. AIR 1924 Oudh 163 (163, 164).

(9) Where the subject-matter of a suit is only the kudivaram right in the land, it is the market value of the kudivaram right that will be value of the suit. AIR 1935 Mad 569 (570, 571).

(10) Where the subject-matter of the suit for possession is only the verumpattom right in land it is the market value of the verumpattom that will be the value of the suit. AIR 1951 Trav-Co 142 (Pr. 12) = 1950 Trav-Co LR 581 (DB).

(11) Where the plaintiff seeks recovery of possession of immovable properties in which the defendant has a limited interest ad valorem Court-fee will have to be paid on the market value of that limited interest. AIR 1951 Trav-Co 212 (Pr. 3).

20. Market-value.— (1) An ancient temple devoted absolutely and in perpetuity to religious purposes has no market and therefore no market-value. A suit for recovery of possession of such a temple will not be governed by Sec. 7 (v) (e) but by Schedule II, Article 17 (VI). AIR 1938 Nag 481 (482) ** AIR 1924 Mad 19 (21, 22) = 46 Mad 782 (FB). (25 Cal 194 = 24 Ind App 177 (PC), Foll.)

(2) The market-value is the value at the date of the suit. AIR 1928 Lah 852 (853) ** AIR 1924 Lah 380 (381) ** AIR 1955 Nag 184 (Pr. 9) = ILR (1954) Nag 658 ** AIR 1949 All 107 (Pr. 5) = ILR (1948) All 339 ** AIR 1965 J & K 121 (123, 124).

(3) A suit for possession of service inam land must be valued under paragraph (v) and not under Schedule II, Article 17-A (Mad). The mere fact that the property is declared inalienable by Section 5, Madras Hereditary Village Offices Act (3 of 1895), does not render it incapable of valuation. AIR 1951 Orissa 183 (1) (Pr. 1) = ILR (1949) 1 Cut 804 (DB).

(4) For a proper assessment of the market value of the land, for purpose

Section 7, Para (v) — Note 22 (contd.) of Court-fee, it is essential that a local investigation should be held as the value of land, like the value of almost every other commodity, depends on its quality. Where the plaintiff does make a prayer for local investigation, the Court acts with material irregularity in not allowing this prayer. AIR 1949 Cal 659 (Pr. 5) = ILR (1950) 1 Cal 506 (DB).

(5) The fact that under Assam Abolition of Zamindari Act the owners of estates are to receive three times the net profits as compensation, does not furnish a proper standard for assessing market value under the Court-fees Act. AIR 1953 Cal 710 (Pr. 9) (DB).

21. Clause (e).— (1) Where a tenant of a shop brings a suit for possession of the shop against third party who has dispossessed him from the shop the subject-matter of the suit is shop itself, and not the tenancy right of the plaintiff and therefore, Court-fee is payable under this clause on the market value of the shop. AIR 1951 Simla (Punj) 238 (Pr. 10) = ILR (1951) Punj 155.

(2) Lessee holding over after expiration of lease — Lessee's heirs continuing in possession after his death — Possession sought from lessee's heirs on the allegation that they have no right after lessee's death — Heirs not described as any kind of tenants — Court-fee, held, payable under Section 7 (v) (e) and not under Section 7 (xi) (cc). AIR 1968 Punj 302 = 70 Punj LR 87.

22. Proviso — Cases are prior to repeal by Bombay Act 36 of 1959.— (1) The proviso has been intended to provide a standard of valuation in the Bombay Presidency for all cases of suits for land. (1887) 11 Bom 541 (548) (FB) ** 1883 Bom PJ 164.

(2) The word "Land" in this proviso means land surveyed and assessed by Government. The proviso will not, therefore, apply to suits for possession of inam lands which have never been surveyed and assessed by Government. In such cases Court-fee is to be computed according to Clause (c) of the paragraph. 1889 Bom PJ 241.

(3) Where the land in suit is settled for a period not exceeding thirty years and full assessment is paid to Government, the value of the land is to be computed according to the first paragraph of the proviso. 1894 Bom PJ 425 (DB) ** 1884 Bom PJ 150 (DB).

(4) Proviso (3) applies to lands in respect of which the whole or any part of the survey assessment has been remitted. ('88) 1888 Bom PJ 352 (DB). (Inam village held on permanent settlement and partially exempt from revenue — Proviso (3) must be applied for determining its value for purposes of Court-

fees.) ** 1883 Bom PJ 164. (Suit for recovery of land situated in talukdari village in respect of which large portion of revenue was remitted.)

(5) The remission contemplated by proviso (3) need not be expressed. In suits for possession of land in a talukdari village the difference between the full survey assessment for the land and the jama payable by the talukdar should be regarded as remission within the meaning of this proviso. (1887) 11 Bom 541 (548) (FB).

[But see (1887) 11 Bom 550n (551n) (DB). (This case must be deemed to have been overruled in 11 Bom 541 (FB).]

(6) Proviso (3) will not apply to a suit for possession of land in respect of which there was a previous assessment and a remission but which is no longer existing. (1905) 29 Bom 480 (488) (DB).

(7) A suit for possession of land, situated in an inam village, between subholders to which the inamdar is not a party must be valued for purposes of court-fees as inam land quite regardless of the tenure under which it may be held by the actual parties to the suit. 1882 Bom PJ 87.

23. "House", meaning of. — (1) The term "house" has not been defined by the Act, Prima facie, it means a building for human habitation. AIR 1931 Sind 6 (7) (DB).

(2) In its wider meaning, "House" includes a building used for other purposes than ordinary human habitation. AIR 1931 Sind 6 (7) (DB). (For example, an elm-house, a bake-house, a brew-house, a lighthouse, a summerhouse, a work-house, a church or a temple, an eating-house, a stock exchange, a cow-house, a hen-house, a green-house.)

(3) An indigo factory or a water mill comes within the meaning of the expression "House". (1902) 24 All 218 (225, 226) (DB) ** AIR 1941 Pesh 69 (71) (DB). (24 All 218, Rel. on.)

(4) A suit for the recovery of a building site, on which a house was only partially built, was held to be a suit for possession of a "House" falling under Clause (e). AIR 1931 Sind 6 (7, 8) (DB). ((1884) Bom PJ 150, Not followed; AIR 1930 Sind 15, Rel. on.)

(5) A temple building is not a "house". AIR 1924 Mad 19 (21, 22) = 46 Mad 782 (FB). (Per Venkata Subba Rao J.)

(6) A matham used as a shelter for pious men and for keeping certain things for the temple procession is a "house". (1936) 159 Ind Cas 636 (636) (Mad).

(7) A house includes the site on which it stands. AIR 1941 Pesh 69 (71) (DB) ** AIR 1931 Sind 6 (7) (DB).

(8) The fact that the land on which the house is situated is assessed to land

Section 7, Para. (v) — Note 24 (contd.) revenue, does not affect the Court-fee chargeable. AIR 1941 Pesh 69 (71) (DB) ** (1902) 24 All 218 (225) (DB).

(9) Suit by distinct reversioner after daughter's death, for recovery of half share in land sold by her — Houses standing upon site — Plaintiff held could not be valued under Section 7, Cl. (v) (b) — Land as whole had to be valued for purposes of Court-fee and jurisdiction — Court-fee to be paid was on half the market value of the entire site together with the houses under Sec. 7, Clause (v) (e). AIR 1949 Mad 717 (Prs. 2, 3).

(10) Whether a suit is for the recovery of the "house" or the land on which it stands, must be determined by ascertaining if the substantial subject-matter of the suit is the house itself. (1902) 24 All 218 (226) (DB).

[See also AIR 1917 Lah 377 (378) = 1917 Pun Re No. 27 (DB). (Suit to preempt certain share of plot of land with a garden and bungalow thereon.)]

24. "Garden".— (1) The word "Garden" in Clause (e) should be taken as referring primarily to a garden in the English sense, ornamental or pleasurable or vegetable." AIR 1918 Mad 805 (806) = 40 Mad 824 (DB). (Reversing AIR 1916 Mad 740.)

[See also (1889) 12 Mad 301 (304) (FB).]

(2) A suit for possession of a field on which coconut trees stood and which was assessed to revenue was held not to be governed by Cl. (e) but by Cl. (b) of the paragraph. AIR 1918 Mad 805 (806) = 40 Mad 824 (DB). (Reversing AIR 1916 Mad 740.) ** AIR 1948 Mad 344 (344) ** AIR 1964 J & K 34 (39) = 1963 Kash LJ 279.

(3) A bagayat land paying annual revenue to Government should be valued under Clause (a) and not under Cl. (e). 1884 Bom PJ 150.

(4) Panmalla or a field where betel leaves are grown is not a garden within the meaning of this clause and if it is assessed to revenue it should be valued under Clause (a) and not under Cl. (e). AIR 1953 Hyd 28 (Prs. 4, 5) = ILR (1952) Hyd 550.

(5) The meaning of the word "Garden" is not restricted to a pleasure or vegetable garden but extends also to a fruit garden even though the land under it is assessed to revenue. (1922) 68 Ind Cas 345 (346) (Lah) (DB) ** AIR 1914 Lah 388 (389) = 1914 Pun Re No. 71 (DB). (What kind of garden not given in report.) ** 1908 Pun Re No. 146, p. 669 (670) (DB). ((1889) 12 Mad 301 (FB), Not followed.) ** 1880 Pun Re No. 33, p. 72 (72) (DB). (Suit for possession of a date garden by mortgagee is

governed by Section 7 (v) (e) and not by Section 7 (x) (b) — It is not material for purposes of para. (v) that the garden is upon revenue paying land.) ** AIR 1930 Sind 15 (16) = 24 Sind LR 4 (DB). (AIR 1916 Mad 740. Followed.)

[See 1969 All LJ 593 = 1969 All WR (HC) 389. ("Garden" in Section 7 (v) (ii) does not include "grove".)]

(6) To find out whether a property is a garden or not it would be a good indication to find out whether such properties are popularly referred to as gardens. A group of wild trees which were never planted by any one cannot be called a garden. Even after the trees grow up, cultivation to greater or less extent is continued in gardens and the nature of cultivation is usually different from that employed in fields. Spade is used in addition to, or in place of plough. The property is usually enclosed by a fence. (1949) 54 Mys HCR 364 (370).

(7) It has been held that a honge grove in a portion of dry land cannot be called a garden, within the meaning of the Act, especially when there is nothing to show that the trees were planted or raised by anyone. (1949) 54 Mys HCR 364 (370).

(8) The term 'garden' connotes a small piece of land which is usually adjacent to a dwelling house and used for the purpose of growing flowers, vegetables or fruit for human consumption or is kept in order to beautify and add to the grandeur or value of the dwelling house or is otherwise used for pleasure. AIR 1964 J & K 34 (39) = 1963 Kash LJ 279 (DB).

25. Suit for religious property.— (1) A temple as such has no market-value and a suit for possession of a temple is chargeable with a fixed Court-fee of Rs. 10 under Schedule II, Article 17 (vi). (1938) 40 Pun LR 113 (115) ** AIR 1924 Mad 19 (22) = 46 Mad 782 (FB).

[See also AIR 1953 Mad 856 (Pr. 4). (In a suit in which the plaintiff seeks declaration of a joint right in respect of impartible and communal land which is not capable of valuation, the value of the trees standing thereon cannot affect the question of valuation of the suit.)]

(2) It cannot be said that any property belonging to a temple and sued for as such has no market-value. Whether the property is capable of valuation or not depends on the nature of user to which it is put. Ordinarily it is the materials and site of the temple and the buildings which are an adjunct to it that will not be capable of valuation. (1938) 40 Pun LR 113 (115) ** AIR 1953 Madh B 40 (Pr. 9) ** AIR 1948 Mad 345 (345).

[See also AIR 1920 Upp Bur 7 (8) = 3 Upp Bur Rul 236. (Merely because property is religious property it cannot be said to be incapable of valuation.)]

Section 7, Para. (v) — Note 26 (contd.)

(3) Suit for possession of wakf properties by mutwalli — Court-fee is not payable ad valorem on market value of properties — Plaintiff should value his suit in accordance with his estimate of what the value of his rights as mutwalli would amount to. AIR 1948 Cal 312 (319) = ILR (1949) 1 Cal 333 (DB) ** AIR 1954 Cal 101 (Pr. 7) (DB).

26. Court-fee on appeals.— (1) Where a suit for possession is decreed and the defendant appeals from the decree, the appeal is liable to be charged with Court-fees according to the scale laid down under this paragraph though the defendant is in possession and is not asking for a decree for possession in his favour. AIR 1931 Cal 333 (335) ** AIR 1952 Trav-Co 5 (Pr. 9) = ILR (1951) Trav-Co 275 (DB) ** AIR 1929 Sind 161 (161) (DB) ** (1893) 16 Mad 310 (311) (DB).

[See (1906) 29 Mad 172 (173) (DB).]

[See also AIR 1927 All 308 (308) = 49 All 398. (Land falling under paragraph (v) (c) — Court-fee on appeal under Clause (c) is enough though plaintiff may have paid fee under Clause (d).) * * AIR 1925 Mad 805 (805). (Appellant claiming possession as trustee — Still Court-fee must be paid under this paragraph).]

(2) If the suit is dismissed and the plaintiff appeals repeating his claim for possession, the appeal will come under this paragraph. 1881 All WN 5 (5) (DB).

[See also (1912) 17 Ind Cas 270 (271) (DB) (Lah). (Suit for removal of defendant from management of dharma-shala held to be for possession — Suit dismissed — Appeal by plaintiff — Same Court-fee as in trial Court.)]

(3) Where the suit is decreed subject to the plaintiff paying a certain sum to the defendant and the plaintiff appeals against such condition in the decree he will have to pay ad valorem Court-fee on the amount in dispute. AIR 1939 Mad 49 (50) = ILR (1939) Mad 328 (DB). (Value of improvements.) ** AIR 1952 Mad 23 (Pr. 2) ** AIR 1926 Mad 225 (226) (DB) ** AIR 1922 Lah 440 (441) (DB) ** AIR 1921 Lah 371 (372) ** (1912) 15 Ind Cas 746 (747) (Oudh) ** (1910) 13 Oudh Cas 62 (65) (DB).

[See however (1900) 23 Mad 84 (85) (DB). (Suit to eject defendant — Appeal by defendant — Held, even where claim for improvement is the only question raised in appeal, appellant should not be called upon to pay Court-fee other than that payable in suit for possession.)]

(4) Where a decree for possession is subject to the payment of a certain sum of money and the defendant appeals from the decree on the ground that the plaintiff was not entitled to a decree for possession at all, Court-fee on the ap-

peal will have to be paid under this paragraph. AIR 1925 Mad 323 (324) = 48 Mad 652 ** AIR 1953 Him Pra 4 (Prs. 4, 6) ** AIR 1922 All 358 (360) = 44 All 629 ** 1907 Pun Re No. 39, p. 168 (170) (DB).

(5) Even where a defendant appeals against a decree for possession on the ground that the plaintiff is bound to pay a certain sum before he can recover possession, the appeal will be governed for purposes of Court-fees by this clause. AIR 1928 Mad 929 (930) (DB). (Claim for compensation as a condition precedent to plaintiffs seeking to enforce their right to eject.) ** AIR 1951 J & K 10 (Prs. 2, 3) = 9 J and K LR 162 ** AIR 1914 All 273 (275) = 36 All 322. (Claim for dower debt.) ** (1900) 23 Mad 84 (85). (Claim for compensation for improvements.)

(6) Where a plaintiff is awarded possession but only for a limited period and he appeals against such limitation of his right a court-fee of Rs. 10 is sufficient on the appeal as he is only in the position of a person seeking a declaratory decree. (1911) 33 All 705 (707). [But see (1875) 24 Suth WR 454 (455).]

(7) Appeal from a decree of the Sub-Judge, passed on a reference by the Collector under the Bengal Alluvial Lands Act, Section 5 — Court-fee of Rs. 20 held sufficient. AIR 1932 Cal 47 (49) = 58 Cal 710.

(8) Suit for possession by mortgagee — Conditional decree allowing mortgagor to redeem mortgage on payment of certain sum of money passed — Appeal by mortgagee for unconditional decree — Held, that court-fee was payable ad valorem on five times the Government assessment. AIR 1920 Oudh 308 (308).

(9) Suit for declaration of title and confirmation of possession — Court fee of Rs. 10 paid on declaration — Relief of confirmation valued at Rs. 100 and court-fee Rs. 7-8 paid thereon — Court holding value of subject-matter to be Rs. 3,000 demanding court-fee thereon — Plaint rejected on plaintiff's failure to pay additional court-fee — Appeal by plaintiff — Held court-fee on Rs. 3,000 should have been paid on appeal. AIR 1916 Cal 276 (277) (DB).

(10) Decree for possession and mesne profits — Appeal by defendant — Court-fee on future mesne profits need not be paid (1898) 21 Mad 372 (372) (DB).

(11) Suit for possession dismissed on ground of insufficiency of court-fee — Appeal by plaintiff — Court-fee need not be paid as on claim or possession but only on amount of court-fee in dispute. 1882 All N 244 (244).

(12) Suit for ejectment against several defendants — Each claiming to be in possession of specific plot of land — Suit decreed — Some defendants alone ap-

STATE AMENDMENTS

Sections 7 (v-A) and (v-B)

Uttar Pradesh:

After sub-section (V) of Section 7 the following were inserted as sub-sections (V-A) and (V-B), namely :—

“(V-A). In suits for possession—

(1) of superior or proprietary rights where under-proprietary or sub-proprietary rights exist in the land—

according to the market value of the subject-matter,

and such value shall be determined by multiplying by fifteen the annual net profits of the superior proprietor,

Section 7, Para (v) — Note 26 (contd.)
pealing — Appellants not liable to pay court-fee in respect of plots claimed by non-appealing defendants. AIR 1945 Pat 453 (455) = 24 Pat 379 (DB).

(13) Where the memorandum of second appeal does not give any valuation it must be taken that the valuation is the same as that in the first appellate Court for the purpose of court-fees. AIR 1953 Ajmer 24 (I) (Pr 2).

(14) Suit for ejectment against several defendants — Each claiming to be in possession of specific plot of land — Suit decreed — Some defendants alone appealing — Appellants not liable to pay court-fee in respect of plots claimed by non-appealing defendants. AIR 1945 Pat 453 (455) = 24 Pat 379.

(15) Suit for possession — Defendant's claim for compensation for improvements — Decree against defendant — Decree against — Appeal by defendant — Appeal essentially relates to possession — Court fees paid on basis of relief for possession is adequate. AIR 1962 Mys 155 (156, 157) = 38 Mys LJ 565.

(16) Suit for possession from a person said to be lessee — Trial and First Appellate Courts holding the lease to be void — Relationship of lessor and lessee also found not to exist — Court-fee on memorandum of appeal, held, had to be paid on market value of property. (T. P. Act (1882), Section 105). 1969 Cur LJ 589 (592) (Punj).

27. Court-fee on cross-objections. —

(1) A memorandum of cross-objections is not included within the meaning of the word “suit” in Section 7 and hence cross-objections claiming possession of immovable property are not liable to be charged with court-fee under this paragraph but under Sch. I, Art. 1. AIR 1925 All 119 (119) = 47 All 89.

(2) Suit for cancellation of sale-deed and possession — Court dismissing claim for possession but holding that as to part of consideration, viz., Rs. 100, there was no legal necessity and giving relief as to such amount — Appeal by plaintiff — Cross-objections by defendant against that part of decree which related to Rs. 100, held liable to ad valo-

rem court-fee on amount involved, viz., Rs. 100. AIR 1924 All 175 (175) = 45 All 537.

28. Bengal Amendment. — (1) If the Court has reason to think that the amount of nett profits given by the plaintiff has been wrongly estimated then the Court has to ascertain (i) the net profits of the land, building or garden as the case may be in the year immediately preceding the presentation of the plaint, and also (ii) its market value. If the nett profits are not readily ascertainable or assessable or where there are no such profits the Court has only to ascertain the market-value of the land building or garden under clause (b) of the paragraph. But where they are readily ascertainable or assessable the Court is bound to direct inquiry under both the heads (i) and (ii) and demand additional court-fee on the basis of the lower of the two figures arrived at in such inquiry. In such a case the Court cannot merely ascertain the amount of nett profits and assess court-fee on fifteen times such profits without determining the market-value. AIR 1940 Cal 438 (440, 441) = ILR (1940) 2 Cal 450 (DB).

(2) Suit for recovery of possession against ex-tenant and transferee from him on ground of forfeiture of tenancy by reason of transfer of tenancy rights — Suit is governed by Section 7 (v) (a) (Beng) and not by S. 7 (vi) (cc) — Net profit would be rent received by landlord after excluding collection charges, taxes etc. AIR 1949 Cal 426 (Prs. 7, 10) = ILR (1948) 2 Cal 554.

(3) Suit for possession against licensee after revocation of license — Court-fee payable is ad valorem on market value of premises under Section 7 (v) (b). AIR 1960 Cal 420 (420, 421) = 64 Cal WN 80 (DB).

28A. Orissa Amendment. — (1) Suit for recovery of possession — Disputed land constituting definite share of State — Section 7 (v) (h) (as amended in Orissa) applies — Valuation for purposes of court-fee should be ten times the revenue payable — In absence of rules framed by State Government or by High Court, for determination of

(2) of under-proprietary or sub-proprietary land as such—
according to the value of the subject-matter, and such value shall be determined by multiplying by ten the annual under-proprietary or sub-proprietary rent as the case may be, recorded in the Collector's register as payable for the land for the year next before the presentation of the plaint.

If no such rent is recorded in the Collector's register, the value shall be determined in the manner laid down in clause (c) of sub-section (v) of this section save that the multiple will be ten.

Explanation.—Land held by any permanent lessees shall be treated for the purpose of this sub-section, as under-proprietary or sub-proprietary land."

"(v-B). In suits for possession of land between rival tenants and by tenants against trespassers—

according to the value of the subject-matter and such value shall be determined if such land is the land of—

- (a) a permanent tenure-holder or a fixed rate tenant—by multiplying by twenty the annual rent recorded in the Collector's register as payable for the land for the year next before the presentation of the plaint;
- (b) an ex-proprietary or occupancy tenant—by multiplying by two such rent in case of suits for possession of land between rival tenants, and by annual rent in suits by tenants against trespassers;
- (c) any other tenant—by annual rent.

If no such rent is recorded in the Collector's register, the value shall be determined in the manner laid down in clause (c) of sub-section (v) of this section save that the multiple shall be that entered in clauses (a), (b) and (c) of this sub-section according as the class of tenancy affected is governed by clauses (a) or (b) or (c) of this sub-section."
— U. P. Act 19 of 1938 (9-1-1939).

Section 7, Para (v) — Note 28-A (contd.)
value for purposes of jurisdiction it is open to plaintiff to value the relief sought for purpose of jurisdiction, which need not be the market value. AIR 1969 Orissa 262 (262, 263) = 35 Cut LT 476.

29. U. P. Amendment. — (1) The test laid down in Section 7 (v) (I) (D) for determining the market-value of the land. (viz.), multiplying by fifteen the rental value of the land is not applicable where there is no evidence of the rental value. In such cases the market-value must be determined in any other proper manner. AIR 1945 Oudh 135 (137).

(2) The price which a property may fetch in the market by sale is not necessarily the same as the price calculated for the purposes of court-fee under Section 7 (v) (i) (e), Court-fees Act. AIR 1954 All 188 (Pr. 11).

(3) Suit for possession of property by plaintiffs as stridhan heirs — Validity of will leaving property to defendants challenged — Court-fees paid on valuation of property in accordance with Section 7 (v) (U. P.) — Proper Court-fees — Court-fees required to be paid in accordance with Section 7 (iv-A) also AIR 1962 All 268 = 1961 All LJ 884. (Overruled on another point in AIR 1968 All 216 (FB).)

(4) Exercise of jurisdiction in one of two alternate manners — Suit for possession of house — Fixation of market value for Court-fee at 20 years' rent by Subordinate Courts instead of at current cost of construction less depreciation — Rejection of Commissioner's valuation — No illegality or material irregularity for interference in revision. AIR 1960 All 590 (593, 594) = 1960 All LJ 514 (DB).

30. Reductions and remissions. — (1) The Madras Government Order No. 5791 of 17th May 1943 does not apply to a suit by persons who claim to be trustees of certain trust-property against the defendant who puts forward the same claim which is not conceded by the plaintiffs. AIR 1945 Mad 102 (103) = ILR (1945) Mad 584 (DB).

Section 7 (V-B) (Uttar Pradesh)—Note 1

(1) Suit for declaration that ejectment order against plaintiff-tenant is ultra vires and for injunction restraining defendant from interfering with plaintiff's possession — Suit falls under S. 7 (iv) (a) — Consequential relief cannot be valued under Section 7 (IV-B) (U. P.) — It should be valued on principle of Section 7 (V-B) (U. P.) i. e. on one year's rental. AIR 1949 All 560 (562) = ILR (1949) All 882.

West Bengal

After paragraph V insert the following:

"v-A. In a suit for recovery of possession of immovable property from—

- (a) a trespasser, where no declaration of title to the property is either prayed for or necessary for disposal of the suit—according to the amount at which the relief sought is valued in the plaint subject to the provisions of Section 8-C;
- (b) a licensee upon revocation or termination of his license,—
 - (i) where a license fee is payable by the licensee in respect of the immovable property to which the suit refers, according to the amount of the license fee of the immovable property payable for the year next before the date of presenting the plaint, or
 - (ii) where no such license fee is payable by the licensee, according to the amount at which the relief sought is valued in the plaint subject to the provisions to Section 8-C." — W. B. Act 18 of 1963, S. 3 (2) (3-5-1963).

to enforce a right of pre-emption;

- (vi) In suits to enforce a right of pre-emption — according to the value (computed in accordance with paragraph (v) of this section) of the land, house or garden in respect of which the right is claimed.

STATE AMENDMENTS

Andaman and Nicobar

Same as that of West Bengal. — Reg. II of 1957, S. 7 (2) (1-8-1957).

Section 7 (V-A) (West Bengal) — Note 1

(1) Sub-clause (b) (ii) of Clause VA of Section 7 as incorporated by the Court-fees West Bengal (Amendment) Act (1963) — Amendment is not retrospective and would not apply to suits instituted long before the amendment came on statute book. ILR (1966) 1 Cal 441.

(2) The words 'licence fee payable for the year next before the date of presenting the plaint' used in the section require an interpretation consistent with the purpose and object of the Court-fees Act and consistent with the relief intended to be given to the licensors in recovering their property on the revocation of their licences. The expression must be given a practical interpretation which will work in all classes of cases where the licensor sues for the recovery of possession of his property on the revocation of the licence and where a licence fee is payable. Therefore, the expression must be understood in the light of the cause of action pleaded in the plaint, which is the revocation of licence. That is to say, the expression 'licence fee payable for the year next before the date of presenting the plaint' means that Court-fee payable is according to the licence fee paid in the last year of the licence before revocation. AIR 1967 Cal 317 (DB).

(3) In a suit to recover possession from a licensee who is not bound to pay any licence fee, the Court-fee payable is under Section 7 (v) A (b) (ii) as amended in Calcutta on the value of 'relief sought' and not on the valuation of the 'property' or 'subject-matter.' The terms valuation of relief and valua-

tion of property are not synonymous terms. The value of the relief is now the value of the suit and this is the new criterion under the amendment. (1966) 70 Cal WN 857 = ILR (1966) 1 Cal 427 (DB). (AIR 1961 Cal 229 held bad law after the above amendment in 1963).

(4) A suit by landlord for recovery of possession of a portion of his building from a person holding leave and licence to use the same free of rent attracts Court-fee under Sec. 7 (v-A) of the Court-fees Act. In the instant case, the valuation put upon the plaint by the plaintiff was held to be sufficient and proper for reasons that it was a case of revocation of licence, that the case of the plaintiff was that no licence-fee was payable, that the plaint was valued according to the mesne profits the basis of which the Court found to be correct. (1968) 72 Cal WN 404 (DB).

(5) Municipality rescinding a lease and recovering possession of demised property on ground of transaction being in breach of Municipal Act — Lessee obtaining order under Section 144 Cr. P. C. — Suit by Municipality for declaration, confirmation of possession and permanent injunction — Case, held not covered by Section 7 (VA) since defendant was neither a licensee nor a trespasser. AIR 1967 Cal 423 (427).

Section 7, Para (vi) — Note 1

(1) Plaintiff cannot in suit for pre-emption put a tentative value on property sought to be pre-empted and pay court-fees on that basis. 1912 Pun WR No. 170 p. 458 (462) = 1912 Pun Re No. 83 (DB).

Madhya Pradesh:

For paragraph (vi) of Section 7 substitute the following, namely,—

“(vi). In suit to enforce a right of pre-emption, according to the value of the subject-matter as specified in the documents furnishing the cause of action for such right, and where there is no such document or where the plaintiff claims to pre-empt for a fair consideration, on the value of the subject-matter as stated in the plaint:

Provided that where the value of the subject-matter determined by the Court exceeds the value stated in the plaint, the decree shall not be executed until the difference, between the fee actually paid and the fee which would have been payable on the value of the subject-matter as determined by the Court, shall have been paid.” — M. P. Act 9 of 1953, S. 3 (15-4-1953).

Pondicherry:

Same as that of Andaman and Nicobar — See Act 26 of 1968, S. 3 and Sch., Pt. II (18-12-1968).

Uttar Pradesh:

In sub-section (vi) of S. 7 the word “building” was substituted for the word “house.” — U. P. Act 19 of 1938 (9-1-1939).

West Bengal:

For paragraph (vi) the following paragraph was substituted:—

“(vi) In suits to enforce a right of pre-emption—according to the market-value of the land, building or garden in respect of which the right is claimed.

Explanation.—In this paragraph “building” has the same meaning as in para. V.” Bengal Act 7 of 1935 (2-5-1935).

STATE AMENDMENTS**Section 7 (vi-A)****Andaman and Nicobar**

Same as that of West Bengal. — Reg. II of 1957, S. 7 (3) (1-8-1957).

Section 7, Para. (vi) — Note 1 (contd.)

(2) Subject-matter of suit for pre-emption being land paying revenue — Valuation for purposes of court-fees is to be made in accordance with para (v) on revenue assessed and not according to consideration for sale. AIR 1933 Lah 767 (768) (DB) ** AIR 1919 Lah 79 (80) = 1919 Pun Re No 15 (DB).

(3) Suit for pre-emption in respect of sale of equity of redemption in certain property — Court-fee must be paid according to para (v) on market value of the property which is subject of mortgage and not according to amount of consideration for sale of equity of redemption. (1910) 32 All 19 (24) (FB) ** 1903 Pun Re No. 123, p. 356 (356, 357) (DB) ** AIR 1945 Oudh 135 (138).

(4) Suit for pre-emption of zamindari share and grove — Grove not appurtenant to zamindari — Court-fee is also payable on value of grove in addition to value of zamindari share. (1907) 4 All L Jour 403 (404) (DB).

(5) Vendee making improvements in good faith on property purchased before institution of suit by pre-emptor — Latter standing by without taking any steps to prevent such improvements which are carried out with his know-

ledge — Value of improvements should also be taken into account in addition to value of property for purposes of court-fees. AIR 1937 Lah 239 (240, 241) ** 1912 Pun LR No. 184 p. 580 (582) ** AIR 1959 Punj 254 = 61 Pun LR 72. (Plaintiff cannot be forced or compelled to pay court-fee on value of improvements made by a vendee after sale and before the date of the suit. 184 Pun LR 1912 and AIR 1937 Lah 239, Dissented from.)

[But see ILR (1953) Punj 572 (577). (Value of improvement added subsequent to bargain sought to be pre-empted is not to be added for Court-fee. AIR 1937 Lah 239, Dissented from.)]

(6) Suit for pre-emption — Court-fee required to be paid according to market-value of property — Held, that value is to be determined with reference to time when right is claimed, i. e., date of suit and not date of sale. 1946 Oudh WN (HC) 166 (169) (DB) ** AIR 1953 Nag 11 (Pr. 4). (The Act makes no distinction between a suit for pre-emption and a suit for possession of land for purposes of court-fees—Note:—Now see the amendment made in para (vi) in Madhya Pradesh in 1953). ** AIR 1949 All 107 (108) = ILR (1948) All 339 (DB).

Madhya Pradesh:

After paragraph (vi) of Section 7, insert the following paragraph, namely,—

“(vi-A). In suits for partition—

- (a) according to one-half of the value of the plaintiff's share of the property; and
- (b) according to the full value of such share if on the date of presenting the plaint the plaintiff is out of possession of the property of which he claims to be a coparcener or co-owner, and his claim to be a coparcener or co-owner, on such date is denied.

Explanation.—The value of the property for the purposes of this paragraph shall be the market-value which in the case of immovable property shall be deemed to be the value as computed in accordance with paragraph (v).” — M. P. Act 9 of 1953, S. 8 (15-4-1953).

Section 7, Para (vi) — Note 1 (contd.)

[See also AIR 1965 J & K 121 (123, 124). (Suit under Right of Prior Purchase Act — Court-fee should be on market value of property at the time of institution of suit and at the time of sale.)]

(7) Suits for pre-emption in which court-fee is payable on market-value of the property — **Held**, that market-value at the time of sale and not at the time of suit is to be taken into consideration in calculating court-fees. AIR 1924 Lah 380 (381) ** AIR 1945 Oudh 135 (138).

(8) Suit for pre-emption — Court finding that market-value of property is different from that stated in plaint — It is improper for Court to hold up decision on question of court-fees until end of suit and incorporate it in decree. AIR 1938 Lah 311 (312).

(9) Suit for pre-emption — Court-fee to be paid according to market value of property — Market-value is to be decided upon some evidence — Recitals in sale deed as to purchase price cannot be evidence against plaintiff. 1946 Oudh WN (HC) 166 (169) (DB).

(10) Decree for pre-emption appealed from — Right to pre-empt attacked in appeal—Real object of appellant being to get value of property enhanced — Court-fee on appeal is to be paid according to value of property under this paragraph. AIR 1944 All 83 (84) = ILR (1944) All 181 ** AIR 1949 All 508 (Prs. 3, 4) ** ('36-43) Tax Dec (Nag) 43 (46) ** AIR 1934 Lah 424 (425) ** AIR 1929 Lah 190 (191) = 9 Lah 563 (DB) ** 1913 Pun LR No. 240 p. 800 (803, 804) = 1913 Pun Re No. 76 (FB) ** (1884) 6 All 488 (490, 491) (DB).

[See AIR 1944 Oudh 276 (277) ** (1936-43) Tax Dec (Nag) 6 (6).]

(11) When dispute raised by appeal relates solely to amount to be paid by pre-emptor, it is the amount in dispute that will determine value of appeal for purposes of court-fees. AIR 1929 Oudh 240 (240) (DB) ** ILR (1950) All 478 (483) (DB) ** AIR 1916 Lah 208 (209) = 1916 Pun Re No. 14 (DB) ** 1913 Pun LR

No. 240 p. 800 (803, 804) = 1913 Pun Re No. 76 (FB). (**Overruling** (1900) 1900 Pun Re. No. 92 (DB)) ** (1884) 6 All 488 (491) (DB).)

(12) Pre-emption suit — Pre-emption sought in respect of five villages — Right of pre-emption refused in respect of three villages but granted in respect of two villages on payment of a certain sum — Plaintiff pre-emptor appealed from decree claiming a right of pre-emption in respect of three villages and also disputed amount of pre-emption price in respect of other villages — **Held**, that appeal being divisible into parts, court-fee was payable on five times Government revenue on three villages in respect of which right of pre-emption was refused and ad valorem court-fee was payable on amount sought to be reduced in respect of other two villages. AIR 1918 All 232 (233) = 40 All 353.

(13) Jurisdictional value of a suit relating to pre-emption in respect of agricultural land throughout the litigation remains the same, that is thirty times the land revenue, and the forum of appeal is also to be determined by this value. AIR 1960 Punj 467 (470) = 62 Pun LR 333 (FB). (16 Punj Re 1908; 146 Punj LR 1908 (FB) **Overruled**.)

(14) Pre-emption suit dismissed — Appeal — Appellate Court is competent to pass pre-emption decree for amount in excess of its pecuniary jurisdiction. AIR 1960 Punj 434 (436, 437). (The jurisdictional value of the suit does not change with the form of the decree and the forum of appeal is to be determined by the value of the suit and not by the value of the decree. AIR 1960 Punj 434 (436, 437).)

Section 7 (vi-A) (M. P.) — Note 1

(1) Amendment not retrospective so as to affect pending proceedings — Suit for partition of joint family property — Preliminary decree passed prior to coming into force of amendment — Court-fee payable is according to law as it stood on date of institution of suit. 1961 Jab LJ 326 = 1961 MPLJ 1202.

Orissa:

After paragraph (vi) the following paragraph was inserted, namely:

(vi-A). In suits for partition and separate possession of a share of joint family property or of joint property or to enforce a right to a share in any property on the ground that it is joint family property or joint property—

if the plaintiff alleges that he has been excluded from possession of the property of which he claims to be a coparcener or co-owner—according to the market-value of the share in respect of which the suit is instituted.

Explanation.—The word “possession” for the purposes of this paragraph includes constructive possession.” — Orissa Act 5 of 1939 (31-10-1939).

Pondicherry:

Same as that of Andaman and Nicobar — See Act 26 of 1968, S. 3 and Schedule, Pt. II (18-12-1968).

Uttar Pradesh:

After sub-section (vi) of S. 7, the following sub-section was inserted, as sub-section (vi-A), namely:—

“(vi-A). In suits for partition—

according to one-quarter of the value of the plaintiff's share of the property, and according to the full value of such share if on the date of presenting the plaint the plaintiff is out of possession of the property of which he claims to be a coparcener or co-owner, and his claim to be a coparcener or co-owner on such date is denied.

Explanation.—The value of the property for the purposes of this sub-section shall be the market-value which in the case of immovable property shall be deemed to be the value as computed in accordance with sub-section (v), (v-A) or (v-B) as the case may be.” — U. P. Act 19 of 1938 (9-1-1939).

West Bengal:

After paragraph (vi) the following paragraph was inserted:

“(vi-A). In suits for partition and separate possession of a share of joint family property or of joint property, or to enforce a right to a share in any property on the ground that it is joint family property or joint property—

if the plaintiff has been excluded from possession of the property of which he claims to be a coparcener or co-owner according to the market-value of the share in respect of which the suit is instituted.” — Bengal Act 7 of 1935 (2-5-1935).

for interest of assignee of land-revenue;

(vii) In suits for the interest of an assignee of land-revenue—Fifteen times his nett profits as such for the year next before the date of presenting the plaint;

Section 7 (vi-A) (U. P.) — Note 1

(1) The word ‘possession’ in Section 7 (iv-A) is not restricted to actual possession but includes constructive possession. A suit for partition by a co-owner in actual possession of a portion of the joint property is governed by the first portion of Section 7 (iv-A). AIR 1951 All 571 (572) (DB). (AIR 1943 Oudh 456, Foll.)

(2) Where the trial Court has held that the plaintiff was out of possession at the date of the suit, the plaintiff-appellant must pay Court fee on his appeal under Section 7 (IVA) U. P. on that basis and the matter cannot be deferred till the hearing of the appeal. AIR 1954

All 722 (Prs. 15, 18) = ILR (1954) 2 All 106 (FB) ** AIR 1945 Oudh 207 (208) (DB).

Section 7 (vi-A) (West Bengal) — Note 1

(1) The distinction between Sch. II, Art. 17, Cl. (v-A) and Section 7 (vi-A) does not turn on the question who is the ostensible owner, or whether the ostensible owner is a member of the family or a stranger, but on the question whether upon the averments in the plaint, the plaintiff is in possession of the properties of which he claims to be a co-sharer. If he is, Sch. II, Art. 17, Cl. (v-A) will apply. If he is not, Section 7 (vi-A) will apply. AIR 1958 Cal 537 (539).

to set aside an attachment;

(viii) In suits to set aside an attachment an attachment of land or of an interest in land or revenue—according to the amount for which the land or interest was attached:

Provided that, where such amount exceeds the value of the land or interest, the amount of fee shall be computed as if the suit were for the possession of such land or interest.

STATE AMENDMENT

Uttar Pradesh:

For sub-section (viii) of Section 7 the following sub-section was substituted, namely:

“(viii) in suits to set aside or to restore an attachment including suits to set aside an order passed under Order 21, Rules 60, 61 or 62 of the Code of Civil Procedure, according to half of the amount for which attachment was made, or according to half of the value of the property or interest attached, whichever is less.

Explanation.—The value of the property or interest for the purposes of this sub-section, shall be the market value which in the case of immovable property or interest in such property shall be deemed to be the value as computed in accordance with sub-sections (v), (v-A) or (v-B) as the case may be.” — U. P. Act XIX of 1938 (9-1-1939).

Section 7, Para (viii) — Note 1

(1) Suit to set aside attachment without preferring objection under O. 21, R. 58 C. P. C. — Property attached being land or interest in land — This paragraph applies. (1884) 6 All 466 (467, 468) (DB).

(2) Claim under O. 21, R. 58 — Claim dismissed — Suit under O. 21, R. 63 — Suit is governed by Sch. II, Art. 17 (i). (1808) 35 Cal 202 (206) = 35 Ind App 22 (PC).

(3) Two brothers brought a suit under O. 21, R. 63, impleading the other two as defendants but on application of the latter they were transposed as plaintiffs. It was held that the transposition did not make any difference to the nature of the suit or the valuation and, therefore, no ad valorem court-fee was payable on the value of the decretal amount. AIR 1955 Punj 104 (Pr. 8) (DB).

(4) Suit to set aside a summary attachment by a Collector under Bombay Act 1 of 1865 held to be governed by this paragraph. (1877) 1 Bom 352 (357) (DB).

(5) Suit which is in terms to set aside a sale on the ground that an attachment is not binding on the plaintiff is virtually a suit to set aside an attachment. (1904) 14 Mad L Jour 144 (144) (DB) ** (1894) 4 Mad L Jour 183 (189) (DB).

(6) The word “value” in the proviso to the paragraph must be construed in the same way as in the previous paragraphs of the section. Where the attached land is one in the Bombay Presidency, held on settlement for a period not exceeding thirty years and paying full assessment to Government, the value will be deemed to be a sum equal to five times the survey assessment. (1877) 1 Bom 352 (357) (DB).

(7) As to valuation where the attachment is not for any amount but one under Sections 87 and 88, Criminal P. C., see the following case. AIR 1945 Oudh 104 (105) = 20 Luck 254 (DB).

(8) Section 7 (viii) (as amended in U. P.) — Temporary injunction restraining defendant from transferring property treated as attachment by parties and court — Objection taken under O. 21, R. 58 dismissed — Suit to set aside order dismissing objection — Held, that suit was one to set aside order under Order 21, Rule 61 and so was governed by Section 7 (viii) and not by Sch. 2, Art. 17 (iii). AIR 1943 Oudh 422 (423) = 19 Luck 405.

(9) Section 7 (viii) (as amended in U. P.) — The word “whichever” must be held to apply to “the amount for which the attachment is made” as well as to the “value of the property or interest.” AIR 1945 Oudh 104 (105) = 20 Luck 254 (DB).

(10) (As amended in U. P.) — A suit for a bare declaration that an attachment is illegal is not equivalent, for purposes of Court-fee to suit for setting it aside. A litigant who merely asks for a declaration that the attachment is illegal cannot be asked to pay ad valorem Court-fee on the ground that the result may ‘involve’ the setting aside of the impugned attachment. AIR 1960 All 688 (691, 692) = 1960 All LJ 687. (14 Mad LJ 144, Diss. from.)

(11) A suit for a declaration that the decree is not enforceable against the property attached without any orders of Court under O. 21, Rules 60, 61 and 62, Civil P. C., is not covered by the provisions of Section 7 (viii) (U. P.). AIR 1962 All 310 (311, 312) = 1962 All LJ 190 (FB).

to redeem;

(ix) In suits against a mortgagee for the recovery of the property mortgaged, to foreclose;

and in suits by a mortgagee to foreclose the mortgage, or, where the mortgage is made by conditional sale, to have the sale declared absolute—

according to the principal money expressed to be secured by the instrument of mortgage :

STATE AMENDMENTS

Delhi:

Same as that of Punjab — See S. R. O. 422, Gaz. of Ind., 1950, Pt. II, S. 3, p. 458.

Madhya Pradesh:

For paragraph (ix) the following paragraph was substituted, namely :

“(ix) (a) In suits against a mortgagee for the recovery of the property mortgaged, according to the principal money expressed to be secured by the instrument of mortgage; and

(b) In suits by a mortgagee to foreclose the mortgage or where the mortgage is made by conditional sale to have the sale declared absolute — according to the amount claimed as due at the date of presenting the plaint.” — C. P. Act XVI of 1935 (21-5-1935).

Punjab, Haryana and Chandigarh:

In paragraph (ix) of S. 7, after the words “property mortgaged” insert the words “according to half the principal money expressed to be secured by the instrument of mortgage.” E. P. Act XXVI of 1949, S. 3 (1-4-1950); Act 31 of 1966, S. 88 (1-11-1966).

Uttar Pradesh:

For paragraph (ix) the following paragraphs were substituted, viz.,

“(ix) In suit against a mortgagee for the recovery of the property mortgaged,— according to the principal money expressed to be secured by the instrument of mortgage;

(ix-A) In suits by a mortgagee to foreclose the mortgage, or where the mortgage is made by conditional sale, to have the sale declared absolute—according to the total amount claimed by way of principal and interest.” — U. P. Act II of 1936 (21-3-1936).

SECTION 7, PARA (ix) — SYNOPSIS

1. Scope.

2. Suit for the recovery of the property mortgaged.

3. Mode of valuation — General.

4. Mode of valuation in suits for redemption.

5. Court-fee in appeals from a suit for redemption or foreclosure.

1. Scope. — (1) A suit by a mortgagee to enforce his mortgage by sale of mortgaged property is not governed by this paragraph but by para (i) of this section. ('36-43) Tax Dec (Nag) 59 (60).

(2) A suit for possession of the mortgaged property by a mortgagee under a mortgage by conditional sale after the

foreclosure proceedings under Regulation XVII of 1806 is a simple suit for possession by a person out of possession and as such is governed by para. (v). 1893 Pun Re No. 20, p. 104 (105) (DB).

(3) Subsequent mortgagee seeking possession of mortgaged property by discharging mortgage debt — Suit is in substance one to redeem prior mortgage — Court-fee is payable under Section 7 (ix) and not under Section 7 (v). 1965 Cur LJ 833 (Punj) = ILR (1966) 1 Punj 793.

2. Suit for the recovery of the property mortgaged. — (1) Suit contemplated by expression “recovery of the property mortgaged” is a suit to redeem the mortgaged property and not a suit

Section 7, Para. (ix) — Note 2 (contd.) for recovery of possession of the mortgaged property from the mortgagee. (1936) 63 Cal 657 (660) ** (1912) 17 Ind Cas 442 (444) (DB) (Mad) ** 1889 Bom PJ 58 (DB).

(2) The existence of the charge is of the essence of the claim in suit for the recovery of the property mortgaged. The raising of any question to the title of land is an incident. (1882) 5 Mad 288n (288n) (FB) ** (1907-1910) 9 Oudh Cas 42 (43, 44) (DB).

(3) This para will apply to a suit for recovery of movable property mortgaged. It does not however apply to a case where the movable property is not mortgaged but pledged. There is a distinction between a mortgage and a pledge. In the case of mortgage there is a remedy by way of a foreclosure but in the case of a pledge the creditor's only remedy is sale. To a suit for redemption of a pledge, this para will not apply. To such a suit para 3 will apply. AIR 1954 Madh B 6 (Pr. 3) ** AIR 1949 Nag 368 (Prs. 10, 11) = ILR (1949) Nag 243 ** AIR 1952 Madh B 196 (Prs. 4, 7) = ILR (1952) Madh B 136 (DB). (AIR 1949 Nag 368, Rel. on.)

(4) A suit praying for "an order to deliver the mortgage-deed with an endorsement of full satisfaction" is a suit to redeem the mortgage and is governed by this paragraph. (1936) 63 Cal 657 (659, 660).

(5) Suit for possession by mortgagor against a mortgagee under a likha mukhi mortgage is suit for redemption. 1899 Pun Re No. 73, p. 316 (317) (DB).

(6) Redemption suit — Mere fact that plaintiff claims payment of any sum which might be found due to him on taking accounts does not alter nature of the suit so as to necessitate the payment of an additional court-fee. AIR 1941 Mad 115 (116) ** AIR 1951 Mad 187 (Pr. 9) = ILR (1952) Mad 92 (FB). (A suit for redemption of a Malabar Kanom, like, any other suit for redemption of a possessory mortgage, can be valued under Section 7 (ix), even though the plaintiff incorporates in his plaint a prayer for the taking of accounts and the payment of arrears of rent due from the Kanomdar.) ** AIR 1957 Mad 297 (298) ** AIR 1953 Pat 306 (Pr. 11) ** AIR 1947 Mad 411 (412) = ILR (1948) Mad 103 (DB) ** AIR 1937 Nag 295 (298) = ILR (1937) Nag 49 (FB) ** AIR 1931 Mad 479 (479) ** AIR 1929 Nag 1 (2) = 24 Nag LR 197 (DB) ** AIR 1923 All 261 (262) = 45 All 154 (DB) ** (1910) 13 Oudh Cas 32 (34) ** (1907) 29 All 471 (475, 476) (DB).

[But see AIR 1915 Oudh 13 (13) (DB) ** (1912) 17 Ind Cas 442 (444) (DB) (Mad).]

(7) Decree for redemption — Compromise in appeal increasing amount — Suit by transferee from mortgagor to avoid compromise decree and for recovery of property — Not one for redemption. AIR 1935 Mad 671 (672).

(8) Suit by reversioner for possession on ground that sale effected by h's collateral was without consideration and necessity — Compromise — Land in suit to be regarded as mortgaged with alienee on behalf of plaintiff who would be entitled to get it back on payment of certain sum — Subsequent suit for possession by plaintiff — Suit is governed by Section 7 (ix) and not by Section 7 (v). AIR 1949 East Punj 336 (Pr. 3) (DB).

(9) The plaintiffs brought a suit for redemption of two mortgages, paying court-fee on the consideration of the mortgages. In the plaint it was stated that the land mortgaged had after the execution of the mortgages been fraudulently sold in execution of rent decree and, as such, they were not bound by the sale and were entitled to redeem the land as stipulated under the mortgages. It was held that the facts stated in the plaint being in the nature of anticipatory defence, the court-fee already paid by the plaintiffs was sufficient and they could not require to pay ad valorem court-fee on the market value of the land under Section 7 (iv) (c). 1956 BLJR 265 (269).

(10) Where according to the allegations made by the plaintiff the mortgaged property is lost altogether or damaged and the property cannot be restored back to the mortgagors and the plaintiff prays for a decree for the market value of the property mortgaged, that does not make any difference. Under Section 7 (ix) the plaintiff is entitled to value the suit only at the amount secured by the mortgage and the mere fact that he has asked for the market price of the property mortgaged as compensation in case the mortgaged property is lost or damaged, does not change the nature of the suit. AIR 1958 Pat 421 (Pr. 2).

3. Mode of valuation — General. —

(1) In all suits governed by this paragraph, the court-fee is payable according to the amount of principal money expressed to be secured by the instrument of the mortgage. AIR 1931 Oudh 366 (368) = 6 Luck 684 (DB) ** AIR 1958 Pat 421 (Pr. 2) ** (1887) 11 Bom 591 (595) (DB) ** (1969) 5 Bom HCR (AC) 153 (155) (FB).

4. Mode of valuation in suits for redemption. — (1) In a suit for redemption the court-fee payable under this paragraph is according to the principal money expressed to be secured by the instrument of mortgage. AIR 1926 Mad

Section 7, Para. (ix) — Note 4 (contd.)
667 (667) ** (1891) 14 Mad 480 (483) **
AIR 1950 Kutch 42 (Pr. 1).

(2) Even if the original debt has been considerably reduced by the payments made by the mortgagor prior to the institution of the redemption suit, the suit will be valued according to the principal money expressed in the deed of mortgage. (1891) 14 Mad 480 (483) ** 1950 Trav-Co LR 44 (46) (DB). (Court-fees have to be paid on the amount expressly secured by the document irrespective of the fact that the amount has been reduced subsequently by adjustment of the parties.)

[See also AIR 1920 Nag 139 (140).]

(3) Mortgagee not paying whole but only a portion of mortgage consideration — Mortgagor suing to recover property mortgaged — It is a suit for redemption of property and court-fee is payable on whole consideration as expressed in the deed. (1902) 1 Low Bur Rul 96 (97) ** (1897) 1 Cal WN 670 (671) (DB).

(4) Principal amount expressed in a deed of mortgage including a certain amount of paddy valued at a certain rate — It is the rate expressed in the deed and not the rate prevailing at the time of the institution of the suit that determines the "principal amount" in assessing court-fee payable in the suit for redeeming that mortgage. AIR 1925 Mad 1254 (1254).

(5) More than one mortgage in respect of the same property — Mortgagor suing to redeem it — Court-fee must be calculated upon sum total of principal money payable under all the deeds and not on the separate sums due under each deed, as all the deeds provide only one cause of action. (1904) 7 Oudh Cas 152 (157) (DB). (Section 17 does not apply to such a case.)

(6) Mortgage in favour of two persons advancing equal amounts — Mortgagor acquiring interest of one mortgagee — Suit for redemption of remaining half — Amount advanced by mortgagee whose interest was not acquired would be principal amount as contemplated in Section 7 (9). AIR 1970 All 188 (190).

(7) An additional prayer for recovery of a certain sum by way of damages or arrears of rent in a suit for redemption does not change the nature of the suit and the court-fee is payable on the principal amount only even when such a prayer is included. AIR 1932 Mad 217 (217) ** AIR 1951 Mad 187 (Pr. 9) = ILR (1952) Mad 92 (FB). (Arrears of rent.) ** AIR 1926 Mad 764 (765). (AIR 1926 Mad 542, Reversed.)

[But see AIR 1947 Mad 435 (436). (Suit for redemption with a claim for certain sum by way of damages for worry, inconvenience and ignominy

caused to mortgagor due to mortgagee's delay in paying off mortgagor's debts out of the money left with him — Latter relief is a separate relief and court-fee is payable thereon.) ** (1893) 16 Mad 415 (418) (DB).]

(8) Amount spent on improvements by mortgagee under kanom deed not to be taken into account in assessing court-fee in suit for redeeming kanom. (1882) 5 Mad 284 (286) (FB).

(9) On account of purchase of portion of equity of redemption by mortgagee, mortgage-debt pro tanto extinguished and integrity of mortgage broken — Some of the mortgagors becoming entitled to recover a portion only of the mortgaged property — In a suit for redemption of such portion, "the principal money expressed to be secured" on which court-fee for the suit is to be calculated under this paragraph must be taken to be the proportionate amount of the debt for which the portion sought to be redeemed would be liable. AIR 1918 Oudh 25 (27) ** (1886) 8 All 438 (441, 442) (FB) ** (1882) 6 Bom 324 (325).

[See also AIR 1953 Mad 754 (Prs. 5, 6). (Suit for redemption of a portion or a share of the hypothecated property — Valuation would be the value of the share of the mortgage amount as determined by the share in the mortgage property to which the plaintiff lays claim — Prayer for partition and for separate possession of the share plaintiff is found entitled to — It is not necessary to value suit as a separate suit for partition.)]

(10) The suit was essentially a suit for redemption. All that the plaintiffs had done was that they had described in the plaint how they were entitled to succeed to the properties of one B as the next reversioners after the death of his widow. They had not prayed for declaration of title in the plaint, nor had they made any allegation in it which could be construed as raising a question of title. It was necessary for them to state how they were entitled to redeem the mortgage. It was only in view of the defence taken in the written statement that it had become necessary for the Court to decide the question of the plaintiff's title in the suit. It was held that the mere fact that the question of title had to be gone into on account of the defence raised by the defendants could not convert the suit into a suit for declaration of title. Court-fee was payable on the principal mortgage money in a suit for redemption and as the suit could not be held to be a suit for declaration of title and consequential relief, they could not be required to pay ad valorem court-fee on the market-value of the properties in question. 1955 BLJR 44 (45).

Section 7, Para. (ix) — Note 4 (contd.)

(11) Suit for redemption — Counter claim not arising out of mortgage contract — Liable to payment of Court-fee. AIR 1966 Madh Pra 330 = 1966 MPLJ 958.

5. Court-fee in appeals from a suit for redemption or foreclosure. — (1) "Suit" includes also an "appeal" therefrom. This clause will apply to appeals also if the subject-matter in appeal is the same as in the suit. AIR 1937 Nag 295 (297) = ILR (1937) Nag 49 (FB) ** AIR 1943 Mad 146 (147) = ILR (1943) Mad 819 ** AIR 1922 Oudh 82 (83) = 25 Oudh Cas 30 (DB).

[See AIR 1954 Trav-Co 204 (Prs. 3, 4, 5) = ILR (1952) Trav-Co 391 (DB). (Section 3 (9), Travancore-Cochin Court-fees Act (2 of 1125) (corresponding to this paragraph) specifically provides that it shall apply to original suits as well as appeals. But to make this provision applicable to appeals the subject-matter in dispute in the appeal must be the redemption of the mortgaged property.)

(2) Suit for redemption or foreclosure dismissed by trial Court — Plaintiff appeals against the decree — Subject-matter in dispute does not change its nature in appeal and is governed by this paragraph. ('36-43) Tax Dec (Nag) 115 (118) ** AIR 1949 East Punj 336 (Prs. 3, 4) (DB) ** AIR 1931 Lah 633 (633) ** AIR 1922 Oudh 82 (84) = 25 Oudh Cas 30 (DB) ** AIR 1919 Oudh 98 (101) = 22 Oudh Cas 289 ** (1893) 16 Mad 326 (327) (DB) ** 1882 Bom PJ 106 (DB).

[See also AIR 1951 Assam 146 (Pr. 3) = ILR (1951) 3 Assam 512 (DB). (Plaintiff's suit dismissed — Mortgage being for Rs. 2000 appeal lies to the District Court and not to the High Court.)]

[But see AIR 1925 All 734 (735) = 47 All 926.]

(3) Suit for redemption or foreclosure decreed — Defendant appeals therefrom, challenging plaintiff's right to redeem or foreclose — Subject-matter in appeal is the same as in the suit and the court-fee payable is on the principal amount under this paragraph and not on the amount decreed ('36-43) Tax Dec (Nag) 115 (118) ** AIR 1931 Lah 633 (633) ** AIR 1931 Oudh 353 (354) (DB) ** AIR 1922 Oudh 82 (84) = 25 Oudh Cas 30 (DB) ** (1913) 9 Nag LR 86 (88) ** (1910) 6 Nag LR 164 (167).

[See AIR 1941 All 357 (358) = ILR (1941) All 469 ** AIR 1937 Nag 6 (8).]

[But see AIR 1914 All 520 (520) = 36 All 40 (FB) ** (1906) 33 Cal 1133 (1149) (DB).]

(4) Where in a decree for redemption of all the mortgaged properties, including the properties claimed in appeal, the appellant attacked the entire decree and wanted the entire decree to be set

aside in toto and the suit dismissed, it was held that the proper court-fee payable on the appeal would be certainly on the principal money expressed to be secured by the instrument of mortgage, and not merely on the market value of the one-fourth of the mortgaged properties which he claimed for himself as not redeemable. AIR 1957 Mad 168 (168).

(5) In the following case decree was passed in a foreclosure suit for a certain amount in default of payment of which within a certain time the property was to be foreclosed. Defendant appealed denying plaintiff's right to foreclose on the ground that he was not liable to pay any portion of the sum decreed. Held, that suit had changed its nature in appeal and had become a suit to avoid payment of a specified sum and as such the court-fee payable was to be calculated ad valorem on the amount of the decree under Sch. I, Art. 1. AIR 1922 Oudh 82 (84) = 25 Oudh Cas 30 (DB).

(6) Suit to redeem or foreclose decreed — Plaintiff or defendant in appeal merely challenging amount to be paid or received without any question about right to redeem or to foreclose being raised — Court-fee payable in appeal will be ad valorem on additional amount claimed by mortgagee-appellant or on amount sought to be reduced by the mortgagor-appellant. AIR 1943 Mad 146 (147) = ILR (1943) Mad 819 ** AIR 1954 Trav-Co 204 (Prs. 3, 4, 5) = ILR (1952) Trav-Co 391 (DB). (The introduction of the words 'original or appeal', though an innovation in Section 3 (3) of the Travancore-Cochin Court-fees Act (corresponding to this paragraph, does not make the rule regarding court-fee applicable to appeals, where the dispute relates solely to the true price of redemption, filed in a Court of Travancore-Cochin State any the different from that obtaining elsewhere. To make the provision of S. 3 (9) applicable to an appeal from a decree for redemption, the appeal must be for the recovery of the property mortgaged. But where the recovery has already been decreed on certain terms and the dispute in the appeal concerns only the terms, and the amount or value of the subject-matter in dispute is an ascertained sum and where the amount is so ascertained, the court-fee payable is an ad valorem fee.) ** AIR 1951 Mys 111 (Pr. 14) = ILR (1951) Mys 217 (DB) ** AIR 1937 Nag 6 (8) ** AIR 1931 Lah 631 (633) ** AIR 1922 Oudh 82 (84) = 25 Oudh Cas 30 (DB) ** AIR 1919 Oudh 98 (101) = 22 Oudh Cas 289 ** AIR 1915 Nag 48 (49) = 11 Nag LR 83 (DB) ** AIR 1930 Lah 601 (601) (DB) ** AIR 1926 Mad 225 (226) (DB) ** (1908) 30 All 547 (548, 549) ** AIR 1945 Bom 504 (510) = ILR (1945) Bom 629 (DB) ** AIR 1946 Nag 160 (160).

Section 7, Para. (ix) — Note 5 (contd.)

[But see (1909) 12 Oudh Cas 130 (132) (DB) ** (1890) 13 All 94 (97) ** AIR 1946 All 303 (303) = ILR (1946) All 359 (DB) ** 1891 Bom PJ 218 ** (1886) 10 Bom 44n (44n).]

(7) Appeal against redemption decree — Appellant claiming certain minimum amount as due to him on redemption without limiting maximum — Court-fee paid on minimum — There is no valuation at all. AIR 1946 All 304 (304) = ILR (1946) All 409 (DB).

(8) Dispute in appeal by mortgagee against decree in a redemption suit was as to plaintiff's right to redeem mortgage and not as to amount payable — Held, in view of amendment of Section 2 (iv) in United Provinces by which 'suit' includes 'appeal', court-fee was payable on principal amount under this paragraph — Even if subject-matter in dispute were amount payable, appeal would be governed by this paragraph. AIR 1941 All 357 (358) = ILR (1941) All 469 ** AIR 1953 All 240 (Pr. 4) = ILR (1954) 2 All 59 (DB) ** AIR 1952 All 176 (Pr. 3) (DB). (In an appeal against a decree for redemption, the court-fee payable is only ad valorem on the principal money expressed to be secured by the instrument of mortgage and not on the amount by which the decree is challenged.) ** AIR 1946 All 304 (305) = ILR (1946) All 409 (DB).

(9) Where in appeals, whether by plaintiff or by defendant, from decrees in suits for redemption, both the right to redeem and the amount payable are in dispute, the court-fee is payable only on the principal amount secured by the instrument of mortgage. AIR 1943 Mad 146 (147) = ILR (1943) Mad 819 ** AIR 1937 Nag 295 (299) = ILR (1937) Nag 49 (FB). (Overruling AIR 1931 Nag 180) ** AIR 1933 Lah 155 (156) (DB).

[But see AIR 1924 Oudh 170 (171).]

(10) Suit for redemption of mortgage and two deeds of further charge on the same property decreed — Mortgagee appealed from decree contending that redemption suit should have been dismissed in respect of half property by reason of res judicata — He also claimed interest in respect of his second mortgage — Held, that claim in respect of interest was an independent claim and additional court-fee on amount claimed by way of interest should be paid. AIR 1935 Lah 605 (606) (DB).

(11) Decree given for mesne profits as well as for redemption — Appeal against decree must be stamped for both the reliefs and not only with respect to redemption. AIR 1935 Pesh 8 (9) (DB).

(12) In appeal from decree in redemption suit mortgagee-defendant contending that plaintiff has no right to redeem and claiming alternatively that if he has that right, he can redeem only on payment of a sum larger than that fixed by the decree — Court-fee is to be paid on the relief which is liable to pay the higher fee — Fee is to be calculated on the former relief under Section 7 para (ix), while on the latter relief, under Sch. I, Art. 1 on the additional amount claimed. AIR 1922 Oudh 82 (84) = 25 Oudh Cas 30 (DB) ** (1913) 16 Oudh Cas 354 (356).

(13) Suit to redeem a mortgage — Another mortgage set up by mortgagee — Court finding latter to be not genuine and granting decree for redemption of the mortgage admitted by mortgagor — Mortgagee appealing against that decree and questioning the mortgagor's right to redeem — Court-fee paid on principal money of mortgage admitted by plaintiff is sufficient. AIR 1914 Mad 290 (291) (DB).

(14) In case of appeals or cross-objections in suits or redemption or foreclosure in all cases in which the amount declared by the Court to be due at the date of the decree can be ascertained by reference to the judgment and the decree, it is that amount at which the appeal or the cross-objection should be valued and future interest should not be taken into account. AIR 1930 Oudh 329 (329) = 6 Luck 34 (DB) ** AIR 1918 Pat 210 (211) = 3 Pat L Jour 443 ** AIR 1914 All 520 (521) = 36 All 40 (FB).

(15) Mortgagor suing for possession of mortgaged property on the ground that nothing is due — Court finding mortgage still existing passing decree for possession conditional on payment of certain amount — Plaintiff in appeal against the decree disputing the condition must pay court-fee on the amount he is required to pay the decree. AIR 1922 Lah 440 (440, 441) (DB) ** AIR 1921 Lah 371 (372) ** AIR 1920 Pat 222 (222) = 5 Pat L Jour 455 ** (1910) 13 Oudh Cas 62 (66) (DB).

[See AIR 1920 Oudh 308 (308).]

(16) Suit to foreclose a mortgage — Lower Court as a condition precedent to foreclosure decrees that plaintiff is bound to redeem a prior mortgage by payment of a certain sum — Plaintiff appeals against that portion of the decree — Plaintiff-appellant is bound to pay ad valorem court-fee on the amount. (1900) 31 All 265 (270, 271).

(17) Suit by a mortgagee for possession — Decree passed allowing mortgagor to redeem mortgage on payment of certain amount — Court-fee payable

Section 7, Para. (ix) — Note 5 (contd.)
on appeal by mortgagee paying for unconditional decree is on value of the property in dispute and not on the amount. AIR 1920 Oudh 308 (308).

(18) Appeal from order under Section 12 of U. P. Agriculturists' Relief Act — Subject-matter in dispute in appeal being only the amount — Ad valorem court-fee on amount sought to be reduced or increased will have to be paid under Sch. I, Art. 1. AIR 1942 Oudh 385 (387) ** AIR 1941 Oudh 447 (449) (DB) ** AIR 1953 All 240 (Pr. 4) = ILR (1954) 2 All 59 (DB).

(19) In the following case lower Court ordered that mortgagor was entitled to redemption without payment of any money to mortgagee and claim of mortgagee that he was entitled to a certain sum was not accepted — Mortgagee appealed valuing his appeal at the amount which he claimed in the lower Court — **Held**, that ad valorem court-fee was payable on memorandum of appeal under Section 7 (ix). AIR 1944 Oudh 113 (114).

(20) Where in an appeal by some of the co-mortgagors from a preliminary decree for foreclosure the relief claimed is a declaration that the mother of the appellant who was also a mortgagor had only a limited interest in the property mortgaged and not an absolute interest as found by the lower Court, the subject-matter of the appeal is the difference between an absolute and a limited interest. This is not capable of valuation and the Court-fee payable on the relief is under Article 17 (vi). ('36-43) Tax Dec (Nag) 70 (71).

(21) Order allowing redemption of a mortgage under a conditional decree for redemption with the alternative for foreclosure — Money paid by mortgagor and order having the effect of decree absolute for redemption passed — Appeal by mortgagee on the ground that payment was too late and should not have been received by Court — Right to foreclose or to redeem not in question — Subject-matter is incapable of valuation — Court-fee of Rs. 10 under Schedule II, Article 17 (vi) must be paid. (1911) 7 Nag LR 41 (42) (DB).

(22) Where in a suit for redemption of a mortgage a decree for redemption is passed with a condition superadded that if the defendant deposits certain amount in Court within a certain time the decree shall not take effect and the plaintiff appeals against the decree seeking to avoid the condition, the Court-fee on appeal is payable under Sch. II, Art. 17 (vi). 1949 Trav-Co LR 95 (99, 100) (DB).

(23) The plaintiffs mortgaged a certain share in a tauzi usufructually to defendants Nos. 1 and 2 to secure a loan of Rs. 1,600, 12 bighas of land were included in the hypothecated property as bakasht land. The suit was brought by the plaintiffs to redeem the mortgage. They also sought khas possession of these 12 bighas as against defendants Nos. 3 and 4 alleging that these defendants were the benamidar for defendants Nos. 1 and 2. The defendants Nos. 3 and 4, claimed occupancy rights in the 12 bighas, which they claimed to have been settled with them by the predecessor in interest of the plaintiffs with the consent of the mortgagees. This defence was not accepted and the Court granted the plaintiff the relief prayed for. The defendants 3 and 4 filed an appeal. It was held that the question that was raised in the appeal was not a question which arose between the mortgagor and the mortgagee but it arose between the mortgagor and persons who were strangers to the mortgage. Clause (ix) of Section 7, therefore did not apply and Court-fee was payable on the appeal under Article 1 of Schedule I on the value of the interest claimed by the appellants in the 12 bighas of land. AIR 1951 Pat 183 (Prs. 6 to 9) = 30 Pat 859.

(24) Redemption — Decree for redemption passed, fixing a certain sum as amount payable by mortgagor — Latter appealing and claiming that he was agriculturist and that accounts should be taken under Deccan Agriculturists' Relief Act — Appeal to be valued on account of decree of trial Court. AIR 1945 Bom 504 (511) = ILR (1945) Bom 629 (DB) ** AIR 1935 Bom 69 (70) (DB).

(25) In an appeal against a preliminary decree for redemption of a mortgage, neither the right of redemption nor the quantum of the principal amount of the mortgage was in dispute. The decree under appeal directed the Commissioner to ascertain in terms of the directions contained in the decree the amount to which the mortgagee would be entitled in addition to the principal amount and the appellant claimed certain alterations in the directions.

Held, that the relief claimed in appeal was incapable of valuation and therefore Court-fee was payable under Schedule II, Article 17 (vi) and not under Section 7 (ix). AIR 1960 Madh Pra 292 (293) = 1960 MPLJ 886 (DB).

(26) Appeal against appellate decree under Order 34, Rule 8, Civil P. C. — Ad valorem Court-fee has to be paid. AIR 1963 Him Pra 47.

for specific performance;

(x) In suits for specific performance—

- (a) of a contract of sale—according to the amount of the consideration;
- (b) of a contract of mortgage—according to the amount agreed to be secured;
- (c) of a contract of lease—according to the aggregate amount of the fine or premium (if any) and of the rent agreed to be paid during the first year of the term;
- (d) of an award—according to the amount or value of the property in dispute:

STATE AMENDMENT

Uttar Pradesh:

In clause (d) of sub-section (x) of S. 7 the following shall be added, namely :

“and such value shall be the market value which in the case of immovable property shall be deemed to be the value as computed in accordance with sub-section (v), (v-A) or (vB) as the case may be.”—U. P. Act XIX of 1938, S. 13 (9-1-1939).

Section 7, Para. (x) — Note 1

(1) Contract not of the kinds mentioned in the section — Suit for its specific performance will not come under this paragraph. AIR 1939 Cal 155 (157, 158) = ILR (1938) 2 Cal 411 (DB) ** 1890 Bom PJ 204.

(2) A suit for specific performance of a contract to grant a lease comes under this paragraph. AIR 1921 Cal 84 (85) ** (1912) 15 Ind Cas 46 (48, 49) (DB) (Cal).

(3) In a suit for specific performance of a contract to lease, where the monthly rent for the first five years was Rs. 1250 the Court-fee paid on the amount of the rent for the first year, namely Rs. 15,000 is sufficient, under Sec. 7 (x) (c). 1961 Jab LJ 1106 = 1961 MPLJ 1175.

(4) Contract for transfer of land in consideration partly of money and partly of other land belonging to transferee held to be contract of sale. Contract of exchange held to be covered by provision as to contract of sale. AIR 1923 Lah 456 (457, 458).

(5) Memorandum of appeal in suit to enforce contract of exchange — Held that suit was governed neither by Section 7 (x), Clause (a) nor by Art. 17-B of Schedule II, but by Schedule I, Article 1 as memorandum of appeal in question was not otherwise provided for. AIR 1944 Mad 252 (253).

(6) Where in a suit for specific performance of contract for exchange of immovable property, the plaintiff was already in possession of land in suit and the deeds of exchange alone had remained to be executed it was held that as the plaintiff was only asking for relief of having a valid title deed in respect of the land, the case should be considered to come under Section 7 (x) (a) and the valuation put by the plaintiff (consideration amount) must be accepted as correct. AIR 1957 Cal 171 (173).

(7) Suit by vendor for recovery of amount agreed on as consideration in

which he declares his willingness to perform his part of contract by executing proper conveyance of the property will come under this paragraph. AIR 1919 Mad 304 (304) (DB).

(8) Suit to have sale deed executed and completed or for recovery of sale deed already executed is suit for specific performance of contract of sale, though there is no prayer for possession of property sold. AIR 1924 Lah 439 (440) = 5 Lah 75 (DB).

[See also AIR 1956 Hyd 49 (Pr. 4) = ILR (1956) Hyd 138 (DB). (A suit for compelling the defendant to execute a sale deed is a suit for specific performance.)]

(9) A suit for specific performance of a contract of sale of land against defendant first party with an incidental prayer for declaration that the subsequent sale executed by defendant first party in favour of defendant second party is invalid and not binding on plaintiff, would be governed by Section 7 (x), and not by Section 7 (iv) (c) or Section 7 (iv-A) as inserted by Section 8 of the Orissa Court-fees (Amendment) Act (5 of 1939). The valuation for such suit would be the amount of consideration for the suit contract of sale and not that for the subsequent sale. AIR 1960 Orissa 129 (130) = ILR (1960) Cut 184. (AIR 1953 Pat 24, Rel. on.)

(10) Mortgagor contracting with mortgagee that on default in paying mortgage-money within certain time he would execute conveyance of the property to mortgagee — Latter suing for specific performance of the contract — Amount that will be due on mortgage is ascertainable and Court-fee will have to be paid on such amount. AIR 1943 Mad 372 (373).

(11) Plaintiff praying that Court should give effect to certain arrange-

Section 7, Para. (x) — Note 1 (contd.)
 ment he has entered into by which certain properties are to be conveyed to him, but in the plaint desiring that only some of those properties should be conveyed and possession of such properties should be delivered — Suit will have to be valued on consideration mentioned in original arrangement, as Court will, in any event, have to declare the original arrangement and on that basis only will be able to give any relief to plaintiff. AIR 1937 Mad 831 (832, 833).

(12) The plaintiff sold the suit properties to the defendant for a stated consideration of Rs. 5,500. Alleging that the consideration actually paid was only Rs. 3000 and there was an agreement for reconveyance of those properties entered into on the same date for this sum of Rs. 3000, the plaintiff filed a suit for specific performance of that agreement of sale. **Held**, that according to the averments in the plaint the appropriate Court-fee was payable on Rs. 3000 and not Rs. 5500. The amount agreed for the contract of reconveyance was Rs. 300 and the sale consideration for the earlier sale had no bearing. AIR 1954 Andhra 6 (Pr. 6).

(13) According to Clause (x) of Sec. 7 the Court-fee is payable "on the consideration of the sale". Those words *prima facie* mean the consideration agreed upon between the parties as payable in respect of the contract and not the portion of the consideration which according to the plaintiff was payable at the time of the suit. AIR 1958 All 851 (852).

(14) Different views are held as to Court-fee payable on suit for specific performance of a contract of sale and for possession of property sold.

(a) Such a suit falls under this paragraph. AIR 1945 Bom 81 (82) = ILR (1945) Bom 32 (DB) ** AIR 1953 Pat 24 (Pr. 11) = 31 Pat 269 (DB). (AIR 1929 Pat 642, **Overruled**.) ** AIR 1950 Nag 226 (Pr. 14) = ILR (1950) Nag 336 (DB). (AIR 1920 Oudh 167 = 23 Oudh Cas 388, **Dissented from**.) ** AIR 1937 Mad 831 (833) ** AIR 1924 Mad 360 (361) = 47 Mad 150 (DB) ** AIR 1924 Lah 439 (440) = 5 Lah 75 (DB) ** AIR 1928 Lah 635 (635) ** AIR 1916 All 228 (228) = 38 All 292.

(b) Such suit falls under para. (v). AIR 1918 Lah 323 (323) ** (1911) 11 Ind Cas 228 (229) (DB) (Cal).

(c) In such cases the Court-fee should be paid on the two reliefs separately, unless the contract itself provides for delivery of possession

as well as execution of sale deed. AIR 1920 Oudh 167 (169) = 23 Oudh Cas 388 ** AIR 1945 Bom 81 (81, 82) = ILR (1945) Bom 32 (DB).

(15) Suit for possession against seller on basis of a completed sale is not one for specific performance within the meaning of this paragraph although the suit contains a prayer that defendant may be ordered to execute and have registered a sale deed. AIR 1920 Lah 72 (72).

(16) Suit by lessee to be put in possession of leasehold property will not come under this paragraph but will come under paragraph (v). AIR 1933 Oudh 363 (365) ** 1908 All WN 201 (202). [But see AIR 1937 Sind 93 (93) (DB).]

(17) Suit for specific performance of contract to lease and also for delivery of possession of certain premises belonging to defendant No. 1 and held by defendants 2 and 3 as lessees — **Held** suit as framed was a suit for specific performance of contract of lease and relief of possession was only incidental to it — Court-fee payable was under Sec. 7 (x) (c) and not under Section 7 (v). AIR 1959 Madh Pra 430 (431, 432) = 1959 MPLJ 649.

(18) Suit directed against third person not a party to the contract — Suit as against him would be only for possession. AIR 1939 Mad 360 (361) = ILR (1939) Mad 367 (SB).

(18-A) Suit for possession by usufructuary mortgagee who has been subsequently dispossessed is clearly not one for specific performance. 1880 Pun Re No. 33, p. 72 (72) (DB).

(18-B) If plaintiff files an award with the plaint and prays that it be filed and enforced, the suit is for specific performance of an award. (1909) 4 Ind Cas 815 (816) (DB) (Upp Bur).

(19) Suit calling upon defendant to admit execution of sale deed and register same before proper authority — Suit being for specific performance *ad valorem* Court-fee is payable on amount of consideration on plaint and memorandum of appeal — Appellate Court not to ask payment of deficit Court-fee on plaint until and unless deficit Court-fee is paid on memorandum of appeal. AIR 1964 Pat 534 (536 to 538) = 1964 BLJR 893.

(20) Contract rescinded and decree for specific performance set aside — Appeal by plaintiff — Court-fee payable would be on the very basis on which it was paid on plaint and not under Article 17 (3) of Schedule 2. AIR 1960 Mys 175 (176) = 38 Mys LJ 123.

between landlord and tenant.

(xi) In the following suits between landlord and tenant:—

- (a) for the delivery by a tenant of the counterpart of a lease,
- (b) to enhance the rent of a tenant having a right of occupancy,
- (c) for the delivery by a landlord of a lease,
- °[(cc) for the recovery of immovable property from a tenant, including a tenant holding over after the determination of a tenancy,]
- (d) to contest a notice of ejectment,
- (e) to recover the occupancy of †[immovable property] from which a tenant has been illegally ejected by the landlord, and
- (f) for abatement of rent—
according to the amount of the rent of the †[immovable property] to which the suit refers, payable, for the next year before the date of presenting the plaint.

[°] Inserted by the Court-fees (Amendment) Act, 1905 (6 of 1905), S. 2 (1).

[†] Substituted for "land," *ibid*, S. 2 (2).

STATE AMENDMENT

Uttar Pradesh:

In sub-section (xi) of S. 7, the word "and" at the end of clause (e) and the dash

SECTION 7, PARA. (xi) — SYNOPSIS

1. Clause (b).
2. Clause (cc).
3. Clause (d).
4. Clause (e).
5. Rent — Meaning of.
6. Application for standardisation of rent — Valuation.

1. Clause (b). — (1) A suit for commutation of grain rent into money rent of equal value does not fall under this clause. AIR 1924 Mad 623 (624) (DB).

(2) "A tenant having right of occupancy" does not include a person having a superior interest. A tenure-holder in Bengal is a person having a superior interest and a suit for enhancement of rent against him is not governed by Clause (b) of Section 7 (xi). AIR 1934 Cal 674 (678) = 61 Cal 513.

(3) This clause does not apply to a suit for assessment of rent. AIR 1927 Pat 123 (124) = 6 Pat 17.

(4) In the plaint the suit was valued on the basis that the annual rent was only Rs. 60 per year. The plaintiff had a right to get enhanced rent at the rate of Rs. 1000 per year from a certain date. The defendant contended that the Court-fee paid was insufficient. It was held that in view of the plaintiff's omission to amend the suit valuation and pay Court-fee on the enhanced rate in spite of the defendant's contention a decree could not be passed in favour of the plaintiff for enhanced rent on payment of necessary Court-fee in the High Court. AIR 1955 Trav Co 167 (Prs. 3, 4).

2. Clause (cc).— (1) Suit contemplated by this clause is one by ex-landlord

against ex-tenant for possession of leased property, brought on the ground of determination of tenancy. AIR 1930 Cal 42 (43, 44) = 57 Cal 349 (DB) ** AIR 1945 Pesh 16 (17, 18) ** AIR 1941 Lah 39 (40) ** AIR 1937 Mad 91 (92) ** AIR 1935 Pat 90 (91) ** AIR 1934 All 825 (827) (DB) ** AIR 1933 Cal 822 (824) (DB) ** AIR 1931 Bom 234 (235) (DB) ** AIR 1927 Nag 156 (156) = 23 Nag LR 5 (DB). (AIR 1925 Nag 131 = 20 Nag LR 124, **Overruled.**) ** (1926) 93 Ind Cas 291 (291) (Oudh) ** AIR 1923 Pat 380 (381) = 2 Pat 260 (DB) ** AIR 1916 Mad 942 (943) = 39 Mad 878 (DB) ** AIR 1914 All 282 (283).

[See also AIR 1928 PC 227 (230) = 50 Cal 80 = 55 Ind App 344.]

(2) Where there is a prayer for possession in the case where the defendant had entered into possession of premises as a tenant of the plaintiff without executing the lease, in pursuance of the agreement, it is Section 7 (xi) (cc) which applies. The Court-fee payable is according to the amount of rents payable for the next year before the date of presenting the plaint. Section 7 (xi) (cc) is comprehensive and it covers every suit for the recovery of immovable property from a tenant. The scope of the provision is not limited. 1961 Jab LJ 1106.

(3) Meaning of word 'tenant' in Section 7 (xi) (cc) of the Act includes a person to whom that description would apply immediately before the institution of the suit but whose tenancy has terminated entitling his landlord to eject him. 1968 Pat LJR 292 = ILR 47 Pat 359.

(4) After determination of tenancy, tenant is a mere trespasser and that

at the end of clause (f) were deleted and the following two clauses were added after clause (f), namely :

- “(g) for commutation of rent; and
(h) for determination of rent.”

A comma shall be substituted for the full stop occurring at the end of this sub-section and the following words shall be added at the end of the sub-section;

“except in the case of suits falling under clause (h) in which, according to twice the amount claimed by the plaintiff to be the annual rent.”—U. P. Act XIX of 1938 S. 14 (9-1-1939).

STATE AMENDMENTS

Sections 7-A to 7-D

Assam and Nagaland:

After Section 7, insert the following sections, namely,—

“7-A. Inquiry as to valuation of suits.—If the Court is of opinion that the subject-matter of any suit has been wrongly valued, it may revise the valuation and determine the correct valuation, and may hold such inquiry as it thinks fit for such purpose.

7-B. Investigation to ascertain proper valuation.—(1) For the purpose of an inquiry under Section 7-A the Court may depute, or issue a commission to, any suitable person to make such local or other investigation as may be necessary and to report thereon to the Court. Such report and any evidence recorded by such person shall be evidence in the inquiry.

Section 7. Para. (xi) — Note 2 (contd.) suit by landlord for possession against him cannot come under this clause. AIR 1938 Nag 162 (163) = ILR (1940) Nag 391 ** AIR 1952 All 658 (Prs. 15, 16) = ILR (1950) All 459 ** AIR 1928 Cal 753 (753) ** AIR 1925 Nag 131 (132) = 20 Nag LR 124.

[See also AIR 1955 Nag 234 (Pr. 12) = ILR (1956) Nag 274 (DB).]

(5) A suit by a landlord for possession of a house against the ex-tenant and a person in actual occupation of the house not as the agent, representative or sub-tenant of the ex-tenant is not governed by this clause and Court-fee has to be paid on the full value of the house. AIR 1953 Ajmer 28 (1) (Pr. 5).

(6) A suit for possession of land by a landlord against his ex-tenant and a sub-tenant from the latter is governed by this clause and not by Section 7 (v) (d). AIR 1953 Mad 513 (Pr. 2).

(7) A suit for possession against an ex-tenant by a person to whom the landlord's interest has been assigned after the determination of the tenancy is governed by this clause. AIR 1937 Mad 91 (92) ** AIR 1949 Assam 61 (Prs. 7, 10) = ILR (1949) 1 Assam 105.

[But see AIR 1938 Nag 162 (163) = ILR (1940) Nag 391.]

(8) A suit against an ex-tenant on ground that tenancy has been determined by forfeiture comes under this clause. AIR 1925 All 142 (143) (DB).

(9) Suit for possession of land encroached upon by the tenant does not

fall under this clause. AIR 1930 Cal 42 (44) = 57 Cal 349 (DB).

(10) Suit for declaration of title and other consequential reliefs — Suit must be governed by Section 7 (iv) (c) and not by Section 7 (xi) (cc). AIR 1965 Pat 260.

(11) Suit for ejectment against under-raiyat upon whom notice under Sec. 49, Bengal Tenancy Act has been served is governed by this clause. AIR 1932 Cal 6 (9) (DB).

(12) A person permitted another to occupy his house as a tenant-at-will without payment of any rent — **Held**, that suit for ejectment by former against latter was not governed by this paragraph. AIR 1927 Sind 248 (251) (DB).

[See also AIR 1932 Sind 73 (75) = 26 Sind LR 29.]

(13) Suit against licensee — A licensee cannot be included in the term tenant and therefore a suit to recover possession of the property against a licensee is not governed by this clause. AIR 1955 Mys 98 (Pr. 6) = ILR (1955) Mys 261 ** AIR 1954 Mad 200 (Pr. 3) ** AIR 1960 Tripura 7 (7, 8).

(14) Where a suit for possession is brought against two persons of which one is a licensee and the other is a stranger and who have taken forcible possession of the premises, the suit is governed by Section 7 (v) (e) and not by Section 7 (xi) (cc). AIR 1956 Tripura 17 (18).

(15) When an ejectment suit is framed as between the landlord and the

(2) The Court may, from time to time, direct such party to the suit as it thinks fit to deposit such sum as the Court thinks reasonable as the cost of the inquiry, and if the costs are not deposited within such time as the Court shall fix, may, notwithstanding anything contained in any other Act, dismiss the suit if such party is the plaintiff or the appellant and, in any other case, may recover the costs as a public demand.

7-C. Power of persons making inquiry under Sections 7-A and 7-B.—(1) The Court, when making an inquiry under Section 7-A and any person making an investigation under Section 7-B shall have, respectively, for the purposes of such inquiry or investigation, the powers vested in a Court under the Code of Civil Procedure, 1908, in respect of the following matters, namely :

- (a) enforcing the attendance of any person and examining him on oath or affirmation;
- (b) compelling the production of documents or material objects; and
- (c) issuing commissions for the examination of witnesses.

Section 7, Para. (xi) — Note 2 (contd.)
tenant with the expiration of tenancy and cause of action, the question of general title need not be gone into in such a suit — Denial by defendant of relationship of landlord and tenant does not alter the character of the suit and remove it from category assessable under this clause. AIR 1915 Mad 654 (655) (DB) ** AIR 1953 Mad 513 (Pr. 2) ** AIR 1927 Nag 321 (322) ** AIR 1932 Mad 409 (410).

[But see AIR 1958 Andh Pra 755 (755).]

(16) Suit based on title and defendant sued as trespasser — Suit cannot be valued for purposes of Court-fees under this clause. AIR 1938 Nag 162 (163) = ILR (1940) Nag 391 ** AIR 1953 Hyd 234 (Pr. 3) = ILR (1953) Hyd 89 ((DB) ** AIR 1951 Mad 206 (Pr. 5) ** AIR 1937 Mad 91 (92) ** AIR 1933 Mad 42 (43) = 56 Mad 314 ** AIR 1926 Cal 504 (505) ** AIR 1920 Cal 205 (206) (DB).

(17) When a plaintiff brings a suit for possession of premises on a specific lease which is not established but the defendant admits a different lease it is competent for the Court to award relief to the plaintiff based upon the admitted lease. The Court-fee paid by the plaintiff under Section 7 (xi) (cc) on the basis of the amount claimed by him is sufficient to cover the relief. AIR 1954 Trav-Co 152 (Prs. 15, 16).

(18) Where the plaintiff in a suit for possession alleged that the defendants had trespassed upon the suit property and that the case of a lease put forward by the defendants in a criminal case between the parties was false, but the plaintiff was prepared to accept the lease put forward by the defendants and he claimed the relief of possession on that basis, it was held that the suit could not be regarded as on basis of title and the plaintiff was bound to pay Court-fee only for the relief actually claimed by him, namely, recovery of possession on the basis of a lease. AIR

1933 Trav-Co 459 (Prs. 3, 4). (34 TLR 116 (FB), Applied.)

(19) Where the defendants in a suit for possession of absolute occupancy fields had, according to plaintiff's allegations, taken forcible possession from the absolute occupancy tenants and the plaintiff had expressly stated in the plaint that he does not recognize them as his tenant, Section 7 (xi) (cc) has no application. AIR 1955 Nag 184 (Prs. 7, 9) = ILR (1954) Nag 658.

(19.a) A suit by a tenant for possession does not fall under this clause. AIR 1937 Sind 93 (93) (DB) ** AIR 1931 Cal 333 (335).

(20) A suit for possession by a subsequent lessee against a prior lessee who is holding over after the expiration of the term of the lease is governed not by this paragraph but by Section 7 (v). AIR 1955 Andhra 140 (Pr. 7) ** AIR 1951 Bom 352 (Pr. 5) = ILR (1951) Bom 385 ** AIR 1958 Andh Pra 711 (712, 713) = ILR (1958) Andh Pra 416 (DB).

[But see AIR 1948 Mad 409 (411).]

(21) Plaintiff landlord getting decree for possession against tenant subject to payment by landlord to tenant of certain sum of money as compensation for improvements made by tenant — Plaintiff appealing disputing amount of compensation — Subject-matter in appeal is amount in dispute and Court-fee must be paid on that amount. AIR 1939 Mad 49 (50) = ILR (1939) Mad 328 (DB) ** (1928) 108 Ind Cas 379 (380) (Lah).

(22) Suit for possession against lessee — Decree for ejectment with direction that it should remain suspended till certain contingency happened — Appeal against direction — Court-fee payable on memorandum of appeal is same as that payable on plaint. AIR 1947 All 170 (170) = ILR (1947) All 225

(23) Where in a suit for redemption of a mortgage a decree is passed against the mortgagee and his tenant in possession and the tenant appeals against the decree claiming protection against eject-

(2) An inquiry or investigation referred to in sub-section (1) shall be deemed to be a judicial proceeding within the meaning of Sections 193 and 228 of the Indian Penal Code.

7-D. Costs of inquiry as to valuation and refund of excess fee.—If in the result of an inquiry under Section 7-A the Court finds that the subject-matter of the suit has been undervalued the Court may order the party responsible for the undervaluation to pay all or any part of the costs of the inquiry.

If in the result of such inquiry the Court finds that the subject-matter of the suit has not been undervalued the Court may, in its discretion, order that all or any part of such costs shall be paid by Government or by any party to the suit at whose instance the inquiry has been undertaken, and if any amount exceeding the proper amount of fee has been paid shall refund the excess amount so paid." — Assam Act 18 of 1947, S. 2 (17-12-1947).

Manipur and Tripura:

Same as that of Assam — See G. S. Rs. 1119-1120, Gaz. of Ind., 1-7-1963, Pt. II, S. 3(i) Ext., pp. 501; 531.

Section 7, Para. (xi) — Note 2 (contd.) ment under the Punjab Rent Restriction Act the appeal is governed by Sec. 7 (xi) (cc) for purposes of Court-fee. AIR 1951 Punj 404 (Pr. 16) = ILR (1950) Punj 271 (DB).

(24) Suit for possession against tenant holding over — Valuation under Section 7 (xi) (cc) for purposes of Court-fees is also valuation for purposes of jurisdiction. AIR 1953 Bom 168 (Pr. 3) = ILR (1953) Bom 441 (DB).

(25) Suit for ejectment of tenant holding over and his sub-lessees — Court finding sub-lessees as trespassers against plaintiff — Court cannot insist on plaintiff to base his suit on title as against them also. AIR 1964 Tripura 1 (2).

(26) Where, a suit was filed by a landlord for ejectment of the tenant and for recovery of damages for a particular fasli.

Held, if he is regarded as a tenant for the purpose of Section 7 (xi) (cc) the amount of rent fixed under the document should be taken as the basis for paying the Court-fee though a larger amount is claimed by way of damages for the unlawful occupation of the land. The Court-fee should be paid on the rent fixed under the lease document. (1959) 1 Andh WR 326.

3. Clause (d).— (1) This clause applies to a suit by a tenant to contest a notice of ejectment. See (1882) 11 Cal LR 91 (94).

(2) Suit to contest notice of ejectment — Fact that ground on which plaintiff contests is a claim for compensation for improvements made by him, does not make it suit for money chargeable with Court-fee under Section 7, Clause (i). 1883 Pun Re No. 111, p. 346 (347) (DB).

(3) Under Oudh Rent Act decree for ejectment is consequential on decree for arrears of rent — Decree for arrears of

rent and ejectment passed against defendant — Defendant appeals — He need not pay separate Court-fee under Sec. 7 (xi) (d) in respect of relief of ejectment. AIR 1936 Oudh 13 (14) (DB).

(4) Plaintiff claiming owner's interest and not tenant's interest — Issue involving question of title between two rival bidders for land — Section 7 (iv) (c) and not Section 7 (xi) (d) or (e) will apply. AIR 1962 Orissa 123.

4. Clause (e).— (1) A suit by tenant against landlord and persons inducted into the land by landlord for recovery of possession is not governed by this clause. AIR 1933 Nag 312 (313) = 29 Nag LR 367 ** AIR 1951 Hyd 53 (Pr. 2) = ILR (1951) Hyd 830 (DB) ** AIR 1946 Mad 322 (323) = ILR (1946) Mad 821 ** AIR 1914 Cal 791 (791) (DB) ** (1908) 31 Mad 14 (16) ** (1905) 32 Cal 268 ((269) (DB)).

[See however AIR 1954 Nag 124 (Pr. 8) = ILR (1954) Nag 67 ** AIR 1925 Sind 275 (280).]

(2) Suit to recover occupancy by tenant against landlord and others — Allegations of initial dispossession by landlord and subsequent induction of others by him — Suit is between tenant and landlord — Section 7 (xi) (e) and not Section 7 (v) (e), is applicable. AIR 1965 Punj 434 (435, 436) = 67 Pun LR 322.

(3) The clause is restricted to those cases only where the landlord has a right to eject the tenant but exercises the right in an illegal manner. (1913) 21 Ind Cas 224 (225, 226) (FB) (Cal) ** AIR 1948 Cal 200 (201) = ILR ((1948) 2 Cal 386 (DB)).

(4) Suit for possession of house property by alleged statutory tenant from his alleged landlords and from some other persons — Plaintiff alleging that forcible possession was taken away by landlords in plaintiff's absence and given

Section 7, Para. (xi) — Note 4 (contd.) to other persons — Suit held fell under Section 7 (v) and not under Section 7 (xi) (e). AIR 1963 Guj 45 = (1963) 4 Guj LR 274.

(5) Suit contemplated by the clause is one for recovery of actual physical possession. AIR 1934 Cal 674 (677) = 61 Cal 513 ** (1908) 31 Mad 14 (16) ** AIR 1953 Bom 382 (Prs. 3, 4) = ILR (1953) Bom 980 (DB).

(4) The clause is not confined to suits by ryots with occupancy rights. AIR 1934 Cal 674 (677) = 61 Cal 513.

(6) Tenant suing for possession after determination of question of title — Suit is governed by Section 7 (v) and not by this clause. AIR 1926 Pat 251 (253) = 5 Pat 208 ** AIR 1954 Mad 168 (Pr. 3).

[But see AIR 1951 Pat 403 (Prs. 4, 5) = 28 Pat 425 (DB). (AIR 1926 Pat 251 = 5 Pat 208, **Diss from.**) ** (1936-1943) Tax Dec (Nag) 96 (98, 99).]

(7) A tenant holding over after the termination of tenancy still continues to maintain that character for the purpose of enforcing his rights as a tenant under this clause. AIR 1951 Mys 101 (Pr. 6).

(8) The plaintiff as raiyat of certain land brought a suit against the defendant landlord for setting aside a compromise decree for ejectment on the declaration that the same was fraudulent, illegal and inoperative and for permanent injunction restraining the defendant from putting the decree into execution by ejectment of the plaintiff. It was held that though Section 7 (xi) (e) did not in terms apply to the case, the principle of it applied. (1954) 58 Cal WN 922 (924).

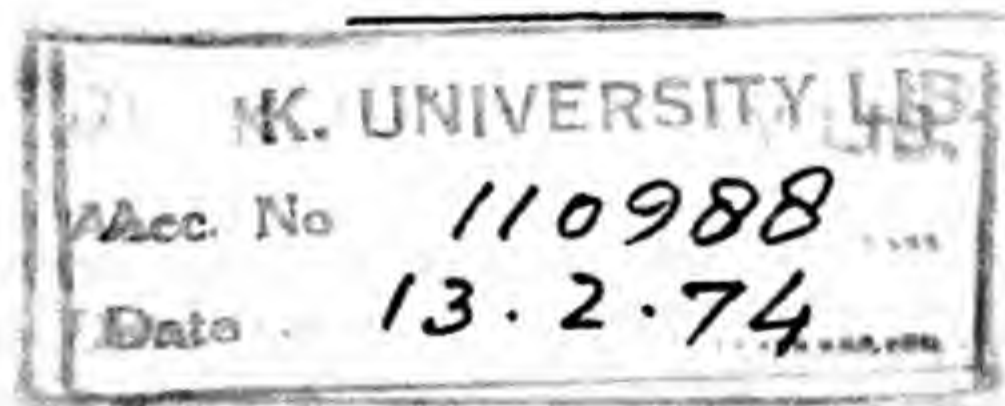
(9) Plaintiff claiming owner's interest and not tenant's interest — Issue involv-

ing question of title between two rival bidders for land — Section 7 (iv) (c) and not Section 7 (xi) (d) or (e) will apply. AIR 1962 Orissa 123.

(10) Plaintiff claiming occupancy rights in land — Suit for recovery of such land from landlord — Proceedings under Section 145, Criminal P. C. ending in favour of landlord — Land vesting in State under Orissa Estates Abolition Act — Yet suit valued as between landlord and tenant — Section 7 (xi) (e) does not apply — Court-fees must be paid on market value of lands. AIR 1969 Orissa 140.

5. Rent — Meaning of.— (1) The word "rent" in this paragraph cannot be interpreted to mean all payments which the tenant undertakes to pay. Hence, it would not include the Government cist agreed to be paid by the lessee. AIR 1948 Mad 409 (411).

6. Application for standardisation of rent — Valuation.— (1) Though Cls. (b) and (f) of Section 7 (xi) do not in terms apply to an application for standardisation of rent under the Rent Control Act, the principle underlying these clauses should be applied for purposes of valuation of application for standardisation of rent. Hence, the true valuation of such applications when either enhancement or reduction of rent is claimed would be an amount equivalent to the amount of rent payable for the year next preceding the presentation of the application; in other words, twelve times the monthly contractual rent, when the rent has been uniform and, in other cases, the total of the actual rent for the twelve months. AIR 1954 Cal 77 (Prs. 5, 7) = ILR (1954) 2 Cal 396 (DB).



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A. I. R. Commentaries Judicially Appreciated

A.I.R. 1948 Patna 460 (462) (Pr. 9) [V 35 C 161] (D.B.)—Per Meredith J.—
"I will make two quotations from Chitaley and Annaji Rao's annotated edition of the Civil Procedure Code, 4th Edn. Vol. III, because those learned commentators have, in my opinion, correctly summed up the position in language which cannot be bettered."

CONSTITUTION OF INDIA.

1961 Manipur 1 (4) (Pr. 11) [A.I.R. V 48 C 1]—Tirumalpad J. C.—"What is prohibited (in Art. 23 (1)) is begar and other similar forms of forced labour. The A. I. R. Commentaries on the Constitution of India at page 635 define 'begar' as a system under which persons are pressed to carry burdens for individuals or public or to perform other forms of menial service under compulsion".

1956 All. 341 (345) (Pr. 33) [A.I.R. V 43 C 126] (DB). — Desai J. —"Shri Jagdish Sahai could not cite any authority in support of his contention that the right given to the Court to draw an adverse inference is equal to compelling the accused to be a witness against himself. We notice that Chitaley in his Commentary on Constitution, Vol. I, pp. 497-498, does not see any conflict between the provisions of Art. 20 (3) and those of S. 342, Cr. P. C."

1956 J. & K. 1 (10) (Pr. 34) [A.I.R. V 43 C 1] (F. B.) — Kilam J. —"The learned author Chitaley in his luminous commentary on the Constitution has, after discussing almost the whole case law on the subject, enunciated some principles which I might give more or less in his own language. According to the learned author" (Points from Note 8 (g) under Art. 21, p. 533 quoted.)

CIVIL PROCEDURE CODE, 1908.

1953 S. C. 23 (27) [A.I.R. V 40 C 7]—[Touching the revisional jurisdiction of the High Court set out in S. 115, Civil P. C.] "A large number of cases have been collected in Edn. 4 of Chitaley & Rao's Code of Civil Procedure (Vol. I) which only serve to show that the High Courts have not always appreciated the limits of the jurisdiction conferred by this section."

1949 P. C. 156 (158) (Pr. 19) [A. I. R. V 36 C 48]—Sir John Beaumont—"There have been no doubt, decisions in some High Courts in India which lend support to the view upon which the Judges acted. The cases are collected in Edn. 4 of Chitaley and Rao on the Code of Civil Procedure, Vol. I, p. 1105."

P. L. D. 1965 (W. P.) Lahore 590 (594, 595) (DB). — Sajjad Ahmad J.—"There has been a conflict of judicial opinion on the question of the applicability of this section to decrees in appeals under the Letters Patent. The High Courts of Bombay, Punjab, Madhya Pradesh and Madras have held that the section applies. The High Court of Patna took a contrary view (See Chitaley's Commentary on S. 114 of the Civil P. C.—headnote 1, at page 1507, Vol. II, 1963, Edition.) In a recent Full Bench decision reported in *Jwala Prasad v. Jwala Bank Ltd.*, A. I. R. 1961 All. 381, the Allahabad High Court has held that . . . and has overruled an earlier decision to the contrary given by another Full Bench of the same Court reported in *Mst. Abhilakhi v. Sada Nand*, AIR 1931 All. 244."

1968 J. & K. 13 (14) (Pr. 7) [A. I. R. V 55 C 4]—J. N. Bhat J.—"The principle as laid down in certain authorities as summarized in the Commentary on Chitaley's Civil P. C. (7th Edn., Vol. 2, Page 1927) is that the Court has to see whether the suit cannot be determined in the absence of the person who applies to be made party or whether his interests will not be prejudiced by not being joined as a party".

1968 Mad. 1 (21) (Pr. 59) [A. I. R. V 55 C 1] (FB) — Venkataraman J.—"Pointing out that S. 105, Civil P. C., must be read harmoniously with S. 99, Civil P. C., the decisions have held that the phrase 'affecting the decision of the case' in S. 105 must be interpreted to mean 'affecting the decision of the case on merits'. The decisions will be found collected in any text book, for example, in the Commentary of A. I. R. Section 105, Note 6"

1965 All. 527 (531) (Pr. 28) [A. I. R. V 52 C 148] — *Oak J.* — "Mr. Brij Lal Gupta pointed out that the Court dealing with the matter in April 1947 was a Munsif. The present suit was tried by a Civil Judge. The valuation of the suit was Rs. 35,000. The Munsif had no jurisdiction to try the present suit. Under S. 11, C. P. C., the Court trying the former suit should have been competent to try the subsequent suit itself. (See Chitaley's Commentary on the Code of Civil Procedure Volume I, Page 415), (Now see 1963 (7th Edn.) pp. 379-380)."

1965 Punj 494 (496) [A. I. R. V 52 C 157 Pr. 7] — *Shamsher Bahadur J.* — "The words 'for any other substantial cause' (in O. 41, R. 27 (b)) must be read with the word 'requires' in the beginning of the sentence and need not be construed in the narrow sense suggested by the doctrine of ejusdem generis Reference may be made to Chitaley's Commentary on the Code of Civil Procedure, Vol. IV, at page 4319."

1965 Kerala 104 (105) (Pr. 3) — *S. Velu Pillai J.* — "The rights inter se of rival purchasers in sales in execution of decrees on mortgages have been the subject of consideration in several decided cases. The result of these has been summarised as follows in A. I. R. Commentaries on Civil Procedure Code, Vol. 3, 1957 (6th) Edn., pp. 3791 and 3792. (Now see 1963 (7th Edn.), pp. 3807, 3808, O. 34, R. 1, N. 39, Pts. 26 to 34)"

('64) I. L. R. (1964) 1 Ker. 320 (322) — *Madhavan Nair J.* — "The A. I. R. Commentaries on the Code of Civil Procedure in Note No. 4 to O. 34, R. 7 put the position succinctly thus"

COURT-FEES ACT, 1870 & SUITS VALUATION ACT, 1887.

1968 Manipur 52 (53, 54) (Prs. 5, 12) [A. I. R. V 55 C 18] — *C. Jagannadha-charyulu J. C.* — "There is consensus of opinion in most of the High Courts that S. 7 (iv) (b) of the Court-fees Act does not apply to a suit for partition by a person in joint possession for partition of his share but that Art. 17 (vi) of Sch. II of the Court-fees Act applies. Vide pages 111, 112, 113, 114 and 115 of the Court-fees and Suits Valuation Act (A. I. R. Commentaries) Second Edition."

1965 Punj. 1 (11) (Pr. 25) [A. I. R. V 52 C 1] (FB) — *P. O. Pandit J.* — "With regard to this definition (of 'consequential relief'), Chitaley in his Commentaries on the 'Court-fees Act and the Suits Valuation Act (Second Edition)', on page 135 has observed thus—".

CRIMINAL PROCEDURE CODE, 1898.

A. I. R. 1969 Orissa 56 (57) (Pr. 5) [V 56 C 23] — *S. Acharya J.* — "Their Lordships of the Madras High Court in their decision reported in A. I. R. 1954 Mad. 214 in quoting a passage from Chitaley and Annaji Rao's Criminal Procedure Code, observed as follows: 'But a Criminal Court, as well pointed in the exhaustive analysis in Chitaley and Annaji Rao's Criminal Procedure Code, Vol. III, 4th (1950) Edn. at page 2862, is not expected, under the provisions of S. 517 to 'try' civil cases'. This view has been reiterated in a decision of this Court in (1967) 33 Cut. L. T. 868."

1967 Current L. J. 717 (719) — *Shamsher Bahadur J.* — "Prior to the enactment of this amendment (S. 139-A), the Court had by judicial decisions engrafted a law which, according to Chitaley's Commentary on the Code of Criminal Procedure, Vol. I, Page 590, was this"

LIMITATION ACT, 1963.

1968 Mad. 226 (229) (Pr. 5) [A. I. R. V 55 C 50] — *Natesan J.* — "Quoting from Chitaley and K. N. Annaji Rao on Limitation Act, it is observed therein"

1963 Punj 457 (459) (Pr. 7) [A. I. R. V 50 C 127] — *Grover J.* — "As stated in Chitaley's Limitation Act, (3rd Edition), Volume 1, Page 524, the words 'Stayed by an injunction or order' have reference to an order of a Court and not to a disability to sue or to apply arising from other causes."

1961 Pat. 134 (137) (Pr. 18) [A.I.R. V 48 C 36]—*Raj Kishore Prasad J.*— "The question under consideration has been thoroughly and clearly dealt with in A.I.R. Commentaries on the Indian Limitation Act, 3rd Edition, Vol. I, Note 11, page 595, Note 18, pages 601-604 and Note 32, page 638."

1960 Kerala 306 (308) (Pr. 17) [A.I.R. V 47 C 144]—*M. S. Menon and T. K. Joseph JJ.*— "As pointed out by Chitaley : 'Where no time is fixed for delivery, if the correspondence between the parties shows that the matter was being enquired into and that there was no refusal to deliver up to well within a year of the suit, this article (Art. 31) cannot be pleaded as a bar ' (Limitation Act, Vol. 2, Page 1137)."

REGISTRATION ACT, 1908.

1960 Madh. Pra. 3 (Pr. 8) [A. I. R. V 47 C 2] — *Dixit J.* — "The principle laid down in I. L. R. 4 Bom. 126 has been followed in many cases which have been noted in Chitaley's Registration Act (Second Edition) at page 367"

1960 Mad. 244 (Pr. 9) [A. I. R. V 47 C 77] — *Ramaswami J.* — "It is interesting in this connection to note that the A. I. R. Commentaries on the Registration Act (Second Edition) at pages 526 to 530, after an elaborate discussion of the entire case-law and the principles of S. 77 of the Registration Act, mention at p. 530 that the view expressed by Abdur Rahman J., is correct."

STAMP ACT, 1899.

1967 Him. Pra. 29 (31) (Pr. 11) [A. I. R. V 54 C 9] — *Om Parkash J. C.* — "From the language, used in the document, it is capable of falling within the definition of a bond, as defined in sub-s. (5) (b) of S. 2, Stamp Act, and also within the definition of a promissory note, under sub-s. (22) of that section. The maxim being, *specialia generalibus derogant*, an instrument which satisfies the definition under sub-s. (5) (b) must be held to be taken out of the more general definition in sub-s. (22), vide A. I. R. Commentaries on the Stamp Act, p. 70."

TRANSFER OF PROPERTY ACT, 1882.

1964 Punj. 210 (211) (Pr. 4) [A.I.R. V 51 C 52]—*S. S. Dulat Actg. C. J. and D. K. Mahajan J.* — "It is significant that the provisions of this section (S. 111, T. P. Act) have never been applied as a rule of equity, justice or good conscience by any of the High Courts in the territories to which this provision is not made applicable under S. 1 of the T. P. Act, whereas a number of cases will be found at page 173, Note 4, of Chitaley's Transfer of Property Act, Vol. I, where principles underlying the provisions of the Transfer of Property Act have been so applied"

1961 Mad. 28 (30) (Pr. 7) [A. I. R. V 48 C 7] — *Ramaswami J.* — "In this connection the learned District Munsif has pertinently pointed out the implications of the decision in *Gopal Chandra Das v. Harendra Nath Datta*, 63 Ind. Cas. 483 (Cal.) This decision has been cited with approval in the well-known commentaries on the Transfer of Property Act by Chitaley and Annaji Rao, Third Edition (1950) page 1861."

A. I. R. MANUAL (2ND EDN.) JUDICIALLY APPRECIATED

JAGANNADHACHARYULU J. C.—"Article 14 (of the Constitution) protects all persons from discrimination by the legislative as well as executive organs of the State. Vide Note 8, Page 2673 of A. I. R. Manual Vol. 3, 2nd Edn."—1968 Manipur 58 (63) (Pr. 16) [A. I. R. V 55 C 21.]

P. N. RAMASWAMI J.:—"For an exhaustive citation of the relevant cases (on S. 10, Cattle Trespass Act, 1871), see the most welcome 2nd (1960) Edn. of the A. I. R. Manual Vol. I referring to A. I. R. 1947 Pat. 172 = 47 Cri. L. J. 986; A. I. R. 1943 Sind 152 = 44 Cri. L. J. 761; A. I. R. 1916 Lah 281 = 17 Cri. L. J. 63; A. I. R. 1919 Cal. 93 = 20 Cri. L. J. 398."—A. I. R. 1960 Mad. 331 (332) = 1960 Cri. L. J. 932 (933).

—See also A. I. R. 1960 Mad. 443 (446) = 1960 Cri. L. J. 1340 (1344) [Vol. 4 of the A. I. R. Manual (2nd Edn.) referred to.]